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FOREWORD

The Bill of Rights in the Welfare State: A Bicentennial Symposium

Geoffrey R. Stone[†]

The essays presented in this volume were prepared in connection with a Symposium on "The Bill of Rights in the Welfare State," which was held at The University of Chicago Law School on October 25-26, 1991. This Symposium celebrated both the Bicentennial of the Bill of Rights and the Centennial of The University of Chicago. In addition to those whose essays appear herein, we also enjoyed the participation of Vincent Blasi, Stephen Carter, Thomas Grey, Margaret Jane Radin, and Carol Rose, who served brilliantly as moderators of the five substantive debates. One might say that this Symposium assembled the most talented collection of constitutional theorists since the Framers themselves met in Constitutional Convention, or, to paraphrase John F. Kennedy's quip about Jefferson, since James Madison dined alone.

Madison was, of course, the framer, the architect of the Bill of Rights. But he himself was less than confident that his list of guarantees would make a difference. As Madison wrote to Jefferson in 1788, "experience proves the inefficacy of a Bill of Rights on those occasions when its control is most needed," offering as illustration "repeated violations of these parchment barriers . . . committed by overbearing majorities" whenever circumstances allow.

Nonetheless, when Madison presented his proposed bill to Congress, he offered two arguments for the proposition, or at least the hope, that the Bill of Rights would matter. First, Madison predicted that his list of guarantees would be treasured by the judicia-

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ry, that those “independent tribunals of justice would consider themselves . . . the guardians of these Rights,” and that the courts would serve as “an impenetrable bulwark against every [unwarranted] assumption of power.” What Edmund Burke believed about a free people, Madison believed about the courts—that they would “sniff the approach of tyranny in every tainted breeze” and that they would “be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution.” Second, Madison believed that the enactment of a Bill of Rights would serve an essential educational function in a self-governing society, predicting that “the political truths declared” in the Bill of Rights would “acquire . . . the character of fundamental maxims of free government” and, as they became “incorporated with the national sentiment, [would] counteract the principles of interest and passion.”

It is noteworthy that one hundred years ago there were few, if any, celebrations of the Centennial of our Bill of Rights, whereas today, we have been inundated with seemingly endless conferences, symposia, and debates celebrating its Bicentennial. This is so because, in its first hundred years, the Bill of Rights played only a minor role in our constitutional system and our national consciousness. It was not until the Supreme Court’s incorporation decisions of the 1930s and 1940s, and the consequent extension of the Bill of Rights to the states, that Madison’s guarantees finally emerged as a central and defining theme of our national life. Thus, in a very real sense, the Bill of Rights that we celebrate today is as much the product of the judicial doctrine of incorporation as it is of the foresight and wisdom of the Framers themselves.

This Symposium would not have taken place, and these papers would not now be available, but for the foresight, the wisdom, and the very gracious generosity of the Robert J. Kutak Foundation, which provided essential financial support. We are deeply grateful to the Foundation’s inspired and enlightened philanthropy.

At the time that The University of Chicago was founded, William Rainey Harper, its first president, explained that “although many will deny that democracy has a religion,” none “will deny that democracy has a philosopher—the university,” he said, “is the philosopher of democracy.” To fulfill this vision of our University, we offer this volume, which we hope will illumine some of the most important constitutional issues of our day.