

The Ex-Post-Facto and the Contracts Clauses in the Federal Convention: A Note on the Editorial Ingenuity of James Madison*

William Winslow Crosskey

According to James Madison, Rufus King, of Massachusetts, moved in the Federal Convention, on August 28th, that there be added to the Constitution, "*in the words used in the Ordinance of Cong[re]s[s] establishing new States*, a prohibition on the States to interfere in private contracts." The ordinance in question was the Ordinance for the Government of the Northwest Territory, which the Continental Congress had just passed a little earlier in the same summer. The ordinance declared, in the provision to which King referred, that "no law ought ever to be made or have force in the said territory, that sh[ould], in any manner whatever, interfere with or affect private contracts, or engagements, bona fide, and without fraud *previously formed*." This prohibition, it will be observed, was expressly limited to "interferences" with contracts "previously formed." So, King's motion was for a prohibition of retrospective "interferences" only.

According to Madison, there ensued a considerable debate over King's proposal. James Wilson, Roger Sherman, and Madison himself supported the motion, and George Mason and Gouverneur Morris spoke against it. From the nature of the objections, it soon became apparent that the debaters—or, at least, some of them—believed a prohibition of prospective, as well as retrospective, "interferences" with contracts

* This excerpt from the papers left by Professor Crosskey at his death was to be included in a projected fourth volume of his *Politics and the Constitution in the History of the United States*. Written several years ago, it was subsequently revised at several intervals by the author, the latest revision being made in the summer of 1967.

Footnotes and cross-references have been omitted from the excerpt.

Professor of Law, University of Chicago, 1935-62. B.A., Yale University, 1923; LL.B., Yale University, 1926; law clerk to Chief Justice William Howard Taft, 1926-27; practiced law in New York City, 1927-35; Associate Professor of Law, University of Chicago, 1935-41; Professor of Law, University of Chicago, 1941-62. Author: *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953); *John Marshall and the Constitution*, 23 U. CHI. L. REV. 377 (1956); *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. CHI. L. REV. 539 (1947).

had been proposed; whereupon James Wilson pointed out that "the answer to [the] objections [being urged was] that *retrospective* interferences only [were] to be prohibited." And then Madison asked a question which demonstrated that he, at least, had been supporting what he believed to be a prohibition of prospective as well as retrospective "interferences." His question also demonstrated that he at this time had understood the prohibition of "ex post facto laws" which the Convention had added to the Constitution six days earlier, on August 22d, as a prohibition of all retrospective laws, whether civil or criminal in kind. In other words, Madison understood the term "ex post facto laws" in what it has been shown, in an earlier volume of this book, was the ordinary eighteenth-century meaning of the words. His question was whether retrospective interferences with contracts were not "already" proscribed "by the prohibition of ex post facto laws" just referred to.

The true answer to Madison's question was that the prohibition of "ex post facto laws" previously adopted was addressed, in terms, to "the Legislature of the United States." No such answer appears, however, in Madison's record. Instead, he records only that John Rutledge moved, in substitution for King's proposed prohibition, one covering "bills of attainder" and "*retrospective* laws"; and that the substituted prohibition was adopted, by a vote of seven states to three. In a footnote, Madison draws attention to the fact that, "in the printed Journal," the words "ex post facto" appear in the substituted motion, instead of the word "retrospective," as his notes record.

Now, Madison's account of this matter—and except upon a single point, his is the only account we have—manifestly appears to support the accepted view of the two Ex-post-facto Clauses of the Constitution. For John Rutledge's motion, as Madison records it, seems to imply that "*ex post facto* laws" meant to the Convention retrospective criminal laws only. They had previously forbidden "*ex post facto* laws" to Congress; but when, on August 28th, they wanted to forbid retrospective civil laws to the states, they used the word "retrospective," and not the words "ex post facto." And, thus, Madison's assertion in the Virginia convention, that such had been the interpretation of "*ex post facto* laws" in the Federal Convention, appears to be corroborated by his own presumably earlier taken notes. It is true, he calls attention to the variant version of the Rutledge motion, which the Convention's Journal contains; but since, in many other instances, Madison corrected his notes from the Journal, his variant behavior in this particular instance is as much as to say that, while he wishes to be fair and bring the variant record in the Journal to the attention of his readers, he still believes his own notes to be correct.

Considering the contemporary meaning of "*ex post facto* laws", it certainly would be a remarkable thing if Madison's account of these proceedings on August 28th were, in fact, correct. For it would mean that the Federal Convention, a numerous body of men, understood the term "*ex post facto* laws," in a sense different from that which was current at the time. Nevertheless, if Madison's notes and the Convention's Journal had been the only evidence available as to what happened on August 28th, Madison's version of what occurred probably would have been accepted. But as the Convention made its various changes in the Report of the Committee of Detail, George Washington noted these down on his printed copy of the committee's report. David Brearley, of New Jersey, did the same. And both the Washington copy, and the Brearley copy, of the committee's report have survived, and both corroborate the Journal as to the form of the Rutledge motion which the Convention adopted. So, if the rest of Madison's record of the proceedings of August 28th is reliable, the Convention, on that date at least, understood "*ex post facto* laws" to cover all retrospective legislative acts, whether civil or criminal in kind; for, on the basis of the evidence Madison presents, the prohibition of state "*ex post facto* laws," which the Convention adopted, was clearly intended to cover civil retrospective laws. And of course it also follows that the prohibition of "*ex post facto* laws" to Congress, adopted six days earlier, must have been intended in the same sense.

Strange to say, the next thing Madison records about this subject is utterly inconsistent with the impression which his notes for August 28th were plainly written to convey. For he presents John Dickinson, of Delaware, as "mentioning to the House," on August 29th, "that on examining Blackstone's Commentaries, he found the terms 'ex post facto' related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for this purpose would be requisite." That Madison overlooked the inconsistency between this statement and his record for August 28th seems a certainty. For, if he was trying to present a true record, perception of the inconsistency would have demonstrated to him that the Journal was correct about the Rutledge motion, and he would have amended his notes to accord with the Journal, as he did in so many other cases. And, on the other hand, if his purpose was to present a deceptive record for August 28th, he would, if he had perceived the inconsistency, at once have seen that this purpose must fail, since the remarks attributed to Dickinson, on August 29th, would make clear to any reader that the Journal, and not Madison, was correct about the Rutledge motion. So, incredible as it may seem, Madison

must have overlooked the inconsistency between these two neighboring parts of his notes.

We have only Madison's word for it that Dickinson made the remarks in question; and that he did, in fact, do so, does not, inherently, seem very probable. For, if Dickinson had been convinced by the passage in Blackstone, the natural thing to suggest was the need for an additional provision as to both the nation and the states. To be sure, Dickinson might, conceivably, have overlooked the national Ex-post-facto Clause. But that clause had been adopted, only seven days earlier, by a vote of seven states to three, with one divided; and it is hardly credible, if Dickinson convinced the Convention with the passage from Blackstone (as Madison plainly desired his readers to believe), that all the men making up that large majority, of only a week before, would similarly overlook the necessity of some additional provision forbidding retrospective civil laws to the nation. Yet there is no record that any member of that large majority made any effort to obtain such a provision. The Journal contains no such record; and as Madison tells the story, the only measure taken, in even possibly apparent consequence of Dickinson's remarks, was the addition of the Contracts Clause to the Constitution, on September 14th, in pursuance of a recommendation made by the Committee of Style, on the day before.

This action, it should further be observed, hardly fits. For the Contracts Clause (taken, for the sake of argument, as covering retrospective laws only) does not cover the same ground as the state Ex-post-facto Clause (taken as the Convention intended it on August 28th), which, it should not be forgotten, the Convention then deliberately substituted for King's suggestion of an expressly retrospective contracts clause. The Contracts Clause is not complete in its coverage of retrospective civil laws, even in the field of contracts; and outside that field, it covers no such retrospective laws at all. Its adoption, then, was not a natural or probable change to make, in consequence of becoming convinced that the provision adopted on August 28th, to forbid to the states *all* retrospective laws, *both civil and criminal*, in fact forbade them in criminal cases only. If the Convention was convinced by Dickinson that this was the true situation, the natural change—and natural, of course, in the case of both Ex-post-facto Clauses—was to strike out the words "*ex post facto*" and substitute the word "retrospective." Madison's story, obviously, is lacking in inherent credibility; and that means it is highly unlikely Dickinson made the remarks to the Convention, on August 29th, which Madison's notes record.

And the thing seems unlikely for another reason. It is unlikely because, if the thing really did happen as Madison's notes imply, the fact

that the passage from Blackstone had convinced the Convention would have been impressed on Madison's memory. Yet we already know that, less than ten months later, in the Virginia Convention, Madison—and, for that matter, Edmund Randolph, too—seemed totally unaware of the existence of the passage in Blackstone. For, hard pressed as they were in the Virginia Convention, they would certainly have cited the Blackstone passage, had they known of its existence. So, in view of all these facts, the probability is that the remarks attributed to Dickinson, on August 29th, were a later Madisonian fabrication, introduced to lend a seeming plausibility to the retrospective theory of the Contracts Clause, which he wished to establish.

The Contracts Clause came into the Constitution, on September 14th, in consequence, as already indicated, of a recommendation made by the Committee of Style, on the day before, as part of the complete draft constitution they then reported. The Committee of Style consisted of William Samuel Johnson, of Connecticut; Rufus King, of Massachusetts; Alexander Hamilton, of New York; Gouverneur Morris, of Pennsylvania; and *James Madison, of Virginia*. The Contracts Clause, as they reported it, read "No state shall pass any laws altering or impairing the obligation of contracts." The clause was entirely new, and it is quite unlikely that the committee's spokesman, Gouverneur Morris, made no explanation of why it should be added to the Constitution. Yet Madison's notes record nothing of the kind. All his notes say is that—

The first clause of Art. I. sect. 10—was altered so as to read —"No State shall enter into any Treaty alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold & silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

Immediately after this entry, Madison does, it is true, present Elbridge Gerry, of Massachusetts, as "enter[ing] into observations inculcating," as Madison says, "the importance of public faith, and the propriety of the restraint put on the States from impairing the obligation of contracts—Alleging that Congress ought to be laid under the like prohibitions." And he says that Gerry "made a motion to that effect," and then adds: "He was not 2ded." In other words, Madison asks his readers to believe that the Contracts Clause, understood to forbid retrospective laws only, of the kind it describes, was adopted by the Convention, to take the place of what was thought to be the civil phase of the state

Ex-post-facto Clause when that clause was adopted, on August 28th; yet that, in that same Convention, which, by a vote of seven states to three, with one divided, had adopted a similar Ex-post-facto Clause applying to the nation on August 22d, there was no one to be found, on September 14th, sufficiently interested in what had been intended on August 22d, to second Gerry's motion. To expect credit for such a tale is surely expecting a very great deal.

But Madison's notes, as they relate to the Contracts Clause, are incredible, not only because of these things that they *do* contain, but, also, because of the things they do *not* contain. Thus, when George Mason, of Virginia, read over his printed copy of the Report of the Committee of Style, of September 13th, he apparently saw at once that this new clause had the comprehensive meaning suggested in the first section of this chapter. For, to a memorandum of other changes in the committee's report, which he meant to move, Mason added a notation to move the insertion of the word "previous" after the words "obligation of" in the committee's Contracts Clause. This would have made the clause read: "No state shall pass any laws altering or impairing the obligation of previous contracts." During the sessions of the Convention on the 14th and 15th of September, Mason actually did move most of the changes he had on his list, and he recorded, opposite each change he moved, the decision upon it which the Convention made. His record, which is now in the Library of Congress, shows that one of the changes he actually moved was the insertion of the word "previous" in the Contracts Clause, and that the change was "refused." About this revealing motion of Mason's, and the equally revealing action upon it by the Federal Convention, which would have brought Madison's whole structure of deception with respect to the Ex-post-facto Clauses and the Contracts Clause tumbling to the ground, Madison's notes contain nothing at all.

As to how Madison dared to omit a thing like this, which, in the ordinary course, would have been fully recorded in the Convention's Journal, the answer is that the Journal for the closing days of the Convention's session was very baldly kept. Of forty-three votes recorded for the 14th and 15th of September, twenty-eight are recorded without any indication of what the question was that was being voted on. Among these twenty-eight unidentified votes, there are many refusals; and as Mason's motion on the Contracts Clause does not appear among the identified votes, it is apparent that his motion must have been among the refusals which the Convention's secretary carelessly failed to identify. And it was this that gave Madison his chance, or his apparent chance, to omit all record of Mason's motion with safety.

He undoubtedly died satisfied that his deception in regard to this matter would never be discovered. But, unfortunately for Madison's aims, George Mason kept his memorandum; and when it eventually came to light, it made perfectly clear what Madison had done.

As to why Madison should do such a thing, the answer is that Madison, before he died, had shifted his position completely on Congress's power to regulate commerce. Before the meeting of the Federal Convention, Madison had been an advocate, as we have seen, of "full power [for Congress] for the regulation of commerce, foreign and domestic." In the First Congress, in 1790, he had declared that Congress, under the Constitution, was possessed of power "to regulate the mode in which every species of business should be transacted." In his old age, on the other hand, Madison had come to be an advocate of an interstate interpretation of the national power; and he maintained, further, that Congress's internal power had not, in reality, been intended as a power that was to be available for use for the affirmative purposes of the national government. Rather, though granted in the same terms, it was intended, he said, as a mere negative, or preventive, provision to keep the states from injuring each other.