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THE FEDERALIST PAPERS AND THE BILL OF RIGHTS

*Shlomo Slonim**

Of all the complaints lodged by the Antifederalists in their campaign to defeat ratification of the Constitution, the failure to attach a bill of rights to the Constitution emerged as the leading and most formidable one.¹ This omission represented an Achilles' heel that might very well have doomed the process of ratification.² In the 1787 Constitutional Convention, it will be recalled, no one thought of the need for a bill of rights until Virginian delegate George Mason raised the issue just several days before the Convention was due to rise on September 17. "It would give great quiet to the people," he said.³ Thereupon, Elbridge Gerry of Massachusetts submitted a proposal for adding a bill of rights to the Constitution which Mason seconded. The Convention unanimously rejected the proposal by a vote of 10 to 0,

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1. Thus, the *Dissent* of the minority in the Pennsylvania ratifying convention, issued on December 18, 1787 states: "The first consideration that this review [of the Constitution] suggests is the omission of a BILL OF RIGHTS." 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 630 (John P. Kaminski & Gaspare J. Saladino eds., 1976) [hereinafter DHRC]. And George Lee Turbeville, in a letter to James Madison dated December 11, writes: "The principal objection that the opponents bring forward against this Constitution, is the total want of a Bill of Rights." 8 *id.* at 232. And in a subsequent letter to Madison dated April 16, 1788, Turbeville refers to the demand for the adoption of a bill of rights as "the favorite Topic of the ablest Antifoederal declamers." *Id.* 234-35 n.3. James Wilson, at one point, referred to the complaint over the omission of a bill of rights as "this [subject] so violently supported out of doors." 2 *id.* at 469-70.

2. As Robert Rutland has written, "[T]he Antifederalists stumbled upon one oversight in the Constitution that bore the appearance of an Achilles' heel"; and they "assiduously promoted the idea that the failure to include a bill of rights was not an oversight, but a studied bit of Federalist deception." ROBERT ALLEN RUTLAND, THE ORDEAL OF THE CONSTITUTION: THE ANTIFEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787-1788, at 32-33 (1966).

3. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587-88 (Sept. 12, 1787) (1937).

with one state absent.⁴ Failure to heed Mason's counsel was to plague the Federalists throughout the ratification campaign.

Already in the first major confrontation over ratifying the Constitution, which took place in Pennsylvania several weeks after the close of the Constitutional Convention, the Seceders from the state Assembly called upon their electorate to consider whether the rights of citizens could be regarded as safe under a constitution which did not contain a bill of rights.⁵ In the same state, Samuel Bryan, in his first essay on the topic, Centinel 1, published on October 5, 1787, declared that the absence of a bill of rights made it essential for a second constitutional convention to be held to rectify the errors and omissions of the first.⁶

In response to these charges, James Wilson, who contributed significantly to the drafting of the Constitution as a member of the Pennsylvania delegation to the Constitutional Convention, and who was a prominent legal scholar who would subsequently serve as a Justice on the original U.S. Supreme Court, enunciated a thesis which distinguished between a government of unlimited powers and one of enumerated and defined powers. The former, as illustrated by the state governments, were sovereign in their authority and had free rein to exercise any and all powers, but the latter, as illustrated by the federal government, could only exercise those powers which it disposed of under the Constitution. There was, therefore no fear that the federal government could threaten the rights of citizens in such matters as freedom of the press, freedom of religion etc., since it was powerless to operate in such spheres. Wilson explained:

There are two kinds of government; that where general power is intended to be given to the legislature and that where the powers are particularly enumerated. In the last case, the implied result is, that nothing more is intended to be given, than what is so enumerated, unless it results from the nature of the government itself. . . . [I]n a government like the proposed one, there can be no necessity for a bill of rights. For . . . the people never part with their power. . . . [W]e are told, that there is no security for the rights of conscience. I ask . . . what part of this system puts it in the power of Congress to attack

4. *Id.* at 582, 588.

5. 2 DHRC, *supra* note 1, at 71, 128-31; 3 THE COMPLETE ANTI-FEDERALIST, Pennsylvania 13-16 (Herbert J. Storing & Murray Dry eds., 1981) [hereinafter STORING].

6. 2 THE COMPLETE ANTI-FEDERALIST at 136-43; 13 DHRC, *supra* note 1, at 328-37. For background to the appearance of Centinel, see *id.* at 326.

those rights? When there is no power to attack, it is idle to prepare the means of defense.⁷

And Justice Thomas McKean of the Pennsylvania judiciary, likewise contended that a bill of rights was superfluous in the federal constitution:

[I]t has already been incontrovertibly shown that on the present occasion a bill of rights was totally unnecessary, and that it might be accompanied with some inconveniency and danger if there was any defect in the attempt to enumerate the privileges of the people. This system proposes a union of thirteen sovereign and independent states in order to give dignity and energy to the transaction of their common concerns. It would be idle, therefore to countenance the idea that any other powers were delegated to the general government than those specified in the Constitution itself.⁸

If a person possessed of 1,000 acres decides to convey 250 acres, "is it necessary to reserve the 750?" he asked.⁹ "[T]he whole plan of government [of the Constitution] is nothing more than a bill of rights—a declaration of the people in what manner they choose to be governed."¹⁰ "It seems," he said, "that the honorable members are so afraid the Congress will do some mischief that they are determined to deny them the power to do any good."¹¹ In conclusion, he exhorted the delegates to ratify the Constitution and declared:

But sir, perfection is not to be expected in the business of this life; and it is so ordered by the wisdom of Providence that as our stay in this world seldom exceeds three score and ten years, we may not become too reluctant to part with its enjoyments, but by reflecting upon the imperfections of the present, learn in time to prepare for the perfection of a future state. Let us, then, Mr. President, be content to accept this system as the best which can be obtained.¹²

Given the prominence and centrality which the issue of a bill of rights assumed in the struggle over ratification, it might have been expected that the authors of the *Federalist Papers*

7. 2 *id.* at 470-71; *see also id.* at 167-68; also reproduced 13 *id.* at 339-40. For discussion of Wilson's presentation and the reaction to it, *see id.* at 337-39.

8. 2 DHRC, *supra* note 1, at 412.

9. *Id.* at 546-47.

10. *Id.* at 387.

11. *Id.* at 414.

12. *Id.* at 418.

would take note of this complaint and immediately issue a rebuttal. After all, Hamilton in *Federalist 1*, in explaining the purpose of the series wrote, that in addition to explaining the insufficiency of the Articles of Confederation for preservation of the Union and the merits of the new Constitution, the series would also “endeavor to give a satisfactory answer to all the objections” which “shall have been raised against the Constitution.” And yet, the fact is that the *Federalist Papers* remain silent on this topic until practically the end of the series. Only in *Federalist 84*, one before the last, does Hamilton address the question of a bill of rights, and then, as Jack Rakove has justly said, as a sort of afterthought, in the process of tying up all loose ends.¹³

What is particularly surprising is that Madison seems to have completely ignored the subject, contenting himself to merely saying that the Articles of Confederation were equally without a bill of rights. (*Federalist 38*). This very inadequate response to the hue and cry of the Antifederalists, appears also to disregard the view of Madison’s mentor, Thomas Jefferson, who in a letter to him dated December 12, 1787, sharply attacked Wilson’s thesis that a bill of rights was not needed in the case of a government of limited powers. The thesis, Jefferson said, was “gratis dictum,” i.e. gratuitous, and “opposed by strong inferences from the body of the instrument” of the Constitution. He pointed out that in contrast to the Articles of Confederation, the Constitution contained no clause to the effect that “every power . . . not . . . expressly delegated to the United States in Congress” was retained by the states. “A bill of rights,” he declared, “is what the people are entitled to against every government on earth, general or particular [i.e. national or state], and what no just government should refuse, or rest on inference.”¹⁴

In fact, however, Madison had not forgotten about a bill of rights and its non-inclusion in the Constitution. He addressed the issue in the *Federalist Papers*, but his answer was an oblique one, not direct. He spoke of rights and not of a bill of rights. His re-

13. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 327 (1996).

14. Letter of Dec. 12, 1787, in 12 JEFFERSON, PAPERS 440. Jefferson also took issue with Wilson’s attempted justification of the Convention’s failure to institute jury trial in civil cases because it had been cancelled in several states. He wrote:

It was a hard conclusion to say because some [states] have been so incautious as to abandon this mode of trial, therefore the more prudent states shall be reduced to the same level of calamity. It would have been much more just and wise to have concluded the other way that as most of the states had judiciously preserved this palladium, those who had wandered should be brought back to it, and to have established general right instead of general wrong.

sponse appears in the second half of *Federalist 51*, which echoes the thesis Madison enunciated in *Federalist 10* regarding the virtues of a multiplicity of sects arising out of an expansion of territory. Contrary to what some people think, 51 is not simply a repetition of 10, nor are there grounds for their puzzlement over the fact that Madison found it appropriate to re-insert this argument in an article devoted to discussing the separation of powers.¹⁵ In *Federalist 10* Madison prescribed a formula for overcoming the bane of factions; in *Federalist 51* he employed it to explain why rights would be safe under the Constitution. The two issues are related, but they are not the same. In 10, Madison expounded the thesis that a system of representative government, combined with expansion of territory, would result in a multiplicity of interests that would neutralize one another, thus helping to curb the force of faction, *i.e.* of party, in the legislature. In 51, the first half is devoted to explaining how the operation of the separation of powers would prevent any one branch of the federal government from monopolizing power and instituting a tyranny; the second half is devoted to showing how a multiplicity of sects and interests in the United States will ensure that individual rights are protected. There is no reference here to a system of representative government as a means of curbing faction, since he is talking about protecting the rights of individuals. But the upshot is that a bill of rights is not required under the federal Constitution. As Madison put it in the second half of 51:

It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.

15. See DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 142-46 (1984), who struggles with the need to explain what the second half of *Federalist 51* adds to *Federalist 10*, and why Madison found it necessary to repeat a thesis he had already expounded.

Madison, it should be noted, even before the Convention, had already enunciated his thesis that enlargement of the sphere would help divide the community into numerous clashing sects and interests. See "Vices of the Political System of the United States" (April 1787), 9 MADISON, PAPERS 355-57. He presented the thesis to the delegates at one of the first sessions of the Convention, on June 6, 1787. 10 *id.* at 33. After the Convention, he reiterated the thesis to Jefferson in his letter of Oct. 24, 1787. *Id.* at 213-14. Thus, *Federalist Nos. 10 and 51* reflected a longstanding notion of Madison.

There were only two methods of “providing against this evil,” said Madison. One, was to create “a will in the community independent of the majority,” as illustrated by a monarch.¹⁶ The other, was “by comprehending in the society so many descriptions of citizens as will render an unjust combination of a majority of the whole very improbable.” The latter method was exemplified in the federal republic of the United States.

Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.

In a small state like Rhode Island, continued Madison, there was every probability of “reiterated oppressions” by “factious majorities.” It was different with “the extended republic of the United States.” Given “the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good.” And justice, Madison stressed, “is the end of government. It is the end of civil society.”

Thus, by propounding a thesis to explain how citizens’ rights would be safeguarded under the new Constitution, Madison effectively countered the Antifederalist argument for a bill of rights. His presentation does not refer directly to the Antifederalists, but the implication is clear for them to note. If rights are secure, there is no need for a document spelling out a bill of rights.

In the Virginia Ratifying Convention, Madison had occasion to reiterate the analysis he had spelled out in *Federalist 51*, and also to allude by inference to Wilson’s thesis. Patrick Henry had charged that the Constitution was seriously flawed for lack of a

16. The question naturally arises whether Madison meant that a judicial body could also serve this purpose. Given his subsequent opposition to judicial review this assumption seems doubtful. See “Observations on Jefferson’s Draft of a Constitution for Virginia” (Oct. 15, 1788); 11 MADISON, *supra* note 15, at 293.

bill of rights. Thus, religion, he declared, is not guarded.¹⁷ In response, Madison queried whether a bill of rights was a security for religion.

Would the bill of rights in this State exempt the people from paying for the support of one particular sect, if such were exclusively established by law? If there were a majority of one sect, a bill of rights would be a poor protection for liberty. Happily for the states, they enjoy the utmost freedom of religion. This freedom arises from the multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society. . . . There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation. . . . [T]he United States abound in such a variety of sects, that it is a strong security against religious persecution, and is sufficient to authorise a conclusion, that no one sect will ever be able to out-number or depress the rest.¹⁸

Madison's response helped disarm Patrick Henry's charge regarding the omission of a bill of rights, and enabled the Virginia Convention to proceed and ratify the Constitution.¹⁹

Madison's analysis in the second half of *Federalist 51* perhaps explains why Hamilton found it possible to avoid addressing the question of a bill of rights until *Federalist 84*. The publication of Madison's thesis on a multiplicity of interests operating as an effective surety for individual rights, and this, coming on top of Wilson's contention that a bill of rights was uncalled for under a government of enumerated powers, apparently convinced him that he need not address the subject. But the persistence and ferocity of the Antifederalist campaign, and its concentration on the absence from the Constitution of a bill of rights, apparently persuaded Hamilton that he could not avoid publishing his own rejoinder. As will be seen, his comments, while they included a reference to Wilson's thesis, also presented an additional and entirely different line of argument. And as for Madison's thesis, although Hamilton did not react publicly to it, privately he seems to have entertained some doubts about its strength and general applicability.²⁰ In this regard it should be noted, that Hamilton's reference, in *Federalist 9*, to ENLARGEMENT OF THE

17. 10 DHRC, *supra* note 1, at 1213.

18. *Id.* at 1223-24.

19. *See id.* at 1540 (June 25, 1788).

20. *See* Hamilton's minutes at the Convention for June 6. 1 FARRAND, *supra* note 3, at 146-47; 10 MADISON, *supra* note 15, at 34 n.2.

ORBIT as a salutary factor in the creation of the United States, relates to the advantages of a federal arrangement over consolidation into a single unitary state. It does not bear on the subject matter of Madison's thesis.

Hamilton's first point in *Federalist 84* is to note that the constitutions of various states, including New York itself, contain no separate bill of rights. And, if in answer it is contended that rights are strewn throughout the body of the New York constitution, the same is true, said Hamilton, in the case of the federal Constitution, so that the sum total of rights is no less numerous and no less significant. The provision on *habeas corpus*, and the prohibition on *ex post facto* laws and of titles of nobility in the federal Constitution, could be labelled as the most meaningful "securities to liberty and republicanism." The ban on titles of nobility, in fact, "may truly be denominated the corner-stone of republican government."

Furthermore, said Hamilton, bills of rights are appropriate for stipulations between kings and their subjects, but "have no application to constitutions, professedly founded upon the power of the people, and executed by their immediate representatives and servants." "Here," he declared, echoing Wilson, "the people surrender nothing; and as they retain every thing they have no need of reservations." And in words, quoting the opening phrases of the Constitution, Hamilton continued:

WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity do *ordain* and *establish* this Constitution' . . . is a better recognition of popular rights, than volumes of those aphorisms which . . . sound much better in a treatise of ethics than in a constitution of government.

But, in fact, said Hamilton, a document "intended to regulate the general political interests of the nation," or of a state, does not require "a minute detail of particular rights." Moreover, a bill of rights might even be dangerous, since "they would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than was 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? . . . The Consti-

tution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given.

Hamilton also queried whether it was possible to formulate a provision which would absolutely guarantee liberty of the press. "Who can give it any definition which would not leave the utmost latitude for evasion?" In an ultimate sense, Hamilton contended, "its security . . . must altogether depend on public opinion."

After presenting these various arguments, Hamilton in conclusion, enunciated a completely different thesis—that the Constitution, in and of itself, was a bill of rights. Earlier, it will be recalled, Judge McKean, in the Pennsylvania convention had made a similar claim,²¹ but Hamilton elaborated on the thesis:

Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the plan of the convention; comprehending various precautions for the public security. . . . Is another object of a bill of rights to define certain immunities and modes of proceeding, which are relative to personal and private concerns? This we have seen has also been attended to.

In essence, what Hamilton is claiming is that a democratic system of government, in which all the office-holders are answerable to the electorate at regular intervals, cannot become a despotic regime. The voters are at liberty to dismiss the office-holders, be they in the executive or legislative branches of government, and thus bring about an end to oppressive or objectionable policies. The rights of citizens are most securely protected by virtue of the system of government which shall be instituted in the United States. No bill of rights could possibly do more to protect the rights of individuals and minorities than the very structure of government itself. Liberty to change the composition of the governing bodies is the surest guarantee of the liberty of citizens, and all supplementary guarantees are, as Hamilton stressed, dangerous because they imply the existence of powers where none are designated, and misleading because in substance they cannot effectively protect. Thus, for Hamilton, the Constitution was the embodiment of all bills of rights that could realistically be conceived.

21. See *supra*, text accompanying note 10.

In summation, it emerges that the authors of the *Federalist Papers* did not neglect the issue of a bill of rights in their discussion. Three principal answers were supplied by the Federalists to justify the omission of a bill of rights from the Constitution, each of which was duly noted in the *Federalist Papers* (either expressly or implicitly) at one point or other. The first attempt to explain why a bill of rights was not required appears in the second half of *Federalist 51*, where Madison replicates the thesis he had enunciated in *Federalist 10*. But whereas earlier he was intent on demonstrating how the bane of factions in the legislature could be overcome, in 51 he seeks to explain why the rights of individuals will be secure. The enormous expanse of the United States, embracing as it did a vast variety of clashing interests and sects, would forestall legislation or executive action violating the rights of individuals. In effect, the different interests and sects would cancel one another out and prevent the imposition of policies designed to reward one group at the expense of another or to harm one set of individuals so as to benefit another set. The second argument to be noted in the *Federalist* was that of James Wilson (chronologically appearing first), according to which the federal constitution, providing for a federal government of limited and enumerated powers, did not allow a government to act except on the basis of granted powers. In the absence of a power bearing on rights, that government would be powerless to threaten the liberty of citizens. The third and final thesis was that of Alexander Hamilton which contended that the Constitution, in and of itself, was the greatest surety for the rights of individuals since it established a system of government which provided for free and regular elections. This would enable the electorate to react and cancel, by means of a changing of the guard, any and every policy which they found to be inimical to the rights of citizens.

It is interesting to note that it did not take long for these three theories to be put to the test in determining which one most effectively protected the rights of citizens. In 1798 the U.S. Congress adopted the Alien and Sedition laws²² which, in the view of most subsequent commentators and opinions of the U.S. Supreme Court, violated the Bill of Rights that had entered into force some seven years earlier.²³ Obviously, neither the thesis of

22. For background to the Alien and Sedition Acts, see STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800* at 590-93 (1993).

23. Justice William J. Brennan, in his majority opinion in the case of *New York*

Wilson nor that of Madison had operated to prevent the adoption of laws which were clearly partisan and inhibitive of freedom of speech and of the press. On the other hand, Hamilton's thesis would seem to have been vindicated, since Jefferson's victory in the 1800 elections was inspired, to a considerable degree, by the electorate's condemnation of the conduct of the Federalists in infringing the liberties of the people.²⁴ In the words of one prominent constitutional scholar, "the constitutionality of the Sedition Act . . . was decided by the people in the national elections of 1800, which drove the Federalist party out of office and into oblivion."²⁵ While in this instance even the Bill of Rights only served as a "parchment barrier"²⁶ in protecting rights, ultimate justice was enforced by the democratic right of the people to select the government of their choice and thereby determine the laws by which they shall be governed. This pattern of events gives rise to the engaging thought that perhaps Hamilton had it right after all, and the Bill of Rights merely made explicit what was implicit in the Constitution from the beginning.²⁷ In later years, thanks to the adoption of the Fourteenth Amendment and the jurisprudence of the Supreme Court, the "parchment barrier" was to assume an entirely different and much more formidable character in guaranteeing individual liberty.²⁸

Times v. Sullivan, 376 U.S. 254 (1964), declared that, while the validity of the Sedition Act was never determined in a court of law, "the attack upon its validity has carried the day in the court of history." *Id.* at 276

24. See ELKINS & MCKITRICK, *supra* note 22, at 725-27.

25. LOUIS FISHER, *AMERICAN CONSTITUTIONAL LAW* 643-44 (2d ed. 1995).

26. The term was used by Madison in correspondence with Jefferson (Oct. 17, 1788) to explain why he did not favor a bill of rights. Among the reasons he presented was the argument that "experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State." 11 MADISON, *supra* note 15, at 297.

27. See two engaging articles that endorse such a thesis: Herbert J. Storing, "The Constitution and the Bill of Rights" in *HOW DOES THE CONSTITUTION SECURE RIGHTS?* 15-35 (Robert A. Goldwin & William A. Schambra eds., 1985), and Walter Berns, "The Constitution as Bill of Rights" in *id.* at 50-73.

28. On the doctrine of incorporation see, HENRY J. ABRAHAM & BARBARA A. PERRY, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES* 29-91 (7th ed. 1998).