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## THE ADOPTION OF THE BILL OF RIGHTS\*

by Maeva Marcus\*\*

As a historian, and one who is not a lawyer, I approach a discussion of the origins of the Bill of Rights from a perspective that I suspect is very different from yours. When looking at the events of the last two decades of the eighteenth century, I am not necessarily searching for definitive answers to the question that seems to be of most interest to twentieth-century judges and attorneys: what did each of the first ten amendments to the Constitution mean in 1791? From long experience with historical research in that period, I know all too well that such answers cannot always be found. But more important, I know that the Revolutionary generation, in wrestling with the problem of rights, did not concern itself primarily with stating, with absolute textual precision, the rights that Americans believed would best protect their liberty. Rather, the founding generation struggled with the larger question of what kind of government would facilitate the enjoyment of the rights the American people knew they possessed. The events of the 1780s and 1790s demonstrate this proposition.

In the short time allotted to me, I cannot give you a detailed accounting of the developments supporting my contention that issues relative to the structure of the new government, rather than the task of defining and enumerating individual rights, were foremost in the minds of Americans after the Revolution. What I can do, in a necessarily impressionistic manner, is to show you how the passage and ratification of the Bill of Rights fit into that thesis.

Even before the specific provisions of the Constitution were publicly known, newspapers characterized it as "a revolution in favor of *Government*." One paper opined that the day the Constitution was unveiled would become "equally dear to all Americans with the 4th of July, 1776 — for while this day gave us *liberty*, the 15th of September, 1787, gave us, under the smiles of a benignant Providence, a *Government*, which alone could have rendered that liberty *safe and perpetual*." But as soon as the details of the Constitution were revealed, its lack of a bill of rights became an immediate topic of discussion. This discussion was fostered by the opponents of the Constitution, who became known as Antifederalists. They realized that because Americans were fiercely protective of their rights, championing this issue would win popular support and perhaps lead to the Constitution's defeat.

George Mason, in his "Objections to the Constitution of Government formed by the Convention," articulated the Antifederalist argument. In the last days of the constitutional convention, Mason had proposed that a bill of rights be included in the Constitution, but the convention unanimously rejected his motion. Refusing to sign the Constitution, Mason returned to Virginia and immediately penned his "Objections," which pointed to the absence of a "Declaration of Rights." But the larger part of his objections took issue with the structure of the proposed federal government which, in his view, was altogether too powerful, and the balance of power between the state and federal

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\* These remarks were delivered October 21, 1991 in a Plenary Session, "An Historical Perspective: If Those Who Created the Bill of Rights Could Talk to Us Today, What Would They Say, and Should it Matter" for the Conference for the Federal Judiciary in Honor of the Bicentennial of The Bill of Rights in Williamsburg, Virginia.

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governments. These objections led supporters of the Constitution to question the sincerity of the call for a bill of rights, suspecting that the Antifederalists were using it merely as a means to mobilize the populace against the adoption of the Constitution.

The process of ratifying the Constitution in the states proved that Federalist suspicions were not without a solid basis. Although four states — Delaware, New Jersey, Georgia, and Connecticut — approved the new frame of government without the issue of amendments creating much controversy, the question proved troublesome elsewhere. The Pennsylvania and Maryland conventions ratified the Constitution, but only after defeating the efforts of significant Antifederalist minorities to make those ratifications conditional on the adoption of amendments. Massachusetts was the first state to urge Congress to consider nine amendments to the Constitution, only two of which dealt with individual rights: one specified indictment by a grand jury before any person could be tried for a crime by which he might "incur an infamous punishment or loss of life," and the other required that every issue of fact in a civil action between citizens of different states be tried by a jury if either party requested it. New Hampshire followed the lead of Massachusetts and approved the Constitution, urging adoption of virtually the same nine amendments recommended by Massachusetts, but adding three more that declared that Congress shall make no laws respecting religion, shall not disarm any citizens unless they had been involved in an actual rebellion, and shall not establish a standing army in time of peace unless three quarters of both the House and Senate consent to it or allow soldiers to be quartered in private homes in time of peace without the owners' consent. South Carolina ratified the Constitution and recommended four amendments, none of which concerned individual rights.

At this point the requisite nine states had ratified the Constitution, but everyone knew that the union could not succeed without the inclusion of Virginia and New York. Both states had large numbers of Antifederalist delegates in their ratifying conventions, and it seemed a foregone conclusion that the Federalists would have to make some concessions. They did this in both states, by agreeing to recommend amendments to Congress in exchange for ratification of the Constitution. Virginia and New York thus became the tenth and eleventh states to join the union. Virginia's proposed amendments were divided into two parts, the first a bill of rights specifying twenty "essential and unalienable Rights of the People," and the second a list of twenty alterations to be made in the body of the Constitution concerning such diverse subjects as representation, taxes, treaties, commerce, the balance of power between the federal government and the states, and the judicial power of the United States. New York submitted to Congress a list of twenty-three rights and explanations consistent with the Constitution, along with twenty-two amendments mainly dealing with the powers and structure of the federal government.

All in all, Congress received approximately two hundred amendments. Taking duplication into account, about one hundred distinct proposals emerged from the ratification process. The largest category consisted of those directed at Article III of the Constitution. The states clearly wished to restrict the jurisdiction of federal courts. Some wanted no inferior federal courts to be established and urged the use of state courts as federal trial courts. Other amendments would have limited the President to two terms and altered his powers of pardon. Congress's powers also would have been restricted with regard to regulation of federal elections and state militias; its exclusive jurisdiction over the capital city would have been limited; and its authority to legislate in the areas of commerce and taxation would have been curbed. Several states, for example, did not want Congress to have the power to grant monopolies. Almost all the states submitting amendments to Congress declared that powers not expressly delegated to Congress should be reserved to the states. A number of the amendments afforded protections against the national government interfering with rights claimed by individuals or states. A few even aimed to defend Americans against arbitrary judges.

A listing of the amendments proposed gives no indication of the robust debate that accompanied the ratification process. One has to read the newspapers and the correspondence of the time to appreciate how widely the nature of government was discussed and how ideas had changed since the Revolutionary War. The principal subject of the debate was what kind of government Americans wanted, not what rights this government should protect. The lack of serious discussion about the definition of particular rights should give you some perception of the difficulty of establishing the precise motivation underlying the first ten amendments to the Constitution.

The Federalists understood this problem as well, as is obvious from their opposition to a national bill of rights. Not only did they think that one was unnecessary, because the government created by the Constitution was limited and could not interfere with the rights of the people, but they also believed that a federal bill of rights might actually be dangerous. An enumeration of certain rights would omit others that in the future might be considered important but would be understood as not protected because they were not listed. Moreover, bills of rights were statements of values held in common and these differed from state to state. A national bill of rights would consist of the lowest common denominator and therefore exclude rights believed by many to be of great consequence. A national bill of rights presented another problem in that its existence would imply that the federal government had some authority in every area, notwithstanding the fact that no specific powers had been delegated. Yet the Federalists in many states were forced, if they were not to lose the whole Constitution, to go along with the recommendations for amendments, even though they did not believe in them.

The outcome of the first federal elections for Congress compounds the difficulty of gauging the significance of the ratification of the Bill of Rights. The proposed amendments became the main issue of most campaigns. Antifederalists pledged support for them; Federalists were evasive about which ones would receive their endorsement and why. While the results of the ratification process would have led you to believe that a good portion of the populace wanted a bill of rights, the elections brought an overwhelming Federalist victory, suggesting, perhaps, that Americans were more interested in giving the new government a chance to succeed than in ensuring the adoption of amendments.

The First Congress certainly did not believe that passing amendments to the Constitution was one of its priorities, and none would even have been considered in the first session had it not been for the persistence of James Madison. The evolution of Madison's theory of rights is an important element in the story of the adoption of the Bill of Rights, but one which I can summarize only briefly. By the time of the constitutional convention Madison believed that there was more to be feared from legislation than from the arbitrary exercise of the coercive authority of the state; that rights were needed more to protect individuals and minorities against popular majorities than to protect people against their rulers; and that rights would be in the greatest danger from governments that were most immediately responsive to the desires of their citizens, namely, from the states rather than the national government, which would be better insulated against populist pressure.

With such beliefs, Madison, in 1787, dismissed bills of rights as so many "parchment barriers" of no practical use. He thought that a limited, balanced government where the legislature did not have total control was a far more effective tool for protecting rights than textual declarations of rights. He also believed that the states offered considerable protection against any federal abuse of power. Madison feared that, "a positive declaration of some of the most essential rights could not be obtained in the requisite latitude" especially if "rights of conscience" were included. But more important, Madison's most recent experience had proved to him the inefficacy of bills of rights, which had been violated with impunity in every state since the Revolution. As he

explained to Thomas Jefferson, "In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents. This is a truth of great importance, but not yet sufficiently attended to."

Madison admitted to Jefferson that he could see two possible uses for a bill of rights in a republic. One was educational — "The political truths declared in that solemn manner," he wrote, "acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion." But he did not put much faith in such an outcome. A second use could be as a tool against the oppressive acts of government, but Madison considered this unnecessary in the new American republic.

What then accounts for his conversion to support for the proposed amendments in the First Congress? Politics is the obvious answer. Madison had faced a tough congressional contest against James Monroe, an Antifederalist, in a Virginia district where sentiment in favor of amendments was high. But during the campaign, and when he introduced his amendments in Congress, Madison restated his own beliefs about the limited usefulness of a bill of rights in the new republic, pointing out that state governments posed more of a danger to rights than the federal government. He conceded, however, that amendments were necessary in order to reconcile to the Constitution those "respectable" citizens whose "jealousy . . . for their liberty . . . though mistaken in its object, is laudable in its motive."

The amendments that Madison introduced in the House aimed primarily at increasing the security of rights in the new nation. In his speech of June 8, 1789, Madison candidly declared that he was "unwilling to see a door opened for a reconsideration of the whole structure of the government." He culled his amendments from those submitted by the states, sticking mostly to those that were rights-related. However, he included two amendments not found in any state proposal: one declaring that no property could be taken without just compensation; and the other, the amendment that Madison believed the most important, number 14 of the amendments the House passed on to the Senate, declaring that "No state shall infringe the equal rights of conscience, nor freedom of speech, or of the press, nor of the right of trial by jury in criminal cases." The Senate killed the 14th amendment. In September 1789 Congress submitted twelve amendments to the states for their approval. Ten were ratified by the requisite number of state legislatures (11) by December 15, 1791 and became what we now know as the Bill of Rights. Three states, Massachusetts, Connecticut, and Georgia, did not ratify the Bill of Rights until 1939.

The fact that it took more than two years to ratify the Bill of Rights attests to the lack of interest in Madison's amendments. Federalists and Antifederalists thought his proposals a diversion, a way of avoiding any changes in the structure or powers of the new government. Alexander Hamilton, writing in 1801, observed that Madison's amendments met "scarcely any of the important objections which were urged, leaving the structure of the government and the mass and distribution of its powers where they were." Hamilton believed further that the amendments were "too insignificant to be with any sensible man, a reason for being reconciled to the system if he thought it originally bad."

The disagreements of the 1790s demonstrate that rights were not a major concern of the founding generation. Issues that engendered heated debates — the establishment of a Bank of the United States, the foreign relations authority of the executive, the jurisdiction of federal courts, for example — involved the powers of government. Even the battle over the passage of the Alien and Sedition Acts in 1798, usually cited as the first instance when the rights of a free press came to the fore, can be attributed to a

difference of opinion as to which government, federal or state, had the power to prosecute those who committed the crime of seditious libel.

Although the Bill of Rights generated little interest in the 1790s, it created a legacy that both Jefferson and Madison foresaw. Early in 1789, when Madison was trying to formulate arguments in favor of the passage of amendments by Congress, Jefferson had written to him that one weighty consideration for adopting a declaration of rights was "the legal check it puts into the hands of the judiciary." Madison made this sentiment his own and, in his speech introducing the amendments to Congress, stated that if a declaration of rights was "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," — a worthy statement with which to conclude a presentation before so many judges.