

One of the Middling-Interest, *Massachusetts Centinel*, 28 November 1787

Some Objections to the New Constitution considered.

The first objection that is generally made to the proposed form of government is the want of a "BILL OF RIGHTS." To answer this objection we shall do well to consider where we learned the idea of a bill of rights, what it is, and what purpose it would serve in the new government, and whether there is in fact a bill of rights connected with that government or not.

We acquire the idea of a bill of rights from the English history, and the instrument emphatically called by that name, was executed at the revolution, and was absolutely necessary to ascertain and guard the privileges of a people who had no *written* constitution, as we have. I say they had no *written* constitution, unless we call by that name the Magna Charta, the petition of rights, or their several acts of parliament. A very great part of even the *laws* of England, namely, that called the common law, is wholly *unwritten*, and what has been handed down as custom and common usage through many centuries: And we are even at this day to look for the English *constitution* among the opinions of contradictory authors; and it is altogether a matter of argument, though indeed it happens that in the course of so many years, almost all possible questions of constitutionality have arisen in their courts of law, and have been decided—So that by looking into a vast variety of voluminous authors we *can come at* the English constitution.—I premise all this to shew the propriety of *that* people insisting on an *expressed* bill of rights, and on several other great instruments which at different opportunities they acquired—Because their constitution being only to be collected out of the dust of ages, and from the meer opinions of the learned, it was just they should procure their kings to sign and seal, if I may so express it, a plain and express confirmation of those parts of their constitution which former monarchs had denied or violated. This is a short history of the origin of a bill of rights.

We are now to see what use such an instrument would be in the lately proposed form of federal government.

If we had not a state constitution already declared on paper—and if we were now in the same circumstances we were when we seceded from Britain, and before we had ascertained and declared all our rights, it might be more necessary for us to do it *now* when we are to form a new federal constitution. But agreeably to the theory of the original contract, and which authors once thought visionary, we assembled in a state convention eight years since, and then plainly distinguished, agreed to, and published a bill of rights and form of government for this Commonwealth.—I now undertake to say that we part with few or none of these rights by accepting the new federal constitution—that *where* we part with *any*, it is in exchange for others that are national, and fully expressed; and that some of those rights ascertained in the state constitution are even repeated in that which is offered by the federal convention. The very reason why some of those are thus *repeated* is because those rights were considered essential by the federal convention, and are not found in the particular constitutions of all the States, as they are in that of Massachusetts. And the reason why *some* rights which are

expressed in the Massachusetts constitution, *are not* repeated in the federal plan is because such rights are plainly expressed in *all* the other state constitutions. Thus for example, the tenth section of the first federal article (which by the way, as well as the ninth section, is a bill of rights) declares that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility. Now this declaration (except that of the *ex post facto* law, which we shall hereafter consider) is altogether superfluous as it relates to Massachusetts, because our own constitution includes the same restrictions: But it is quite necessary for those States whose forms of government contain no such regulations.

According to this idea then, we have our rights more clearly expressed than formerly; for we *retain* all those rights which are prefixed to our state constitution, and which are not expressly given up to the national government; in addition to which we have those other rights which are *not* in the state constitution, but which are expressed in the *federal*.—The 24th article of our own state bill of rights declares, for example, that laws made to punish for actions done before the existence of such laws, &c. are unjust. This relates then to *ex post facto* laws in criminal prosecutions: But our state bill of rights is silent as to any *ex post facto* laws which relate to property, and civil prosecutions; though it must be confessed that such laws are as much against the nature of government as those relating to crimes. The federal constitution has accordingly guarded against such laws, and clearly, because some states, of which our own is one, have not observed such a restriction. Here then is one example at least of our own bill of rights being amended by the federal; or rather of a distinct right expressed in the federal, but not in the state constitution.

The first section in the federal form will help our eye-sight, if we are not determined to be blind, to see that we retain all our rights, which we have not expressly relinquished to the union—That section declares, that all legislative powers herein *given* (i.e. given in the new constitution) shall be vested in Congress, &c.—The legislative powers which are *not* given therein, are surely not in Congress; and if not in Congress are retained by the several states, and secured by their several constitutions.

The opposers of the new government have branched out the evils arising from the pretended want of a declaration of rights into several particulars—one of which is, that the LIBERTY OF THE PRESS is not provided for:—But the real question is, where is it taken away? For if the several state constitutions already protect the liberty of the press, and no legislative power is given to Congress to restrict that liberty; but if on the other hand the republican forms of government are guaranteed to the several states, then surely the liberty of the press is most amply provided for. The first section in the federal constitution already quoted, plainly shews, that Congress have no legislative powers but what are given them by that constitution—they therefore can never restrict the liberty of the press, unless they have some power given them by the constitution so to do, which no where appears.

The *trial by jury*, in civil cases, is also said not to be protected by the new government. It is true, the convention have not said that trial by jury in civil cases is indispensable as they have in criminal cases; if they had so said it would have been a very great absurdity; for there is no one point in which the states more differ than in this, though

there is one circumstance in which they all agree, viz. in deciding some cases of property without any jury at all. In Massachusetts the penalty of bonds is reduced by the judges to the principal and interest, mentioned in the conditions of those bonds, without the equitable interference of a jury;—and judgments are rendered in default cases at the clerk's offices without either judge or jury in thousands of instances—though in some States after default [is] made, a jury are by law obliged to ascertain the damages. If people would reflect, that out of three or four hundred actions at a court not more than ten are decided by jury, they would not be anxious to have it expressed in a bill of rights, that *all* civil causes should be tried by jury: And if it were to be expressed *what* civil causes should be tried by jury, it might take a volume of laws instead of an article of rights. The legislature, no doubt, will make some general regulations in this matter, which will suit the greater number of states—and if those regulations should not suit the ancient usage of any *particular state*, still the advantages would not be important, when we remember that the federal court are to decide upon no causes whatever which are now triable in any one state, unless it be causes which may arise between the citizens of different states, which are so rare, as that they make up but a very small part of the publick business—and even causes of this kind, if found inconvenient to the citizens, may be excepted, in whole or in part, from continental jurisdiction, as appears by the latter part of the 2d section of the 3d article in the federal government.

But some will ask, why is even this left to the inclinations of Congress, who *may* authorize the judicial to bring a citizen from one end of the continent to the other, to answer to an action between citizens of different states? The answer is, that all legislatures must be trusted with something—to suppose they will so form the judicial departments merely to oppress, without a possibility of serving avarice, ambition or any known human motive, is to suppose that men will be so disinterested as to act against their own existence, and from no given cause that can be described. Our own state constitution declares that the legislature shall erect judicatories for the trial of all causes in the Commonwealth, but does not declare how many, nor what sort, nor when they shall sit: Because this would be making the law, which is the business of the General Court, and not the business of the makers of the constitution.

There are other exceptions which I shall consider in a future paper, not having room to do it in this. I cannot, however, conclude these remarks, without observing upon the unjustifiable arts which have been practised to sour the minds of the people against the new government. There are men whose abilities are commensurate to the narrow circle of state politicks, and whose little splendours would be lost in the bright blaze of continental glory. There are others whose fortunes are desperate and whose last hopes are to participate [in] the booty in a publick shipwreck. Some of these, not contented with stating fairly their observations in the Gazettes—have published hand-bills fraught with lies, and by night have scattered them on the floors of the Senate house, to intimidate the minds of some, and to inflame the breasts of others.

The adoption of a new government for many millions of people is certainly of too serious a nature to be forwarded or discouraged by violence or cunning. Every man who has property to protect, or children to make happy, or who, having neither property nor children, has only his own personal liberty to maintain or enlarge, will consider the

present sera as a golden opportunity offered him by providence; an opportunity that never came before, and that may never arrive again!

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