The Potential Dangers of the Bill of Rights

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Table of Contents

Chapter I

Questioning the Bill of Rights

There are few documents in American history that are more influential and well-regarded than the Bill of Rights. It is the basis by which American citizenship has been determined and how freedoms are defined. Because of its importance in American politics, many historians, legal scholars, and political scientists have written on the subject. These works tend to focus on either the current political effects of the Bill of Rights or the history of the Bill of Rights. In neither group is there a tendency to study the Bill of Rights in light of what disadvantages it causes in the American political system. The document is widely accepted by Americans today, which is in stark contrast to how highly it was debated by Americans at the time of its ratification. One American who was notably involved in the debates was Alexander Hamilton who led the campaign to ratify the federal Constitution but was opposed to the addition of the Bill of Rights. His perspective was not uncommon among his contemporaries and offers worthwhile insights for consideration in studying the Constitution and its functions.

Hamilton wrote in Federalist 84, in his defense of the proposed U.S. Constitution, that the Constitution contained all necessary boundaries for the assurance of liberty without any of the proposed amendments that would constitute a bill of rights. He saw no use in adding a bill of rights and further cautioned that it would be detrimental to the preservation of liberty. This question simplifies to an analysis of whether the Bill of Rights has served to preserve American rights over the last couple hundred years more than it has limited rights and liberty. The question is worth asking because there was such disagreement between founding fathers on the answer at the time that the Constitution was written, despite the

subject falling out of focus in more recent times. Hamilton was in favor of leaving the Constitution as it was without any immediate amendments while the Anti-Federalist party were of the belief that the absence of the Bill would result in the loss of natural rights for all Americans. The debate is still relevant to the modern-day political climate in America because of ongoing questions on constitutional originalism as a basis for constitutional interpretation and how its usage has affected the decisions made, most often by the Supreme Court, on what American rights are and how to practically apply them in a modern era.

In Federalist 84, Hamilton directly confronts the main arguments that he faced in New York for the addition of the Bill of Rights. New York was among the states without a bill of rights, yet people from New York who said they liked the state constitution were adamant that a bill of rights was necessary for the national Constitution. Hamilton believes that those who would favor state constitutions without bills of rights yet not a federal constitution without one do so because they think that the New York constitution has the rights protected in the document already or that since the constitution so fully embodied English common law it protected rights without expressly addressing each one.

Hamilton believed that the national constitution being proposed protected rights in its structure just as much as the state constitution. He points to the different aspects of the Constitution that he believes fulfill any need for a bill of rights. The first he references is the guideline around impeachment procedure from Article 1, section 3, clause, "Judgement in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject indictment, trial, judgement, and punishment according to the law," (418). Hamilton writes about this

particular feature of the Constitution in Federalist 69, stating it to be one of the key differences between the British monarchy and the American republic because it ensures the executive officer is held accountable for wrong doings in a manner that the British ruler is in no danger of facing.

The next protection of *habeas corpus*, which ensures that someone imprisoned will be brought before a judge or court, was also reviewed. Hamilton notes its appearance in the Constitution, "Section 9, of the same article, clause 2- 'The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.'" Hamilton later states on the subject, "The practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny," this further reinforces his belief that the presence of such articles as the clause on *habeas corpus* is enough protect the people from tyranny because it removes opportunity for governing officials to abuse their powers.[1]

Hamilton next addresses the matter of *ex post facto* laws, "Clause 3 'No bill of attainder or ex-post-facto law shall be passed.'" This clause ensures that no bills of attainder or *ex post facto* laws, to guard against specific groups being targeted or something becoming a crime after someone commits the action, can be passed by the government to utilize against the people. *Ex post facto* laws are amongst the tools that Hamilton states to be the chief "instruments of tyranny". [2]

He follows by pointing out the clause forbidding titles of nobility and the acceptance of titles from foreign nations, "Clause 7 'No title of nobility shall be granted by the United

[1] Alexander Hamilton, *Federalist Papers* (Mineola, New York, Dover Publications, 2014) 418-19.
[2] Ibid, 418-19.

States; and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state,"'.[3] This clause became Clause 8 of Section 9 in Article 1 of the Constitution and is now known as the Emoluments Clause. It is of note because it ensures that no aristocracy or monarchy can emerge within the United States as well as guarding against the influence of foreign nations on specific governing officials through any bribes of titles or offices. This is something that Hamilton noted to be of concern in Federalist 22, "One of the weak sides of republics, among their numerous advantages, is that they afford to easy an inlet to foreign corruption,".[4] The presence of the Emoluments Clause helps circumvent this issue which strikes Hamilton to be a great protector of the republic.

Hamilton next reviews the section stating that with the exception of impeachment cases all crimes are to be tried with a jury in the state the crime was committed, "Article 3, section 2, clause 3 'The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed,"'.[5] This clause ensures that individuals accused of a crime are entitled to a jury, and because it is in the state of the crime committed, it is a jury of peers rather than a jury of whoever the government deemed convenient. This clause could be taken to be approximately the same in practice as the 6th and 7th amendments.

[3] Ibid, 418.
[4] Ibid, 104.
[5] Ibid, 418.

The last clause Hamilton notes is the directions for cases of treason in Clause 3 of Article 3 Section 2, "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court," followed closely by Clause 3 of the same Section, "The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted,".[6] Both of these clauses work to ensure that any accused of treason are treated fairly with appropriate judicial processes.

Hamilton states that these sections of the Constitution are protectors of the rights of the people. He also points out that the protections visible in the national Constitution are greater than that of the state constitution making an argument that the state constitution already has all necessary protections built in, but the proposed national Constitution is deficient, completely unfounded.

Hamilton's response to the second argument in favor of New York's Constitution but against the national Constitution without a bill of rights is that the state laws are subject to change whenever the legislature uses its power so the state constitution lacks any power to enforce its idea of common law in the face of legislature and cannot be held as a protector of rights for its use of common law alone. He writes, "They are therefore at any moment liable to repeal by the ordinary legislative power, and of course have no constitutional sanction. The only use of the declaration was to recognize the ancient law and to remove doubts which might have been occasioned by the Revolution. This consequently can be considered

[6] Ibid, 418.

as no part of a declaration of rights, which under our constitutions must be intended as limitations of the power of the government itself,".[7] In this he expresses that the common law stated as a part of the state constitution cannot be viewed as a declaration of rights since a declaration of rights is understood to be something that puts limitations on the power and authority of the government and the state law is underneath the power and authority of the government, not the other way around.

Hamilton then addresses the need for a bill of rights at all. It is his view that historically Bills of Rights have been used against monarchies and dictatorships, they are not necessary for a republic which is run by the people through their representatives. He suggests that since government through the proposed Constitution would draw its power solely from the people there is no point to attempting to limit the government's power over the people in matters that the people have not first granted the government power over themselves. In this he means that without a ruling body that has all the authority to begin with, there is no need to expressly state that they must not infringe upon certain rights. In a governing system in which the people are responsible for allowing the government authority over matters—rather than the other way around—Bills of Rights are not needed to ensure the safety of the rights considered most important since those were never surrendered by the people to the government to begin with.

Hamilton goes on to argue that many of the statements that states have attempted to use to protect rights are more in line with a code of ethics than with a document protecting the rights of the people and further suggests that the idea that the people of the U.S. ordaining and establishing a Constitution has far more weight in the matter of preserving

[7] Ibid, 419.

their freedoms than any Bill of Rights could. This is a continuation of his previous argument that the power comes from and remains in the hands of the people which means that there is no room for power over the matters in the proposed Bill of Rights since those remain in the hands of the people. Hamilton puts it like this:

> It is evident, therefore, that, according to [Bills of Rights] primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations. 'WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ORDAIN and ESTABLISH this Constitution for the United States of America.' Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.[8]

This plainly states Hamilton's perspective that the ideal of the Constitution is to limit powers granted to the federal government and keep all other powers in the hands of citizens which makes the concept of a bill of rights both unnecessary and concerning for its added possibility of expanding federal powers. Furthermore, he is pointing out that bills of rights serve more as reminders than actual legislation, so it is unwise to add

Hamilton notes that the constitution is only intended to, "regulate the general political interests of the nation," rather than encompass all public and private concerns like many state constitutions. As a result of the different roles that state and federal constitutions play, he does not think that the federal Constitution needs additional protections for rights that many state constitutions hold.[9] Hamilton views the Constitution as a regulator to what

[8] Ibid, 420.
[9] Ibid, 420

powers the people have placed in the hands of the government. These powers are few, specific, and—from Hamilton's perspective—already well-documented within the Constitution to ensure that no further powers, that were not clearly assigned and allowed, are taken and used.

Hamilton goes on to say that adding a bill of rights to the proposed Constitution would even be dangerous for it could suggest the allowance of powers never granted to the federal government. He states, "I go further, and affirm that Bills of Rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?".[10] His point is that if it is expressly stated that the government is not to infringe on certain rights it infers that without the Bill of Rights they had the power over that matter despite there being no mention of such a power in the Constitution that is intended to be the document that specifically outlines the power that government offices have. The addition of a bill of rights risks further inference of powers not listed in the Constitution over rights not listed in the Bill of Rights. To put it simply, to state the rights deemed most important to be protected risks leaving all less important rights being infringed upon because they were not listed, and if one needs to list a right to ensure it is maintained, then all not stated are suggested to be under the authority of the government.

His argument is essentially that there is no need to state a protection of something that is not under the power of anyone but the people to begin with. He uses liberty of press

[10] Ibid, 420.

as an example, if one has to state that there is freedom of the press, are they not also stating that someone had power to infringe upon it to begin with? It is Hamilton's perspective that no such power exists in the Constitution, so there is no need for a separate document stating that it cannot be infringed upon.

Perhaps a more current example will further clarify his meaning. For one controversial example, strictly speaking, there is no part of the Constitution that states whether the government has any power whatsoever over whether a woman elects to have an abortion. From Hamilton's argument of the meaning of the Constitution, this means that the government does not have any authority over the issue to begin with. However, because of the manner in which the Bill of Rights and the Constitution are now understood to function, when a matter of whether it was permissible to abort a pregnancy became an issue, it was handled by suggesting it was a right implied in the Bill of Rights as a right to privacy as listed in the 4th amendment. In essence, the claim was that the matter fell under the enumerated rights that are protected and thus the government should allow women to have abortions. If Hamilton's vision for the proceedings of the Constitution had been fulfilled, the argument would have been, the national government has no say in this matter, so women, healthcare professionals, and the states will decide for themselves how they handle the matter within state regulation.

Hamilton expressed concern that this would occur when he wrote in Federalist 84 that to enumerate the rights that were specifically protected against the government would result in limiting all the rights that Americans possessed in the same way that enumerating the power of government limited its power to strictly what was written. Returning to his example of liberty of press, Hamilton points out that to state that there is a right that must

be protected suggests that there is an authority over that right which must be limited to preserve the right. In his view, the Constitution didn't place any power over the freedom of speech, but, by stating that it is a right that cannot be infringed upon, it implies that there is an authority that could infringe without the Bill of Right's existence. If there is freedom of press, what counts as press and who is going to define it for the purposes of ensuring that it is not infringed upon? These questions become issues as soon as the right is declared to be protected. By stating that reproductive choices fell under the right to privacy, those arguing for the right to abortion actually placed regulation of any sort of reproductive rights under the power of the government to decide how far they extended and how they would be handled.

Hamilton's goal with the U.S. Constitution was to create a specific outline for what the government had authority over and to what extent. His concern with adding a bill of rights to the document was that it would shift the interpretation from the Constitution stating all that the government *could* do to the Bill of Rights stating all that the government *could not* do. The shift creates a far more expansive amount of power for the government and risks changing the dynamic of power coming from the people to be used by the government at the people's will, to power coming from the government to be used by the people at the government's will. With this understanding of the possible effects of the Bill of Rights it is not difficult to see why Hamilton saw it as dangerous and was against its addition to the Constitution.

Chapter II

Existing Discussion on the Bill of Rights

Literature Review

The Bill of Rights has generated a great deal of academic literature from multiple different perspectives. From that of studying the Bill of Rights, itself, on James Madison as its main contributor, and on the Bill's effect on constitutional law, however, one aspect that not a lot of works focus on are the efforts taken to actually pass the Bill of Rights and add it to the Constitution. An even more difficult subject to find authors writing on is the adverse effects that a bill of rights could have and the potential danger that it brings to the Constitution. This is concerning on a historical subject specifically because at the time of the Bill of Rights' ratification it was a highly controversial issue, yet many modern academic writings fail to fully express this, or how easily history could have continued without a bill of rights after the Constitution was ratified on its own. Within what works exist, the perspectives on whether the Bill of Rights was a necessary addition tend to favor it in American politics; many scholars approach the topic with the singular view that the Bill of Rights was a vital addition that has and will continue to be a positive piece of legislature for the nation. For the purpose of this research project, the notable sources are separated by those that offer information on how the Bill of Rights can be harmful and those that do not.

Starting with works that do not mention the potential ill-effects of a bill of rights is *From Parchment to Power: How James Madison Used the Bill of Rights to Save the Constitution* by Robert A. Goldwin. Just from the title it is apparent what he thinks about the addition of the Bill. This was the only source found that was directly on the topic on Madison's shifting opinion to become in favor of a bill of rights as well as his efforts to ratify it. Goldwin argues that the Bill of Rights was something that Madison initially viewed as a nothing but a

'parchment barrier' but came to see as something of true value specifically because of the influence of Thomas Jefferson.[11] The book seeks to answer why there was no Bill initially, why Madison became convinced of its necessity, and then what he did to see it added. Goldwin writes, "One of my main arguments is that the task of making the Constitution of the United States was not complete until the Bill of Right was adopted,".[12]

In the 2018 book *The Heart of the Constitution: How the Bill of Rights Became the Bill of Rights*, Gerard N. Magliocca writes on the Bill of Rights from a view of the Bill as an important *positive* addition to the Constitution. This book focuses on the story of the progression of the Bill of Rights from merely the first 10 amendments to a vital portion of the Constitution that people turn to as a basis of rights protections. It discusses the way the mindset of Americans has shifted towards the Bill of Rights over time as well as the more practical notion of how it has changed in its application to government. It does take note, however, of how the Bill of Rights was a matter of controversy and provides details on the struggle to ratification. Magliocca writes, "Why does it matter if a guarantee is in a bill of rights so long as that right is in the constitution somewhere? Strictly speaking, it does not matter. Courts do not hold that freedoms in a bill of rights are entitled to more weight than other constitutional rights. Nonetheless, most people think that having a bill of rights is essential and care a great deal about what should or should not be in that list.[13] In this quote it is apparent that the author takes into consideration that the Bill of Rights is not entirely necessary yet still settles on the conclusion that it is important for the sake of freedoms.

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[11] Robert A. Goldwin *From Parchment to Power* (Washington D.C.: The AEI Press, 1997) 8.
[12] Ibid, 5-6.
[13] Gerard N. Magliocca, *The Heart of the Constitution: How the Bill of Rights Became the Bill of Rights* (New York: Oxford University Press, 2018) 5-6.

Jay Cost wrote another book on the subject with a focus on the relationship between Madison and Hamilton and how it affected the theory governing the Constitution. The book *The Price of Greatness* written in 2018, focuses on the Constitution primarily rather than the Bill of Rights, but it does offer information on the different perspectives the two men brought to the project to determine what the final project looked like. Cost's perspective is fairly positive on the Bill of Rights he writes that part of the task of the new nation was, "A bill of rights to guarantee civil and religious liberty".[14] His idea is that one of the important outcomes from the teamwork of Hamilton and Madison in writing and ratifying the Constitution was the Bill of Rights. This again offers the perspective that a necessary outcome from that period of time was the Bill of Rights.

A similar book in scope, that it limited to James Madison and primarily focused on him as the author of the Constitution, is Irving Bryant's book *James Madison: Father of the Constitution* which was published in 1950. This book's objective is to offer a detailed account of Madison's part in the Constitution and its ratification. He does write on the Bill of Rights to some extent, but it is not the primary focus. Rather, he seeks to write an account that encompasses relevant issues to the Constitution and Madison's hand in them. There is a good deal written on the Bill of Rights, specifically, throughout the book as well as in its own chapter, and in those portions he writes a general outline rather than a specific history and does not argue either for or against the ratification, merely acknowledges that it happens in a detailed account told from Madison's perspective.

Further reading on the subject led to Robert S. Peck's *The Bill of Rights and the Politics of Interpretation*. This is another book that is not entirely focused on the ratification of the Bill

[14] Jay Cost, *The Price of Greatness* (New York: Basic Books, 2018) 181.

of Rights. However, because of the necessary context to truly explain what theories of interpretation are most prevalent, there is a fair amount of historical background given on the Bill of Rights and how it came to be ratified and why. As a historical source, this offered little opinion on whether the Bill of Rights *should* have been ratified, focusing instead on how it came to be that it was ratified and what arguments from what individuals assisted it in the process.

Other books found on the subject edged away from being entirely about the ratification of the Bill of Rights. Most books focus on the broader subject of Madison and the Constitution. One such work is *James Madison on the Constitution and the Bill of Rights* by Robert J Morgan in 1988. This book is a comprehensive overview and analysis of Madison's political thought and his goals within the documents that he contributed to, Morgan studies this through reading his notes and works. This work is perhaps a more objective source for it is not the author's specific goal to discuss how necessary the Bill of Rights was to having a complete Constitution. Instead, it is an overview of Madison's process to begin supporting a bill of rights as well as an account of those in favor and against that addition and how the debates ultimately played out.

The book *Origins of the Bill of Rights* by Leonard W. Levy leads the sources that question the Bill of Rights and all the potentials it holds. This source was dedicated to understanding the foundations of the Bill of Rights. The notable difference between this book and others of a seeming similar nature is that it focuses less on the historic story of ratification and more on the theories and arguments both for and against the Bill. Levy notes the arguments in Federalist 84 by Hamilton arguing against a bill of rights. He wrote on Hamilton's point saying, "This argument proved far too much. First, it proved that the

particular rights that the Constitution already protected—no religious test, no bills of attainder, trials by jury in criminal cases, a power to violate it. Second, the inclusion of some rights in the original text of the constitution implied that all unenumerated ones were relinquished".[15] In this he notes that there were legitimate arguments against the Bill of Rights that are still of note today.

A similar work is Akhil Reed Amar's *The Bill of Rights: Creation and Reconstruction* which was written in 2000. This book takes the interesting perspective of how the Bill of Rights was initially intended to guard against, "self-interested government".[16] Rather than its protection of minority rights against the majority as the author believes the Bill is commonly used for. His argument is that the Bill was intended to work as a part as a structure rather than solely for rights in instances of court cases. While his argument is not strictly that the Bill of Rights as it was created is dangerous, he is arguing that the way it is understood and utilized in modern times is dangerous, which opens the door for the larger debate of whether the Bill as a whole was created in a way that could be abused. Amar argues that the Bill of Rights was changed in reconstruction politics with the addition of the 14th amendment and the resulting incorporation of the Bill of Rights applicability to states.

Another source specifically on the topic of Madison's part in ratifying the Bill is Richard E Labunski's book written in 2008, *James Madison and the Struggle for the Bill of Rights*. This source acknowledges the fact that the Bill of Rights was not actually a given part of the Constitution; it was a hard-won battle that James Madison ultimately took up, despite the Constitution passing as it was. This book focuses on understanding Madison's efforts to

[15] Leonard W. Levy, *Origins of the Bill of Rights* (, 1999) 245.
[16] Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Harrisonburg, VA: Yale University, 2000) xiii.

ratify the Bill of Rights and what obstacles he overcame in order to accomplish the task. It further gives insight of what Madison's goals were with the addition of the Bill of Rights and why he was so willing to champion its placement in the American Constitution. Interestingly, this work is also focused on how Madison became an "unlikely hero" to save the nation. Labunski, himself, summarizes the work saying, " This book tells the story of how Madison helped lead the republic at its infancy away from a potentially bleak future toward the democratic society that he knew could exist and that the nation has become today".[17] The work is entirely focused on how the Bill of Rights was necessary and how instrumental Madison was in its ratification that he deserves credit for.

Another book covering the topic of the Bill of Rights addition but not specifically targeted at that subject is David Stewart's book. *Madison's Gift: Five Partnerships That Built America*. As the title suggests, Stewart mainly focuses on what Madison accomplished through partnerships with other influential people of his day and age. Because of the historical, rather than political, bent of this book, it is unsurprising that it offers little to no opinion on the importance of the Bill of Rights focusing instead on the importance of the his work with Hamilton to shift his opinion in one way and Jefferson to influence him the other way. The only real opinion offered was in the section connecting Madison and Jefferson where Stewart writes, "Madison championed the Bill of Rights out of a sense of obligation, not one of mission…Yet the intervening centuries have demonstrated that the Bill of Rights achieved far more".[18] He goes on to write on the influence of the Bill of

[17] Richard E. Labunski *James Madison and the Struggle for a bill of rights* (Oxford University Press, 2008) 2.
[18] David Stewart, *Madison's Gift: Five Partnerships That Built America* (Simon & Schuster, New York, 2016) 101.

Rights, but even on this point he is not clear on an opinion of whether or not the Bill has operated for the betterment of rights or not.

Most academic works on the topic, focus on the way the Bill of Rights affects Americans presently, rather than focusing on what the Bill of Rights meant to the Americans who created it. Political literature is almost exclusively written on present cases and changes made because of the Bill of Rights. In order to fully study the arguments against a bill of rights, specifically from the perspective of what it was originally intended to accomplish and what it did accomplish in its earlier years, historical sources are absolutely necessary as there is not a wealth of new works done on that perspective.

Chapter III
The Original Constitution

Considering that the Constitution was initially written and ratified without any amendments attached, one must question what the leaders that ratified it were thinking about how the document would function that made them willing to accept it as the formation of a new form of government. Hamilton had not been alone in his belief that the Constitution was protective enough of natural rights that further amendments were unnecessary. It warrants observing how the Constitution was thought to function practically, in order to understand how the later addition of the Bill of Rights did change the structure of the federal government. Without knowing what it started as—or at least what it was assumed to start as—one cannot discern what changes occurred later.

The Articles of Confederation were put into effect March 1, 1781 and by May of 1787, a convention of Congress was gathered to revise the document in order to make it more effective.[19] At the Congressional meeting on May 29, Madison came prepared with an entirely new proposal known as the Virginia Plan that was introduced by Edmund Randolph. The Virginia Plan proposed an entirely new constitution rather than amendments to the Articles. This proposal was intensely debated as most delegates were not prepared for the suggestion of beginning anew.[20] The main differences to be found between the previous constitution, the Articles of Confederation, and the new was that the former was based almost solely on a legislative branch. The states, therefore, remained almost entirely

[19] Robert S. Peck, *The Bill of Rights and the Politics of Interpretation* (St. Paul, MN: West Publishing Company, 1992) 55-56.
[20] James Madison, Editors: Gailard Hunt, James Brown Scott, *The Debates of the Federal Convention of 1787 which Framed the Constitution of the Unites States of America* (Athens, OH: Ohio University Press, 1920) 20-27.

autonomous since their delegates represented them in discussion but there was no amount of authority that could force any given state into doing something they did not wish to do. The Virginia Plan was a new concept of 3 branches of government, all given different authorities to keep the others in check. While the legislature still plays what was supposed to be the most important part of government, much as was found under the Articles of Confederation, the states—and therefore their representatives—can never agree enough to truly force action that would cause this branch to dominate the other two branches beyond its authority.

The Virginia Plan was presented by Rudolph as resolutions of changes that the convention would begin to take action on, it was not yet the artfully worded Constitution that we are familiar with today. The more notable resolutions he offered on May 29, 1787 were as follows:

> 1. Resolved that the Articles of Confederation ought to be so corrected & enlarged as to accomplish the objects proposed by their institution; namely, "common defense, security of liberty and general welfare."
>
> 2. Resolved therefore that the rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.
>
> 3. Resolved that the National Legislature ought to consist of two branches.
>
> 6. Resolved that each branch ought to possess the right of originating Acts; that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress bar the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union ages any member of the Union failing to fulfill its duty under the articles thereof.
>
> 7. Resolved that a National Executive be instituted; to be chosen by the National Legislature for the term of years, to receive punctually at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the Magistracy, existing at the time

of increase or diminution, and to be ineligible a second time; and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.

8. Resolved that the Executive and a convenient number of the National Judiciary, ought to compose a Council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by of the members of each branch.

9. Resolved that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviors; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. that the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.

10. Resolved that provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of Government & Territory on otherwise, with the consent of a number of voices in the National legislature less than the whole.

11. Resolved that a Republican Government & the territory of each State, except in the instance of a voluntary junction of Government & territory, ought to be guarantied by the United States to each State

12. Resolved that provision ought to be made for the continuance of Congress and their authorities and privileges, until a given day after the reform of the articles of Union shall be adopted, and for the completion of all their engagements.

13. Resolved that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.

14. Resolved that the Legislative Executive & Judiciary powers within the several States ought to be bound by oath to support the articles of Union.

15. Resolved that the amendments which shall be offered to the Confederation, by the Convention ought at a proper time, or times, after the approbation of Congress to be submitted to an assembly or assemblies of

> Representatives, recommended by the several Legislatures to be expressly chosen by the people, to consider & decide thereon."[21]

While the Virginia Plan was by no means complete, it was the first step to encouraging the other states that a stronger federal government would be more effective and would still not have authority to deny liberty among the states.

The Federal Constitution that emerged from these debates was most publicly sponsored by James Madison and Alexander Hamilton, members of what was referred to as the Federalist Party. Hamilton had seen problems with the Articles of Confederation as early as September 3, 1780 when he wrote a letter to James Duane, one of the New York delegates at the Continental Congress, to outline an ideal of a federal government, much closer to the one created by the Constitution than the Articles of Confederation[22]. It would seem this letter had some effect and was well-accepted as Duane's actions following its arrival seemed to in some ways follow its instructions in terms of placing single leaders over the main congressional affairs of diplomacy, naval affairs, war, and finance, which Hamilton had advocated.[23] This is where the record begins of Hamilton's campaign to change the existing form of government and institute a stronger federal power overseeing the states. He wrote, both privately and publicly, to excessive lengths to get his point across. He addresses both individuals and entire conventions while advocating for changes he thought necessary for the success of the newly founded nation.

While Hamilton is credited for his effort orchestrating the actual convention with the necessary people present to actuate change to the federal government system, he is not regarded as a main contributor to the actual Constitution that was formed at that those

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[21] "The Virginia Plan," U.S. Senate: The Virginia Plan, June 03, 2019, accessed November 1, 2020.
[22] Clinton Rossiter, *Alexander Hamilton and the Constitution* (New York, NY, 1964) 36.
[23] Ibid, 37.

conventions.[24] He spoke freely on his rationale for its adoption and was seemingly well-respected by fellow delegates but did not garner much support from any of the delegates. Some of this may be contributed to the fact that his two fellow delegates from New York, John Lansing and Robert Gates, were far more conservative in their view of a federal government so any vote from New York would be the two of them outnumbering Alexander Hamilton.[25] Thus, he contributed relatively little to the actual Constitution and though he became its staunchest supporter, he is not regarded as a main contributor like Madison. However, because he was determined to see the Constitution that was created through, he is remembered for the effort he put into ensuring its ratification, "His resolve to go all out for the Constitution, a resolve that called for a compromise with abstract desire but not with concrete principle, now combined with his natural audacity and energy to carry him through one of his most creative years."[26] Hamilton approached the goal of ratifying the Constitution with the same fervor he had gathering the convention to create one.

Objections to the Constitution

Once the decision had been made to create a new Constitution, work began on revising and agreeing with the proposal of Madison for the document. The matter of a bill of rights came up fairly quickly, those in favor of it upheld bills of rights as guarantees of certain natural rights that would grant the people more confidence in the additional power granted to the federal government though the new Constitution, while those against it

[24] Ibid, 49.
[25] John R. Vile, *The Writing and Ratification of the U.S. Constitution: Practical Virtue in Action* (Lanham, MD: 2012) 32-33.
[26] Rossiter, 50.

pointed out how it was being used in the states that did have similar documents. For example, Edmund Randolph took particular opportunity to confront Patrick Henry on the Virginia Declaration of Rights which did not forbid the bills of attainder. Bills of attainder served to declare guilt over individuals and/or state crimes and punishment; these were passed by the legislature of either state or federal government and, essentially, by passed any judicial input or right to trial by jury. In Virginia, there had been a specific individual, Josiah Philips, along with about 50 others accused of being Tories and thus traitors and murderers. When they failed to turn themselves in, the administration under Patrick Henry who was governor at the time, made it legal for the men to be killed by anyone.[27] This argument along with the fear of enumeration of rights inadvertently granting further power and instances where states could be found to have distinctly violated a right written in their bill of rights, caused the vast majority of delegates to agree with the suggestion that an imperfect bill would be more trouble than no bill at all.[28] The Framers of the original Constitution, that is the Articles of Confederation, were also in opposition to bills of rights for many of the same reasons. Thus, the trend of thinking within the delegates was to believe there was no need for a bill of rights and, similar to Hamilton, thought they could even prove it to be quite detrimental to their central goal of balanced government through three branches that checked one another.

The Constitution was ratified without any amendments or any of the clauses specifically defending rights that would later make up the Bill of Rights that had been suggested by the Anti-Federalist party. Elbridge Gerry, a delegate from Massachusetts, and Charles Pickney, from South Carolina repeatedly attempted to make adjustments such as

[27] Levy, 19-22.
[28] Ibid, 22-23.

clauses to protect freedom of the press, creating a committee to begin writing a bill of rights and omitting the clause banning ex post facto laws. The two men were frequently backed by George Mason of Virginia, though he made no moves of his own. The attempts were continuously shot down, primarily by Roger Sherman of Connecticut who used the argument that if the right hadn't been granted to Congress in the Constitution, it did not need any additional protection.[29]

[29]Ibid, 13.

Chapter IV

Why There is a Federal Bill of Rights

There was great debate over the fact that newly formed government lacked a bill of rights, something several states had as additions to their constitutions. While the Constitution was ratified without the Bill, its later addition mollified many people who were concerned about the jump in power afforded to the federal government from the Articles of Confederation to the Constitution.

The Bill of Rights became the main point that those opposed to the Constitution rallied to as a reason for its defeat. While there was a genuine desire for a bill of rights, it was also a convenient argument against the Constitution considering that several states at the time, most notably Virginia, had versions of declarations of rights in their constitutions. Anti-Federalists had a general sentiment acknowledging the usefulness of a bill of rights that worked well for their cause in opposing the Constitution.[30] Those who desired the Constitution to remain unaltered argued that the powers afforded to Congress would not interfere with the powers of states and state constitutions. Their argument was that the existence of state bills of rights were sufficient guards to 'natural rights' without being further listed in the national Constitution.[31]

The Push for a bill of rights

By the end of the Constitutional debates, three delegates, Elbridge Gerry, George Mason, and Edmund Randolph, elected not to sign the Constitution for their fears of the

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[30] Ibid, 14.
[31] Ibid, 15-16.

amount of power and lack of protection of rights it contained.[32] The Constitution was officially ratified on September 7, 1787, but debates still ran over whether the Constitution was enough to preserve essential rights and freedoms as it was. The Anti-Federalists continued to publish letters to the public urging for a bill of rights to be added to the Constitution.[33]

One of the prominent writers calling for additional changes to the Constitution was Richard Henry Lee writing under the name the "Federal Farmer" beginning in October of 1787.[34] He wrote 5 letters under the pseudonym citing the issues he saw with the new U.S. Constitution. Amongst his primary objections he writes in his second letter published October 9, 1787:

> There are certain unalienable and fundamental rights, which in forming the social compact, ought to be explicitly ascertained and fixed—a free and enlightened people, in forming this compact, will not resign all their rights to those who govern, and they will fix limits to their legislators and rulers, which will soon be plainly seen by those who are governed, as well as by those who govern: and the latter will know they cannot be passed unperceived by the former, and without giving general alarm—These rights should be made the basis of every constitution; and if a people be so situated, or have different opinions that they cannot agree in ascertaining and fixing them, it is a very strong argument against their trying to form one entire society, to live under one system of laws only.[35]

In this paragraph Lee is articulating the problem with not having documentation of the rights considered fundamental and natural to citizens. He is also explaining why the absence of this documentation and a consensus of what should be on it is proof of how poor an idea it is to attempt to create one, strong government with such power over the individual states.

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[32]Peck, *Bill of Rights,* 58-60.
[33] Ibid, 61-62.
[34] Ibid, 61.
[35] Cecelia Kenyon, *The Antifederalists* (Indianapolis: Bobs-Merrill Company Inc, 1966) 211

Lee was not alone in his criticisms of the Constitution, an author under the name Agrippa—presumed but never confirmed to be one James Winthrop from Cambridge, Massachusetts—addressed the topic of the Constitution serving the role of a bill of rights in his letter to the Massachusetts Convention published January 20, 1788; his perspective was that all power resides in the hands of individuals until they appoint others to govern them and allow those appointed power over them. However, he points out that after having many kings and rulers become tyrannical, the function of a constitution is to dictate the connections and jurisdictions of the parts of government, themselves, rather than defining what limits a government has in connection with the rights of the people. He further argues that if even state constitutions such as that of Massachusetts require bills listing 30 different rights that are fervently protected, then a national constitution should require even more for defense of the people's rights.[36] He writes, "Though our bill of rights does not, perhaps, contain all the cases in which power might be safely reserved, yet it affords a protection to the persons and possessions of individuals not known in any foreign country."[37] It is his opinion that while bills of rights do not solve all problems, they do create another barrier between the rights of the people and tyrants who would seek to usurp them.

Others echoed these concerns, in private and public letters, conventional addresses, and debates. Patrick Dollard at the South Carolina convention debating the U.S. Constitution was especially critical of the lack of bill of rights in the document. He said in a speech addressing the convention:

> "[His constituents in Prince Fredrick's Parish] are nearly all, to the man, opposed to this new Constitution, because, they say, they have omitted to insert a bill of rights therein, ascertaining and fundamentally establishing, the unalienable rights of men, without a full, free, and secure enjoyment of which

[36] Ibid, 148-150.
[37] Ibid, 151.

> there can be no liberty, and over which it is necessary that a good government should have the control. They say that they are by no means against vesting Congress with ample and sufficient powers; but to make over to them, or any set of men, their birthright, comprised in Magna Charta, which this new Constitution absolutely does, they can never agree to.[38]

In this address, he puts the focus on the citizens of America and seeks to impress on the listeners that his constituents are not opposed to a proper government structure capable of uniting the states, but are opposed to the lack of any protections to their natural rights from such a strong government.

There was, perhaps, no delegate or prominent figure more set on the need for a bill of rights than George Mason. Mason's works on natural rights of man and his definitions for what those rights actually consisted of were already well-known amongst many at the point of the Constitution's ratification. Mason had been the main author of the Virginia Declaration of Rights ratified in Virginia on June 12, 1776, and a large influence on Thomas Jefferson's Declaration of Independence a less than a month later.[39] Prior to the Constitutional Conventions starting the summer of 1787, which Mason attended as the Virginian delegate, he preferred to stay in state-level politics, but on the occasion of the national conventions to discuss the changes necessary for the survival of the nation, Mason elected to participate as urged by others of prominence in his state.[40]

Mason was in favor of a stronger, more effective government being formed. He was generally in agreement with the proposals of James Madison and had no qualms supporting the making of a stronger government capable of maintaining order between the states. Mason was directly involved in the writing of the Constitution, the wording for the oath for

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[38] Ibid, 187.
[39] Donald J. Senese, *George Mason and the Legacy of Constitutional Liberty* (Fairfax, VA 1989) 62.
[40] Ibid, 61-64.

presidential inauguration, and the definition of treason. It is important to note, that his disagreement with the Constitution that was ultimately ratified, to the point of refusing to sign it, was not based on the power of a central government, but in the lack of a bill of rights or other documentation that would secure rights, especially economic ones such as Southern shipping and other matters of Southern economy, from being touched by the federal government.

Mason published the *Objections of the Hon. George Mason, to the Proposed Federal Constitution* in early October of 1787. He sent copies to Madison, Washington, and Jefferson—who was in France at the time—citing his disagreements with the Constitution as it currently stood. His first sentence read, "There is no declaration of rights: and the laws of the general government being paramount to the laws and constitutions of the several states, the declarations of rights, in the separate states are no security."[41] He went on to state the issue that the House of Representatives in not drawn in a manner creating actual representation and that the Senate is granted too much power without being direct representation of the people. Other problems he raises are the lack of constitutionally mandated council for the president to ensure well-reasoned advice and counsel, the ability of a president to pardon a treason—especially since a president could have mandated the crime to begin with and then pardoned it—and the majority needed to make policies effecting economy is pre-determined to favor the Northern states with a vastly different way of life and economy then the Southern states who will always lose a vote to them.[42] These reasons culminate to make the Constitution unacceptable to Mason, and he attempted to raise awareness of those concerns to force those in power to take action and make the necessary

[41] Kenyon, *The Anti-Federalists,* 191-192.
[42] Ibid. ,192-195.

changes. Despite the Constitution being ratified, without his signature or approval, he had won the support of individuals such as Thomas Jefferson and James Madison, the latter of whom took action almost immediately, becoming a member of Congress and working to create and ratify a bill of rights such as Mason had suggested and based off of the Virginia Declaration of Rights and many of the same documents that had initially inspired Mason.[43]

[43] Senese, *George Mason and the Legacy of the Constitution*, 77-81.

Chapter V
The Bill of Rights

After the ratification of the Constitution had already been completed, the matter of any amendments forming the proposed Bill of Rights was still up for decision. James Madison began the work of constructing the Bill so that it could be proposed in Congress. Bills of Rights were not uncommon in the British tradition, but, as Alexander Hamilton pointed out in Federalist 84, that was in the case of a monarchy and so it wasn't completely intuitive to add one to a republican government's constitution. However, individual states created constitutions for themselves, several such as Pennsylvania and Virginia while the Revolutionary War was still being waged, which did contribute to the idea of bills of rights as necessary portions of republican constitutions.[44]

While Madison initially was against adding a bill of rights because he considered them unnecessary, or if he thought individual rights were at stake, he was not immediately persuaded that a bill of rights was the solution. As Goldwin puts it, "He consistently emphasized the primacy of protecting rights, but he doubted the effectiveness of a bill of rights to do the job."[45] One of the primary influencers that seemingly changed his mind on the subject was Thomas Jefferson, whom he shared regular correspondence with despite Jefferson's absence as the ambassador in Paris, France at the time. Jefferson was strongly in favor of a bill of rights being added. While he was in Paris, he continued to write letters with individuals like Madison, most notably, discussing the Constitution as it was going through the process of ratification. Madison kept Jefferson updated in part by sending the *Federalist*

[44]Levy, *Origins of the Bill of Rights*, 12.
[45] Goldwin *From Parchment to Power*, 59.

Papers as they were published to address many of Jefferson's questions and concerns. On October 17, 1788, Madison wrote to Jefferson on the subject of the proposal of a bill of rights in the new constitution. Madison writes, "My own opinion has always been in favor of a bill of rights, provided it be so framed as not to imply powers not meant to be included in enumeration…I have favored it because I supposed it might be of use, and, if properly executed, could not be of disservice."[46] Jefferson responded to this letter on March 15, 1789, he writes, "Your thoughts on the subject of the Declaration of rights in the letter of Oct. 17. I have weighed with great satisfaction. Some of them had not occurred to me before, but were acknoleged just in the moment they were presented to my mind. In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity. I am happy to find that on the whole you are a friend to this amendment. The Declaration of rights is like all other human blessings alloyed with some inconveniences, and not accomplishing fully it's object."[47]

In these letter exchanges, Jefferson continually argues that the Bill of Rights would be a "legal check" or power put into the hand of the judiciary to further check and balance the other branches. He later writes in the same letter, "The declaration of rights will be the text whereby they will try all the acts of the federal government. In this view it is necessary to the federal government also: as by the same text they may try the opposition of the subordinate governments."[48]

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[46] James Madison and Ralph Ketcham, *Selected Writings of James Madison* (Indianapolis: Hackett Pub., 2006), 159.
[47] Founders Online: From Thomas Jefferson to James Madison, 15 March 1789.
[48] Ibid.

Jefferson continues in the same letter to say:

> But the good in this instance vastly overweighs the evil…A constitutive act may certainly be so formed as to need no declaration of rights. The act itself has the force of a declaration as far as it goes: and if it goes to all material points nothing more is wanting. In the draught of a constitution which I had once a thought of proposing in Virginia, and printed afterwards, I endeavored to reach all the great objects of public liberty, and did not mean to add a declaration of rights. Probably the object was imperfectly executed: but the deficiencies would have been supplied by others in the course of discussion…Half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can....The inconveniences of the Declaration are that it may cramp government in it's useful exertions. But the evil of this is short-lived, moderate, and reparable. The inconveniencies of the want of a Declaration are permanent, afflicting and irreparable: they are in constant progression from bad to worse…I am much pleased with the prospect that a declaration of rights will be added: and hope it will be done in that way which will not endanger the whole frame of the government, or any essential part of it.[49]

Even as a strong proponent of the Bill of Rights, Jefferson acknowledges that in early drafts of his own version of the Constitution there was no Bill and he finishes discussing the Bill by offering his hopes that the creation of the Bill will be done in such a way that it minimalizes that potential danger, thus, also acknowledging that there were some dangers attached to ratifying the Bill.

Jefferson, Madison, and Hamilton all foresaw the judiciary playing a role in the interpretation of the Constitution and the Bill of Rights as an extension of that. It was assumed by Jefferson that the part that the Bill of Rights would play would be to further cement the sanctity of the rights considered to be natural and essential to maintain liberty. This is the crucial point on the Bill of Rights in which he and Hamilton differed. Hamilton believed that the Bill of Rights would extend the power of the federal government over natural rights in the alleged attempt to protect them.

[49] Ibid.

Chapter VI

The Manifest Dangers of a Bill of Rights

Within American minds and literature on the subject, it appears there is a fairly singular mindset on the role the Bill of Rights plays in American politics and ideals of freedom. This mindset seems to consistently be a positive one. One source on the subject carries the title *From Parchment to Power: How James Madison Used the Bill of Rights to Save the Constitution* demonstrating that within academic literature there is a consistent bent in favor of the Bill of Rights. Even with political parties that could not seem more divided, there is consensus on the role of the Bill of Rights. For Bill of Rights Day in 2016, President Barack Obama released a statement that included, "For 225 years, the Bill of Rights has shaped our Nation and protected our citizens, and today, in honor of all those who have worked to secure these freedoms, we strive to continue forming a more perfect Union guided by an enduring belief in these highest ideals."[50] President Donald J. Trump in 2019, made a statement for Bill of Rights Day saying, "In the 228 years since the adoption of the Bill of Rights, it has continuously served as the guarantor of some of our most cherished freedoms: the right to practice the religion we choose, the right to speak freely and openly, the right to privacy, and the right to keep and bear arms."[51] The two men are obviously quite divided in their political beliefs, and yet their statements on the Bill of Rights are in agreement, though they choose to emphasize different aspects of its power.

[50] Barack Obama, *Presidential Proclamation -- Bill of Rights Day, 2016.*
[51] Donald J Trump, *Presidential Proclamation on Human Rights Day, Bill of Rights Day, and Human Rights Week, 2019.*

While there are disagreements on the correct interpretations of the Bill of Rights, the discrepancies between what people believe rights to be and what courts have ruled the Bill to protect are attributed to errors, usually on the part of opposing political parties. The issues people find are not ascribed to the Bill of Rights, itself, either in its structure or in its existence. The query this thesis initially sought to answer was whether the Bill of Rights has affected the balance of power between citizen and government that differed from the goals of the ratifiers of the Bill, which was to preserve the power to the hands of the citizen without possibility for government interference into what was considered vital, natural rights. The most distinctive manner in which such impacts can be mapped out are through the judiciary system and the decisions that have been made based on the Bill of Rights.

For the majority of the Bill of Rights' history, it has been only applicable to the federal government in terms of its power in court. The case of *Barron v. Baltimore* in 1833 was the first Supreme Court ruling on the question of whether the Bill of Rights held states accountable as well as the federal government. In this case, John Barron, a man who owned a wharf in Baltimore, sued the city for construction that he said had changed the water flow and harmed his business. The grounds were that under Fifth amendment protections the city could not take Barron's property without due process. In this instance, the court ruled unanimously that the Bill of Rights did not extend its protection against state or local governments. In the opinion Chief Justice John Marshall stated:

> 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. We are therefore of opinion that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of

> that State, and the Constitution of the United States. This court, therefore, has no jurisdiction of the cause, and it is dismissed.[52]

In this ruling the incorporation of the Bill of Rights as an authority over state and local government was soundly rejected and the matter was tabled until 1868 with the passage of the Fourteenth amendment.

With the addition of the Fourteenth amendment which explicitly applies to states with the phrasing, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[53] With this addition to the federal Constitution, the question of other amendments' applicability to states had to be readdressed. The *Slaughterhouse Cases* of 1873 were the beginning of this new question on incorporation.

In the *Slaughterhouse Cases* the issue was a slaughterhouse in New Orleans that had been given a monopoly in the city. The excluded Butchers in the city sued on the grounds that it violated the Thirteenth amendment for forcing servitude to the slaughterhouse granted allowance to run. They also claimed their Fourteenth Amendment rights of receiving due process prior to their businesses being shut down for any reason. Their claim was denied as the courts ruled that the Thirteenth and Fourteenth amendment regarded equality of rights--not economic privileges, especially not from the states, since none of the matter pertained to federal rulings.[54]

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[52] *Barron v. Mayor & City Council of Baltimore, 32 U.S. 243* (1833)
[53] George Anastaplo, *Reflections on Freedom of Speech and the First Amendment* (Lexington, KY 2011) 208.
[54] *Slaughter-House Cases,* Oyez.

Another case questioning incorporation of the Bill of Rights to states was the *Chicago, Burlington, and Quincy Railroad co. v. Chicago* of 1897. This was an instance of the city of Chicago claiming land that was in some parts private property and in others owned by the Quincy Railroad. The private owners received just compensation while the railroad was given a single dollar for its trouble. Thus, the railroad sued on the grounds that its right to due process had been violated and, in this instance, its claim was upheld. The court determined that the city of Chicago was obligated to give just compensation to the railroad for its property.[55] Notably the court did not find that the railroad was deprived of due process under the Fourteenth amendment, but, rather, the application of the Fifth amendment right to compensation when property is taken for public use. In this instance the court specifically stated that the Fifth amendment was applicable because of the Fourteenth amendment's applicability to states.[56]

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Similar cases arose in the Supreme Court questioning to what extent the Bill of Rights could be applied in cases against local and state governments. In *Maxwell v. Dow* in 1899 and *Twining v. New Jersey* in 1908 the court ruled against incorporation, however, in *Gitlow v. New York* in 1925, *Fiske v. Kansas* in 1927, *Near v. Minnesota* in 1931, *Powell v. Alabama* in 1932, and eventually *Palko v. Connecticut* of 1937 the court ruled in favor of incorporation.[57] By *Palko v. Connecticut*, another sort of test was devised for determining what the answer should be and to create and maintain some sort of consistency in rulings. In this particular case, Frank Palko was tried for murder in Connecticut. In his first trial he was convicted with second degree, which was deemed unsatisfactory, so he was tried again and was convicted of

[55] *Chicago, Burlington, and Quincy Railroad co. v. Chicago,* Oyez.
[56] Ibid.
[57] Thomas T. Lewis, *The Bill of Rights vol. 1*, (Ipswich, MA: Salem Press, 2017)

first degree in the second trial. The argument was, of course, that the Fifth Amendment protected Palko from double jeopardy in being tried twice. Therefore, the argument was made that *because* of the Fourteenth amendment, the Fifth amendment was now applicable in cases against the states. The premises of the argument about the Fourteenth causing the Fifth amendments to be applicable was accepted, but the ruling stated that rights must be of a natural variety in order to have the Fifth amendment apply. This decision strengthened some arguments, especially those on the court that desired for the Bill of Rights to be fully incorporated, but it added the conditions necessary for the rights to pertain to state and local government.[58] This decision was later overturned by *Benton v. Maryland* in 1969.

The role of the judiciary in how the Bill of Rights has been utilized in American history is more than notable. The judiciary is the least talked about branch of the federal government in the Constitution, yet, through judicial review, it one of the greatest factors determining what the other two branches are able to do. It can be argued that the judiciary's power has been *increased* by the Bill of Rights as one more thing that the judicial branch is empowered to define and decide. This is especially notable because the Bill of Rights has power over the other two branches of government in its capacity to guard the people against actions that limit freedom. The judiciary, then, has power over the rights that are intended to be protected against federal power altogether.

From records of the founding fathers, it appears many were aware of the idea of judicial review and were supportive of it as part of the system of governance. Jefferson wrote to Madison saying the Bill was necessary as a "legal check which it puts into the hands of the judiciary."[59] He later writes on about the concerns of legislative and executive tyranny, yet

[58] *Palko v. Connecticut*, Oyez.
[59] Levy, 33.

seem unconcerned about the possibility of the judicial branch becoming an abuser of power over the people. It is believed by some historians that Jefferson maintained his support of judicial review because of his extremely high standards for who qualified for becoming a judge, and the faith he put into the few that could meet his expectations. He wrote that judges should be "men of learning and experience in the laws, of exemplary morals, great patience, calmness and attention."[60] Initially, it was understood that the judiciary would be reviewing actions of the other branches and determining whether they were permissible under the Constitution, including under the Bill of Rights, and Jefferson, for one, was comfortable with the notion.

Alexander Hamilton was more than a strong supporter of judicial review, he was highly in favor of vesting a great deal of federal power in the courts. In Federalist 78 he famously argues for the judiciary as a whole and on the subject of judicial review he writes, "A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; , in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."[61] He assumes the issue of whether actions contrary to the Constitution will be allowed to remain will arise, and writes that it is in the hands of the judiciary to determine whether actions contradict the

[60] C. Perry Patterson, *The Constitutional Principles of Thomas Jefferson* (Gloucester, MA: Peter Smith, 1976), 121.
[61]Hamilton, *Federalist Papers*, 381.

Constitution. He believes the judiciary should have authority to rule that legislative actions are unconstitutional and stop them from continuing.

Judicial review was considered by the founders; it was not something that developed after and got through into the system. However, in the founders' considerations of it, they only write on the improvement it offers the system to have the judiciary in a position to oversee the legislative branch. There was no fear that the power of judicial review would grant the judiciary power over the states as well, further down the road, through the powers already afforded to them to rule on the Bill of Rights when that came to mean the Bill of Rights for state as well as federal government legislation.

Freedom of speech as detailed in the first amendment is an interesting case study of how the courts have determined what is and isn't a right covered by the Bill of Rights. Throughout history, the courts have ruled types of speech or expression that include: incitement, fighting words, obscenity, defamation, commercial speech, and cases in which freedom of speech is outweighed by an even more compelling interest, are not protected by the Bill of Rights.[62] While most people are not inclined to argue that these types of speech content should be defended, it does raise the concern of rights being regulated by the government they were intended to guard from, which Hamilton voiced in Federalist 84. To his mind, the matter of the true right being protected is a secondary issue to whom decides what is the true right is and therefore having power to regulate rights that are intended to be solely in the hands of the people. As the Constitution originally stood, there was no power granted to Congress or the Court to determine free speech, however, because of its presence in the Bill of Rights, it now falls under the power of the Court to regulate and determine free

[62] *What Does Free Speech Mean?* United States Courts (www.uscourts.gov)

speech in America. This, from Hamilton's perspective, has granted further power to the federal government and taken it away from the people. The fact that there are court cases ruling on the basis of the Bill of Rights, for or against a contested right, is evidence of authority granted to the Court to rule on a right intended to rest solely in the hands of the people.

What freedom of speech covers is continually being more specifically defined. In the court cases concerning the Espionage Act of 1917, Justice Oliver Wendell Holmes attempted to create a test that would provide consistency concerning regulating freedom of speech known as the "clear and present danger" test. His statement of the test was that, "the question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[63] This meant that the test was to determine if the speech in question had directly caused the evils and dangers that Congress does have authority, through the Constitution, to regulate.

The cases in question, mainly *Schenck v. U.S.*, concerned whether it was permissible, during wartime, for individuals to distribute content or speak with the intent to discourage enlistment in the war.[64] The case arose because a man by the name of Charles Schenck was accused of violating the Espionage Act of 1917 by distributing pamphlets that accused the draft of WWI soldiers to be unconstitutional under the 13th Amendment. The Espionage Act had been issued after the U.S. declared war on Germany and was created to define modern espionage as it should be viewed during wartimes. In the lower courts, it was a matter of determining whether Schenck's acts had violated the Espionage Act. In the Supreme Court

[63] Lewis, *The Bill of Rights,* 159.
[64] Ibid, 77-78.

case, the question became whether the very existence of the Espionage Act which stated, "whoever for the purpose [of harming the U.S. war effort and/or aiding a foreign country], and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing or note of anything connected with the national defense" was an unconstitutional order.[65]

In this instance, Holmes ruled that, in wartime, such actions presented a clear and present danger to society and U.S. interests. This test was often misconstrued in the cases that followed which Lewis explains by stating, "As applied, this test was far less protective of free speech than the term 'clear and present danger' might suggest. No showing of present danger was required in *Schenck* or subsequent cases. The Court held that if the 'tendency and intent' of the speech was to encourage illegal action, then the Court was often willing to *assume* a bad tendency and intent if the speech was critical of the government or its policies."[66] Practically, this meant that any time an individual utilized free speech to voice a criticism or personal dissent from actions of the government, the court could rule it to be in the tendency of causing issues such as anarchy or unrest and the individual would be punished for the "crime".

In the later case of *Abrams v. U.S.,* outside of wartime, Holmes dissented from using this case as a precedent or citing 'clear and present danger' for instances that were, in his opinion, far less pressing with the absences of a war. In this case, defendants were a group of Russian immigrants who had been distributing pamphlets protesting U.S. troops sent to

[65] Digital History. *Espionage Act of 1917.* 2019
[66] Ibid, 129

Russia by President Woodrow Wilson to combat the Bolshevik Revolution.[67] While Holmes dissented on the grounds that this was not an instance of 'clear and present danger', his test was used as reasoning and the defendants were ruled guilty. There is a distinct reason for concern for the idea of the judiciary having power to determine to what extent a citizen can vocalize disagreements or protest actions taken by the very same government, which is why freedom of speech was intended to be out of the hands of the government and maintained by the people.

The Constitution was written as a stand-alone document intended to so specifically outline the powers authorized to the different branches of the federal government in such a way that their individual powers were balanced and limited. With the later addition of the Bill of Rights, some of the distinct understanding of what authority was relegated to any given branch of government became unclear. While there seemed to be an understanding that the judiciary *would* be interpreting whether federal legislation and actions were constitutional or not, they did not, that my research found, reference the applicability to the states and how that would grant the federal judiciary power to determine the constitutional legality of state actions, so long as it pertained to rights. One of the consequences of adding the Bill of Rights, was greater federal power over the state and local governments. In addition, the Bill of Rights became another federal document requiring interpretation in order to be applied, which further extended federal powers as seen in the case of *Schenck*, which ultimately limited the freedom of speech and put federal power in authority over it, rather than ensuring it was safe from federal power.

[67] Ibid, 159.

The Bill of Rights was passed despite the inhibitions of individuals like Alexander Hamilton because it was believed that the Bill could be written in such a way that it was only used for the benefit of the people and with that confidence there was no reason not to ratify it. However, history has shown that there is room for the Bill to be utilized to empower the federal government rather than limit its powers. It is impossible to prove that the Bill of Rights has done more to grant power to the federal government than it has done to limit the powers of the federal government, but it is possible to state that Hamilton's worries were ultimately justified through the passage of the 14th amendment that caused the incorporation of the entire Bill of Rights and gave the federal judiciary far more extensive jurisdiction over the states.

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