Keeping the People's Liberties

Dinan, John J.

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The delegates to the federal constitutional convention took a number of steps to safeguard individual liberties. In the belief that rights would be most secure when powers were exercised by separate institutions, they created an energetic executive and an independent judiciary and then furnished each with the means to maintain its independence against legislative encroachments. To prevent the passage of legislation that would be injurious to rights, they divided the lawmaking power and created a bicameral congress. In order to provide multiple sources of security for individual rights, they established a federal system. Finally, in an effort to prevent factious majorities from working their ill effects, they created a government that extended over a large territory.

As important as these decisions were, the delegates were fully conscious that security for individual rights in the new republic would depend primarily on the design of the state governments. Connecticut delegate—and future U.S. Supreme Court Chief Justice—Oliver Ellsworth therefore “turn[ed] his eyes to the states for the preservation of his rights. It was from these alone that he could derive the greatest happiness he expects in life.”

All told, eleven states drafted constitutions between 1776 and 1787, additional states ratified constitutions prior to their admission to the Union, and all these states revised their constitutions at regular intervals throughout the eighteenth and nineteenth centuries. It was in these conventions, and in particular through the drafting of declarations of rights and frames of government, that citizens resolved the most important questions about how rights would be protected.

It turns out that the understanding of rights protection that emerges from these conventions differs dramatically from our current understanding. In particular, these documents do not conform to the understanding—which was first expressed by U.S. Supreme Court Justice Robert Jackson and has come to represent the common view of the matter—that the “purpose of a Bill of Rights was
to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts." In fact, delegates to eighteenth- and nineteenth-century conventions were not convinced that their liberties were secured primarily through bills of rights. Rather, they were principally concerned with designing proper frames of government. Nor did they believe that the principal purpose of these documents was to empower courts of justice to place rights beyond the reach of representative institutions. Rather, their common aim in drafting bills of rights and frames of government was to ensure that rights would be secured by elected officials acting through representative institutions.

DECLARATIONS OF RIGHTS

The citizens of all but three states eventually ratified the first ten amendments to the federal constitution, and a majority of the states prefaced their own constitutions with bills of rights. Significantly, though, bills of rights were rarely viewed as an important, much less a primary, source of protection for liberties. Moreover, even when bills of rights were drafted and ratified, they were prized more for their capacity to educate citizens and public officials than for their ability to serve as legal principles to be enforced through judicial decisions.

This was certainly the case at the national level. The prospect of adding a bill of rights to the federal constitution did not even surface until late in the convention proceedings, and then the motion was easily dismissed. Nor did the absence of a bill of rights figure prominently in the explication and defense of the constitution that appeared in the *Federalist Papers*. It was not until the penultimate paper that Alexander Hamilton took up the question of whether to add a bill of rights, only to reject the idea on several grounds. Hamilton’s objections, although they differed in several respects from those of other convention delegates such as James Madison and James Wilson, served to express the general mind-set of the founding generation toward bills of rights. Hamilton argued that “The Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.” Rights were primarily secured, he contended, through provisions that outlined the “political privileges of the citizens in the structure and administration of the government,” as well as through “certain immunities and modes of proceeding.” The ultimate security for rights, then, “whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on the general spirit of the people and of the government.”

Even when a consensus emerged in favor of adopting a federal bill of rights, this came about not so much because these theoretical objections were overcome but because political and prudential concerns dictated its passage. The individuals who drafted and secured the ratification of the first ten constitutional amendments were guided primarily by an effort to blunt the pressure for a second convention,
which they feared would revise the structure of the new government, as well as a desire to make good on promises made in the course of constitutional and congressional campaigns. Neither the supporters nor the opponents of the Bill of Rights thought that its provisions would be of much practical utility in protecting liberty. Rather, as Jack Rakove has argued, the federal Bill of Rights was thought to establish a set of standards that would either “enable the people to judge the behavior of their governors” or “enable republican citizens to govern themselves—to resist the impulses of interest and passion that were the root of factious behavior.”

Bills of rights were viewed in a similar manner by state constitutional conventions. A number of the delegates to these conventions shared Hamilton’s view that such documents were unnecessary. John Biddle argued, during the course of the Michigan Convention of 1835, that declarations of rights were “mere lumber in the constitution. All the world acknowledge the principles, and they are familiar to all.” Similarly, several speakers at the Oregon Convention of 1857 pleaded with the assembled delegates to dispense with the traditional declaration of rights. Stephen Chadwick “denounced the whole bill of rights as a humbug,” and George Williams thought that a bill of rights “was merely a Fourth of July oration” and “entirely unnecessary.”

Some state convention delegates went so far as to argue that bills of rights could actually prove harmful to the protection of liberty. They feared that citizens would be led, mistakenly, to think that their rights were primarily protected through written declarations, thereby distracting them from the work of designing governing institutions and obtaining popular support for rights, which provided the real source of security for liberty. Borrowing liberally from The Federalist, Thomas Church pleaded with the Michigan Convention of 1850 not to load down the document by adding a bill of rights:

I submit to the Convention, as a mere matter of taste, whether a constitution, commencing with the simple announcement that “we, the people of the state of Michigan, in convention assembled, to secure the blessings of liberty to ourselves and posterity, have ordained and do ordain this constitution of government;”—proceeding then to a division of the powers of government; then to an article establishing, for instance, the legislative department, setting out its construction, its operation, its limits and restrictions; then an article establishing the judiciary . . . ; describing with simplicity and clearness, each part of our government, its powers, and closing in each by the necessary checks and balances—would not present to the world a better document, one in better taste, and of more manifest utility, than one lumbered with a bill of rights, confused, miscellaneous, and calculated only to mislead the inquirer, by its unfortunate location of those principles.

Even when these arguments proved unpersuasive and states chose to approve bills of rights, as nearly all of them did by the mid-nineteenth century, these declarations served purposes that are quite distinct from the current understanding.
To be sure, these documents made clear that certain spheres of liberty could not be transgressed by any legitimate government. Thus the Virginia Declaration of Rights, which was drafted less than a month prior to the Declaration of Independence, proclaimed: “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; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”

It is true, also, that these documents secured explicit protection for a variety of rights. Religious liberty enjoyed pride of place in many of these declarations. Thus the Oregon Bill of Rights held, in typical fashion, that: “All men shall be secured in their natural right to worship Almighty God according to the dictates of their own consciences.” Freedom of expression was featured prominently as well. The Michigan Bill of Rights declared, for instance, that “Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right.” Also universally esteemed were the various guarantees of a fair trial. The Michigan Bill of Rights therefore stated: “In all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury of the vicinage; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to have the assistance of counsel for his defence.” Furthermore: “No person should be held to answer for a criminal offence, unless on the presentment or indictment of a grand jury.” In addition: “No person for the same offence shall be twice put in jeopardy of punishment.” Other guarantees included the right of individuals to be secure from arbitrary searches and seizures, to bear arms in the defense of themselves or the state, and to be compensated adequately for land taken for public use.

It is significant, however, that no single institution was considered to be more likely than another to violate these guarantees. Rather, these documents were directed equally to all governing officials. As Mr. Williams argued in the Oregon Convention of 1857:

I am in favor of distributing what is usually contained in a bill of rights throughout the constitution, and not have it all contained in one separate article. The people of this country are sovereigns; they make the government, and this bill of rights is intended to contain restrictions upon that government. Now, these restrictions must be either of the legislative, the executive, or the judicial departments of the government. I propose that so much of any bill of rights as restricts the legislative department shall be put under that head, and so with the rest.

It is true that some of the clauses in these state bills of rights were intended, according to Thomas Cooley, author of the most prominent late-nineteenth-century constitutional treatise, “for the express purpose of operating as a restriction upon
legislative power.”20 The Michigan Bill of Rights held, for instance, that “No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, shall be passed.”21 Similarly, the Massachusetts Declaration of Rights stated that “the Legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.”22

For the most part, though, these documents contained principles that were “declared rather as guides to the legislative judgment than as marking an absolute limitation of power.”23 As Cooley argued, many of the provisions took the form of an “admonition addressed to the judgment and the conscience of all persons in authority, as well as of the people themselves.”24 Thus the Virginia Declaration of Rights held “That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments,”25 and the Oregon Bill of Rights urged that “Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice.”26

To the extent, finally, that there was any expectation that particular individuals or institutions would be responsible for remedying violations of these principles, this role was entrusted primarily to the people and to their representatives.

To be sure, judges were expected to abide by and to uphold these declarations, but they were given no more responsibility in this area than were other citizens and public officials. Delaxon Smith’s defense of a bill of rights in the Oregon Convention of 1857 came perhaps the closest to expressing the consensus view of eighteenth- and nineteenth-century constitution makers in this regard. Smith did not believe that a bill of rights contributed significantly to the protection of individual liberties. He argued: “It is manifest that it is not absolutely necessary, certainly for any purposes connected with the constitution, that its main provisions shall be preceded by a declaration of rights, and should we omit it we should but follow the example of several of the states.” But, he concluded:

Believing, as I do, that these declarations, thus solemnly made by a convention and ratified by the people, will always not only command universal respect, but the attention of courts, I desire that such a bill may precede or become a part of our constitution. It is a sort of manual—a sort of textbook of weighty matters, placed there *multum in parvo*, and the reference of the most common mind to the constitution . . . teaches that mind its rights under our government. They are there in monosyllables; and although individuals of common capacity, or of ordinary pursuits, may not be regarded as expounders of the constitutional law, yet the doctrine is contained, the declarations embodied in that bill of rights, and the meanest capacity can understand them.27

Thus the Massachusetts Declaration of Rights acknowledged the right of citizens “to assemble to consult upon the common good; give instructions to their
representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.” Moreover, it held that “[t]he legislature ought frequently to assemble for the redress of grievances.” Likewise, the Oregon Bill of Rights stipulated that no law be passed, “the taking effect of which shall be made to depend upon any authority except as provided in this constitution.” It further provided that “[t]he operation of the laws shall never be suspended except by the authority of the legislative assembly.” The view underlying these and similarly framed provisions was that rights were most secure in representative institutions, and therefore it was important to ensure that these institutions were accessible and responsible to the public.

Citizens were expected to play a role in protecting rights in several ways. They were exhorted to maintain the virtues that were essential to sustaining republican institutions and to remain vigilant for violations of liberty. The Massachusetts Declaration of Rights, for instance, urged the people to recur frequently to “the fundamental principles of the constitution” and in their selection of officers to pay particular attention to “piety, justice, moderation, temperance, industry, and frugality.” Through these provisions, constitution makers communicated the view that the ultimate security for liberty lay to a certain extent outside the operation of formal institutions and rather with the people’s virtue. The founders prized virtue in the sense of sacrifice for the sake of the public interest, as when the Massachusetts Declaration of Rights announced that “[g]overnment is instituted for the common good,” and “not for the profit, honor, or private interest of any one man, family, or class of men.” They also counseled virtue in the sense of moral uprightness, as when the Virginia Declaration of Rights admonished the people that “it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.” The Massachusetts Declaration of Rights even went on to exhort the citizens to retain their virtue in a religious sense, noting that it was “the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being.”

It is apparent, then, that the principal utility of declarations of rights did not lie in their ability to serve as judicially enforced limitations on the legislature. Bills of rights were intended, rather, to impress upon governing officials the importance of upholding certain standards and guarantees and thereby prevent them from being violated. In the event that infringements of rights did occur, these declarations would provide the citizens with a principled basis on which they could seek to persuade their elected representatives to reestablish their rights on a proper foundation.

FRAMES OF GOVERNMENT

According to Chancellor James Kent, author of the most prominent early-nineteenth-century constitutional treatise, security for rights consisted “not so
much in bills of rights, as in the skillful organization of the government, and its aptitude, by means of its structure and genius, and the spirit of the people which pervades it, to produce wise laws, and a just, firm, and intelligent administration of justice." Accordingly, constitution makers were principally concerned with designing a proper frame of government, one that would separate the various governing powers and ensure their proper exercise.

The first challenge was to prevent governing institutions from infringing on rights, as when public officials might act without benefit of adequate reflection and discussion or under the influence of a temporary passion or delusion. Constitution makers were concerned, therefore, with allocating power to the appropriate public officials and ensuring that that power was exercised in a responsible manner.

It was thought that there existed, by nature, a legislative, executive, and judicial power, and that rights were most secure when each of these powers was placed in a suitable institution. In order to guarantee this functional division, each institution was endowed with the means to prevent encroachments on its central functions. The executive veto, which would eventually come to serve as a means by which the executive could promote reasonable deliberation, was originally intended to provide executives with the capacity to resist encroachments on their office, thereby safeguarding the executive power. Likewise, judicial review, which would soon become a vehicle for superintending legislation, was initially viewed as a means by which judges could maintain their jurisdiction, tenure, or salary against any encroachment, and thereby retain the ability to perform their judging function.

The next step was to ensure that these powers were exercised responsibly. The most important means of preventing abuses of power was to permit citizens to hold public officials accountable for their actions. Effective exercise of popular control required, at a minimum, that the people have an opportunity to select their representatives and to pass judgment on their performance at frequent intervals. A popularly elected assembly could still betray the public trust in a variety of ways, however, and, especially as the nineteenth century progressed, constitution makers approved a number of provisions to guard against this possibility. For one thing, legislators might shield their deliberations from the public in such a way that it would be difficult for the people to hold them accountable for their actions. Therefore, it was provided that "[t]he doors of each house shall be open unless the public welfare requires secrecy." Legislators who were intent on enacting oppressive statutes might also propose, debate, and enact bills with such haste that citizens would not have a chance to register their disagreement. As a result, constitutional provisions were also enacted to require that each bill be read on three separate days before it could be approved.

Publicity was not a sufficient requirement for the protection of rights, however, because legislators might still evade popular scrutiny by disguising the contents of offensive bills. One way of doing so was to enact omnibus bills that contained numerous provisions, many of which were unrelated to one another
and some of which were not even described in the title. The idea was that even the most vigilant citizens would be unable to detect offensive provisions that were hidden in such bills. Accordingly, it was stipulated that “[e]very act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title.” Some states went even further and held that “[n]o act shall ever be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at full length.” A final danger was that popular control could be frustrated by the use of technical language that could mask the actual intent and implications of statutes. Accordingly, bills were required to be “plainly worded, avoiding, as far as practicable, the use of technical terms.”

The theory underlying these procedural requirements was that, “Prevented from doing harm, [the legislature] might then be trusted with power to do good.” Constitution makers believed that if elected representatives exercised only those powers for which they were best suited, if they could be held accountable for their actions at regular intervals, and if their deliberations were sufficiently public, then they could be counted on to provide appropriate redress for popular grievances.

Finally, in the event that representative institutions failed to prevent violations of rights, the founders also provided opportunities for periodic constitutional amendment and revision. The Virginia Constitution followed the proposal of Thomas Jefferson, who recommended that conventions be held every nineteen years in order to correct institutional imbalances. Virginia therefore mandated that “each twentieth year,” the legislature would submit to the people the question of whether to hold a constitutional convention. Other states required that referendums be held at even more frequent intervals. Massachusetts provided for a referendum every fifteen years, “[i]n order the more effectually to adhere to the principles of the constitution, and to correct those violations which by any means may be made therein, as well as to form such alterations as from experience shall be found necessary.” Michigan directed that the question of constitutional revision should be put to the people in “each sixteenth year.”

The general view underlying these provisions was that all constitutions, even the most skillfully designed, were susceptible to corruption over time. But these clauses were also informed by the particular concern that legislators seeking to perpetuate their careers could fail to redraw district boundaries at regular intervals. Accordingly, constitution makers mandated a decennial census and, in some cases, reapportionment and redistricting by a body other than the legislature. The Virginia Constitution, for instance, established a particularly elaborate mechanism for guaranteeing the right to an equal vote. In case the legislature could not agree on a redistricting plan, each house was directed to forward its preferred principle of representation to the governor, who would then submit these proposals for popular review. It was possible, though, that the assembly could still evade its responsibility by declining to submit any proposals to the governor. The constitution made provisions against this eventuality as well, providing that in case
of a failure to forward any principles of representation, the governor would be ordered to hold a popular referendum at which time the people would select from among four possible principles of representation, and the most popular principle would be implemented at the next assembly session.49

In general, then, the republican regime relied on institutional arrangements to prevent violations of rights. To the extent that grievances did arise, the political process would provide appropriate opportunities for redress. In case both of these avenues proved fruitless, the citizens could amend or revise the constitution.

CONCLUSION

There is a tendency today to view frames of government and bills of rights as serving distinct purposes, with the former understood primarily as granting powers to governmental institutions and the latter thought to secure rights by limiting the exercise of those powers. This is not the view, however, that informed constitution making in the eighteenth and nineteenth centuries. In fact, bills of rights served several functions that we now ascribe to constitutions, and constitutions performed some roles that we now attribute to bills of rights.50 Constitutions, or frames of government, specified the institutional arrangements by which citizens could exercise effective representation; bills of rights protected these channels of representation and exhorted the people to make wise and prudent use of their votes and petitions. In addition, frames of government specified the institutional arrangements that fostered deliberation; bills of rights affirmed these principles and encouraged the people’s representatives to be faithful to their trust. Furthermore, both frames of government and bills of rights identified principles that all public officials were bound to uphold.

Far from serving a distinct purpose, therefore, bills of rights and frames of government were animated by a common understanding of how rights were best protected. Representative institutions were thought to be most capable of representing the considered judgment of the public. Elected representatives were sufficiently responsive to public opinion, but also far enough removed from popular passions, to be able to distinguish momentary ill humors from the public interest. Deliberation would take place through the political process, particularly through and among representative institutions, where competing claims of justice could be advanced, alternative means of securing justice could be discussed, and the consequences of these arrangements could be debated. Compliance with legal guarantees would obtain when decisions about rights protection were made by institutions that were governed by the representative principle. It was essential that the people have some agency in making the laws under which they were governed, but it was sufficient that this participation be indirect.