

weakness of an observation made in the convention by a law character, . . . it is enough for the present purpose, that it does not certainly, and necessarily, include it, because it is a point too important to be left constitutionally doubtful. To say it may be provided for by laws as well as by the constitution, is to arraign the wisdom of the people of the whole union; for they have all solemnly adopted it as a fundamental and principal right in their forms of government” (Alfred III, *Massachusetts Spy*, 23 October 1788, RCS:Mass. Supplement, 446–47).

2. Dawes refers to the case of *Rex v. Nickerson*. In November 1772 a Chatham, Mass., vessel sighted another vessel (bound from Boston to Chatham) flying a distress signal. Ansell Nickerson, who was discovered on the distressed vessel, told the captain of the Chatham vessel that three crew members had been murdered and thrown overboard by pirates, who also carried away a young boy. Nickerson, the only crew member to escape, was taken to Chatham, questioned, and then released. A man-of-war was sent to look for the pirates. The authorities, having second thoughts about Nickerson, took him into custody and reexamined him. Nickerson was then committed “in order to receive Directions from the Governor.”

Soon after, Nickerson was taken to Boston, where he was questioned by the Commissioners for the Trial of Piracy, including Governor Thomas Hutchinson, Lieutenant Governor Andrew Oliver, and Admiral John Montagu, commander of the North American Squadron. After the man-of-war returned without finding the pirates, the commissioners decided to hold Nickerson for trial. They convened a Special Court of Admiralty for the Trial of Piracies. In December 1772 Nickerson pleaded not guilty before the court and was put in prison. The court adjourned until June 1773.

Nickerson’s trial for murder and piracy began on 28 July 1773, when he was defended by John Adams and Josiah Quincy, Jr. The case was tried without a jury before eight commissioners, with Hutchinson serving as president. On 5 August Nickerson was found not guilty on procedural grounds and lack of direct evidence. The commissioners had divided four and four on the matter. Hutchinson, who believed that Nickerson was guilty, was attacked during this episode for being in favor of juryless trials. (See L. Kinvin Wroth and Hiller B. Zobel, eds., *Legal Papers of John Adams* [3 vols., Cambridge, Mass., 1965], II, 335–51.)

3. See Article XV of the Massachusetts Declaration of Rights (BoR, I, 79).

4. Nathaniel Gorham’s comments have not been preserved in any version of the debates that has been located.

William Cushing: Undelivered Speech in the Massachusetts Convention, c. 4 February 1788 (excerpt)¹

. . . And first as to a bill of rights, wch. the worthy Gent. from Sutton,² thinks wanting.

Bills of rights originated in antient despotic times; in the times of despotic Kings, whose prerogatives were boundless & whole will alone was law. I will mention one Instance—in the Reign of Chs. the I., the spirits of the Commons rose high agst. his usurpations, & Ld. Coke & others drew up a *bill* of rights, which the King was obliged to assent to, before he could obtain a grant of monies he demanded.³

But it was of no consequences, for no sooner had he assented to the bill of rights *than* he trampled the whole under foot.⁴ The short of the

matter is,—when the people could extort an Acknowledgment of some of their essential rights as freemen from the King, who before had full possõn of the whole, they thought they gained a great point.

Twas then deemed treason to hold, that all civil power originated from the people & that its sole End was their good.

But now this being the only doctrine of the country, & well understood by every man, we should lay ourselves under a disadvantage to go about to enumerate all the particular rights we meant to retain, because we might inadvertently omit some important ones which would thereby be lost

The fact is (& it is a selfevident proposition)—we retain all that we do not part with.

And this is the only safe Idea that the freemen of America can rest upon when they assemble to draw up forms & delegate powers of govmt.

And therefore it is that *in the Constitution of New York*, & a number of others—there is no bill of rights at all;—*going Upon this Sure ground, that no authority could be exercised over the people*, but such as should be expressly granted by them; which in my opinion is better & safer than any bill of rights that the wisest mortal can draw by attempting a particular enumeration of rights.

It is said still that without the guard of a bill of rights, Congress might even prescribe a religion to us;—That could not be without a downright usurpation which we should have as good a right to refuse without a bill of rights as with one—I will put a plain case precisely in point.

A man makes a power of atty to his friend to receive monies due upon certain notes of hand, which he specifies, with dates Sums & names. Does such a power authorise the Atty to receive monies upon any other notes (not named) or to touch real Estate? No more can Congress impose a Religion upon us without color of warrant or authority a Shadow of authority given in any one paragraph of the whole System.

The doctrine that rulers may have the Controll of the peoples rights, without their grant, is better adapted to the despotic monarchies of the East than to this Enlightned Country—and our Constituents will have no reason to thank us for placing their Liberties upon so dangerous a foundation, as necessarily implies that *they* are all born slaves, instead of being born free & equal.⁵ . . .

1. MS, Cushing Papers, MHi.

2. For speeches about rights by Amos Singletary on 19 January in which he said that the lack of a religious test allowed men to be elected who would endanger rights, and