Constitution, Contract, and Rights

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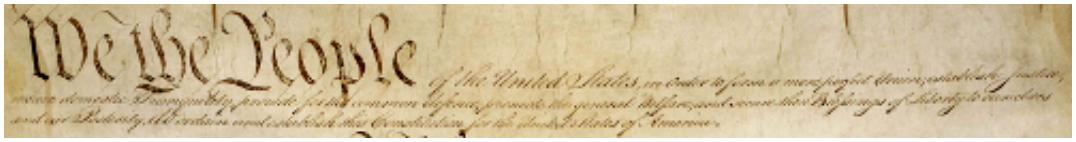
Introduction To Series

This is the first article in a series on the Constitution and the First Amendment. It is being written as a news article since it probably will be “news” to most people. It certainly was to me when I first realized the realities that will make up the content for this series. Once the series is completed, some of the articles may be updated to include more detailed information, and they may be compiled into a single article. We will see how that works when the time comes I guess. Here is a rough summary of the topics that the series will cover:

*Note: If you want the abbreviated version of an article, read the **bold text**.*



Constitution, Contract, and Rights

If the United States Constitution does not address certain powers or rights, does that mean that the Federal government can assume those powers, or rights, if needed? Well to understand the answer to this question, we need to understand a couple of realities about what the U.S. Constitution is.

Alexander Hamilton, along with John Jay and James Madison collaborated together to write a series of articles that would explain each facet of the Constitutional Convention's plan (which became the U.S. Constitution). Both Hamilton and Madison were a part of the Constitutional Convention. Jay had been a member and a President of the Continental Congress, had helped write the New York State Constitution, had been the Chief Justice of the New York Supreme Court, had been a minister to Spain and also, along with Benjamin Franklin and John Adams, signed the final peace treaty with Great Britain which ended the Revolutionary war. Jay was later to be appointed as the first Chief Justice of the Supreme Court by President George Washington. The articles, now known as the Federalist Papers, written by these three were published in a number of newspapers, but were primarily directed toward New York. New York Governor George Clinton agreed with many others that the forming plan of the Constitutional Convention could have adverse effects on individual and state rights. The Federalist Papers which set out to explain the plan and answer objections, has become a first hand commentary and view into the original intent of the Convention's plan.

When the Constitutional Convention was meeting to debate and craft what would become the U.S. Constitution, one of the major criticisms against the plan was that it did not contain a Bill of Rights. **Alexander Hamilton explained why he felt that a Bill of Rights was not needed**. In Federalist Paper 84, he said

“It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was MAGNA CHARTA, obtained by the barons, sword in hand, from King John.... It is evident, therefore, that, according to their primitive signification, they have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations, 'WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America.'... I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are 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... that a power to prescribe proper regulations concerning it was intended to be vested in the national government.... The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.” [1] [Emphasis Hamilton's]

Did you catch what Hamilton is saying?

First, he points out that *bills of rights* were normally between the people and a monarch to keep them from abusing rights, but our Constitution is an agreement between the people of the several states. **He points out that the reason a Constitution does not need a *bill of rights*, is that the powers actually belong to the people as a whole.** If they belong to the people as a whole, and powers are abused by the Federal Government, then the majority of the people can add, change, remove, or annul powers or the present government. Before the above quotation from Hamilton, he makes the case that though the Constitution does not need a *bill of rights*, he then mentions that the Constitution did provide important restrictions of the Federal Government (that is a government of limited powers for a limited function) [2] and in essence is a *bill of rights*. He mentioned the following as restricted from the Federal Government by the proposed Constitution:

Art I, Sec 3

impeachment goes no further than removing from office (trials for crimes are separate);

Art I, Sec 9

habeas corpus [means a person must be charged and brought to trial, rather than left in detention to be forgotten] is not suspended except in cases of rebellion or invasion; no Bill of Attainder [a legislative act that punishes an individual without a trial – including execution and confiscation of property] or ex post facto law [a law passed after the fact and used to prosecute someone who had done an action now illegal, but at the time, before the law was passed, was not illegal], no titles of nobility granted and restrictions on those who have titles of nobility;

Art III, Sec. 2

trials of crimes, except in impeachment, will be by jury, in the state where the supposed crime was committed (unless crime not committed in a state, then a place congress has directed by law);

Art III, Sec. 3

treason specifically defined, no person can be convicted of treason except on testimony of two witnesses, and punishment of treason can not extend beyond life of the person attained. [3]

Yet, Joseph Story, in his Commentaries on the Constitution of the United States **says: "Notwithstanding the force of these suggestions, candor will compel us to admit that, as certain fundamental rights were secured by the Constitution, there seemed to be an equal propriety in securing in like manner others of equal value and importance."** [4] [Emphasis mine] He makes this comment after giving a concise list of all those things which were proposed as rights which should be specifically prohibited from the Federal government. These are listed at the end of the article for those interested. [5]

Who is Joseph Story you ask? He was an attorney, educator, and supreme court justice who was appointed by our fourth President, James Madison. He, like Daniel Webster, Became a strong defender of

the original intent of the Founding Fathers, and the principles that our republic was founded upon. He himself was a U.S. Representative before he was appointed to the Supreme Court. He founded Harvard Law School, and was its professor of law. He is considered, along with Chancellor James Kent, to be the "Father of American Jurisprudence." He was one of the Supreme Court's most prolific judicial writers. In his 34 years on the Supreme Court, he authored opinions in 286 cases, of which 269 were reported as the majority opinion of the court.

Contract

The second point that Hamilton makes is that, **the constitution is a contract**. **Remember, Hamilton said: "Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations...** ***Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given [to the Federal Government in the U.S. Constitution] by which restrictions may be imposed?*****."** [Emphasis mine] The Founding Fathers saw the Constitution as a social compact between the majority of the citizens of the several states, where once ratified would be binding on all the citizens of the states and could only be withdrawn by:

1. the majority of the citizens represented by the majority of the several states offering to revoke it by amendment, or
2. by war on the principles set forward in the Declaration of Independence (that God did not intend government to be despotic, and therefore a despotic government was an illicit use of government, and the people, who God had granted rights, may justly move to retrieve their God given rights from an illegitimate use of government once every possible option of humble reconciliation had failed). [6]

Story says:

"It may be admitted, as was the early exposition of its [the U.S. Constitution's] advocates, 'that the Constitution is founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but that this assent and ratification is to be given by whole people, not as individuals composing one entire nation, but as composing the distinct and independent States, to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State, the authority of the people themselves. The act, therefore, establishing the Constitution, will not be [is not to be] a national, but a federal act." [7]

As a contract, Hamilton points out that only those rights specifically granted to the Federal Government belong to the Federal Government. The powers themselves belong to the people, and by the consent of the majority of the people, through their representatives, may submit themselves to, alter, add, or remove powers from the Federal Government. Just like a contract today, only those things listed in the contract are binding. All other rights belong to their respective party. If the Federal Constitution does not positively (explicitly) or negatively (by restrictions) give a power to the Federal Government, or the States, then the power remains in the use of the people themselves - since it was never agreed upon that the people would submit that specific authority, by their majority consent, to the Federal government.

Interestingly, Hamilton's observation was correct that a *bill of rights* may be a tool in the hands of those who wish to twist the Constitution for their own means, by using the prohibitions within the Constitutional Amendments to claim the power in question was originally meant to rest with the Federal Government. It has selectively happened. Yet, Story also points out that citizens and States had a good reason to call for a Bill of Rights. He states:

"Although it must be conceded that there is much intrinsic force in this reasoning [referring to Federalist Paper 84 (not needing a Bill of Rights)], it cannot in candor be admitted to be wholly satisfactory or conclusive on the subject. It is rather the argument of an able advocate than the reasoning of a constitutional statesman. In the first place, a bill of rights, in the very sense of this reasoning, is admitted in some cases to be important.... … a bill of rights is important, and may often be indispensable, whenever it operates as a qualification upon powers actually granted by the people to the government.... Whenever, then, a general power exists,... there seems a peculiar propriety in restricting its operations, and in excepting from it some at least of the most mischievous forms in which it may be likely to be abused.... In the next place a bill of rights may be important, even when it goes beyond powers supposed to be granted. It is not always possible to foresee the extent to the actual reach of certain powers which are given in general terms. They may be construed to extend... to certain classes of cases, which did not at first appear to be within them.... The want of a bill of rights, then is not either an unfounded or illusory object." [8]

The *Bill of Rights* would in affect say "whatever powers you have been granted by the majority of people, through the U.S. Constitution, we want you to know Federal Government that you can never construe the powers granted to you to touch any of the rights and powers enumerated in the Bill of Rights (the first ten amendments)."

Bill of Rights Does Not Grant You Rights - It Protects Them

The Bill of Rights to the U.S. Constitution do not grant you any rights at all. The U.S. Constitution does not specify those rights listed in the Bill of Rights to any branch of the Federal Government. **Those rights are given to you by God.** [9] The Bill of Rights only makes sure that the Federal Government understands that they are specifically prohibited from construing any of the powers granted to them by the majority of the people in such a way as to encroach on these specific rights. **The preamble to The Bill of Rights makes this certain when it says "THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, *that further declaratory and restrictive***

clauses should be added....” [Emphasis mine] **The Bill of Rights is a list that says “Federal Government, we want you to know these are not your powers, these are our rights, and though you should understand that because they are not given to you in the contract of the Constitution, we are specifically letting you know that these are not part of the agreement.”**

Not Specified - Not A Power

One of **Hamilton's** arguments about the protection of the people's rights from any abuse of the Federal government, was that the people retain the right to retrieve the powers they grant to the Federal Government - since the powers comes from the consent of the majority of the governed. **He points out that the Federal Government only has the powers specifically granted by the people of the several states, in order to serve the people. Those powers not specified in the U.S. Constitution are not the Federal Government's. Those who proposed stronger protections of rights from the Federal Government, wisely, said in essence “that is a great point, let's include that in the Bill of Rights.”** This is recorded in amendment numbers nine and ten of the Constitution.

Amendment nine states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

Amendment ten states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

What does it all mean in Short?

So, in short, the Constitution is a contract; It gains its authority from the consent of the majority of the people of the majority of the several states, who may add, change, and remove powers, or abolish the current form of government where it becomes despotic; the first ten amendments make clear that the rights contained by those amendments are never to be construed as powers granted to the Federal Government; and that the rights in the first ten amendments, as well as those not specified by the Constitution to the Federal government, are specifically reserved to the people, or through their representatives, to their State.

End Notes:

[1] Alexander; Madison, James; Jay, John, The Federalist Papers, edited by Rossiter, Clinton - with an introduction and notes by Kesler, Charles (New York, New York: New American Library - a division of Penguin Group, 1999), No. 84, 512-513.

[2] Alexander; Madison, James; Jay, John, The Federalist Papers, edited by Rossiter, Clinton - with an introduction and notes by Kesler, Charles (New York, New York: New American Library - a division of Penguin Group, 1999), No. 39, 239.

"The act, therefore, establishing the Constitution will not be a *national* but a *federal* act." [Emphasis is Madison's]

[3] Alexander; Madison, James; Jay, John, The Federalist Papers, edited by Rossiter, Clinton - with an introduction and notes by Kesler, Charles (New York, New York: New American Library - a division of Penguin Group, 1999), No. 84, 510-511

[4] Story, Joseph, Commentaries On The Constitution Of The United States: With A Preliminary Review Of The Constitutional History Of The Colonies And States Before The Adoption Of The Constitution, forth edition with notes and additions by Cooley, Thomas M. (Boston: Little, Brown, and Company, 1873), Vol I, 212, Book III § 305.

[5] From Story, Joseph, Commentaries On The Constitution Of The United States: With A Preliminary Review Of The Constitutional History Of The Colonies And States Before The Adoption Of The Constitution, forth edition with notes and additions by Cooley, Thomas M. (Boston: Little, Brown, and Company, 1873).

"Among the defects which were enumerated, none attracted more attention, or were urged with more zeal, than the want of a distinct bill of rights which should recognize the fundamental principles of a free republican government, and the right of the people to the enjoyment of life, liberty, property, and the pursuit of happiness. It was contended that it was indispensable that express provision should be made for the trial by jury in civil cases, and in criminal cases upon a presentment by a grand jury only; and that all criminal trials should be public, and the party be confronted with the witnesses against him; that freedom of speech and freedom of the press should be secured; that there should be no national religion

[in other words, that the U.S. congress would not establish a national denomination of Christianity which could be used to persecute Christians of other Denominations, but that States were free to establish a religious body – it would leave both the State and Federal Government free to encourage and support Christianity as "Indeed, in a republic, there would seem to be a peculiar propriety in viewing the Christian religion as the great basis on which it must rest for its support and permanence if it be what it was ever been deemed by its truest friends to be, the religion of liberty. Montesquieu has remarked that the Christian religion is a stranger to mere despotic power." (**Story section 1873**).]

[Further Explanation on national religion From Joseph Story:

Story section 1871: “The promulgation of the great doctrines of religion, the being, and attributes, and providence of one Almighty God; the responsibility to him for all our actions, founded upon moral freedom and accountability; a future state of rewards and punishments; the cultivation of all the personal, social, and benevolent virtues; - these never can be a matter of indifference in any well-ordered community. It is, indeed, difficult to conceive how any civilized society can well exist without them. And at all events, it is impossible for those who believe in the truth of Christianity as a divine revelation to doubt that it is the especial duty of government to foster and encourage it among all the citizens and subjects. This is a point wholly distinct from that of the right of private judgment in matters of religion, and of the freedom of public worship according to the dictates of one's conscience.”

Story section 1873: “Now, there will probably be found few persons in this or any other Christian country who would deliberately contend that it was unreasonable or unjust to foster and encourage the Christian religion generally as a matter of sound policy as well as of revealed truth.”

Story section 1874: “Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship.”

Story section 1876: “But the duty of supporting religion, and especially the Christian religion, is very different from the right to force the consciences of other men or to punish them for worshipping God in the manner which they believe their accountability to him requires. It has been truly said that 'religion, or the duty we owe to our Creator, and the manner of discharging it, can be dictated only by reason and conviction, not by force or violence.”

Story section 1877: “The real object of the [first] amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects [denominations], and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion which had been trampled upon almost from the days of the Apostles to the present age.... Apostasy, heresy, and non-conformity, had been standard crimes for public appeals, to kindle the flames of persecution, and apologize for the most atrocious triumphs over innocence and virtue.”

Story section 1879: “It was impossible that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendency, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed by a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. Thus, the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions....”

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, and the rights of conscience should be inviolable; that excessive bail should not be required, nor cruel and unusual punishments inflicted; that the people should have a right to bear arms; that persons conscientiously scrupulous should not be compelled to bear arms; that every person should be entitled of right of petition for the redress of grievances; that search warrants should not be

granted without oath, nor general warrants at all; that soldiers should not be enlisted, except for a short, limited term, and not be quartered in time of peace upon private houses without the consent of the owners; that mutiny bills should continue in force for two years only; that causes once tried by a jury should not be re-examinable upon appeal, otherwise than according to the course of the common law; and that the powers not expressly delegated to the general government should be declared to be reserved to the States. In all these particulars the Constitution was obviously defective; and yet (it was contended) they were vital to the public security. Besides these, there were other defects relied on, such as the want of a suitable provision for a rotation in office, to prevent persons enjoying it for life; the want of an executive council for the President; the want of a provision limiting the duration of standing armies; the want of a clause securing to the people the enjoyment of the common law; the want of security for proper elections of public officers; the want of a prohibition of members of Congress holding any public offices, and of judges holding any other offices; and finally, the want of drawing a clear and direct line between the powers to be exercised by Congress and by the States." (**Story section 301 and 302**)

"Many of these objections found their way into the amendments, which, simultaneously with the ratification, were adopted in many of the State conventions. With the view of carrying into effect popular will, and also of disarming the opponents of the Constitution of all reasonable grounds of complaint, Congress at its very first session, took into consideration the amendments so proposed; and by a succession of supplementary articles provided, in substance, a bill of rights, and secured by constitutional declarations most of the other important objects suggested. These articles (in all, twelve) were submitted by Congress to the States for their ratification, and ten of them were finally ratified by the requisite number of States, and thus became incorporated into the Constitution...." (**Story Section 303**)

[The two that were not ratified were:

Article the first.....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.

Article the second...No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

The "Article the second" finally received the ratification in the proper number of states to be fully ratified as an amendment to the Constitution on May 7, 1992, and became the twenty-seventh amendment to the Constitution.]

[6] For an extensive discussion on the Nature of the U.S. Constitution; the U.S. Constitution as a Social Contract; Implications of "Social Contract"; and a strict sense of how certain implications of a Social

Contract can not apply to the U.S. Constitution, see

Story, Joseph, Commentaries On The Constitution Of The United States: With A Preliminary Review Of The Constitutional History Of The Colonies And States Before The Adoption Of The Constitution, forth edition with notes and additions by Cooley, Thomas M. (Boston: Little, Brown, and Company, 1873), Vol I, 214-263, Book III § 306-373.

[7] Story, Joseph, Commentaries On The Constitution Of The United States: With A Preliminary Review Of The Constitutional History Of The Colonies And States Before The Adoption Of The Constitution, forth edition with notes and additions by Cooley, Thomas M. (Boston: Little, Brown, and Company, 1873), Vol I, 256, Book III § 365.

The quotation that Story is quoting is from Federalist Paper 39.

[8] Story, Joseph, Commentaries On The Constitution Of The United States: With A Preliminary Review Of The Constitutional History Of The Colonies And States Before The Adoption Of The Constitution, forth edition with notes and additions by Cooley, Thomas M. (Boston: Little, Brown, and Company, 1873), Vol II, 598-601, Book XLIV § 1863-1865, 1868.

[9] Blackstone acknowledging the reality that since God created all things, human law must rest upon God's Law:
Sir William Blackstone was an attorney, jurist, and political philosopher. He lectured on law, and was chair of the Bar in England, as well as a judge in court of Common Pleas. His Commentaries on the Laws of England became the premier legal work used by the Founders and were practically the final word in law for much of America's history.

"Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being.... he should in all points conform to his Maker's will. This will of his Maker Is called the law of nature.... This law of nature, being coeval [coexistent] with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.... The doctrines thus delivered we call the revealed or divine law and they are to be found only in the holy Scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature.... Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these."

Quoted from Barton, David, Original Intent: The Courts, the Constitution, and Religion (Aledo, TX: Wallbuilder Press, 2010) , 223: originally quoted from Blackstone, William, Commentaries on the Laws of England (Philadelphia: Robert Bell, 1771), Vol I, 39, 41-42.

For an example of two Founding Fathers acknowledging that human law must rest on God's Law: Rufus King was an attorney, diplomat; and was a delegate to the Constitutional Convention where he signed the Federal Constitution.

"[T]he... law established by the Creator... extends over the whole globe, is everywhere and at all times binding upon mankind.... [This] is the law of God by which he makes his way known to man and is paramount to all human control."

> Quoted from: Barton, David, Original Intent: The Courts, the Constitution, and Religion (Aledo, TX: Wallbuilder Press, 2010), 343: originally quoted from King, Rufus, The Life and Correspondence of Rufus King, edited by King, Charles R. (New York: G.P. Putnam's Sons, 1900), Vol. VI, 276, to C. Gore, February 17 1820

James Wilson was an attorney, educator, jurist; member of the Continental Congress where he signed the Declaration of Independence, and a delegate to the Constitutional Convention where he signed the Federal Constitution.

"All [laws], however, may be arranged in two different classes. 1) Divine. 2) Human.... But it should always be remembered that this law, natural or revealed, made for men or for nations, flows from the same Divine source: it is the law of God.... Human law must rest its authority ultimately upon the authority of that law which is Divine."

> Quoted from: Barton, David, Original Intent: The Courts, the Constitution, and Religion (Aledo, TX: Wallbuilder Press, 2010), 343: originally quoted from Wilson, James, The Works of the Honourable James Wilson, edited by Wilson, Bird (Philadelphia: Lorenzo Press, 1804), Vol. I, 103-105, *"Of the General Principles of Law and Obligation."*