Liberty Tree

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WHAT'S Wrong WITH Rights?

PART II

Governments don't like limits on their power.

By Dick Greb

> First. That there be prefixed to the constitution a declaration, that all power is originally vested in, and consequently derived from, the people. That Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety. That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.

In the first installment of this series on the Bill of Rights, we saw the original versions of the amendments to the Constitution as they were introduced by James Madison in the House of Representatives on June 8, 1789. Those original versions differ, in varying degrees, from the versions that were ultimately ratified by the States. And even though the ratified versions are the controlling force of the Bill of Rights, it is still instructive to consider the early versions to get a sense of what was intended. In the course of this study, we will also be looking at some of the arguments presented by other Representatives as the proposed amendments progressed to their final form, in order to gain some insight into the reasoning behind those final forms. For now, we'll just look at a few of the significant differences as a preview of what's to come, before getting back to Madison's address introducing the amendments.

The first proposed change[1]— which apparently didn't make the final cut — showed the true basis of the powers conferred on the government by the Constitution. Since all such power is derived from the people, then obviously, the government could not possibly be invested with any power but that which could originally be exercised by the people in their individual capacities. And notice that the third clause recognized the right of the people to change their government, whenever it be found adverse or inadequate to its purpose — which was declared to consist of the protection of the people's rights to acquire and use property, pursue and obtain happiness and safety, and enjoy their lives and liberties. The recognition of this right of the people justifies the decision of the southern states to separate themselves from the government which they found to be increasingly adverse to their interests and form a new one which would benefit them.

It is interesting that Madison's fourth proposal, incorporating most of what became the Bill of Rights, was originally intended to be placed into Article 1 — which delegates the powers to the Legislative branch of government — between the prohibition of bills of attainder and *ex post facto* laws, and the requirement that all direct taxes be laid in proportion to the census. In my opinion, the decision to place them at the end of the constitution rather than within the legislative article has contributed to the depreciation of those rights to a "second class status," or worse.

The first of the rights protected was for religious belief and worship, and a prohibition against the establishment of a ***national*** religion (like the Church of England, for example). This was followed by the freedom of speech, of the press, and of peaceably assembling. When it came to the right to keep and bear arms, notice the two clauses are reversed from what became the 2nd Amendment, demonstrating the proper preeminence of the right itself, rather than as subordinate to the militia clause as is so often asserted in our time.

Another important difference can be seen in the prohibition against "more than one punishment or one ***trial*** for the same offence." How-

1. See left column.

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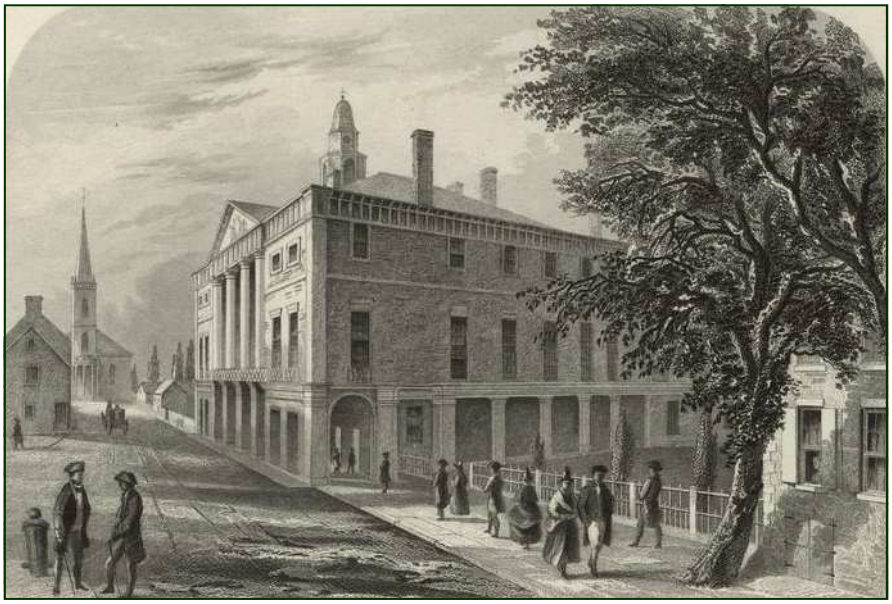
Rights ever, the final version changed the phrase to "be twice put in ***jeopardy*** of life or limb." This has opened the door to the ludicrous judicial practice of declaring mistrials when juries fail to unanimously convict, in order to justify retrying defendants over and over again — under the pretense that although there may be multiple *trials*, they all come under the same single *jeopardy*! This goes along with the failure to include the change in Madison's seventh proposal: that is, "*The trial of all crimes ... shall be* by an impartial jury of freeholders of the vicinage, *with the requisite unanimity for conviction*." Notice that only *conviction* requires unanimity! Without such unanimity, the presumption of innocence of all criminal defendants remains operative. Therefore, a "hung jury" is simply one which *decided not to convict* — an acquittal, not a mistrial.

We'll be looking at some of these issues in later installments, as we follow the arguments offered in favor of and against these proposed amendments. But for now, we will pick back up with James Madison's address to Congress, laying out his rationale for the addition of the Bill of Rights to the Constitution.

— Madison's address —

The first of these amendments relates to what may be called a bill of rights. I will own that I never considered this provision so essential to the federal constitution, as to make it improper to ratify it, until such an amendment was added; at the same time, I always conceived, that in a certain form, and to a certain extent, such a provision was neither improper nor altogether useless. I am aware, that a great number of the most respectable friends to the Government, and champions for republican liberty, have thought such a provision, not only unnecessary, but even improper; nay, I believe some have gone so far as to think it even dangerous. Some policy has been made use of, perhaps, by gentlemen on both sides of the question: I acknowledge the ingenuity of those arguments which were drawn against the constitution, by a comparison with the policy of Great Britain, in establishing a declaration of rights; but there is too great a difference in the case to warrant the comparison: therefore, the arguments drawn from that source were in a great measure inapplicable. In the declaration of rights which that country has established, the truth is, they have gone no farther that to raise a barrier against the power of the Crown; the power of the Legislature is left altogether indefinite. Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body, the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British constitution.

But although the case may be widely different, and it may not be thought necessary to provide limits for the legislative power in that country, yet a different opinion prevails in the United Sates. The people of many States have thought it necessary to raise barriers against power in all forms and departments of Government, and I am inclined to believe, if once bills of rights are established in all the States as well as the federal constitution, we shall find that although of them are rather unimportant, yet, upon the whole, they will have a salutary tendency.



"Old City Hall, Wall St., N.Y." A steel engraving by Robert Hinshelwood depicts the city hall built 1699-1703, and remodeled and renamed "Federal Hall" when it became the federal government's first Congressional seat under the Constitution in 1789. Here the proposal and initial ratification of the Bill of Rights occurred (12 amendments were drafted, 10 were adopted). Yes, the first U.S. Congress met on Wall Street, the seat of powerful financial thieves today.

It may be said, in some instances, they do no more than state the perfect equality of mankind. This, to be sure, is an absolute truth, yet it is not absolutely necessary to be inserted at the head of a constitution.

In some instances they assert those rights which are exercised by the people in forming and establishing a plan of Government. In other instances, they specify those rights which are retained when particular powers are given up to be exercised by the Legislature. In other instances, they specify positive rights, which may seem to result from the nature of the compact. Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature. In other instances, they lay down dogmatic maxims with respect to the construction of the

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Government; declaring that the legislative, executive, and judicial branches shall be kept separate and distinct. Perhaps the best way of securing this in practice is, to provide such checks as will prevent the encroachment of the one upon the other.

But whatever may be the form which the several States have adopted in making declarations in favor of particular rights, the great object in view is to limit and qualify the powers of the Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode. They point these exceptions sometimes against the abuse of the executive power, sometimes against the legislative, and, in some cases, against the community itself; or, in other words, against the majority in favor of the minority.

In our Government it is, perhaps, less necessary to guard against the abuse in the executive department than any other; because it is not the stronger branch of the system, but the weaker: It therefore must be levelled against the legislative, for it is the most powerful, and most likely to be abused, because it is under the least control. Hence, so far as a declaration of rights can tend to prevent the exercise of undue power, it cannot be doubted but such declaration is proper. But I confess that I do conceive, that in a Government modified like this of the United States, the great danger lies rather in the abuse of the community than in the legislative body. The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the executive or legislative departments of Government, but in the body of the people, operating by the majority against the minority.

It may be thought that all paper barriers against the power of the community are too weak to be worthy of attention. I am sensible they are not so strong as to satisfy gentlemen of every description who have seen and examined thoroughly the texture of such a defence; yet, as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one means to control the majority from those acts to which they might be otherwise inclined.

It has been said, by way of objection to a bill of rights, by many respectable gentlemen out of doors, and I find opposition on the same principles likely to be made by gentlemen on this floor, that they are unnecessary articles of a Republican Government, upon the presumption that the people have those rights in their own hands, and that is the proper place for them to rest. It would be a sufficient answer to say, that this objection lies against such provisions under the State Governments, as well as under the General Government; and there are, I believe, but few gentlemen who are inclined to push their theory so far as to say that a declaration of rights in those cases is either ineffectual or improper. It has been said, that in the Federal Government they are unnecessary, because the powers are enumerated, and it follows, that all that are not granted by the constitution are retained; that the constitution is a bill of powers, the great residuum being the rights of the people; and, therefore, a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the Government. I admit that these arguments are not entirely without foundation; but they are not conclusive to the extent which has been supposed. *It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent*, in the same manner as the powers of the State Governments under their constitutions may to an indefinite extent; because in the constitution of the United States, there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the Government of the United States, or in any department or officer thereof; this enables them to fulfil every purpose for which the Government was established. Now, may not laws be considered necessary and proper by Congress, for it is for them to judge of the necessity and propriety to accomplish those special purposes which they have in contemplation, which laws in themselves are neither necessary nor proper; as well as improper laws could be enacted by the State Legislatures, for fulfilling the more extended objects of those Governments. I will state an instance, which I think in point, and proves that this might be the case. *The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for this purpose*, as well as for some purpose which it was supposed at the framing of their constitutions

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The great object in view is to limit and qualify the powers of the Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode.

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the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.

It may be said, indeed it has been said, that a bill of rights is not necessary, because the establishment of the Government has not repealed those declarations of rights which are added to the several State constitutions; that those rights of the people, which had been established by the most solemn act, could not be annihilated by a subsequent act of that people, who meant, and declared at the head of the instrument, that they ordained and established a new system, for the express purpose of securing to themselves and posterity the liberties they had gained by an arduous conflict.

I admit the force of this observation, but I do not look upon it to be conclusive. In the first place, it is too uncertain to leave this provision upon, if a provision is at all necessary to secure rights so important as many of those I have mentioned are conceived to be, by the public in general, as well as those in particular who opposed the adoption of this constitution. Besides, some States have no bills of rights, there are others provided with very defective ones, and there are others whose bills of rights are not only defective, but absolutely improper; instead of securing some in the full extent which republican principles would require, they limit them too much to agree with the common ideas of liberty.

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.

It has been said, that it is unnecessary to load the constitution with this provision, because it was found effectual in the constitution of the particular States. It is true, there are a few particular States in which some of the most valuable articles have not, at one time or other, been violated; but it does not follow but they may have, to a certain degree, a salutary effect against the abuse of power. If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights. Besides this security, there is a great probability that such a declaration in the federal system would be enforced; because the State Legislatures will jealously and closely watch the operations of this Government, and be able to resist with more effect every assumption of power, than any other power on earth can do; and the greatest opponents to a Federal Government admit the State Legislatures to be sure guardians of the people's liberty. I conclude, from this view of the subject, that it will be proper in itself, and highly politic, for the tranquillity of the public mind, and the stability of the Government, that we should offer something, in the form I have proposed, to be incorporated in the system of Government, as a declaration of the rights of the people.

As you can see, Madison offered quite a few reasons why the inclusion of a Bill of Rights to the Constitution would be beneficial. But of them all, the most important reason is this one: "the great object in view is *to limit and qualify the powers of the Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode*. ... [T]he powers of the General Government are circumscribed, they are directed to particular objects; but *even if Government keeps within those limits*, it has certain discretionary powers with respect to *the means*, which *may admit of abuse to a certain extent*."

And that, dear readers, is what is wrong — in the government's point of view — with rights. Rights further limit government, even beyond the limits inherent in the enumeration of specific powers; and we all know that limits are one of the things governments abhor. We'll pick up this issue in our next installment, and also consider the example Madison gives concerning the necessity and propriety of limiting the means of exercising government's delegated powers.