Perspectives on Comparative Federalism

The American Experience in the Pre-incorporation Era

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Abstract

Today the Bill of Rights is understood to limit not only the federal government but also the power of the states to infringe on the civil liberties of citizens. This was not always the case. In the early days of the republic, most Americans feared federal authority far more than the states. This remained the case until passage of the 14th amendment to the Constitution followed by a series of interpretations over the years by the Supreme Court that broadened its scope. Some delegates at the convention of 1787 and other critics during ratification complained that the Constitution did not include a bill of rights, but others objected that the people needed such protections from government power. It became clear, however, that ratification could not be attained without inclusion of a Bill of Rights, which were adopted as amendments in 1791. In 1833, the Supreme Court ruled, in Barron v. Baltimore*, that the provisions of the Bill of Rights imposed restrictions only on the federal government and not on the states. Passage of the 14th amendment in 1868 made the Bill of Rights restrictions on the states. Over the years, federal courts increasingly broadened the authority of the Bill of Rights as limitations on the states.*

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Today the Bill of Rights – the first ten amendments to the United States Constitution – is understood to limit not only the national government but also (and to a greater extent) the power of the states, to infringe on the civil liberties of citizens. Such was not always the case. In the early days of the republic, most Americans feared federal authority far more than the states. This remained the case until passage of the 14th amendment to the Constitution followed by a series of interpretations over years by the Supreme Court that broadened its scope.

The Constitution was created out of frustration. After Britain's North American colonies declared independence in 1776, the Continental Congress formalized a government in the Articles of Confederation, an agreement to establish a per-

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petual "mutual friendship and intercourse among the people of the different states".[1]

But events demonstrated that the Articles were woefully inadequate and in May 1787, delegates from the states met in Philadelphia to create a new and more effective frame of government. One unique aspect of the newly created American government was the way the Constitution defined sovereignty. In the Confederation, the states retained their sovereignty except for powers specifically granted to the Confederation. The system the Constitution established was federalist, with power shared between the national government and the states. The preamble of the Constitution placed sovereignty in 'the people', delegating some power to the people in the states and some to 'the people' in a national sense. By seeking ratification of the Constitution by conventions of 'the people' in the states rather than by state governments, the framers reinforced this new concept of popular sovereignty. James Madison argued that this established "the fabrics of governments which have no model on the face of the globe".[2]

But the Convention was not without controversy. Americans were suspicious of government power in general and centralized power in particular. Though the Constitution included some civil liberties, such as the right of *habeas corpus* and trial by jury in criminal cases, as well as prohibiting bills of attainder, *ex post facto* laws and religious tests for office, it did not include a comprehensive bill of rights like those seen in the state constitutions.

In the closing days of the Convention, on 12 September 1787, George Mason, the author of the 1776 Virginia Declaration of Rights, asserted that the proposed Constitution should have one, which "would give great quiet to the people". Elbridge Gerry, of Massachusetts, supported Mason. Roger Sherman of Connecticut countered that nothing in the Constitution repealed states' bills of rights and Mason's proposal was unanimously defeated.[3]

Three days later, Mason again objected because "[t]here is no Declaration of Rights", and since Article VI of the Constitution made the laws of the federal government "paramount to the laws and constitution of the several States, the Declaration of Rights in the separate States are no security". The Constitution had no provision for freedom of the press, trial by jury in civil cases or prohibiting standing armies in time of peace. It would lead, he said, to "a monarchy, or a corrupt, tyrannical 'oppressive' aristocracy".[4] On the final day of the Convention, 17 Sep-

1 *Journals of the Continental Congress*, Washington, DC, Government Printing Office, 1907, Vol. 9, available at: https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc0091)).

2 J. Murrin, '1787: The Invention of American Federalism', *in* D.E. Narrett & J.S. Goldberg (Eds.), *Essays on Liberty and Federalism: The Shaping of the U.S. Constitution*, College Station, Texas A&M University Press, 1988, p. 35-36, 40; J. Madison, 'Objections to the Proposed Constitution From Extent of Territory Answered', *Federalist*, No. 14, available at: https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-14.

3 M. Farrand (Ed.), *The Records of the Federal Convention of 1787*, 4 Vols., New Haven, Yale University Press, 1937, p. 2:587-588; A. Koch (Ed.), *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, August 31, 1787, Athens, Ohio University Press, 1966, p. 630.

4 G. Mason, 'Objections to this Constitution of Government (September 16, 1787)', *in* R. A. Rutland (Ed.), *The Papers of George Mason, 1725-1792*, 3 Vols., Chapel Hill, University of North Carolina Press, 1970, p. 3:991.

tember 1787, Mason, joined by fellow Virginian Edmund Randolph and Gerry, declined to sign the Constitution. Though they expressed several concerns, all three complained that the Constitution did not include a bill of rights.[5] James Madison informed Thomas Jefferson, then in Paris, that Mason had returned to Virginia determined to defeat adoption of the Constitution because he considered the lack of a bill of rights 'a fatal objection'.[6]

But Mason was not alone in the belief that a bill of rights was in order. From Paris Jefferson said he did not like "the omission of a bill of rights providing clearly and without the aid of sophisms" for fundamental liberties. In his view "a bill of rights is what the people are entitled to against every government on earth ... and what no just government should refuse or rest on inference".[7]

Madison himself was sceptical about adding a bill of rights. He wrote Jefferson that there was "scarce any point on which the party in opposition is so much divided as to its importance and propriety". He believed some of its advocates acted "from the most honorable and patriotic motives", but

> experience proves the inefficacy of a bill of rights on those occasions its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current.[8]

When the Convention sent the Constitution to the states for their approval, a national debate erupted. As opinion divided, those who favoured the new Constitution co-opted the term 'federalist' leaving those who had reservations about it described as 'anti-federalists'. Arguments ranged over the entirety of the Constitution's provisions and reflected widely differing views about government, including even whether the United States was too large, diverse and factious to sustain itself as a republic. But much of the debate focused on the necessity for a bill of rights.

Critics said that the proposed rights amendments were no more than throwing "a tub to the whale", a phrase borrowed from the practice of tossing an empty tub or a barrel to a whale to divert it until 'the harpoon' had secured the prey. A Federalist newspaper mocked the amendment fervour by writing that "[t]he worship of the ox, the crocodile, and the cat, in ancient time, and the belief in astrology and witchcraft by more modern nations, did not prostrate the human understanding more than the numerous absurdities" of the amendments. Connecticut

5 J. Elliot, *The Debates in the Several State Conventions of the Adoption of the Federal Constitution*, 5 Vols., Philadelphia, J.B. Lippincott, 1941, p. 1:482-496.

6 Madison to Jefferson, October 24, 1787, *in* M. Farrand, *The Records of the Federal Convention of 1787*, 4 Vols., New Haven, Yale University Press, 1937, p. 3:136.

7 Jefferson to Madison, December 20, 1787, *in* R.A. Rutland *et al*, *The Papers of James Madison*, 17 Vols., Chicago, University of Chicago Press, 1962, p. 10:335-339.

8 James Madison to Thomas Jefferson, New York, Oct 17, 1788, *in* R.A. Rutland (Ed.), *Papers of James Madison, 7 March 1788-1 March 1789*, Charlottesville, University Press of Virginia, 1977, p. 11:295-300.

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Federalist Noah Webster opined that "paper declarations of rights are trifling things and no real security to liberty".[9]

At a meeting in the State House in Philadelphia, on 6 October 1787, Federalist James Wilson ridiculed the idea of a bill of rights as 'superfluous and absurd' because under the Constitution the government only had the specific powers it had been given and it could not misuse powers it had not been given. In reply, Judge Samuel Bryan said Wilson's argument was "an insult on the understanding of the people". Bryan repeated Mason's view that since the Constitution would be the supreme law of the land no power could restrain Congress, if it violated personal rights.[10]

The omission of a bill of rights became "the most important obstacle in the way of its adoption by the states". For many anti-federalists, it was a simply a matter of principle.[11]

The actions of the four largest states – Pennsylvania, Massachusetts, Virginia and New York – were critical to the success or failure of ratification. Should anyone of them withhold approval, it was unlikely that the fledgling nation could succeed.

At the Pennsylvania ratifying convention, on 28 November 1787, James Wilson again belittled the clamour over a bill of rights. The fact was, he said, that it had never been an issue at the Convention until three days before adjourning and "even then, of so little account" that it was dismissed without debate. It was certain, he said, that bills of rights were "unnecessary and useless". John Smilie, an Irish emigrant who became a member of the Pennsylvania legislature, objected that the power of government was so loosely defined that it would be impossible to determine the limits of government without 'a test of that kind'. And 750 residents of Cumberland County signed a petition asking that Pennsylvania not ratify the Constitution unless amendments for rights were added. Nonetheless, the convention was ratified without adding rights amendments by a vote of 46 to 23. Anti-federalists reacted to the defeat by calling their own convention at which they rejected the Constitution because it lacked a bill of rights.[12]

In Massachusetts, where the contest for ratification was closer, Federalists and Anti-Federalists brokered a deal in which John Hancock proposed adding a statement to the Constitution that all powers not explicitly granted to the federal government remained with the states. He hoped that this proposition would "quiet the apprehensions of gentlemen". Samuel Adams supported the proposal which, he said, amounted to "a summary of a bill of rights". Massachusetts was

9 D.E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995*, Lawrence, University Press of Kansas, 1996, p. 98; K.R. Bowling, '"A Tub to the Whale": The Founding Fathers and Adoption of the Federal Bill of Rights', *Journal of the Early Republic*, Vol. 8, 1988, p. 225.

10 B. Bailyn (Ed.), *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters during the Struggle over Ratification*, 2 Vols., New York, Library of America, 1993, p. 1:64 & 1:77.

11 L.W. Levy, *Origins of the Bill of Rights*, New Haven, Yale University Press, 1999, p. 12; R.A. Rutland, *The Birth of the Bill of Rights, 1776-1791*, Bicentennial Edition, Boston, Northeastern University Press, 1991, p. 124-125.

12 Bailyn, 1993, p. 807 & 809; Rutland, 1991, p. 140-141.

the first state to ratify the Constitution, by a vote of 187 in favour and 168 opposed, with a proposal to add rights amendments.[13]

The anti-federalist movement also was strong in the important state of Virginia. Patrick Henry, a Revolution era patriot, had declined even the opportunity to serve as a member of the state delegation to the Constitutional Convention because he said he 'smelt a rat' and George Mason's 'Objections' were so widely circulated that one federalist, David Stuart, complained there was a copy in every house in his county. Richard Henry Lee, who as a member of the Second Continental Congress had introduced the motion to declare independence from Britain in 1776 and served in the Confederation Congress, insisted that a bill of rights was necessary to protect the people. Edmund Randolph, who had refused to sign the Constitution at the Convention, however, had now switched sides and favoured ratification. Patrick Henry led the charge against ratifying the Constitution unless it included a bill of rights. He spoke "often and long, one speech lasting seven hours". He declared that a bill of rights was "indispensably necessary". Federalists in Virginia realized they needed to concede acceptance of a bill of rights. On 25 June 1788, the Virginia convention ratified the Constitution with the recommendation that rights amendments be added.[14]

The New York ratifying convention met in the Hudson River town of Poughkeepsie on 17 June 1788. The Federalist cohort included the influential Alexander Hamilton, John Jay and Chancellor Robert Livingston, the highest judicial officer in the state. The anti-federalists included state senator Thomas Tredwell, who warned that a government not limited by clearly defined rights was "like a mad horse, which, notwithstanding all the curb you can put upon him, will sometimes run away with his rider". After debate, the convention passed the Constitution on 24 July 1788 ... with a recommendation that a bill of rights be added in the future.[15]

Thus the largest and most important states – Pennsylvania, Massachusetts, Virginia and New York – accepted the Constitution. The contest had been spirited in each and the failure of ratification in any one of them would have meant the failure of the Constitution.

The most important discussion of the meaning of the Constitution, of course, was The Federalist, a collection of 85 essays written by John Jay, James Madison and Alexander Hamilton, between October 1787 and August 1788 under the pen name 'Publius'.[16]

The Federalist explored nearly every aspect of the Constitution, including whether it should include a bill of rights. In several numbers of The Federalist, James Madison argued against adding a bill of rights, arguing that there was no

13 Kyvig, 1996, p. 92; J. Elliot (Ed.), *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*.... 2nd ed., 5 Vols., Philadelphia, J.B. Lippincott, 1836, p. 2:123 & 2:131.

14 Bailyn, 1993, p. 636; Elliot (Ed.), 1836, p. 3:655-656; Kyvig, 1996, p. 95; Rutland, 1991, p. 163, 165, 167, 170 & 173-174; R. Labunski, *James Madison and the Struggle for the Bill of Rights*, New York, Oxford University Press, 2006, p. 38.

15 Rutland, 1991, p. 178 and 180-181.

16 *The Federalist Papers*, available at https://www.congress.gov/resources/display/content/The+Federalist+Papers.

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agreement on what rights should be included and that the Confederation had functioned without one. He also asserted that the Constitution already prohibited the states from violating some rights and that a bill of rights was not necessary because the states would protect the people's rights. And once more, he objected that experience proved that state governments violated liberties even when they had bills of rights.[17]

Hamilton, in Federalist No. 84, largely reiterating James Wilson's arguments, wrote that a bill of rights was unnecessary. Historically, he said, bills of rights originated in conflicts "between kings and their subjects". This was not necessary in the American Constitution because it was a government based on the authority of the people. He added that "[t]he Constitution is itself, in every rational sense, and to every useful purpose, a Bill of Rights". Moreover, he continued, adding a bill of rights was "not only unnecessary … but would even be dangerous" because it could provide a pretext to violate rights that were not specified.[18]

State judge Robert Yates, writing under the name 'Brutus', replied that the need for a bill of rights was obvious. Rulers had always tried "to enlarge their powers and abridge the public liberty". Supporters of the Constitution said that a declaration a bill of rights was not necessary, yet the power and authority granted the government in it "reaches to every thing which concerns human happiness – Life, liberty, and property, are under its control".[19]

The history of the ratification conventions in the states suggests that the Constitution won approval only because its supporters agreed to add a bill of rights as amendments. That understanding had provided the critical margin of success in several states.

James Madison took that commitment seriously. On 8 June 1789, now Congressman Madison proposed rights amendments drawn from those suggested by the state ratifying conventions. As his earlier remarks had shown, Madison was as suspicious of states as he was of federal power and he specifically proposed making rights of conscience, freedom of the press and trial by jury binding on the states.[20]

In the debate that followed, the House discussed the amendments as a Committee of the Whole and sent seventeen to the Senate. The Senate reduced that number to twelve, which were sent to the states for ratification at the end of September. Significantly, among the proposals discarded by the Senate was one that

17 *Ibid*., no. 38, 44, 46 & 48; Labunski, 2006, p. 62; P. Finkelman, 'James Madison and the Bill of Rights: A Reluctant Paternity', *Supreme Court Review*, Vol. 1990, Chicago, University of Chicago Press, 1990, p. 316-319.

18 A. Hamilton, 'Certain General and Miscellaneous Objections to the Constitution Considered and Answered', *Federalist*, No. 84, available at: https://www.congress.gov/resources/display/content/The+Federalist+Papers.

19 H.J. Storing (Ed.), The Complete Anti-Federalist, Chicago, University of Chicago Press, 1981, Vol. 2, Part 2, p. 372-377, available at: http://teachingamericanhistory.org/library/document/brutus-ii/.

20 Kyvig, 1996, p. 98.

specifically prohibited the states from infringing on the rights of citizens.[21] The proposed amendments fell into three broad categories:

- the rights of citizens such as freedom of religion, speech, press, assembly, petition, participation in the militia, the right to keep and bear arms and protection against quartering troops in one's home;
- judicial rights, such as reasonable search, double jeopardy, compulsion to testify against oneself, due process of law, and the right to speedy and public trial by a jury of one's peers;[22]
- it also included the general principles of the ninth and tenth amendments: that specifying certain rights could not be construed to deny others retained by the people and that powers not delegated to the federal government are reserved to the states or to the people.

Adoption of the Bill of Rights was completed when Virginia ratified the amendment on 15 December 1791.

The states declined to approve two measures:

- An amendment that provided Congress could not increase its own compensation "until an election of Representatives shall have intervened". (That proposal was eventually ratified 203 years later as the 27th amendment in 1992.)
- The other amendment that failed ratification was one that would have adjusted the number of a state's representatives in the House of Representatives as the population increased. The measure would have limited the size of a district to no more than 50,000. (Today one member of Congress represents about 500,000 persons.)

Enacting the measures that made up the Bill of Rights was a significant achievement. The amendments satisfied many anti-federalists who had been concerned about the reach of federal power. A number of former anti-federalists subsequently served in the national government: Edmund Randolph served as attorney general in the administration of George Washington and Elbridge Gerry was later vice president in James Madison's administration. (George Mason was never fully able to reconcile himself to the Constitution, which led to estrangement between him and George Washington.)

The struggle over the Bill of Rights also demonstrated that, contentious as it was, the process of amending the Constitution provided a stable system for practical constitutional change and reform.

It remained a matter of dispute, at least in the minds of some, whether the Bill of Rights applied only against the power of the national government or included limits on the states. In 1825, Philadelphia attorney William Rawle wrote that since provisions for protection of rights differed among the states "[a] declaration

21 The debate is covered thoroughly in Bowling, 1988, p. 234-246.
22 Kyvig, 1996, p. 103.

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of rights, therefore, properly finds a place in the general Constitution, where it equalizes all and binds all".[23]

A few years later, that issue came to the Supreme Court in the case of *Barron v. Baltimore*.[24] In 1815, John Barron built a profitable dock and warehouse in Baltimore, Maryland. Two years later, the city began street improvements in the area that caused sand and mud to accumulate around the wharves and seriously damage the businesses there. After appeals to the city were ignored, Barron sued. The local court agreed with Barron and awarded him damages, but the city appealed and the case made its way to the Supreme Court.[25]

At the Supreme Court, headed by Chief Justice John Marshall, Barron's lawyer argued that the city's actions violated the 'takings clause' of the 5th amendment of the Constitution which held that "private property [shall not] be taken for public use, without just compensation". It was an easy case for Marshall, who had been a member of Virginia ratification convention. Immediately after Barron's counsel made his argument, the Chief Justice informed Maryland state attorney, Roger B. Taney, that there was no need for him to say anything in the case.[26]

Marshall continued for a unanimous court.

> The question thus presented is, we think, of great importance, but not of much difficulty. The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State had established a constitution for itself, and in those provided such limitations and restrictions on the powers of its particular government as its judgment dictated.... [T]he fifth amendment must be understood as restraining the power of the General Government, not as applicable to the States. In their several Constitutions, they have imposed such restrictions on their respective governments, as their own wisdom suggested, such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.[27]
>
> We are of opinion that the provision in the Fifth Amendment to the Constitution declaring that private property shall not be taken for public use without just compensation is intended solely as a limitation on the exercise of power by the Government of the United States, and is not applicable to the legislation of the States.[28]

23 W. Rawle, *A View of the Constitution of the United States of America*, 2nd ed., Clark, New Jersey, The Lawbook Exchange, 2003, p. 120-121. Originally published Philadelphia, Philip H. Nicklan, 1829.

24 *Barron v. Baltimore*, 32 U.S. (7 Peters) 243 (1833).

25 F.W. Friendly, *The Constitution: That Delicate Balance*, New York, Random House, 1984, p. 1-6.

26 *Ibid*, p. 12.

27 *Barron v. Baltimore*, 32 U.S. (7 Peters) 243, 247-248 (1833).

28 *Ibid*., at p. 250-251.

In the historical context, Marshall was correct. The historical context provides the evidence. The Bill of Rights amendments were added to the Constitution at the behest of anti-federalists who had wanted to limit the power of the federal government over the states, not increase it. Where the Constitutional Convention did wish to restrict state action, it did so clearly. For example, Article 1, section 10 states explicitly that "[n]o state shall … pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts". This, said Marshall, was "universally understood".[29]

Still, others disputed Marshall's interpretation. In *Holmes v. Jennison* (1840), a Vermont case involving the extradition of a fugitive sought by Canada, Cornelius P. Van Ness, the attorney for the accused said "with the utmost deference" that the Supreme Court had erred in *Barron v. Baltimore*. The Bill of Rights, he said, included "absolute rights, inherent in the people, and of which no power can legally deprive them". The principles in the Bill of Rights were "the very foundation of civil liberty, and are most intimately connected with the dearest rights of the people". The Court divided in a 4-4 on the issue and declined to decide the case.[30]

So the law stood until the 14th amendment was enacted in the aftermath of the Civil War. Ohio Congressman John Bingham, the author of the amendment, later explained that early drafts did not include specific restrictions on the states, but Marshall's limits on the meaning of the Bill of Rights in *Barron* inspired him to include the words "*No state shall* … abridge the privileges or immunities of citizens" or "deprive any person of life, liberty, or property without due process of law" or deny any person of "equal protection" of the law.[31]

It would require time and case law to determine the full development of the 14th amendment. In the post-Civil War era, the nation's commitment to equality collapsed. In the *Civil Rights Cases* (1883), a collection of law suits from five states, the Supreme Court held that while the 14th amendment limited state discrimination, it did not prohibit individuals from practising racial discrimination. A few years later, in *Plessy v. Ferguson* (1896), the Supreme Court went further and allowed racial segregation as long as the facilities provided were 'separate but equal'. In those cases, Justice Harlan Fiske Stone, a former slave owner from Kentucky, dissented, arguing in *Plessy* that "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law".[32] The idea that the Bill of Rights applied to all citizens eventually would take its place in the Constitution when *Plessy* was officially repudiated in *Brown v. Board of Education* in 1954. Achieving the reality of equality before the law is taking longer.

29 *Ibid*., at p. 250. The view that the Bill of Rights applied only to the federal government is convincingly presented in A.R. Amar, *The Bill of Rights*, New Haven, Yale University Press, 1998, p. 140-145.

30 *Holmes v. Jennison* 39 U.S. (14 Peters) 540, 556-557 (1840).

31 Amar, 1998, p. 164-165.

32 32 *Civil Rights Cases*, 109 U.S. 3 (1883); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

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