

THOMAS JEFFERSON AND JAMES MADISON, CORRESPONDENCE ON A BILL OF RIGHTS (1787-89)

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Within the First Congress, James Madison emerged as the leader of the effort to pass a bill of rights. In many ways, the “Father of the U.S. Constitution” was an unlikely “Father of the Bill of Rights.” Like many leading Federalists, Madison did not believe that the Constitution needed a bill of rights. First, Madison argued that one was unnecessary. In his view, a bill of rights would serve as a mere parchment barrier—providing no real protections for the American people. Madison argued that to limit abuses of power, the key was constitutional structure, *not* a bill of rights: limit the powers of the national government, divide those powers between three branches, and give those branches the power to check one another. Second, Madison argued that a bill of rights might even be dangerous. For Madison, the American people’s rights were so numerous that to write them down would be to limit them. In this series of letters, Madison’s friend Thomas Jefferson—who was abroad in France—urged Madison to support a bill of rights. Eventually, Madison did just that—leading the push for a bill of rights in the First Congress.

Excerpt:

Thomas Jefferson to James Madison, December 20, 1787:

There are many things that I like about the new Constitution. The season admitting only of operations in the Cabinet, and these being in a great measure secret, I have little to fill a letter. I will therefore make up the deficiency by adding a few words on the Constitution proposed by our Convention. I like much the general idea of framing a government which should go on of itself peaceably, without needing continual recurrence to the state legislatures. I like the organization of the government into Legislative, Judiciary & Executive. I like the power given the Legislature to levy taxes, and for that reason solely approve of the greater house being chosen by the people directly. For tho’ I think a house chosen by them will be very illy qualified to legislate for the Union, for foreign nations &c. yet this evil does not weigh against the good of preserving inviolate the fundamental principle that the people are not to be taxed but by representatives chosen immediately by themselves. I am captivated by the compromise of the opposite claims of the great & little states, of the latter to equal, and the former to proportional influence. I am much pleased too with the substitution of the method of voting by persons, instead of that of voting by states: and I like the negative given to the Executive with a third of either house, though I should have liked it better had the Judiciary been associated for that purpose, or invested with a similar and separate power. There are other good things of less moment. I will now add what I do not like. **But it was a mistake to leave out a bill of rights.** First the omission of a bill of rights providing clearly & without the aid of sophisms for freedom of religion, freedom

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of the press, protection against standing armies, restriction against monopolies, the eternal & unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land & not by the law of Nations. To say, as Mr. Wilson does, that a bill of rights was not necessary because all is reserved in the case of the general government which is not given, while in the particular ones all is given which is not reserved, might do for the Audience to whom it was addressed, but is surely a gratis dictum, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation which had declared that in express terms. . . . Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse or rest on inference. . . .

But you are better informed than me; as you know, I am not a fan of a strong government; plus, I think that Shays' Rebellion is overblown. I have thus told you freely what I like & dislike: merely as a matter of curiosity, for I know your own judgment has been formed on all these points after having heard every thing which could be urged on them. I own I am not a friend to a very energetic government. It is always oppressive. The late rebellion in Massachusetts has given more alarm than I think it should have done. Calculate that one rebellion in 13 states in the course of 11 years, is but one for each state in a century & a half. No country should be so long without one. Nor will any degree of power in the hands of government prevent insurrections. . . .

But I leave the fate of the Constitution in the hands of the people; plus, we can amend the Constitution later to correct for any defects; the American republic will thrive if we commit to agriculture and education. [I]t is my principle that the will of the Majority should always prevail. If they approve the proposed Convention in all it's parts, I shall concur in it cheerfully, in hopes that they will amend it whenever they shall find it work wrong. I think our governments will remain virtuous for many centuries; as long as they are chiefly agricultural; and this will be as long as there shall be vacant lands in any part of America. When they get piled upon one another in large cities, as in Europe, they will become corrupt as in Europe. Above all things I hope the education of the common people will be attended to; convinced that on their good sense we may rely with the most security for the preservation of a due degree of liberty. I have tired you by this time with my disquisitions & will therefore only add assurances of the sincerity of those sentiments of esteem & attachment with which I am Dear Sir your affectionate friend & servant.

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James Madison to Thomas Jefferson, October 17, 1788:

There were many objections to the new Constitution; at this point, we will probably add amendments that protect some rights, but some argue that this move is unnecessary and improper. The little pamphlet herewith inclosed will give you a collective view of the alterations which have been proposed for the new Constitution. Various and numerous as they appear they certainly omit many of the true grounds of opposition. The articles relating to Treaties—to paper money, and to contracts, created more enemies than all the errors in the System positive & negative put together. It is true nevertheless that not a few, particularly in Virginia have contended for the proposed alterations from the most honorable & patriotic motives; and that among the advocates for the Constitution, there are some who wish for further guards to public liberty & individual rights. As far as these may consist of a constitutional declaration of the most essential rights, it is probable they will be added; though there are many who think such addition unnecessary, and not a few who think it misplaced in such a Constitution. There is scarce any point on which the party in opposition is so much divided as to its importance and its propriety.

A bill of rights is fine with me if we craft it wisely; but I don't think that it's a big deal, either way; I'm happy to add one if it will help convince more people to support the new Constitution; overall, it might be of some use, and, if constructed properly, it won't do any great harm. 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 the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by *subsequent* amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and if properly executed could not be of disservice.

But I don't think it's important because we have created a national government of limited powers; I also fear that we won't be able to craft language that captures the full breadth of our rights; plus, history shows that bills of rights aren't very effective when we most need them. I have not viewed it in an important light 1. because I conceive that in a certain degree, though not in the extent argued by Mr. Wilson, the rights in question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of Conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power. . . . 3. because the limited powers of the federal Government and the jealousy of the subordinate Governments, afford a security which has not existed in the case of the State Governments, and exists in no other. 4. because experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. . . .

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Here, the majority rules; a bill of rights can only do so much to stop a powerful majority.

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: and is probably more strongly impressed on my mind by facts, and reflections suggested by them, than on yours which has contemplated abuses of power issuing from a very different quarter. Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful & interested party than by a powerful and interested prince. The difference, so far as it relates to the superiority of republics over monarchies, lies in the less degree of probability that interest may prompt abuses of power in the former than in the latter; and in the security in the former agst. oppression of more than the smaller part of the society, whereas in the former it may be extended in a manner to the whole.

In many ways, a bill of rights may be better suited to a monarchy than a republic. The difference so far as it relates to the point in question—the efficacy of a bill of rights in controuling abuses of power—lies in this, that in a monarchy the latent force of the nation is superior to that of the sovereign, and a solemn charter of popular rights must have a great effect, as a standard for trying the validity of public acts, and a signal for rousing & uniting the superior force of the community; whereas in a popular Government, the political and physical power may be considered as vested in the same hands, that is in a majority of the people, and consequently the tyrannical will of the sovereign is not [to] be controuled by the dread of an appeal to any other force within the community.

But a bill of rights can serve an important educational function, reminding the people of their most cherished liberties; plus, it can also provide the people with a set of criteria to use when criticizing the government for its abuses. What use then it may be asked can a bill of rights serve in popular Governments? I answer the two following which though less essential than in other Governments, sufficiently recommend the precaution. 1. The political truths declared in that solemn manner 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. 2. Altho' it be generally true as above stated that the danger of oppression lies in the interested majorities of the people rather than in usurped acts of the Government, yet there may be occasions on which the evil may spring from the latter sources; and on such, a bill of rights will be a good ground for an appeal to the sense of the community. Perhaps too there may be a certain degree of danger, that a succession of artful and ambitious rulers, may by gradual & well-timed advances, finally erect an independent Government on the subversion of liberty. Should this danger exist at all, it is prudent to guard agst. it, especially when the precaution can do no injury. At the same time I must own that I see no tendency in our governments to danger on that side.

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Thomas Jefferson to James Madison, March 15, 1789

The judiciary can use a bill of rights to check the government. 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 acknowledged 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. . . .

Declarations of Rights don't solve all of our problems, but they do more good than harm. The Declaration of rights is like all other human blessings alloyed with some inconveniences, and not accomplishing fully it's object. But the good in this instance vastly overweighs the evil. I cannot refrain from making short answers to the objections which your letter states to have been raised.

We may have created a limited government, but a bill of rights can give us an extra layer of protection. 1. That the rights in question are reserved by the manner in which the federal powers are granted. Answer. 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. . . . But in a constitutive act which leaves some precious articles unnoticed, and raises implications against others, a declaration of rights becomes necessary by way of supplement. This is the case of our new federal constitution. This instrument forms us into one state as to certain objects, and gives us a legislative and executive body for these objects. It should therefore guard us against their abuses of power within the field submitted to them.

We may not perfectly state our rights when we craft our bill of rights, but let's secure whatever rights we can. 2. A positive declaration of some essential rights could not be obtained in the requisite latitude. Answer. Half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can.

The states can rely on a bill of rights to check abuses by the national government. 3. The limited powers of the federal government and jealousy of the subordinate governments afford a security which exists in no other instance. Answer. The first member of this seems resolvable into the 1st. objection before stated. The jealousy of the subordinate governments is a precious reliance. But observe that those governments are only agents. They must have principles furnished them whereon to found their opposition. 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.

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It's true that sometimes our bills of rights fail us, but sometimes they succeed, they rarely do harm, and it's far more dangerous to leave one out than to include one in a framework of government. 4. Experience proves the inefficacy of a bill of rights. True. But tho it is not absolutely efficacious under all circumstances, it is of great potency always, and rarely inefficacious. A brace the more will often keep up the building which would have fallen with that brace the less. There is a remarkeable difference between the characters of the Inconveniencies which attend a Declaration of rights, and those which attend the want of it. The inconveniences of the Declaration are that it may cramp government in it's useful exertions. But the evil of this is shortlived, 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. . . .

***Bold sentences give the big idea of the excerpt and are not a part of the primary source.**