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THE ORIGINAL CONSTITUTION AS A BILL OF RIGHTS

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The exclusion of a bill of rights was fundamental to the constitutional theory of the Framers of the Constitution. For that reason they deliberately omitted such a bill. Yet, no Framer opposed the rights conventionally protected by a bill of rights. As George Washington wrote to LaFayette during the controversy over ratification, "there was not a member of the Convention, I believe, who had the least objection to what is contended by the advocates for a Bill of Rights."[1] All the Framers were civil libertarians. Why then did they deliberately exclude an enumeration of the rights of the people, and why did they not prohibit the national government from abridging those rights? They believed that a bill of rights was quite unnecessary, because the Constitution, as they framed it, adequately protected the people's rights.

Thomas McKean, second only to James Wilson as an advocate of the ratification of the Constitution in Pennsylvania, explained to his state's ratifying convention that a bill of rights "is an unnecessary instrument, for, in fact, the whole plan of government is nothing more than a bill of rights—a declaration of the people in what manner they choose to be governed."[2] Alexander Hamilton made the point even more directly in *Federalist No. 84* when writing that "the Constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS." Indeed, he added, the proposed Constitution "will be a bill of rights of the union."[3] But why was a bill of rights unnecessary, and why was the Constitution itself in effect such a bill, in the minds of the Framers?

Hamilton's explanation reflected the Federalist party line. Bills of rights, he declared, originated as contracts between a king

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* Editor, Encyclopedia of the American Constitution.

1. Washington to Lafayette, April 28, 1788, quoted in Charles Warren, *The Making of the Constitution* 508 n.2 (Little Brown, 1928).

2. Merrill Jensen, ed., *The Documentary History of the Ratification of the Constitution, Volume 2: Ratification of the Constitution by the States. Pennsylvania* 387 (State Historical Society of Wisconsin, 1976) ("*Documentary History*").

3. *Federalist 84* (Hamilton) in Jacob E. Cooke, ed., *The Federalist* 581 (Wesleyan U. Press, 1961).

and his subjects, as in the case of Magna Carta, the Petition of Right, or the Declaration of Rights. Accordingly, bills of rights had no relevance to constitutions founded on the power of the people, who retained all rights and surrendered none. The preamble of the Constitution constituted "a better recognition of popular rights than volumes of those aphorisms" contained in the state bills of rights; those aphorisms "would sound much better in a treatise of ethics than in a constitution of government."[4]

Moreover, observed Hamilton, a bill of rights was not only unnecessary but would be "dangerous," because it

> would contain various exceptions to powers not granted; and on this very account, would afford a colourable pretext to claim more (powers) than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?[5]

Similarly, James Wilson, the most influential Framer next to James Madison, sought to explain the Convention's omission of a bill of rights by observing that while the people of the states vested in their governments all powers and rights not explicitly reserved, the case was different as to the national government, whose authority rested on enumerated powers. Therefore everything not delegated to the United States was reserved to the people or the states. A bill of rights stipulated the reserved rights of the people; the Constitution, however, merely provided for the existence of an effective national government. An enumeration of popular rights not divested would, therefore, be "absurd."[6]

Wilson trumpeted the Federalist line when he made the argument that a bill of rights would be "preposterous and dangerous," would put rights at risk, and would augment national powers. He reasoned that a formal declaration on freedom of the press or of religion, over which Congress had no powers whatever, could "imply" that some degree of power over the press or religion had been granted because of an attempt to define its extent. Wilson also insisted on the impossibility of enumerating and reserving all the rights of the people. A bill of rights, he added, "is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied powers

4. Id. at 579.
5. Id.
6. Jensen, 2 *Documentary History* at 390 (cited in note 2).

into the scale of the government; and the rights of the people would be rendered incomplete."[7] (That argument eventually gave rise to the ninth amendment.)

The rights of the people, according to Federalist theoreticians, depended not on "parchment provisions," but on public opinion, an extended republic, a federal system, a pluralistic society of competing interests, and a national government of limited powers structured to prevent any interest from becoming an overbearing majority and to prevent any branch of government from exercising a power that could jeopardize liberty.

Personal liberty depended on public opinion rather than parchment guarantees because experience had revealed such guarantees to be ineffective when confronted by "public necessity." The Framers tended to be skeptical about the value of a bill of rights when confronted by what James Madison called "overbearing majorities." He had seen repeated violations of the bills of rights in every state. Recent history had revealed the futility of a bill of rights "when its controul is most needed."[8] In Virginia, for example, the constitutional protection of the rights of conscience meant little when the legislature had favored an establishment of religion; it was averted only because Madison and dissenters turned the tide of opinion against the bill. Any Framer could have cited examples of abridgements of civil liberties during times of popular hysteria.

Moreover, no state bill of rights was sufficiently comprehensive, and six states did not even have bills of rights. Virginia's highly praised Declaration of Rights omitted as many rights as it protected. It failed to protect against bills of attainder, for example, and the legislature had enacted them. A majority of states failed to protect basic rights; seven omitted a prohibition on ex post facto laws, nine failed to provide for grand jury proceedings, ten said nothing about freedom of speech, and eleven were silent about exposure to double jeopardy. Whether or not omissions implied a power to violate, omissions seemed to the Framers to raise a danger that could be prevented by avoiding the problem altogether: omit a bill of rights when forming a new national government of limited powers.

The fact that the government possessed only limited powers secured liberty. The fact that it was a government that was neither wholly national nor wholly federal also secured liberty, as *The Federalist* argued. The fact that the powers of government were di-

7. Id. at 388.

8. Madison to Jefferson, Oct. 17, 1788, Robert Rutland, et. al., eds., 11 *The Papers of James Madison* 297 (U. Press of Virginia, 1979).

vided between the United States and the states contributed to the same end. The fact that the powers of the government of the United States were separated among three branches that were capable of checking each other also made it more difficult for the government to repress individuals or minorities. The entire system of checks and balances (the Senate's confirmation of treaties and appointments, the bicameral system, the staggered terms of office, the periodic elections, the executive veto, the congressional controls over the judicial branch, the possibility of judicial review) worked against a tyranny of the majority. The fact that Congressmen represented large districts with diverse interests also militated against factional triumphs over the people. America's great diversity was the very greatest safeguard of liberty, an insurance that one class, or religion, or section, or interest, or faction could not become too powerful, jeopardizing the liberty of others. Diversity constituted a natural system of checks and balances, making for an equilibrium of powers contributing to the same end.

The argument that the Constitution adequately secured liberty and made a bill of rights superfluous, even dangerous, seductively attracted the proponents of ratification. But some of the points that they made were patently absurd, such as the claim that bills of rights were appropriate in England but not in America. In fact eleven states had framed written constitutions during the Revolution, and seven drew up bills of rights; even the four without such bills inserted in their constitutions some provisions normally found in bills of rights, as had the Framers when drafting the Constitution for the Union. To imply that bills of rights were un-American or unnecessary merely because the people in America were the source of all power was unhistorical.

Americans had become accustomed over a period of a century and a half to the idea that people created government by written compacts or constitutions that were fundamental law; that the government must be subject to such limitations that were necessary for the security of the rights of the people; and usually that the reserved rights of the people were enumerated in bills of rights. Yet, James Wilson had repeatedly informed the Pennsylvania ratifying convention that a bill of rights was unnecessary in America, even though Pennsylvania's state constitution had an elaborate Declaration of Rights. Governor Edmund Randolph of Virginia, another influential Framer, declared at the Virginia ratifying convention that the esteemed Virginia Declaration of Rights "has never secured us against danger; it has been repeatedly disregarded and violated." That was merely exaggeration, but Randolph's rhetoric risked dis-

belief when he declared, "Our situation is radically different from that of the people of England. What have we to do with bills of rights? . . . A bill of rights, therefore, accurately speaking, is quite useless, if not dangerous to a republic."[9]

That supporters of the Constitution could ask, "What have we to do with a bill of rights" suggests that they had made a colossal error of judgment. They had omitted a bill of rights and then compounded their error by refusing to admit it. Their single-minded purpose of creating an effective government had exhausted their energies and good sense, and when they found themselves on the defensive, under an accusation that their handiwork threatened the liberties of the people, their frayed nerves led them into indefensible positions. Any opponent of ratification could have answered Randolph's question, or Wilson's speeches, or Hamilton's *Federalist No. 84*, and many capably did so.

If a bill of rights was unnecessary, they asked, why did the Constitution protect some rights? The protection of some rights opened the Framers and their supporters to devastating rebuttal. They claimed that because no bill of rights could be complete, the omission of a particular right might imply a power to abridge it as unworthy of respect by the government. That argument, in effect that to include some rights would exclude all others, boomeranged.

Hamilton, in *Federalist No. 84*, oblivious of inconsistency and illogic, had elaborately described the protections of particular rights in the proposed Constitution. Impeachments were regulated by guarantees of indictment, trial, judgment, and punishment according to law. No religious test could be exacted from office holders. Ex post facto laws and bills of attainder were banned, as were titles of nobility. Treason was narrowly defined; its proof regulated. In criminal cases trial by jury was guaranteed, and the writ of habeas corpus was protected too.

In Pennsylvania, Robert Whitehall answered James Wilson by noting the Constitution's protection of selected rights, and he called on Wilson to reconcile his argument with the Convention's handiwork. "For," declared Whitehall, "if there was danger in the attempt to enumerate the liberties of the people, lest it should prove imperfect and defective, how happens it, that in the instances I have mentioned, that danger has been incurred? Have the people no other rights worth their attention, or is it to be inferred, agreeably to the maxim of our opponents, that every other right is abandoned?" Stipulating a right, he believed, destroyed the "argument

9. Jonathan Elliot, ed., 3 *The Debates in the Several State Conventions On the Adoption of the Federal Constitution* 191 (Lippincott, 2d ed. 1891) ("*Debates*").

of danger."[10] Surely the Philadelphia Convention might have thought of some rights in addition to those protected in the Constitution. The ban on religious tests could have reminded them of freedom of religion. Did not its omission, together with the reasoning of proponents of ratification, necessarily mean that the government could attack freedom of religion?

What prevented enumerated powers from being abused by the new government, at the expense of personal liberties? Congress's power to tax, for example, might be aimed at the press or at religion, and therefore was a power to destroy or restrain their freedoms. Taxes might even be exacted for the support of a religious denomination. Tax collectors, unrestrained by a ban on general warrants, might invade homes and, as Patrick Henry feared, might search and ransack everything. Congress, he warned, might "extort confession by torture" in order to convict a violator of federal law.[11] Numerous opponents of ratification contended that Congress could define as crimes the violation of any laws that it might legitimately enact, and in the absence of a bill of rights, accused persons might be deprived of the rights to counsel, to indictment, to cross-examine witnesses, to produce evidence on their own behalf, to be free from compulsory self-incrimination, to be protected against double jeopardy and excessive bail, and to be exempt from excessive fines and cruel punishments.

Henry cleverly observed that the "fair implication" of the argument against a bill of rights was that the government could do anything not forbidden by the Constitution. Because the provision on the writ of habeas corpus allowed its suspension whenever the public safety required, Henry reasoned, "It results clearly that, if it had not said so, they could suspend it in all cases whatsoever. It reverses the position of the friends of this Constitution, that every thing is retained which is not given up; for, instead of this, every thing is given up which is not expressly reserved."[12]

Richard Henry Lee, also advocating a bill of rights, similarly scorned the ratificationists' arguments, turning them upside down. For example, he observed that a clause of the Constitution prohibited Congress from granting titles of nobility. If the clause had been omitted, would Congress have the power to grant such titles and create an aristocracy? "Why then," he asked, "by a negative clause, restrain congress from doing what it would have no power to do? This clause, then, must have no meaning, or imply, that were it

10. Jensen, 2 *Documentary History* at 427 (cited in note 2).
11. Elliot, 3 *Debates* at 448 (cited in note 9).
12. Id. at 461.

omitted, congress would have the power in question . . . on the principle that congress possess the powers not expressly reserved." Lee objected to leaving the rights of the people to "logical inferences," because the Framers' principles led to the implication that all the rights not mentioned in the Constitution were intended to be relinquished.[13]

Abroad, two wise Americans serving their country on diplomatic missions appraised the proposed Constitution without the obligation of having to support a party line. John Adams in London, having received a copy of the document, wrote to Thomas Jefferson, in Paris, to say that he thought the Constitution was admirably calculated to preserve the Union, and he hoped that it would be ratified with amendments. "What think you of a Declaration of Rights?" he asked. "Should not such a Thing have preceeded the Model?"[14] Jefferson agreed. In his first letter commenting on the proposed Constitution, he wrote Madison that he liked the Constitution but concluded by saying what he did not like about it: "First the omission of a bill of rights." After listing the rights he thought deserved special protection, starting with the freedoms of religion and of the press, Jefferson dismissed as campaign rhetoric Wilson's justification for the omission of a bill of rights, and Jefferson concluded: "Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference."[15]

Madison, who had long opposed a bill of rights, finally changed his mind—mainly for political reasons, but also because he came to understand that a bill or rights would complete the Constitution. When, in the First Congress, he introduced the amendments that became the Bill of Rights, he explained that all power is subject to abuse, which should be guarded against by securing "the great rights of mankind." The government possessed only limited powers but it might misuse them. He sought to limit the powers of all branches of the government, unlike liberty documents in Great Britain which operated only against the executive and left the legislative branch unrestrained. The great objective was to prevent abuses of power by "the body of the people, operating by the majority against the minority." He still believed that "paper barriers" might fail, but they raised a standard that might educate the major-

13. *Letters from the Federal Farmer*, Herbert J. Storing, ed., 2 *The Complete Anti-Federalist* 326 (U. of Chi. Press, 1981). Lee's authorship is highly probable but not positive.

14. Adams to Jefferson, Nov. 10, 1787, Lester Cappon, ed., 1 *The Adams-Jefferson Letters* 210 (U. North Carolina Press, 1959).

15. Jefferson to Madison, Dec. 20, 1787, Julian P. Boyd, et. al., eds., 12 *The Papers of Thomas Jefferson* 440 (Princeton U. Press, 1950).

ity against acts to which they might be inclined.[16] Moreover, he declared, if his amendments were adopted,

> independent tribunals of justice will consider themselves in a peculiar manner the guardians of these rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.[17]

Off the record, in his private correspondence, Madison revealed other motives for his unyielding demand for amendments protecting personal liberties. He knew that the amendments, if adopted, would kill the movement for a second convention, sought by opponents of the Constitution for the purpose of crippling the powers of the national government. He believed that the adoption of his amendments would appease the fears of the common people and give them confidence in the new government. He meant, also, to isolate the opponents of the Constitution from their followers; the adoption of his amendments, he said, "will kill the opposition every where," and put an end to disaffection to the new government.[18] Madison's political judgment was right. The Bill of Rights fulfilled the Constitution as a matter of political theory, and it also had the healing effect that he predicted. The Framers had rectified their great blunder of omission.

16. Madison's speech of June 8, 1789 is reprinted in Bernard Schwartz, ed., 2 *The Bill of Rights: A Documentary History* 1023-34 (Chelsea House, 1971).

17. Id. at 1031.

18. Madison to Richard Peters, Aug. 19, 1789, Rutland, 12 *The Papers of James Madison* at 347 (cited in note 8).