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Sins and Omissions: Slavery and the Bill of Rights

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Sins and Omissions: Slavery and the Bill of Rights

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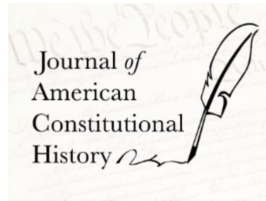

Sins and Omissions: Slavery and the Bill of Rights

Richard Primus[*]

Abstract

According to the conventional story, the Constitutional Convention declined to include a bill of rights in the Constitution because it trusted the enumeration of congressional powers to do the necessary work of limiting the federal government. That conventional story is historically unfounded. It is not supported by contemporary evidence, and it was roundly disbelieved at the time. Although it is not possible to know for certain why (really, for what mix of reasons) the Framers omitted a bill of rights, it seems likely that one major reason was that formulating a bill of rights would have provoked a bitter fight over slavery. In 1787, bills of rights in states that had them were formulated differently depending on the local attitude toward slavery. Drafting a bill of rights for the entire Union would have required choosing between those rival formulations, and any choice would have risked pointed conflict—conflict that might have prevented the Convention from reaching agreement on the Constitution. The choice to omit a bill of rights was likely, at least in substantial part, a means of avoiding that conflict.

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> "[S]uch bills generally begin with declaring, that all men are by nature born free…we should make that declaration with a very bad grace, when a large part of our property consists in men who are actually born slaves."
>
> –Charles Cotesworth Pinckney to the South Carolina House of Representatives, January 18, 1788

INTRODUCTION

During the ratification debates of 1787–88, one of the most prominent objections to the proposed new Constitution was that it contained no bill of rights. To defend the Constitution against that objection, several leading Federalists argued that the Constitution's enumeration of specific congressional powers made a bill of rights unnecessary. If the Constitution were creating a government with general jurisdiction, the argument ran, a bill of rights might be necessary in order to guard against abuses of federal power. But if Congress could only exercise the particular powers enumerated in the Constitution, then the federal government would not be able to behave abusively in the first place. Indeed, according to some versions of the argument, it would be dangerous to add a bill of rights expressly prohibiting Congress from doing certain things, because affirmative prohibitions might imply that Congress as a general matter had the power to do whatever was not affirmatively prohibited.

The first major public articulation of this argument came in a speech by James Wilson, given in Philadelphia on October 6, 1787.[1] But for modern audiences, the most canonical source is Alexander Hamilton's *Federalist* 84. Hamilton put the point as follows:

> [B]ills 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.[2]

In modern constitutional law, this account from *Federalist* 84 operates as a conventional explanation for the original Constitution's omission of a bill of rights[3]—an omission with which virtually everyone who has studied constitutional law is familiar.

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[1] See James Wilson, Speech at a Public Meeting in Philadelphia, October 6, 1787, *in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 337, 339–40 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter DHRC].

[2] THE FEDERALIST NO. 84 (Alexander Hamilton).

[3] *See, e.g.*, Michael J. Klarman, *The Founding Revisited*, 125 HARV. L. REV. 544, 560 (2011) (reviewing PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788 (2010)) (noting the familiarity of this account); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 535 (2012) (opinion of Roberts, C.J.) ("Indeed, the Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 8 n.8 (3d ed. 2000) ("The Constitutional Convention decided against including a Bill of Rights largely in the belief that Congress was in any event delegated none of the powers such a bill would seek to deny. *See* THE FEDERALIST No. 84 (Alexander Hamilton)"); WILLIAM H. RIKER, THE STRATEGY OF RHETORIC: CAMPAIGNING FOR THE AMERICAN CONSTITUTION 86, 87

But to understand the role of this argument within the ratification debate, it is useful to notice two other omissions that are not part of the standard knowledge of constitutional lawyers. The first is an omission within *The Federalist* itself. *Federalist* 84 was part of the denouement of the series, the next-to-last of eighty-five essays. In the first eighty-three *Federalist* essays, the idea that the Constitution's enumeration of powers obviated a bill of rights is nowhere to be found. And even in *Federalist* 84, Hamilton did not present the argument about enumerated powers and a bill of rights as a core tenet of the case for the Constitution. Instead, he downplayed the subject matter, describing the entire essay as one that would treat, with "brevity," various "miscellaneous points" relevant to the ratification debate that had for whatever reasons not been previously addressed.[4] Given the centrality of the bill-of-rights objection to the Antifederalist campaign, it is striking that Hamilton chose to offer his response as if it the whole issue were worth little more than passing reference as *The Federalist* tied up loose ends.[5] Second, Hamilton was among the most active participants in New York's ratifying convention, where some delegates argued that New York should not ratify the Constitution unless a bill of rights were added to that document.[6] Hamilton opposed such a conditional ratification.[7]

(1996) (describing this rationale as both "accepted by the framers in the convention" and "the settled Federalist response to the charge of omission of a bill of rights"). It is worth noting that this account has not always been conventional. No judicial opinion cited *Federalist* 84's enumerated-powers explanation for the initial absence of a bill of rights until Justice Stephen Field's dissent in *Knox v. Lee*, 79 U.S. 457 (1871).

[4] THE FEDERALIST NO. 84 (Alexander Hamilton).

[5] One might think that it was logical for Hamilton to save this explanation for the end of *The Federalist*, because it is the sort of global point about the Constitution that would be best understood if all of the system's workings had already been explained. But given that the ratification debates unfolded dynamically over the course of nearly a year, there was from a strategic standpoint a premium on introducing important ideas into the debate while people were still making up their minds. And there were plenty of earlier points in *The Federalist* where Publius could have cogently explained the idea that the enumerated powers obviated the need for a bill of rights, had Hamilton and his co-authors wished to do so. To give just two examples, such an explanation might have come with *Federalist* 23, in the course of Hamilton's argument that the Constitution's opponents were making unwarranted and inflammatory allegations about the dangers of the powers the government would wield, or after *Federalist* 45, when the series transitioned from discussions of legislative power to other topics like the federal executive and the separation of powers. At either of those junctures, among others, Publius would have given the audience everything it needed to understand the claim that the enumerated powers obviated a bill of rights.

[6] *See, e.g.*, 22 DHRC, *supra* note 1, at 2110–12 (statement of John Lansing, July 7, 1788); *id.* at 2126 (statement of John Lansing, July 10, 1788).

[7] *Id.* at 2160 (July 12, 1788).

But in giving his reasons, he never offered the enumerated-powers explanation for the Constitution's absence of a bill of rights. Apparently, he was willing to offer that justification in *Federalist* 84—late, and as if only by-the-by, and while writing under a pseudonym. But he was not willing to own the argument when standing up in front of a well-informed body of citizens who could respond to him directly. All in all, it seems that Hamilton—and the rest of the Publius trio[8]—did not want to rest too much on the enumerated-powers explanation.

The major reason why the authors of *The Federalist* did not want to foreground the enumerated-powers explanation, I suggest, is that it was a bad argument and easily refuted. As Richard Henry Lee and several other critics wrote, the idea that it would be dangerous for the Constitution to include affirmative prohibitions to protect people's rights is hard to square with the fact that the Constitution already contained affirmative prohibitions to protect people's rights, such as the prohibitions on bills of attainder and ex post facto laws.[9] More generally, the idea that the Constitution gave Congress no power sufficient for interfering with the people's liberties was hard to take seriously in light of the considerable suite of powers that the Constitution clearly did confer—as

[8] James Madison offered the enumerated-powers explanation for the absence of a bill of rights once, in Congress in September 1787, and was immediately confronted with a set of compelling rebuttals by Richard Henry Lee, who was not buying the argument for a moment. James Madison and Richard Henry Lee (Sept. 27, 1787), *in* 13 DHRC, *supra* note 1, at 237. After that exchange, Madison did not repeat the argument (either in his capacity as Publius or in his signed writings) for nearly the entire length of the ratification process. At the very end, on the last day before the Virginia Convention voted, Madison did include this claim about enumerated powers and a bill of rights among his arguments. James Madison (June 24, 1788), *in* 10 DHRC, *supra* note 1, at 1507. Reasonable people can differ as to what this record signals, but here is one interpretation: he tried the argument once, recognized quickly that it was weak and liable to be shredded, and therefore stopped making it, but at the last moment when faced with a close vote he threw in every argument he could muster. Two years later, when Madison in the House of Representatives made the proposal that became the amendments we know as the Bill of Rights, he acknowledged that some people had argued that a bill of rights was unnecessary given the Constitution's enumeration of congressional powers, but he characterized that argument as "not conclusive to the extent which has been supposed." *See* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 823-824 (Charlene Bangs Bickford et al. eds., 1992) [hereinafter DHFFC] (June 8, 1789).

[9] *See* Richard Henry Lee to Samuel Adams (Oct. 27, 1789), *in* 13 DHRC, *supra* note 1, at 484— 85; *Brutus II*, N.Y.J., Nov. 1, 1787, *reprinted in* 13 DHRC, *supra* note 1, at 527-29; *Cincinnatus*, N.Y.J., Nov. 8, 1787, *reprinted in* 14 DHRC, *supra* note 1, at 11, 12; *Brutus I*, N.Y.J., Oct. 18, 1787, *reprinted in* 13 DHRC, *supra* note 1, at 416. See also Ryan C. Williams, *The Ninth Amendment as a Rule of Construction,* 111 COLUM. L. REV. 498, 512 (2011) (noting that "Federalist supporters of the Constitution never mustered a cogent response" to this point).

prominent Antifederalists repeatedly pointed out.[10] Congress had the power to tax, to regulate commerce, and to make all laws necessary and proper for carrying those other powers into effect. Who could be sure that Congress would not impose customs duties and then issue generalized search warrants to empower its agents to conduct widespread and invasive searches of people's homes looking for contraband, as the British colonial administration had? Congress had the power to raise and support armies. Who could be sure that Congress would not expropriate private property to keep such armies supplied? Moreover, the premise that Congress would have no powers beyond those enumerated in the Constitution was hotly disputed.[11] Nothing in the Constitution said that the list of congressional powers was exclusive. (The Tenth Amendment was not yet part of the Constitution, and Americans in the 1780s did not read Article I's Vesting Clause to mean that Congress was limited to its textually enumerated powers.[12]) As a result, people leery of excessive central power reasonably perceived Federalist assurances that the Constitution would work that way as less than fully reliable.

In spite of these weaknesses, some prominent Federalists did try to persuade the ratifying public that the Constitution's enumerated powers made a bill of rights unnecessary or undesirable.[13] But there is little indication that anyone

[10] *See, e.g.*, George Mason, Speech at the Virginia Ratifying Convention (June 14, 1788), *in* 9 DHRC, *supra* note 1, at 936–40; *Federal Farmer*, LETTERS TO THE REPUBLICAN, Nov. 8, 1787, *reprinted in* 19 DHRC, *supra* note 1, at 236.

[11] *See, e.g.*, Thomas Jefferson to James Madison (Dec. 20, 1787), *in* 8 DHRC, *supra* note 1, at 483 (criticizing the idea that the general government would have only the powers specifically given as "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."); Jefferson to Uriah Forrest (Dec. 31, 1787), *in* 8 DHRC, *supra* note 1, at 488 (calling the idea that the general government would have only the powers specifically given "a *gratis dictum*, the reverse of which might just as well be said"); *Cincinnatus I*, N.Y.J., Nov. 1, 1787, *reprinted in* 19 DHRC, *supra* note 1, at 162; *An Old Whig II*, PHILA. INDEP. GAZETTEER, Oct. 17, 1787, *reprinted in* 13 DHRC, *supra* note 1, at 400; *Centinel II*, PHILA. FREEMAN'S J., OCT. 24, 1787, *reprinted in* 13 DHRC, *supra* note 1, at 460; *Federal Farmer*, LETTERS TO THE REPUBLICAN, Nov. 8, 1787, *reprinted in* 19 DHRC, *supra* note 1, at 233.

[12] *See* Richard A. Primus, *Herein of "Herein Granted": Why Article I's Vesting Clause Does Not Support the Doctrine of Enumerated Powers*, 35 CONSTITUTIONAL COMMENTARY 301, 323–26 (2020).

[13] *See, e.g.*, James Wilson, Speech at a Public Meeting in Philadelphia (Oct. 6, 1787), *in* 13 DHRC, *supra* note 1, at 339–40; Charles Pinckney (Jan. 16, 1788), *in* 27 DHRC, *supra* note 1, at 97; James Iredell, *Marcus I*, NORFOLK AND PORTSMOUTH J., Feb. 20, 1788, *reprinted in* 16 DHRC, *supra* note 1, at 163–64, 168.

believed them.[14] Over and over, in tones ranging from the skeptical to the incredulous, critics pointed out the flaws in that justification for the absence of a bill of rights.[15] The demand for such a bill continued in full force.[16] And as the criticisms of the enumerated-powers justification piled up, the fact that some of the more discerning Federalists (including James Madison[17] as well as Hamilton) were hesitant to defend that justification quietly testified to the reality that it was not a justification worth defending. If the Constitutional Convention really had omitted a bill of rights because it trusted the enumeration of powers to do the necessary work, it overestimated the public's willingness to put confidence in that approach.

But another possibility seems more likely. The enumerated-powers justification for the absence of a bill of rights was not, I suggest, an authentic account of the Convention's thinking. It was a rationalization offered after the fact and correctly diagnosed as such by the public.[18]

The evidence for this conjecture is not merely that the argument is weak on its own terms, such that it is hard to think that the savvy Framers would have staked American liberties on so tenuous a theory. It is also a matter of the complete absence of contemporary evidence supporting the idea that the Convention acted on or even considered that reason for omitting a bill of rights.

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[14] *See* Andrew Coan & David S. Schwartz, *The Original Meaning of Enumerated Powers*, 109 IOWA L. REV. 971, 1009 (2024) (describing the argument as "widely questioned and disbelieved by Antifederalists"); Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 617–18 (2014); Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357, 377–78 (2007).

[15] *See, e.g.*, Thomas Jefferson to James Madison (Dec. 20, 1787), *supra* note 11; *Cincinnatus I*, *supra* note 11; *An Old Whig II*, *supra* note 11; *Centinel II*, *supra* note 11; *Federal Farmer*, *supra* note 11. According to William Riker's empirical study, the volume of Antifederalists writing denigrating this explanation for the absence of a bill of rights was vastly greater than the volume of Federalist writing proposing and defending it—a fact that Riker took to indicate that the Antifederalists believed they had a winning position on the issue, because they invested heavily in drawing attention to it. See RIKER, *supra* note 3, at 82–88. I note this observation without endorsing the general idea that the volume of published material reliably indicates the quality or perceived quality of that material; the empirical fact can generate such a hypothesis, but it is not sufficient as proof.

[16] *See, e.g.*, MAIER, *supra* note 3, at 56 (describing the continuing push for a bill of rights).

[17] *See supra* note 8 (describing Madison's making the argument once and then not again until the very end).

[18] *See* Graber, *supra* note 14; LEONARD LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 156 (1988) (arguing that it is difficult to think that the Framers "actually believed their own arguments to justify the omission of a bill of rights").

Nothing in any surviving document written while the Philadelphia Convention was working indicates that the Framers omitted a bill of rights on that rationale. Neither the Convention Journal nor any of the delegates' notes or private correspondence written before the Convention adjourned records anyone at the Convention propounding or acting on that idea. There are two brief passages in Madison's notes that can be read to indicate that delegates held that theory, but only by making multiple inferences from short statements attributed to a single delegate—Connecticut's Roger Sherman—and both passages are better read in other ways.[19] And in any event the relevant passages are not contemporary records of the Convention, because Madison wrote them years later, when he revised his journal after the fact.[20]

That the contemporary records of the Convention give no indication that the Framers omitted a bill of rights because they trusted the enumeration of powers to do the necessary limiting work does not prove that the Framers did not act on that theory. Maybe they did and nobody happened to note the fact in writing.[21] Or maybe someone did note it in writing, and the relevant records

[19] *See infra* Part I. For an example of a scholar who has read both passages in the way that I am criticizing, see RIKER, *supra* note 3, at 86–87.

[20] *See* MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION, 141, 187 (2015).

[21] In an interesting interpretation, Gordon Wood argued that the enumerated-powers explanation for the absence of a bill of rights was genuine even if the Framers had not acted on it consciously. In Wood's account, the Framers did not pay attention to the question of a bill of rights during most of the Philadelphia Convention because the limitation of power simply was not the project that interested them. Their focus was on empowering the general government. But in the ratification debates, when the complaint that the Constitution lacked a bill of rights became salient, the Federalists grasped clearly what they had earlier understood inchoately: that in this new order, a bill of rights was unnecessary because the government would be inherently limited, with all power not delegated to it held by the people. Wood thus regarded the Federalists who made this argument during the ratification debates as sincere, albeit not as articulating a theory on which the Convention had consciously acted. The Antifederalists who regarded the explanation as nonsense, in Wood's view, reacted as they did because they failed to grasp the Federalists' new idea, which was genuine. See GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 538–41 (1969). Wood's account has the virtue of recognizing that the Convention did not deliberately omit a bill of rights on the enumerated-powers theory, and it also has the virtue of treating the Federalists who made the enumerated-powers argument during the ratification debates as sincere. (Other things being equal, an interpretation that takes statements as authentic representations of the speakers' ideas is usually preferable to one that must resort to the claim that the speakers were dissembling.) But in the end, for reasons given in this article, Wood's account seems too credulous. There are simply too many weaknesses with the enumerated-powers explanation and too many indications that leading Federalists understood their argument to be weak.

have been lost. But it seems reasonable to think that a decision to proceed on that basis would have left some trace in the record. The decision to forgo a bill of rights was not a minor matter, and the idea that the enumeration of powers would make a bill of rights unnecessary is not so obvious that everyone would have understood and agreed with it without some discussion. (Certainly the ratifying public did not find it intuitive.) Given the absence of evidence of any such discussion and the weakness of the idea on its merits, it seems reasonable to doubt that Hamilton's famous explanation in *Federalist* 84 was an authentic account of the Convention's motivations rather than an *ex post* rationalization—indeed, a rationalization weak enough that Hamilton would not argue the point on the floor of New York's ratifying convention.

I suggest that we replace the canonical story about enumerated powers as the reason why the Convention omitted a bill of rights with a more complex story that foregrounds a different set of considerations. In all likelihood, there was no single reason why the Convention declined to propose a bill of rights along with the draft Constitution. The Framers were many people thinking many things, and different people among them may have acted for different reasons, or different mixes of reasons. That said, it is possible to identify some likely motivating factors. In that spirit, I wish to draw attention to one consideration that I suspect played a significant role and which has been underestimated in conventional thinking on the subject: the sectional conflict over slavery. There is, of course, an extensive historical literature about slavery in eighteenth-century America, and a fair amount of it engages questions about the relationship between slavery and the Founding.[22] But even historians who have given significant attention to the role of slavery in shaping the work of the Constitutional Convention have neglected its likely role in discouraging the Framers from including a bill of rights.[23]

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[22] *See, e.g.*, ALAN TAYLOR, AMERICAN REVOLUTIONS: A CONTINENTAL HISTORY, 1750–1804 (2016); GEORGE WILLIAM VAN CLEVE, A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC 103–60, 166–72 (2010); DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION 72–105 (2009); IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA (1998); PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (1996); SYLVIA R. FREY, WATER FROM THE ROCK: BLACK RESISTANCE IN A REVOLUTIONARY AGE (1991); DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823 (1975).

[23] *See, e.g.*, MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 257–304 (2016) (describing various ways in which slavery affected the work of the Convention but not connecting that issue to the omission of a bill of rights); VAN CLEVE, *supra* note 22, at 103–60, 166–72 (same); RICHARD BEEMAN, PLAIN, HONEST MEN: THE

The sectional conflict over slavery was not as sharp in 1787 as it would later become. Speaking generally, the American North was at that time more tolerant of slavery than it would be in the middle of the nineteenth century, and there were more leading white southerners in 1787 willing to describe slavery as an evil than there would be two generations later. Still, the sections had meaningfully different postures toward slavery, as everyone knew, and that difference constantly had to be managed as the delegates sought to formulate a draft constitution for the entire Union. Throughout the Convention, various provisions were proposed, opposed, revised, or insisted upon because of the impact they might have on slavery. Most of the time, the delegates ultimately reached agreements that the Convention as a whole could tolerate. After all, even though some delegates were opposed to slavery, they all lived in a world where slavery was a reality, and none of them was sufficiently uncompromising or idealistic on the point so as to refuse to go along with a constitution that would let it continue.

Nevertheless, an attempt to adopt a bill of rights might have overtaxed the Convention's capacity for slavery-related compromises. As the Framers knew, drafting a bill of rights would have required the Convention to choose between two different patterns of language that were standard in state bills of rights at the time, one of them understood to be accommodating of slavery and one of them understood to be hostile. The choice between the two would have been stark and highly salient: in 1787, bills of rights standardly appeared as *prefaces* to constitutions,[24] rather than as the sort of epilogue to which modern Americans have become accustomed. Including a bill of rights might therefore have meant opening the proposed Constitution with language that implied a controversial stand on the nation's most explosive issue, rather than burying that issue in compromise and euphemism deep within the document. Because it would force the slavery issue so far into the foreground, an attempt to formulate a bill of rights to accompany the Constitution might have provoked irresolvable differences between northern and southern delegations, thus threatening to prevent the Convention from agreeing on a Constitution at all. I suggest, therefore, that one important reason why the Constitution originally contained no bill of

MAKING OF THE AMERICAN CONSTITUTION 341–44 (2009) (describing the Convention's decision to omit a bill of rights without any reference to slavery, despite giving considerable attention throughout the book to the role of slavery at the Convention); WALDSTREICHER, *supra* note 22, at 72–105 (surveying many ways in which slavery permeated the Convention's work but drawing no connection to the omission of a bill of rights).

[24] *See* N.H. CONST. of 1776; MASS. CONST. of 1780; PA. CONST. of 1776; MD. CONST. of 1776; N.C. CONST. of 1776.

rights was that the delegates believed that an attempt to compose one might wreck the entire enterprise over the issue of slavery.

Recognizing the role that slavery likely played in preventing the Convention from drafting a bill of rights is important for two reasons beyond the sheer value of getting the story right. First, it stands as a reminder of the general pervasiveness of slavery and the issues of slavery at the time of the Founding. Theorists and practitioners of constitutional law are of course aware that slavery was present in 1780s America. Still, within the discourse of constitutional law, slavery is sometimes imagined as an important matter that stood off to the side, rather than as something deeply woven into everything else that was happening. Indeed, the fact that the canonical explanation for why the Constitution originally contained no bill of rights does not mention slavery is an excellent example of the tendency to minimize slavery's place in the story of American constitutionalism.[25] Second, understanding the way in which the slavery issue probably impeded the drafting of a bill of rights can act as a corrective to a different tendency: the tendency to imagine the Founders in general as either proslavery or at least as unbothered by slavery. Many of the Founders did have views like those, of course. But the reason why the Convention could not draft a bill of rights, on my account, is precisely that others among the Founders held strong antislavery views.

What follows has two parts. First, I show that there is no contemporary evidence indicating that the Convention omitted a bill of rights for the enumerated-powers reason that Hamilton adduced in *Federalist* 84. Second, I suggest the likely role of the slavery conflict in producing that omission.

Before proceeding, a word is in order about what Founding-era Americans had in mind when they spoke of bills or declarations of rights. Today, when the portion of the Constitution we call the Bill of Rights has become a central part not just of constitutional law but of American civic culture, that text shapes our sense of what a "bill of rights" is. In particular, it gives the impression that a bill of rights is a list of specific rights or rights-protective rules. But in 1787, the term had a different meaning—one that mapped the bills of rights that most of the American states had approved when adopting new constitutions in the 1770s and 1780s.[26] On that conception, a bill of rights (or a "declaration of

[25] For two exceptions—that is, scholars within the field of constitutional law who have suggested a connection between slavery and the initial absence of a bill of rights—see John Mikhail, *Does Originalism Have a Natural Law Problem?*, 39 LAW AND HIST. REV. 361, 364-65 (2021); William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 239-40 (2012).

[26] *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 284—86 (1998); GERARD N. MAGLIOCCA, THE HEART OF THE CONSTITUTION: HOW THE

rights"—those two phrases were interchangeable) normally stated fundamental political principles explaining the authority and perhaps the structure of a government as well as specifying particular rights.[27] Indeed, the fact that bills of rights generally began by setting out fundamental justifications for government is what made it natural for such texts to appear at the beginning of constitutions, rather than as articles tacked on to the end.[28]

Consider Virginia's Bill of Rights, adopted in 1776. That document opened with a series of general principles. Section 1 asserted that "all men by nature [are] equally free and independent and have certain inherent rights" not subject to alienation "by any compact," including "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." Section 2 declared "That all power is vested in, and consequently derived from, the people." Section 3 described the purposes of government and the right of "a majority of the community" to "reform, alter, or abolish" a system of government when the public welfare required it. The next four sections articulated a series of principles about officeholding, elections, and the separation of powers. After all that was done, the Bill went on to articulate specific rights with respect to things like jury trials, criminal punishments, and religious freedom.

Given the prevailing conceptions of bills or declarations of rights, Founding-era Americans did not generally regard the ten amendments ratified in 1791 as satisfying the demand for a bill of rights.[29] In the standard modern telling, of

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BILL OF RIGHTS BECAME THE BILL OF RIGHTS (2018). As Magliocca has pointed out, thinking of those state bills and declarations of rights as the model created a different sense of what a bill of rights was than would be the case if the model were the English Bill of Rights. *See* MAGLIOCCA, *supra*, at 26-27. But the English bill had been written a century before and an ocean away, and it was intended to operate within a system of constitutional monarchy. As such, it was a much less proximate example than the several bills adopted since the 1770s, in America, and intended to operate within republican governments. It was accordingly those recent bills and declarations adopted by the American states that set the template.

[27] In Madison's notes for his June 1787 speech in the House of Representatives recommending constitutional amendments, he identified the "Contents of Bills of R[ig]hts" as falling into six categories, the first of which was "assertion of primitive equality &c" and the second of which was about the "rights exerted in form[ing] Gov[ernmnen]ts." After that came natural rights, positive rights, structural features of a system of government, and "moral precepts for the administr[ation] & nat[iona]l character[.]" See 16 DHFFC, *supra* note 8, at 724.

[28] *See* JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE 96 (2024).

[29] *See, e.g.*, Kenneth R. Bowling, *'A Tub to the Whale': The Founding Fathers and the Adoption of the Federal Bill of Rights*, 8 JOURNAL OF THE EARLY REPUBLIC 224 (1988) (describing the

course, public clamor for a bill of rights during the ratification campaign prompted the adoption of a bill of rights after the Constitution was ratified, in the form of those ten amendments.[30] And indeed, when Madison introduced his proposed collection of amendments in the House of Representatives in 1789, he described the package as responding at least in part to the public demand for a bill of rights. But more particularly, what he identified with a bill of rights was his proposal

> 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.[31]

That looked like bill-of-rights language; indeed, it was largely taken from Virginia's 1776 bill. But later in the summer, when the House of Representatives approved a modified version of Madison's overall package, it rejected this declaration of principles, and it also decided that any amendments would appear at the end of the Constitution, rather than at the beginning or as changes to the body.[32] So the articles of amendment that Congress ultimately approved would not appear at the start of the Constitution, where eighteenth-century Americans would have looked for a bill of rights, and they also did not include the kind of broad statement of political principles that Americans at the time expected to appear at the start of a bill of rights. (To be sure, one might think that the text we know as the First Amendment is at least a cousin of the sort of statement of fundamental principles that opened bills of rights. But the proposal that Congress sent to the states did not begin with what we know as the First

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dissatisfaction, among proponents of a bill of rights, with the amendments that Congress actually proposed in 1789).

[30] *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 769 (2010); New York Times Co. v. United States, 403 U.S. 713, 715–16 (Black, J., concurring); 1 RONALD D. ROTUNDA & JOHN E. NOWAK, *The Bill of Rights*, *in* TREATISE ON CONST. L. SUBSTANCE & PROC. § 1.1(g)(ix), Westlaw (updated July 2024); TRIBE, *supra* note 3.

[31] See 11 DHFFC, *supra* note 8, at 821 (June 8, 1789) (Madison, saying that "The first of these amendments, relates to what may be called a bill of rights[.]"); 4 DHFFC, *supra* note 8, at 9 (recording Madison's first proposed amendment) (emphasis added).

[32] See 11 DHFFC, *supra* note 8, at 1308 (August 19, 1789). The surviving records do not shed light on the reasons for the rejection of Madison's proposed statement of principles. *See* MAGLIOCCA, *supra* note 26, at 44.

Amendment. Congress circulated twelve proposed amendments, of which our First Amendment was third. The first of the proposed amendments, which was never ratified, was a dryly written text altering the mathematical formula for setting the size of the House of Representatives—important, certainly, but in no way resembling the statements of principle that normally opened of bills of rights.[33])

Perhaps not coincidentally, Congress did not describe the proposed amendments as a bill of rights when it sent them to the states for ratification.[34] And for a hundred years thereafter, Americans almost never described the first ten amendments as a bill of rights.[35] Only late in the nineteenth century did that nomenclature become common, and only in the twentieth did it become standard.[36] In 1791, Americans knew what a bill of rights was, as they used that term, and to most of them, the new amendments didn't look like one. So Americans who objected to the absence of a bill of rights during the ratification debates

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[33] As circulated to the states, the first proposed amendment read as follows: "After the first enumeration, required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred; after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons." 1 DHFFC, *supra* note 8, at 208.

[34] MAGLIOCCA, *supra* note 26, at 45; 1 DHFFC, *supra* note 8, at 208.

[35] *See* MAGLIOCCA, *supra* note 26, at 46–49, 52–54.

[36] *See* MAGLIOCCA, *supra* note 26, at 64–76, 88, 100–107. This is not to say that there were zero instances in which Founding-era Americans described the initial package of amendments as a bill or declaration of rights. During the debate over those amendments in Congress, several representatives used that language, either in the debates themselves or in their correspondence. *See, e.g.*, 11 DHFFC, *supra* note 8, at 1230 (August 13, 1789) (statement of Roger Sherman, describing the amendments proposed in Congress as "a declaration of rights"); Fisher Ames to Thomas Dwight, June 11, 1789, *in* 16 DHFFC, *supra* note 8, at 784 (saying that Madison had introduced amendments and that the proposal "contains a Bill of Rights"); Thomas Jefferson to James Madison, August 28, 1789, *in* 16 DHFFC, *supra* note 8, at 1410, 1411 ("I must now say a word on the declaration of rights you have been so good as to send me.") But most and perhaps all of these references occurred before the House on August 19 completely eliminated Madison's proposal for an amendment that would put broad language about the principles of the foundations of government at the start of the Constitution. *See* 11 DHFFC, *supra* note 8, at 1308 (August 19, 1789) (rejecting Madison's first proposed amendment). (Jefferson's letter to Madison was dated August 28, but it was written from Paris, and Jefferson's most recent information about the goings-on in Congress was a letter from Madison dated June 30. *See* 16 DHFFC, *supra* note 8, at 1410.)

went right on objecting to that absence after the first ten amendments were adopted: in their view, the Constitution still did not have a bill of rights.[37]

In the summer of 1787, eleven of the thirteen American states had recently written new constitutions.[38] Eight of those eleven had bills or declarations of rights.[39] Given that not every state had a bill of rights, it seems clear that it was thinkable, at the time, to draft a constitution without one. But given that most of the states did have bills of rights, it also seems clear that the drafters of a constitution would confront the question of whether to include a bill of rights. Famously, the General Convention did not adopt one for the Constitution of the United States. The question is why not.

I. OMISSIONS

Modern constitutional lawyers are familiar with eighteenth-century sources in which Federalists explained that the original Constitution had no bill of rights because the Framers intended the enumeration of congressional powers to do the necessary limiting work. But like *Federalist* 84, every one of those sources was composed after the General Convention adjourned. If one restricts the universe of evidence to sources written while the Convention was working, there are zero documents—zero—indicating that the Framers decided to omit a bill of rights on the theory that the Constitution's enumeration of powers would make such a bill superfluous.

There is only one known account of the General Convention's discussion of whether to include a bill of rights in the draft for a new Constitution, and

[37] *See* MAGLIOCCA, *supra* note 26, at 42–46.

[38] Connecticut and Rhode Island continued to operate on the basis of their colonial charters.

[39] The statement that eight states had bills or declarations of rights entails some exercises of judgment about what counts as such a bill or declaration (and so would any other statement of how many states fell in this category). Notably, Georgia had a constitution that began with a preamble asserting "the common rights of mankind" and "the rights and privileges" that Americans "as freemen … are entitled to by the laws of nature and reason," but neither that preamble nor anything else Georgia adopted was officially called a bill or declaration of rights. It seems to me that in substance Georgia's preamble was such a bill or declaration, so my count of eight includes Georgia. The other seven are New Hampshire, Massachusetts, Pennsylvania, Virginia, Delaware, Maryland, and North Carolina. Why these eight states were the ones with bills or declarations of rights is, I think, a question without any single answer: no obviously relevant criterion distinguishes these eight states, as a group, from the other five. The question seems better addressed at the retail level, by asking about the particular processes of constitution-formation in each state individually. For example, Connecticut and Rhode Island did not have bills of rights because they did not adopt new constitutions at all in the revolutionary period; they continued to use their royal charters until 1818 and 1842, respectively.

that account was not written while the Convention sat. It consists of a few lines from Madison's journal of the Convention. Serious scholars have taken it at face value.[40] But as Mary Sarah Bilder has demonstrated, Madison did not write the relevant portions of his journal until 1789, more than two years after the events he described.[41] Madison's rendition of the conversation is therefore a post-ratification source, not a piece of contemporaneous evidence. It accordingly needs to be discounted, and for more than one reason. First, recollections of events two years in the past can be unreliable. Second, the intervening ratification debates, in which some leading Federalists did make the enumerated-powers argument about a bill of rights, might have affected Madison's memory (or presentation) of the Convention. But in the end, the reliability of Madison's account is not the dispositive question. Even if Madison's journal were reliable evidence of what happened when the Convention voted against a bill of rights, it would not support the claim that the Convention's rationale had to do with the limiting function of Congress's enumerated powers.

Madison's account is of a conversation on September 12, 1787, after nearly all the substantive work of the Convention was done and only five days before the body adjourned. According to Madison, three delegates addressed the topic of a bill of rights: George Mason, Elbridge Gerry, and Roger Sherman. The comments attributed to each man are brief. In Madison's rendering, Mason announced that he favored including a bill of rights as a preface to the Constitution and, although he was not formally moving for the appointment of a committee to draft such a bill, he "would second a Motion if made for the purpose[.]"[42] Gerry made a motion to appoint such a committee, and Mason seconded it.[43] Sherman then spoke in opposition. No bill of rights was needed in the Constitution, he argued, because the several state bills of rights would supply the necessary protections.[44] Mason disagreed, pointing out that "The laws of the U.S. are to be paramount"[45]—meaning, presumably, that state declarations of rights could not block oppressive congressional legislation in a

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[40] *See, e.g.*, BEEMAN, *supra* note 23, at 341–42; RIKER, *supra* note 3, at 87.

[41] BILDER, *supra* note 20, at 141, 187. Most of Madison's notes were originally written within a few days of the proceedings, as Bilder explains, but the portions for days after August 21 were not written until much later.

[42] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587–88 (Max Farrand ed., Yale Univ. Press 1911) [hereinafter FARRAND'S RECORDS] (per Madison).

[43] 2 FARRAND'S RECORDS, *supra* note 42, at 588 (per Madison).

[44] *Id.*

[45] *Id.*

system where federal law would be supreme over state law. No further discussion is recorded. By a vote of ten states to none, the Convention then rejected the proposal to appoint a committee to draft a bill of rights.[46] Madison's journal records nothing more about the conversation, and neither does any other surviving source.

Madison's account sheds little light on why the Convention rejected the motion. In the first place, the conversation might not have happened as described: Madison was writing two years later. Nor, if the conversation did happen as described, can we know whether the delegates voted as they did because they agreed with Sherman's argument or for other reasons. Either alternative is conceivable. A modern lawyer might think Mason's rejoinder to Sherman obviously correct, because federal law is supreme, but Sherman was no simpleton, and his view, if in fact he took the view Madison attributed to him, likely made more sense in his own time than it would today. Founding-era jurisprudence often conceived of declarations of rights as pointing to preexisting rights in a natural-law vein, rather than establishing rights as a positive-law matter.[47] At least sometimes, Sherman held that view.[48] And on that conception, Sherman would not have been saying that the state declarations established positive-law rights enforceable against federal law. He would have been saying that the state declarations would inform adjudicators of the existence of a preexisting law superior to federal law. We have no way of knowing, however, how many (if any) of the state delegations shared that view, much less how many voted against preparing a bill of rights on that rationale. And in any case, nothing in Madison's account gives any indication that anyone voted against drafting a bill of rights on the theory that such a bill would be superfluous given the Constitution's enumeration of congressional powers.

Madison's journal for a different day near the end of the Convention's proceedings does contain one comment that might seem to a modern audience to resonate with the idea that a bill of rights would be unnecessary in light of the Constitution's enumeration of congressional powers. On September 14, two days after rejecting the motion to have a committee prepare a bill of rights, the Convention by a vote of six states to five defeated a motion calling for the Constitution to include language stating that "The liberty of the Press shall be

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[46] *Id.*

[47] *See, e.g.*, GIENAPP, *supra* note 28, at 90–94; Jud Campbell, *Constitutional Rights Before Realism*, 5 UNIV. ILL. L. REV. 1433, 1436–40 (2020).

[48] *See* 11 DHFFC, *supra* note 8, at 1230 (August 13, 1789) (statement of Roger Sherman) ("The amendments reported are a declaration of rights, the people are secure in them whether we declare them or not . . . .").

inviolably preserved."[49] In Madison's journal, the entirety of the recorded discussion on the motion is one comment by Sherman, reading as follows: "It is unnecessary—The power of Congress does not extend to the Press."[50]

A reader primed to think that the Convention omitted a bill of rights because it trusted the enumeration of powers to do the limiting work might see this comment from Sherman as an indication that the Framers did indeed proceed on that theory.[51] Sherman seems to have argued that a particular right—the liberty of the press—need not be affirmatively guaranteed because Congress had no power to abridge that right in the first place. With modern assumptions about enumerated powers in place, it is easy to infer that Sherman's statement that "The power of Congress does not extend to the Press" meant "No enumerated power of Congress would enable Congress to regulate the press." On that understanding, Sherman would have been articulating, in the context of press freedom, the conventional view that the limits of Congress's enumerated powers made a bill of rights superfluous.

But this line of reasoning faces multiple problems. First, as Sherman surely knew, the Constitution enumerated several congressional powers that could be used to restrict or censor publications unless blocked by some affirmative limit. A legislature with the power to grant copyrights could forbid or punish infringing publications. A legislature with the power to tax could tax the sale of newspapers, thus making them more costly to buy and reducing their circulation. Or it could make the printing of newspapers ruinously expensive by taxing ink or paper or printing presses. A legislature with the power to regulate commerce could restrict the sale of newspapers—or of particular newspapers. Certainly a Congress with plenary power to legislate within the geographical district that would become the nation's capital city would have the power to impose censorship there, unless some affirmative prohibition on censorship got in the way. It therefore makes sense to ask whether Sherman's assertion that the power of Congress did not extend to the press had some basis other than a view about the extent of Congress's enumerated powers.

As it happens, a less problematic reading is readily available. On one common eighteenth-century conception, the "liberty of the press" was a natural or

[49] According to Madison, the vote was seven states to four. 2 FARRAND'S RECORDS, *supra* note 42, at 618. The Convention's Journal and McHenry's notes both recorded the vote as six states to five. *Id.* at 611, 620. Given that there are two sources against one, and given that one of the majority sources is the official Journal, six to five seems more likely to be right.

[50] *Id.* at 618.

[51] For an example of a scholar who read Sherman's two interventions this way, see RIKER, *supra* note 3, at 86–87.

fundamental common-law right providing that government could restrict the press only by the action of representative institutions and only in pursuit of the public good.[52] So conceived, the liberty was in essence a common-law privilege, defeasible by appropriate governmental action but not otherwise—a limit preventing press regulation that was not properly motivated and sanctioned by the people's representatives. As Jud Campbell has explained, this conception of liberty of the press was often understood to operate whether or not a jurisdiction proclaimed it in something like a constitution or a bill of rights.[53] Explicit proclamation might still be a good idea, of course, but as a matter of recognizing a liberty rather than establishing one—just as bills of rights generally were often understood as recognizing preexisting rights rather than as establishing rights in a positive-law vein. So perhaps Sherman simply meant to say that the liberty of the press that the legal system generally presumed as a limit on government action would apply to the federal government. If so, an explicit specification of the liberty of the press would be unnecessary—not because no enumerated power would enable Congress to restrict the press in the absence of affirmative prohibitions, but because the relevant affirmative prohibition was implicitly built into the system. Indeed, Sherman might simply have been repeating the argument he had made two days earlier in response to Mason's call for a bill of rights: the state declarations of rights existed, and they recognized the preexisting liberty of the press, so it should already be clear that Congress had no power to interfere with the press, except in accordance with the public-purpose and representative-approval strictures that the liberty of the press required.

The point here is not that Sherman must have been making a point about common-law privilege rather than one about enumerated powers. Maybe he was, and maybe he wasn't. Madison's journal entry two years after the fact does little to make either possibility more likely than the other. The enumerated-powers argument had obvious weaknesses, but the common-law argument was not unassailable, either. The Convention rejected the proposal to include a declaration about the liberty of the press, but only by a vote of six states to five, so a large share of the delegates disagreed with whatever argument Sherman was making. And during the ratification debates, supporters of the Constitution did

[52] Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017).

[53] *Id.*

make the enumerated-powers argument about liberty of the press.[54] So that argument was clearly thinkable, even if it was weak. Maybe Sherman meant to make it.

But even if Sherman did mean to say that the enumeration of Congress's powers would prevent Congress from interfering with the liberty of the press, it does not follow that the Convention agreed, much less that the Convention omitted a bill of rights on that theory. One delegate's rationale, even if cogent, might not be shared by all the other delegates. Indeed, the reasons why it is problematic to think Sherman believed that no enumerated power would enable Congress to reach the press are also reasons why it is problematic to think that the rest of the Convention would have endorsed that idea, even if Sherman individually were persuaded. And even if the Convention did decide against a clause guaranteeing liberty of the press on an enumerated-power theory, it would not follow that the same theory explained the Convention's prior decision, two days earlier and by a much more lopsided vote, to omit a bill of rights.

The last point is worth expanding upon. For modern Americans, freedom of the press might seem central enough to what we call the Bill of Rights that an argument about the former would seem to suggest the same argument about the latter. In a kind of synecdoche, the freedom of the press might represent the entire First Amendment, and the First Amendment might seem like the lynchpin of the first ten amendments, such that an argument about the liberty of the press stands in for an argument about the Bill of Rights. But that chain of association would not have been as intuitive in the 1780s. As noted earlier, the paradigmatic elements of a bill of rights at that time were statements of general principle about the basis or structure of government. Founding-era bills or declarations of rights did commonly include statements about press freedom: section twelve of Virginia's sixteen-section Declaration of Rights, for example, called the freedom of the press "one of the great bulwarks of liberty." But the Declaration's first seven sections described general principles about the foundations of political authority and the structure of government. Only later did the Declaration articulate specific rights like the liberty of the press. To read a 1787 argument about the liberty of the press as suggesting the same substantive argument about a bill of rights thus fails to appreciate how much more would have been at stake in the latter context. The delegates at the General Convention seem to have differentiated sharply between the two issues: they rejected

[54] *See, e.g.*, Speech of Charles Pinckney to the South Carolina House of Representatives (Jan. 16, 1788), *in* 27 DHRC, *supra* note 1, at 97; James Wilson, Speech at a Public Meeting in Philadelphia (Oct. 6, 1787), *in* 13 DHRC, *supra* note 1, at 339.

the motion for a clause declaring the liberty of the press by the bare margin of six states to five, but they rejected the motion to draft a bill of rights ten states to none.

In sum, to take Madison's account of Sherman's statement about liberty of the press as good evidence for the conventional story about enumerated powers and a bill of rights, one must accept each of several questionable propositions. First, one must believe that Madison in 1789 correctly recorded an argument that Sherman made in 1787. Second, one must believe that Sherman meant to be arguing that none of Congress's enumerated powers could be used to regulate the press, even though several of the enumerated powers seem sufficient for doing so, and even though Sherman likely held a conception of liberty of the press on which he would have been saying something else. Third, one must think that six state delegations voted as they did because the rationale about enumerated powers was persuasive to them, even though on the merits it was a weak argument, and even though there might well have been other arguments advanced that Madison (two years later) neglected to record. Fourth, one must believe that the Convention's thinking about whether to make a declaration about the liberty of the press was interchangeable with its thinking about whether to draft a bill of rights, despite the fact that the second issue raised many questions that the first did not, and even though the Convention voted rather differently on the two issues.

For all these reasons, the comment Madison attributed to Sherman about the liberty of the press is weak support for the idea that the Convention omitted a bill of rights because it trusted the enumerated powers to do the necessary work. That single comment is the only thing in the records of the Convention that seems in any way to support that theory—and only if one counts Madison's 1791 additions to his Convention journal as a record of the Convention. In the absence of better evidence, it might be natural for people who have learned the conventional enumerated-powers explanation for the omission of a bill of rights to latch onto Sherman's statement and see it as support for the traditional account. But to do so would be to see what one expects to find, even when it is not really there.

II. SINS

If faith in the limiting force of the Constitution's enumeration of powers does not explain the Convention's overwhelming refusal to draft a bill of rights, what better explanations are available? At the outset, one should consider the possibility that no particular explanation is necessary. In 1787, five American

states did not have bills or declarations of rights. So perhaps the decision not to include one when drafting the Constitution of the United States was not an anomaly requiring special justification. But this point should not be overstated. Of the eleven states that had recently written new constitutions, eight had bills or declarations of rights. At the very least, the idea of including bills of rights when writing constitutions was normal. Late in the Convention's proceedings, the question of whether a bill of rights should be included was squarely put before the delegates, and they responded with a consensus of negativity. Some reason, or some combination of reasons, motivated that decision.

My suggestion is that the decision to omit a bill of rights can be substantially understood as motivated by the delegates' desire to avoid a conflict—indeed, a precisely specifiable kind of conflict—over the issue of slavery. But I stipulate that this hypothesis shares an important weakness with the enumerated-powers story I have criticized: it is not established by the testimony of documents recording the proceedings of the Convention. As noted above, the closest thing we have to a contemporary record of the substance of the Convention's conversation on the matter is Madison's brief account, which sheds little light on the question. If the delegates discussed the issue at any length, whether on the floor of the convention or privately, they did so without leaving written evidence of what they said or thought, whether in their notes of the proceedings or in their private correspondence. As a result, my suggestion that the slavery conflict played an important role does not rest on direct documentary support. It asks the audience to make inferences from circumstantial evidence. My burden here is to show why those inferences are reasonable and perhaps even compelling.

As a threshold matter, it is clear that concerns about the future of slavery played a role in the work of the Constitutional Convention.[55] The fundamental problem of how to think about republican liberty in a society that treated large numbers of human beings as slaves was a recurring preoccupation for prominent members of the Founding generation.[56] The Three-Fifths Clause, the Nonimportation Clause, and the Fugitive Slave Clause are obvious examples of slavery's impact on the Constitution. And slavery influenced the Convention in many more ways than that catalog of obvious examples indicates. The congressional power to suppress insurrections, for example, is properly understood in no small part as contemplating slave uprisings as the paradigmatic case where

[55] *See* sources cited *supra* note 23.

[56] *See* sources cited *supra* note 22.

federal power would be needed for such a purpose.[57] The prohibition on taxing exports was designed to forestall legislation that would undermine slavery by raising the cost of marketing the export-focused crops that slave labor produced.[58] These protections for slavery were not procured without opposition or censure. More than once, antislavery delegates argued against accommodating slavery or even harshly denounced slavery as a barbaric practice.[59] But proslavery delegates held their ground. Several times during the Convention,

[57] *See, e.g.*, 2 FARRAND'S RECORDS, *supra* note 42, at 364 (Aug. 21, 1787) (statement of Luther Martin, as rendered by Madison, identifying the enslaved population as a likely source of insurrections). On the background fear of slave insurrection in the Founding generation, see, e.g., DAVIS, *supra* note 22, at 9. In a similar vein, the obligation of the federal government to protect each state against domestic violence had a similar aspect. *See, e.g.*, THE FEDERALIST NO. 43 (James Madison) (justifying that federal function in part by reference to "an unhappy species of population abounding in some of the States, who during the calm of regular government are sunk below the level of men, but who in the tempestuous scenes of civil violence may emerge into the human character, and give a superiority of strength to any party with which they may associate themselves").

[58] *See* 1 FARRAND'S RECORDS, *supra* note 42, at 592 (July 12, 1787) (statement of C.C. Pinckney, as rendered by Madison); 2 FARRAND'S RECORDS, *supra* note 42, at 306 (Aug. 16, 1787) (statement of John Rutledge, as rendered by Madison); *id.* at 360 (Aug. 21, 1787) (statement of Oliver Ellsworth, as rendered by Madison) (explaining that the debate over taxing exports was really only about a small number of taxable exportable commodities, namely tobacco, rice, and indigo); *id.* (Aug. 21, 1787) (reporting that "Mr. Butler was strenuously opposed to a power over exports; as unjust and alarming to the staple States," per Madison); *id.* at 364 (Aug. 21, 1787) (statement of John Rutledge, as rendered by Madison) (noting the direct connection between the size of the slave population and the volume of exportable commodities). The slavery-related nature of the prohibition on taxing exports would be more visible to modern audiences if it had survived into the final Constitution in the form in which it was originally written. In the Constitution's first draft, the prohibition on taxing exports was bundled together with the prohibition on federal laws taxing or prohibiting the slave trade in a section that read, in its entirety, as follows: "No tax or duty shall be laid by the Legislature on articles exported from any State; nor on the migration or importation of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited." *See id.* at 183 (Aug. 6, 1787).

[59] *See, e.g.*, 1 FARRAND'S RECORDS, *supra* note 42, at 561 (July 9, 1787) (Statement of Patterson, as rendered by Madison); *id.* at 588 (July 11, 1787) (Statement of Gouvernor Morris, as rendered by Madison); 2 FARRAND'S RECORDS, *supra* note 42, at 222 (Aug. 8, 1787) (statement of Gouvernor Morris, as rendered by Madison, describing the slave trade as "defiance of the most sacred laws of humanity" and denouncing slavery as "nefarious."); *id.* at 370 (Aug. 22, 1787) (statement of George Mason, as rendered by Madison) (describing the slave trade as "infernal traffic" and warning that an enslaved population would "bring the judgment of heaven on a Country"); *id.* at 372 (Aug. 22, 1787) (statement of John Dickinson, as rendered by Madison) (declaring it "inadmissible on every principle of honor" for the Constitution to authorize the states to import slaves).

southern delegates announced bluntly that their states would support no Constitution that put the future of slavery in danger.[60]

If the Convention were going to succeed in formulating a proposal for a new constitution, it would need to finesse the slavery conflict with a document that was acceptable to people on both sides. Antislavery delegates knew that the new constitution would tolerate the continued practice of slavery, and they were prepared to concede certain protections for proslavery interests as part of the price of agreement. But there were limits. Thus, proslavery delegates never asked for a constitutional clause expressly affirming the right to hold people as slaves, nor did they seek a clause expressly forbidding either the federal government or the state governments to legislate emancipation. Proslavery delegates would presumably have been happy to have a constitution with provisions like those, but they also had a sense of what antislavery delegates would be willing to agree to. Indeed, even some delegates who were themselves slaveholders may have scrupled at expressly affirming the practice of chattel slavery in the Constitution's text. According to his own notes, Madison "thought it wrong to admit in the Constitution the idea that there could be property in men."[61] In accord with that sentiment, the negotiated settlement testified to the delicacy of the subject through its refusal to speak of the matter openly: the Constitution protected the institution of slavery in various ways, but it never referred to slavery expressly. Instead, the provisions that were most obviously concessions to slavery used euphemisms. The clause protecting the slave trade from federal interference, for example, spoke of "the migration or importation" of "persons,"[62] and the clause providing for the re-enslavement of people who had escaped from slavery (commonly called the "Fugitive Slave Clause") spoke of "person[s] held to service or labor."[63] As those examples demonstrate, it was often possible for the delegates to reach agreement on constitutional language where slavery-related issues were concerned.

But if the delegates had tried to draft a bill of rights, I suggest, they would have found it especially difficult to find language acceptable to people on both

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[60] *See e.g.*, 1 FARRAND'S RECORDS, *supra* note 42, at 605 (July 13, 1787) (statement of Pierce Butler, as rendered by Madison); 2 FARRAND'S RECORDS, *supra* note 42, at 95 (July 23, 1787) (statement of C.C. Pinckney, as rendered by Madison); *id.* at 371 (Aug. 22, 1787) (statement of C.C. Pinckney, as rendered by Madison); *id.* at 373 (Aug. 22, 1787) (statement of John Rutledge, as rendered by Madison); *id.* (statement of Hugh Williamson, as rendered by Madison).

[61] *Id.* at 417 (per Madison).

[62] U.S. CONST. art. I, § 9, cl. 1.

[63] U.S. CONST. art. IV, § 2, cl. 3.

sides of the slavery conflict. Any bill of rights proposed as part of the new national Constitution would be compared to, and interpreted against the background of, the bills of rights that already existed in most of the American states. Indeed, according to Madison's account, Mason on September 12 did not merely suggest the formation of a committee to draft a bill of rights. He suggested that such a committee should draw from the existing store of state-law examples.[64] And as the delegates surely knew, the existing state bills and declarations of rights differed from one another in ways that reflected differing attitudes toward slavery in the different states. A committee using those documents as templates would be thrown headlong into the conflict.

Consider first the constitutions of northern states where antislavery sentiment was relatively strong. The Massachusetts Constitution of 1780, drafted by John Adams, included a Declaration of Rights that began by asserting that "All men are born free and equal, and have certain natural, essential, and unalienable rights."[65] On that basis, the Chief Justice of Massachusetts had concluded that slavery was unconstitutional.[66] The Bills or Declarations of Rights in Pennsylvania[67] and New Hampshire[68] also proclaimed that all men were born free and equal, and slavery's days were clearly numbered in both of those jurisdictions.[69] But in states where slavery was more deeply rooted, bills of rights used different

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[64] 2 FARRAND'S RECORDS, *supra* note 42, at 287–88 (statement of Mason, as rendered by Madison).

[65] MASS. CONST. of 1780, Part the First, art. I.

[66] Arthur Zilversmit, *Quok Walker, Mumbet, and the Abolition of Slavery in Massachusetts*, 25 WILLIAM & MARY QUARTERLY 614, 615 (1968); *see also id*. at 622–23 (describing the 1783 case of *Caldwell v. Jennison* as having decided that slavery was unconstitutional in Massachusetts); see also *Legal Notes by William Cushing about the Quock Walker case, [1783]*, MASS. HIST. SOC'Y, https://www.masshist.org/database/viewer.php?item_id=630&br=1 [https://perma.cc/5D3V-BELF]. Given basic ways in which the judicial system in eighteenth-century Massachusetts differed from modern state judicial systems, the statement above does not mean that the Chief Justice decided (or wrote a separate opinion in) an appellate case cleanly presenting the issue of the constitutionality of slavery and wrote, in his opinion, that the Declaration of Rights made slavery unconstitutional. As Zilversmit explained, the Chief Justice delivered his analysis in a jury charge, and the jury returned a verdict that, in the complex circumstances of the case, was taken to indicate that slavery no longer had legal status. On the use of juries rather than appellate courts to enforce declarations of rights in Founding-era America, see GIENAPP, *supra* note 28, at 94, 96; JOHN PHILLIP REID, CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE (2004).

[67] PA. CONST. art. 1, § 1 (1776) ("[A]ll men are born equally free and independent . . . .").

[68] N.H. CONST. art. 1 (1783) ("All men are born equally free and independent . . . .").

[69] Pennsylvania had enacted a gradual emancipation law in 1780. Slavery remained legal in New Hampshire, but the 1790 census recorded only 158 enslaved persons in the entire state.

language. In Delaware, Maryland, North Carolina, and Georgia, the state declarations of rights carefully spoke of the rights of "Freemen."[70] By using that term, and by avoiding any declaration that all men are born free and equal, those states could prevent their bills or declarations of rights from standing as symbolic reproaches to the institution of slavery—or, worse yet, giving legal toeholds to some future movement for emancipation.

To be sure, universalistic language in a declaration of rights would probably not pose a practical threat to slavery in a state where the political leadership class was solidly in favor of maintaining that institution. Declarations of rights do not enforce themselves, and capable southern jurists could surely find ways to interpret language like that in the northern bills of rights so as to avoid any material harm to slavery.[71] But the fact that this second group of states chose to word their bills of rights as they did indicates that they thought the choice of language mattered. Perhaps they understood that public opinion changes over time, such that they could not count on their state governments to be permanently staffed by proslavery men, and they wanted to deny antislavery resources to any future officials who misguidedly favored emancipation. Or perhaps they merely wished to avoid the embarrassment of hypocrisy. It is easy for twenty-first century Americans to imagine that eighteenth-century slaveholders experienced no tension between their revolutionary ideals and their slaveholding, and probably some of them didn't.[72] But it would be a mistake to think that the

[70] Delaware Declaration of Rights (1776) § 12 (stating that "every freeman for every injury done to him … ought to have remedy by the course of the law of the land"); Maryland Declaration of Rights (1776), § XVII ("That every freeman, for any injury done to him … ought to have remedy, by the course of the law of the land"); § XXI ("That no freeman ought to be … deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land"); North Carolina Declaration of Rights (1776) § XII ("That no freeman out to be … deprived of his life, liberty, or property, but by the law of the land"); § XIII ("That every freeman, restrained of his liberty, is entitled to a remedy"); Georgia Constitution (1777) (Preamble) (asserting the rights of "freemen").

[71] For example, a court might say that its state's declaration of rights was aspirational rather than legally binding. Or that slaves were not "men" within the meaning of a declaration's language about "all men" being born free. These examples are only illustrative; motivated jurists would likely also produce others if necessary.

[72] One might here notice that the states of the Deep South had signed the Declaration of Independence, with its language about all men being created equal. Whether that fact testifies to a certain ability to tolerate or ignore moral tension depends on how white southerners understood that phrase in 1776, and that question has its own complexities. As Pauline Maier explained, the Declaration in its early years was understood to state "a justification of revolution" rather than "a moral standard by which the day-to-day policies and practices of the nation could be judged." *See* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION

slaveholders experienced no tension at all or that they were completely incapable of shame. In 1788, when the South Carolina legislature considered whether to approve the Constitution,[73] some delegates raised the normal objection that the Constitution had no bill of rights, and Charles Cotesworth Pinckney responded in part that bills of rights, where they existed—South Carolina did not have one—tended to declare that all men are by nature born free. "[W]e should make that declaration with a very bad grace," Pinckney cautioned, "when a large part of our property consists in men who are actually born slaves."[74]

So imagine the problem the Convention would have confronted if the delegates had accepted Mason's suggestion and tried to draft a bill of rights for the

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OF INDEPENDENCE 154 (1999). In that vein, many white southerners understood the opening paragraphs of the Declaration as a statement about the origins of political authority and, given those origins, as a statement about the unacceptability of enslaving or denying the rights of people who are members of a political community—but not as speaking to questions about justice toward people who were not constitutive members of the political community. *See* Kermit Roosevelt III, *A Tale of Two Americas*, 25 U. PA. J. CONST. L. 939, 940–42 (2023); *see also* KERMIT ROOSEVELT III, THE NATION THAT NEVER WAS: RECONSTRUCTING AMERICA'S STORY 33–52 (2022). What's more, southerners in Congress insisted on eliminating criticism of slavery from the Declaration, which suggests that they were not shy about policing that text in slavery's interest. *See Notes of Proceedings in the Continental Congress, July 2, 1776*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-01-02-0160 [https://perma.cc/WJL9-D56G]. In that light, their accepting the "all men are created equal" language suggests, in line with Roosevelt's view, that they had an understanding of the phrase that was not inconsistent with the slavery they practiced. That said, it is also possible that some slaveholders did understand, or soon came to understand, why language like that could be mobilized against slavery—as in fact happened in Massachusetts only a few years thereafter. Certainly antislavery Americans could perceive the tension and confront slaveholders with it: in a letter to Jefferson, the free Black American Benjamin Banneker asked pointblank how Jefferson could reconcile slavery with the opening of the Declaration. *See Benjamin Banneker to Thomas Jefferson, August 19, 1791*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-22-02-0049 [https://perma.cc/JK6Z-5338]. Jefferson answered Banneker's letter, but he did not squarely address that question. *See Thomas Jefferson to Benjamin Banneker, August 30, 1791*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-22-02-0091 [https://perma.cc/2NWD-KLGG]. Perhaps it is relevant, as William Ewald has noted, that in the fifty years between 1776 and Jefferson's death, Jefferson himself, in his voluminous writings, seems never, ever, not even once, to have repeated the phrase "all men are created equal." *See* William Ewald, *James Wilson and the American Founding*, 1 GEO. J. L.P.P. 1, 24 (2019). And as time went on, more proslavery southerners began to distance themselves from the Declaration's formula. *See* Pauline Maier, *The Strange History of "All Men Are Created Equal"*, 56 WASH. & LEE L. REV. 873, 883–84 (1999).

[73] In South Carolina, the state legislature did not convene a separate body to consider the ratification of the Constitution. It simply deemed itself the ratifying convention.

[74] 27 DHRC, *supra* note 1, at 158.

whole United States, using the existing state bills of rights as templates. Some antislavery delegates would likely have proposed using universalistic language like that adopted in Massachusetts, New Hampshire, and Pennsylvania. Proslavery delegates would have refused to countenance any language that might be used to undermine or embarrass slavery. A bill of rights, in 1787, was expected to state the fundamental principles underlying a system of government, and maintaining the delicate agreement on the draft Constitution required ducking those fundamental principles rather than articulating them.

Virginia's delegates would have had an especially keen sense of the problem, because they had direct experience with a bruising fight about the relationship between slavery and declarations of rights. In 1776, delegates to a Virginia state convention had drafted both a state constitution and a declaration of rights. The principal author of that declaration of rights was Mason, who, though a slaveholder, was critical of slavery.[75] And rather than speaking of the rights of "Freemen," as other southern declarations of rights did, Mason's draft opened with the statement "That all men are created equally free and independ[e]nt."[76] The Virginia convention did not blithely go along with that proposal. Mason's language occasioned a bitter struggle between political factions, with Robert Carter Nicholas—father-in-law of General Convention delegate Edmund Randolph—leading the opposition.[77] Eventually, the Virginia convention adopted a modified version of Mason's language intended to convey that all men were equally free and independent *in the state of nature*, but an organized society was obligated to respect the natural rights of only those men who were parties to the society's organizing compact—a qualification that excluded slaves.[78] But it

[75] *See, e.g.*, JEFF BROADWATER, GEORGE MASON: FORGOTTEN FOUNDER 33 (2006).

[76] *See The Virginia Declaration of Rights (George Mason's Draft)*, DOCUMENT BANK OF VA., https://edu.lva.virginia.gov/dbva/items/show/184 [https://perma.cc/BTD4-GL5Y] (accessed Aug. 4, 2024).

[77] *See* JOHN E. SELBY, THE REVOLUTION IN VIRGINIA, 1775-1783, at 106-08 (1988); THE PAPERS OF GEORGE MASON, 1725-1792, at 275 (Robert A. Rutland ed., 1970); *Edmund Randolph*, *in* HISTORY OF VIRGINIA 253 (Arthur H. Shaffer ed., 1970).

[78] The compromise language ran as follows: "That all men *are by nature* equally free and independent, and have certain inherent rights, of which, *when they enter into a state of society, they cannot, by any compact*, deprive or divest their posterity[.]" VA. DECLARATION OF RIGHTS, § 1 (emphasis added). *See also* ROOSEVELT, THE NATION THAT NEVER WAS, *supra* note 72, at 44 ("This language was added by Edmund Pendleton to make it clear that freedom and equality were enjoyed by all men in the state of nature—not by enslaved people in the state of Virginia."). To be sure, whether this language makes the point clear is not a simple question: absent context, a reader of the compromise text might not read it as designed to reconcile slavery for outsiders with the opening claim that men are free and independent by nature. But apparently it carried

took several days of acrimonious disputation to get there, and it seems that many leading Virginians remained uneasy with the compromise formula in the years that followed.[79] So at the Philadelphia Convention, Mason, Randolph, and the rest of the Virginia delegation understood from experience how volatile the process of drafting a bill of rights could be if the participants held conflicting views about slavery. And however pitched the battle they experienced at Virginia's convention had been, one could reasonably expect something worse in a sequel where the cast of characters included men from all the states, from Georgia to Massachusetts.

Mason and Randolph were leading delegates at the Philadelphia Convention, and it is worth noticing the roles they played with respect to the Convention's consideration of including a bill of rights. Randolph sat on the Committee of Detail, which produced the first draft of the Constitution. He surely understood that a bill of rights would provoke controversy over slavery, and he seems to have argued in the committee against including one.[80] And indeed, the committee presented the Convention with a draft constitution containing no bill or declaration of rights.

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that meaning for enough of the Virginia delegates to enable agreement—at least after everyone had been worn down by a protracted debate.

[79] In 1788, when Virginia's ratifying convention recommended amendments to the new Constitution, it patterned its recommendations on Virginia's own Declaration of Rights—but without the statement that all men are by nature free and independent. *See* MAGLIOCCA, *supra* note 26, at 33. Madison's initial draft of a "bill of rights" amendment similarly drew on the opening of Virginia's bill but with the statement that men are by nature free and independent omitted. See 11 DHFFC, *supra* note 8, at 821 (June 8, 1789).

[80] The evidence for this characterization is a document in Randolph's handwriting that was produced as part of the work of the Committee and which argues that "A preamble … for the purpose of designating the ends of government and human polities" is appropriate in state constitutions but not in the case of the United States Constitution. *See* 2 FARRAND'S RECORDS, *supra* note 42, at 137; *see also* Jonathan Gienapp, *The Myth of the Constitutional Given*, 69 AM. UNIV. L. REV. F. 183, 200–01 (2020) (discussing Randolph's argument); William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 239–40 (2012); *see also infra* text at nn. 89–90 (examining the idea). At the Convention's end, Randolph like Mason declined to sign the Constitution. Given my hypothesis that Mason favored drafting a bill of rights as a way to divide the Convention, one might wonder why Randolph here seems to be trying to avoid the divisive issue rather than push it forward. The answer is that Randolph's opposition to the Constitution was different from Mason's, both in its timing and in its intensity. Randolph, who ultimately supported ratification, declined to sign the Constitution at the Convention's end but was never committed to defeating it, as Mason was. There is no reason to think that he was not in good faith trying to construct the best constitution possible at the time the Committee of Detail was working.

Mason was the delegate who subsequently proposed drafting a bill of rights—something he knew would provoke a fight. Indeed, it seems plausible that Mason's proposal was deliberately designed to stoke that conflict. Early in the summer, Mason had been strongly in favor of forming a more powerful general government and was accordingly one of the delegates most supportive of the Convention's general project. But as time went on, Mason's view shifted dramatically. At the end of the Convention's proceedings, Mason refused to sign the Constitution, and he went on to become a leading opponent of ratification.[81] By September 12, when Mason called for a committee to draft a bill of rights, he had already announced that he would not support the Constitution, and his reasons went beyond the absence of a bill of rights.[82] So perhaps it makes sense to think that Mason's proposal was a deliberate ploy intended to derail the process in its final stages. If Mason could provoke a fundamental conflict that the Convention could not resolve—better yet, a conflict that would leave delegates feeling bitterly toward one another—then he could prevent the Constitution he opposed from going forward to the public.

In assessing the plausibility of this interpretation, it seems relevant that the delegate who took Mason up on his suggestion and actually moved for the creation of a committee to draft a bill of rights was Gerry, who also refused to sign the Constitution at the Convention's end (and whose reasons, like Mason's, were not limited to the absence of a bill of rights).[83] And if Mason and Gerry were in fact trying to jeopardize the Convention's project, it seems that the rest of the room understood what they were doing. The dozens of delegates who had worked for months to reach agreement on a new system of government treated the proposal for a bill of rights in exactly the way that one might expect them to treat a motion to wreck their work at the last minute. They voted it down, ten states to none.

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[81] According to one school of thought, Mason favored a strong general government early in the Convention's proceedings but changed his mind and became a staunch opponent of centralized power when the Convention decided to allocate representation in the Senate equally among the states—a decision that greatly reduced the influence that Mason's home state of Virginia would wield in the new system. *See, e.g.*, JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 3–4 (1999).

[82] *See* 2 FARRAND'S RECORDS, *supra* note 42, at 479 (statement of Mason, as rendered by Madison, that Mason "would sooner chop off his right hand" than agree to the Constitution as it then stood); *id.* at 637–40 (written statement by Mason of objections to the Constitution).

[83] *Id.* at 632–33 (per Madison); *id.* at 635 (per Rufus King).

I do not present this point about slavery and the state bills of rights as a reductive or sole explanation for the Convention's omission of a bill of rights. Given the limits of the evidence, definitive proof is not possible. Moreover, the Framers were many people thinking many things, so it is likely that their decision proceeded from multiple motivations rather than any single cause. (Even if my hypothesized account completely explained Mason's motivation for raising the prospect of a bill of rights on September 12, the Convention's reasons for keeping that item off the agenda up until that point might have been more complex.) I do suggest, though, that the slavery-related problem I describe was likely an important reason, and perhaps the single most important reason, why the Convention refused to draft a bill of rights. So before closing this essay, I will briefly mention three other possible rationales for that decision and explain why they seem less compelling.

One common suggestion is quotidian. According to some scholars, the delegates were simply out of gas by September 12. It had been a long, hot summer. The Framers were fatigued from months of close negotiating, and they wanted to be done. So they had no appetite for taking on any additional significant work.[84] This idea has some appeal, partly because it reminds us that the Framers were human and that the best explanations for the imperfections of group projects sometimes lie in human frailty rather than fully theorized philosophies. Who among us has not been in a meeting that broke up with important business still undone, simply because the people in the room had run out of patience?

But this hypothesis has an important blind spot. At most, it would explain why the delegates were ill-disposed towards Mason's proposal to draft a bill of rights *on September 12*. It would not explain why a question as important as whether to include a bill of rights would not have made it onto the agenda at any time during the previous three and a half months. Was it really the case that none of the Framers thought about this possibility until Mason raised the issue in September?[85] In an environment where eight of the eleven states to have

[84] *See, e.g.*, BEEMAN, *supra* note 23, at 343–44; KLARMAN, *supra* note 23, at 549 (writing, in partial explanation of the quick rejection of Gerry's motion to appoint a committee to draft a bill of rights, that "The delegates had been in Philadelphia for four long, mostly very hot months . . . . Many of them were living in uncomfortable accommodations. In August, John Rutledge had noted 'the extreme anxiety of many members of the convention to bring the business to an end.' Although Mason insisted that a bill of rights could 'be prepared in a few hours' by drawing upon the example of declarations of rights in state constitutions, other delegates probably thought the task of agreeing upon one would take much longer.") (internal citations omitted).

[85] A suggestion by Gordon Wood, noted above, runs along these lines: the Framers initially did not think about including a bill of rights because their project was empowerment rather

recently written constitutions had also written bills or declarations of rights, it seems hard to imagine that several dozen leading American politicians could have wrangled over a constitution for more than three months before anyone thought that whether to include a bill of rights was a subject worth discussing.[86] Certainly many Americans *outside* the Convention had no trouble coming quickly to the idea that a bill of rights should be part of a new Constitution. So it is more than likely, I suspect, that several of the Framers did contemplate the question before September 12—and decided, perhaps quietly, that the Convention had a reason for doing without a bill of rights.

Another possible explanation appears in *Federalist* 84 itself. In that essay, in addition to making the famous argument about enumerated powers, Hamilton contended that a bill of rights was, in its nature, a catalog of negotiated concessions from some aristocratic sovereign. The English Bill of Rights of 1689 fit that description, as did the Magna Carta. On that understanding of what a bill of rights was, Hamilton noted, no bill of rights could be necessary in America. There was no king with whom to negotiate. Instead, the people ruled. Americans were free as a general matter and not merely by the terms of some specific declaration.[87]

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than limitation, and by the time they did think of it, it was too late. *See* WOOD, *supra* note 21, at 538–41. For the reasons given in the paragraph above, this explanation seems to me too much like a just-so story.

[86] When confronted at the Pennsylvania ratification convention with the question of why the Constitution had no bill of rights, the leading Federalist James Wilson asserted that, indeed, the idea of a bill of rights "never entered the mind of many of [the delegates]." But perhaps Wilson was not being entirely candid: he went on to say that he "never heard the subject mentioned, till within about three days of the time of our rising, and *even then there was no direct motion offered for anything of the kind*." Statement of Wilson, November 28, 1787, *in* 2 DHRC, *supra* note 1, at 387 (emphasis added). If this record of the ratifying convention rendered Wilson's remarks accurately, then, unless his memory was remarkably faulty, Wilson was either lying by denying that Gerry had offered his motion of September 12 (a motion attested to not merely by Madison's notes written two years later but by the Convention's official and contemporaneously written Journal, see 2 FARRAND'S RECORDS, *supra* note 42, at 582 (September 12, 1787)) or else perhaps dissembling by distinguishing, *sub silentio*, between Gerry's motion and "a direct motion" for a bill of rights. (Technically, Gerry had only moved for the appointment of a committee to prepare such a bill, rather than for the adoption of a bill itself.) Either way, Wilson's misleading representation does little for the credibility of his claim that nobody thought much about a bill of rights before the end of the Convention.

[87] For an example of a Founding-era thinker other than Publius endorsing this idea, see Noah Webster to James Madison, August 14, 1789, *in* 16 DHFFC, *supra* note 8, at 1310, 1311 ("In England, it has been necessary for parliament to ascertain and declare what rights the nation possesses, in order to limit the powers and claims of the crown; but for a sovereign free people, whose power is always equal, to declare, with the solemnity of a constitutional act, *We are all*

For a simple reason, however, it is hard to take this idea seriously as an explanation for the Convention's decision not to draft a bill of rights: it rests on a conception of bills of rights that most of the American states did not entertain in 1787. Most of the states had bills or declarations of rights at the time, either as part of their state constitutions or as separately adopted instruments. The governments of all of those states were officially premised on popular sovereignty. So it seems reasonably obvious that in most of the states, the prevailing view was that bills of rights need not be contracts with princely sovereigns. A polity where the people ruled could perfectly well have one. And it seems unlikely that the Convention's rejection of a bill of rights by a vote of ten states to none can be explained by a theory that at least eight states had flatly contradicted.

A different potential explanation—and one which Randolph may have articulated in the Committee of Detail[88]—rests on an idea about popular sovereignty that is almost the inverse of the previous one. Given the content of typical bills of rights in Founding-era America, including a bill of rights in the Constitution might have suggested that the government of the United States rested directly on popular authority and was therefore fully sovereign over the state governments, rather than either being the creature of those governments or existing in some sort of undefined co-sovereignty with them. As noted earlier, bills of rights in the American states articulated fundamental principles about the justifications for and purposes of the state governments. A typical bill of rights might declare, for example, that men leave the state of nature and enter society in order to better protect their natural rights, or that all political power rests on the consent of the governed, or that the people always retain the right

born free, and have a few particular rights which are dear to us, and of which we will not deprive ourselves, altho' we leave ourselves at full liberty to abridge any of our other rights, is a farce in government as novel as it is ludicrous") (emphasis original). For modern commentary endorsing this explanation, see, e.g., GORDON WOOD, THE IDEA OF AMERICA: REFLECTIONS ON THE BIRTH OF THE UNITED STATES 184 (2011) ("The rationale for not having a bill of rights was that—unlike in England, where the crown's prerogative power preexisted and had to be limited by a bill of rights—all power in America existed in the people, who doled out only scraps of it to their various agents, so no such fence or bill or rights was necessary."); John P. Kaminski, *Restoring the Grand Security: The Debate over A Federal Bill of Rights, 1787-1792*, 33 SANTA CLARA L. REV. 887, 898 (1993). As Wood's formulation suggests, the reasoning behind this rationale for omitting a bill of rights can overlap with that behind the enumerated-powers rationale.

[88] *See supra* note 81. If Randolph did articulate this argument within the Committee of Detail, it does not follow that he was not also concerned about the slavery point. He might have been motivated by both concerns but have chosen to articulate, or commit to paper, only the more high-minded one.

to alter or abolish their systems of government. On a certain conception, bills or declarations of rights were accordingly important components of (or companions to) state constitutions, because the state governments were primordial—created, in theory, by individuals banding together on the model of Lockean social compacts. (To be sure, no state government was actually formed by people who were not already part of an organized political society, but that bit of realism is beside the present point.) The government of the United States, in contrast, was being formed by people who were already members of political societies, namely the states, or perhaps by the states themselves.[89] The Articles of Confederation contained no bill of rights; it was generally understood to create only a second-order government and therefore not to call for a statement of first principles. Framed by that set of understandings, a decision to include a bill of rights with the new Constitution would have communicated that in the new system, the United States would displace the state governments as the primary unit of political authority. And whether because they themselves did not want to go so far or because they thought the public would not follow them there, the Framers might not have wanted to communicate that message.

But this explanation faces at least two important problems. First, the Convention clearly was willing to communicate that message in other ways, and prominently so. In contrast to the Articles of Confederation, which began by identifying the state governments as the parties in interest, the Constitution began with a preamble announcing that the project was the work of "We the People of the United States." Readers suspicious that the Convention might try to establish a genuine national government rather than a stronger confederation of states had little trouble recognizing that formula as a confirmation of their fears.[90] Similarly, the choice to ask for ratification by popular conventions rather than state legislatures suggested that the Constitution's source of authority would be a direct mandate from the people rather than a delegation of power from the existing state governments. Having already signaled the prospect of a true national government in these ways, perhaps the Convention would not have hesitated to create whatever additional nationalistic implications might arise from including a bill of rights. To be sure, some of the delegates may have thought differently, either because they themselves were only willing to go so

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[89] See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 317 (1997) (offering this explanation for the absence of a bill of rights from the original Constitution).

[90] *See, e.g.*, Samuel Adams to Richard Henry Lee, Dec. 3, 1787, *in* 14 DHRC, *supra* note 1, at 33 ("I confess, as I enter the Building I stumble at the Threshold. I meet with a National Government, instead of a Federal Union of Sovereign States.").

far in the nationalistic direction or because they calculated that each additional sign of a shift toward national government would heighten the political opposition to ratifying the Constitution. So perhaps this consideration had some weight, for some delegates, in rejecting the proposal to draft a bill of rights. But given the Convention's willingness in other respects to embrace (or at least countenance) the idea that the Constitution rested on a direct popular mandate, it seems unlikely that this concern would have predominated.

Second, the Antifederalists and other Americans who criticized the draft Constitution's absence of a bill of rights do not seem to have been in the least bit concerned that including a bill of rights would imply that the government of the United States had replaced the state governments as the primary repository of political authority within the American Union. If including a bill of rights really would have signaled that the general government was primary—a fully sovereign national government, whatever that might mean[91]—then it would have been distinctly odd for so many people skeptical of nationalization to have insisted so fervently that the Constitution must contain a bill of rights in order to be acceptable. To be sure, one might dismiss some Antifederalist criticism of the Constitution's lack of a bill of rights as cynically opportunistic, rather than as flowing from any actual political theory. Maybe some Antifederalists who disparaged the Constitution for not having a bill of rights would just as happily have attacked the Constitution for *having* a bill of rights, in the alternative universe in which the Convention had drafted one. But not all of the criticism can be dismissed that way. After all, many of the people who were skeptical of over-centralization and who criticized the Constitution for not having a bill of rights were also willing to support ratification if a bill of rights were included, or on the promise that one would come later. (Jefferson, for example.[92]) It might still be true that some people inclined to fear national power would have read the inclusion of a bill of rights as a sign that the Constitution vested full sovereign power in the national government. But given the appetite for a bill of rights from people who did not want a national government that strong, this explanation seems predicated on an idea about the relationship

[91] On the puzzle of what "sovereignty" might mean, see DON HERZOG, SOVEREIGNTY, R.I.P. (2020).

[92] *See, e.g.*, Jefferson to Madison, December 20, 1787, *in* 14 DHRC, *supra* note 1, at 482; Jefferson to William Stephens Smith, February 2, 1788, *in* 14 DHRC, *supra* note 1, at 500 ("I was glad to learn by letters … that the new constitution will undoubtedly be received by a sufficiency of the states … were I in America, I would advocate it warmly till nine should have adopted, & then as warmly take the other side to convince the remaining four that they ought not to come into it till the declaration of rights is annexed to it.").

between bills of rights and sovereign power that was not in fact held by many of the Constitution's skeptics or moderate supporters.

One other consideration is worth mentioning when thinking about the likely relative weights of the Convention's various motivations. Objection to the Constitution's lack of a bill of rights was a central weapon in the Antifederalist arsenal. To say the same thing in different words, the Convention furnished the opponents of ratification with one of their strongest arguments by failing to include a bill of rights in the proposed Constitution. So if we attribute the decision to omit a bill of rights to the Framers' worry that *including* a bill of rights would make ratification more difficult, we might have to conclude that the delegates miscalculated the politics of their decision rather badly.[93] Two leading recent histories of the Convention describe the omission as "a major tactical blunder"[94] and "one of the most serious mistakes made by the Founding Fathers."[95] Given that the Framers were human, it is necessarily true that they made mistakes, and perhaps this was one of them. But as a general matter of historiographical method, one should not too readily embrace an account on which historical actors were engaged in unaccountable blundering if an alternative account on which they knew what they were doing is available.

The slavery-related explanation has the virtue of accounting for the omission of a bill of rights in a way that makes the Framers' behavior intelligible as something more than a bizarre failure to understand an obvious point about what the public would want in a new constitution. It explains their decision by reference to their correctly understanding that drafting a bill of rights would provoke a fight within the Convention, one that might destabilize the delicate compromise that agreement on any constitution would require. In other words, the slavery-related explanation sees the Framers as having understood their world accurately, rather than as having missed the mark. Better to make ratification somewhat more difficult by proposing a Constitution that the public would like somewhat less than to guarantee failure by not getting to yes in the Convention in the first place.

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[93] The point here is speculative, of course. As noted above, it is possible that Antifederalists attacked the Constitution for not having a bill of rights because it did not have one and that many of the same Antifederalists would have attacked the Constitution for having a bill of rights, or for the content of that bill of rights, if one had been included.

[94] *See* KLARMAN, *supra* note 23, at 549.

[95] *See* BEEMAN, *supra* note 23, at 342.

CONCLUSION

It is not possible to know for certain why the Constitution initially did not include a bill of rights, and it is exceedingly likely that the real explanation would feature more than a single reason. But the traditional account on which the Framers omitted a bill of rights because they trusted the Constitution's enumeration of powers to do the necessary limiting work is badly flawed. It is not supported by evidence from the time when the Convention was working. It was widely disbelieved at the time by the ratifying public. And it was disbelieved for good reason, because it makes little sense.

In modern constitutional discourse, the conventionality of the enumerated-powers account has the effect of obscuring other possible explanations and in particular of hiding the significance of slavery to this core moment in constitutional history. Instead of foregrounding the role of slavery in shaping the work of the Convention, the enumerated-powers account pushes that uncomfortable subject off the stage and replaces it with a story about the Framers' talent for elegant constitutional design. In so doing, it contributes to two conflicting but coexisting problems in the way that Americans think about slavery and the Founding. First, it contributes to the tendency to understate the role that slavery played. Second, and with a different political valence, it contributes to the tendency to imagine that the Framers were uniformly proslavery—or, at least, uniformly untroubled by slavery. In contrast, the account that I am suggesting reckons with the pervasive importance of slavery at the time of the Founding. And it suggests that a critical factor animating the Framers' decision not to draft a bill of rights was not their comfort with slavery but their deep disagreement about it, even as all of them were willing to tolerate its continued existence.

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