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ISSUE BRIEF

"Information to Action"

Topic: The Bill of Rights

Title: *WHY WERE SOME OF THE FOUNDERS SKEPTICAL ABOUT A BILL OF RIGHTS?* by Joshua Charles

When the Constitution was originally framed in 1787, it didn't include what many today consider to be its most important feature: the Bill of Rights. Why is this?

The reasons are varied, but some of them were articulated in *The Federalist Papers* by Publius (the pseudonym used by Alexander Hamilton, James Madison, and John Jay), especially in No. 84.

Publius offers two main arguments in this paper: first, that the Constitution itself, laying out as it does the federal structure and balance between central and state governments, is a bill of rights itself; and second, that a Bill of Rights would imply the federal government had more power than it actually did, given that it only possessed those powers that were specifically enumerated in the Constitution itself.

Here is Publius' first argument:

> *"The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS. The several bills of rights in Great Britain form its Constitution, and conversely the constitution of each State is its bill of rights. And the proposed Constitution, if adopted, will be the bill of rights of the Union. Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the plan of the convention; comprehending various precautions for the public security, which are not to be found in any of the State constitutions. Is another object of a bill of rights to define certain immunities and modes of proceeding, which are relative to personal and private concerns? This we have seen has also been attended to, in a variety of cases, in the same plan. Adverting therefore to the substantial meaning of a bill of rights, it is absurd to allege that it is not to be found in the work of the convention."*

Publius' second argument is perhaps even more interesting, arguing that a Bill of Rights, far from limiting the federal government, could potentially provide a pretext for expanding its powers:

> *"But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns. If, therefore, the loud clamors against the plan of the convention, on this score, are well founded, no epithets of reprobation will be too strong for the constitution of this State [New York]. But the truth is, that both of them contain all which, in relation to their objects, is reasonably to be desired."*

"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? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights."

It should be noted that many of the world's most authoritarian regimes have a "Bill of Rights." The Soviet Union, for example, supposedly guaranteed free speech, freedom of the press, and the like. China's constitution provides similar "guarantees." But we know these regimes to be among the most authoritarian that have ever existed in history—perhaps *the* most authoritarian.

For this reason, while being profoundly grateful for the various protections afforded by the Bill of Rights, we should ponder Publius' argument, that the ultimate protector of our rights is less to be found in a listing on paper, but in the practical division of powers into separate branches (legislative, executive, and judicial), and separate sovereignties (federal and state). These—not a Bill of Rights that tyrannical regimes themselves have proffered—are the true bulwark against tyranny.