

Scholar Exchange: The Bill of Rights

Briefing Document

INTRODUCTION

Goals

- What is the Bill of Rights, and why did the framers think it was necessary?
- Where did the idea of a Bill of Rights emerge from?
- What rights are in the Bill of Rights? Why those rights and not others?
- What was the role of the Anti-Federalists, those who opposed the Constitution, in making the Bill of Rights?
- After the founding generation, how did the Bill of Rights change over time?

Big Idea

With the Bill of Rights, the founding generation wrote some of our nation's most cherished liberties—from free speech to religious liberty and due process—into the Constitution. As originally crafted, the Bill of Rights protected Americans from abuses by the national government. However, with the ratification of the 14th Amendment and later decisions by the Supreme Court, the Bill of Rights is now truly a national charter of freedom—applying to abuses by *both* national government *and* the states. We'll discuss a few major figures in this framing debate—Alexander Hamilton, James Wilson, James Madison, and George Mason.

BILL OF RIGHTS

First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

- This covers freedom of speech, religion, the press, and assembly and petition. (There are five rights in here, including both establishment of religion and the free exercise of religion.)

Second Amendment: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

- Two parts of the amendment, taken from drafts and state constitutions that often-included language about standing armies, conscientious objectors, and the separation of the civil military power.
- Community/federalism protection v. individual rights guarantee

Third Amendment: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

- Experience of the British Quartering Act of 1774 key here, seeing British rule as tyrannical and invading the sanctity of private property and the home

Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

- Amendment can be broken down into parts: which things are protected (persons, houses, papers, effects), against what (unreasonable searches and seizures), exceptions given (but for probable cause supported by oath or affirmation for a warrant describing object/person to be seized).

Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

- This, along with the Sixth Amendment, grants certain rights to criminal defendants, as well as establishing due process and the "Takings Clause" (also known as "eminent domain," means that private property cannot be taken for public use without just compensation).
- Criminal rights: double jeopardy, grand jury clause for capital crimes, self-incrimination (cannot be compelled to be a witness against yourself)

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

- Here, more criminal defendant rights are established: right to a speedy and public trial, to an impartial jury (in the district where the crime was committed), the "right to be informed" (to know what you've been charged of), the "Confrontation Clause" (think of it as the right to cross-examine witnesses against you), the right to compulsory process for witnesses (that is, court orders to appear in court as a witness for the defense—subpoena power), and the right to counsel (now includes right to effective counsel, establishment of public defenders)
- Over time, much of the amendment has been incorporated against the states.

Seventh Amendment: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

- A key concern of critics of the Constitution demanding a Bill of Rights was that there was no requirement for trial by jury for civil cases, but Article III did contain a requirement for *criminal* cases.
- Also stipulates limitations on the appellate or reviewing authority of the federal courts

Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

- One of many amendments in the Bill of Right with its basis in the English Bill of Rights and the Virginia Declaration of Rights, the 17th-century English history of civil war, violent unrest, and terror is important background (in particular, the draconian punishment doled out during the Stuart dynasty)
- Reflected concerns of Anti-Federalists like Patrick Henry, who worried the powerful government could create new crimes to oppress the people

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

- Interpreted by many scholars to incorporate natural law and natural rights into the Constitution
- Reflects the concern of both sides that a Bill of Rights might either imply powers not granted to the federal government (Federalists) or that it would not list all the most important rights and liberties or sufficiently limit the federal government's power (Anti-Federalists)

Tenth Amendment: "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."

- Original hope for Anti-Federalists was to get language about the federal government only holding the powers "expressly" delegated to them

- Federalism provision meant to protect the "reserved powers" of the state, meaning the powers they held before the Constitution was ratified (like the police power) while noting that power originates with the people (popular sovereignty)

PRECURSORS TO THE BILL OF RIGHTS

Magna Carta

There are several "Bills of Rights" in English history. It is important to realize that the English *Constitution* is an unwritten constitution, but there are statutes and charters passed that do protect certain rights. The first is the Magna Carta, signed 805 years ago in 1215 by King John.

Petition of Right, 1628

Constitutional crisis that began when Charles I, upon taking over for his father King James I who died in 1625, dissolved Parliament in 1625, wanted the taxes to pay for war with Spain, jailed at least 70 people for not paying tax. Implied powers to the king to seize property without process, House of Commons committee wrote resolutions to treat each of these actions as unconstitutional (aided by former Chief Justice Sir Edmund Coke).

English Declaration of Rights, 1689

In the wake of the "Glorious Revolution" of 1688 and the abdication of James II from the throne in favor of Parliamentary supremacy, Parliament passed two acts. Declaration of Rights laid out the liberties that James II had violated (like our Declaration of Independence, this was a list of 12 grievances against King James II, the Bill of Rights was a response to each of those violations). Bill of Rights of 1689, laid out several rights:

- King has no right to suspend or dispense with laws without Parliament's consent
- Levying taxes without Parliament's consent is illegal
- Subjects have a right to petition the king
- Standing armies cannot be keep in times of peace without the consent of Parliament
- Subjects (limited to Protestants) have the right to carry arms for self-defense "suitable to their conditions" and allowed by law
- Elections for Parliament should be free
- No excessive bail or cruel or unusual punishments
- Freedom of speech within Parliament ought not to be questioned or "impeached"

Virginia Declaration of Rights

As we talk about often, after the Declaration of Independence, the first written constitutions were state constitutions. Many of these included Bills of Rights or Declaration of Rights as part of the Constitution. The most influential of these was likely the Virginia Declaration of Rights—written in June 1776 by George Mason and passed just before the Declaration—it was in fact a major influence on Jefferson's language (Thomas Jefferson drafted his own Constitution as well for the state).

The Virginian George Mason is one of the most influential founders and would later be one of the three dissenters who refused to sign the Constitution in September 1787. Mason's list of rights included a ban on excessive bail and cruel and unusual punishments, guaranteed trial by jury in the criminal and civil context, protection for due process and other procedural criminal trial rights, protection for freedom of the press (which could only be restrained by a "despotic" government), and a militia clause protecting a "well-regulated militia" as composed of the body of the people, banning standing armies in times of peace, and ensuring the division of the civil and military powers.

Mason's Declaration of Rights was so influential that many have called him the "Father of the Bill of Rights" because James Madison paid close attention to the Virginia bill. We see similar Bills of Rights in Pennsylvania, Vermont, North Carolina, and Maryland with different language (they added protections for separations of power, bans on general warrants, and the right to instruct representatives).

CONSTITUTIONAL CONVENTION

There was a late unsuccessful push for a Bill of Rights to be included in the proposed Constitution. Virginia's George Mason, the same drafter of the Virginia Declaration of Rights, supported active government, but towards the end of the convention voiced concerns and objections to the Constitution as written. Virginia's governor, Edmund Randolph, agreed that the Senate was too powerful, Congress's power overall was too broad, and that the federal courts were a threat to the power of state courts. Randolph proposed allowing state ratifying conventions to propose amendments to the Constitution to be accepted or rejected by a second general convention. Benjamin Franklin supported this motion, but Mason successfully set it aside until the Convention could see the edited Constitution prepared by the Committee of Style.

In the final days of the convention, between September 12 and 17, the delegates debated the revised version of the Constitution and considered many changes. North Carolina's Hugh Williamson mentioned that the Constitution had no protection for jury trials in civil cases. Mason agreed that a bill of rights that support the right to a jury trial along with other civil rights would "give great quiet to the people." Mason knew that a draft could be quickly prepared based on the state bills of rights. Elbridge Gerry moved to create a committee for that purpose, with Mason seconding the motion. Roger Sherman said that existing state bills of rights were sufficient protection for the people's rights, while Mason thought the laws of the United States would be paramount under the Supremacy Clause and thus to the state bills of rights. Further, not all states had bills of rights. Not one state supported Gerry's motions and later, the delegates rejected other motions to protect

freedom of the press, to include language protecting the people against standing armies in times of peace, and a guarantee of jury trials in civil cases.

Such additions were seen as unnecessary and after months of debate and the conditions of a hot summer, the delegates were ready to be done. Randolph once more moved to allow state conventions to propose amendments and to have a second convention to accept or reject those amendments before the Constitution went into effect. The day after the Constitution was signed on September 17, 1787, there was already debate over amendments and the Bill of Rights in Confederation Congress.

Richard Henry Lee, the prominent Anti-Federalist, thought the omission of any explicit protection for basic rights or a Bill of Rights, which states had because the people needed to reserve certain rights from state legislatures which had "unlimited powers." Federalists said the Constitution only gave enumerated powers to certain cases, so a bill of rights was unnecessary. Lee mentioned many of the rights that would be included in the Bill of Rights, including the First Amendment rights of freedom of speech and religion and criminal defense rights.

THE BILL OF RIGHTS, STATE RATIFYING CONVENTIONS AND THE RATIFICATION DEBATE

Remember, the Federalist and Anti-Federalist debate in the newspapers and pamphlets is happening before and during these state conventions—so many of the key arguments on both sides are known before the conventions.

Federalist Position:

- Bill of Rights was unnecessary, dangerous, and useless
- United States had a republican government, not a monarchical system
- People are sovereign, retain all rights not abdicated to government

James Wilson said this was why many state constitutions did not have Bills of Rights, no need for formal declaration of natural rights. In his famous "State House Yard" speech in October 1787, Wilson stated that it would be "superfluous" and "absurd" to include a federal Bill of Rights to suggest the people should enjoy privileges that they never divested to the new government. There was, for instance, no federal power to destroy liberty of the press, that "sacred palladium of national freedom," such a protection of the right would only be needed if Congress was given, for instance, power equal to their right to regulate interstate commerce to regulate literary works.

Anti-Federalists pointed out that most state constitutions had such bills, Mason thought that if states that were more responsive to the people needed Bills of Rights, even more crucial for protection against federal government.

Alexander Hamilton, Federalist #84

- Takes the familiar position that the English bills of rights (the Magna Carta, the Petition of Right, the Declaration of Rights) were compacts between the king and their subjects, not between the government and the sovereign people, they had "no application" to governments founded in popular sovereignty.
- Hamilton points to the preamble and says, "Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations."
- Hamilton essentially laughed off Anti-Federalist concerns, saying that, "Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government."
- To Hamilton, not only was the national government founded in popular sovereignty, but it was designed to "regulate the general political interests" of the nation, not to regulate "every species of private and public concern."
- A national bill of rights was not only unnecessary, but "dangerous," for they would contain "various expectations to powers not granted" and would be a "colorable pretext" to claim more power than was granted by the text.
    - As an example, Hamilton says there is no protection for freedom of speech and the press because there is no power to regulate the press and the "Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given."
    - He continues that even in states with bills of rights, the meaning of "freedom of the press" is unclear and defined by the people themselves.
- The structure of the Constitution already comprehended "various precautions for the public security."
- He also says that the Constitution itself is already, in "every useful sense," a Bill of Rights for the Union.
    - Again, Hamilton suggests that the design and structure of the Constitution accomplishes this, by declaring and specifying in the most "precise manner" the "political privileges of the citizens in the structure and administration of the government."
    - Such protections for public security are not found, he says, in state bills of rights.

John Dickinson, in his *Fabius* letters, sounded a similar theme to Hamilton—the protection for the rights of the people (and of the states) was not a Bill of Rights, but the structure of the Constitution (federalism, separation of powers, limited powers) and by the "soundness of sense" and "honesty of heart" of the people—Bills of

Rights were mere parchment to Dickinson and were unnecessary reminders of the "Cornerstones of liberty," just as would be writing down that the sun rises (rights like Trial by Jury, Dickinson said, were our "birthright").

Generally, one of the major objections Anti-Federalists made to the Constitution was its lack of a Bill of Rights, particularly with regards to the freedom of the press, freedom of conscience, and trial by jury.

George Mason, "Objections to the Constitution"

His very first objection was the lack of a Bill of Rights in the Constitution: "There is no Declaration of Rights, and the laws of the general government being paramount to the laws and constitution of the several States, the Declarations of Rights in the separate States are no security. Nor are the people secured even in the enjoyment of the benefit of the common law."

Mason also noted that the Constitution allowed Congress under the general welfare clause to grant monopolies in trade and commerce, constitute new crimes, inflict unusual and severe punishments, and extend their powers as far as they shall think proper because the state legislatures had no security for the powers they retained nor did the people have protection for their rights. In particular, Mason was worried that there was no protection for the liberty of the press, trial by jury in civil causes, or restrictions on the danger of standing armies in times of peace.

"*Federal Farmer #4*"

Federal Farmer, who was likely Melancton Smith or Richard Henry Lee, understood that the original Constitution did have a partial Bill of Rights. This was Article I, Sections 9 and 10, which prohibited the states and federal governments from certain actions, including banning ex post facto laws and bills of attainder, limiting when *habeas corpus* can be suspended, and maintaining the obligation of contracts.

Federal Farmer wondered why, if there was a partial Bill of Rights, not protect some of the more important rights such as freedom of speech. Further, he understood that state constitutions already protected some of these core rights. If the federal Constitution only recognize a few of those, like the prohibition on ex post facto laws, did they not constitutionalize the rest of the core rights protected by state constitutions?

Bills of Rights served to check the government and alert the people to dangers to their liberty. Thus, for Federal Farmer, bills of rights were part of what historian Saul Cornell calls the "secular creed of the nation" which had to be reverenced like the Bible—part of political and civil religion: "If a nation means its systems, religious or political, shall have duration, it ought to recognize the leading principles of them in the front page of every family book."

But, other Anti-Federalists disagreed too. John Dewitt wrote that the division between the powers retained by the people and those given to the government could not be "drawn with too much precision and accuracy." While Federalists thought the Constitution created a limited government and did not need a Bill of Rights,

DeWitt thought a Bill of Rights was an additional check on those who might manipulate the language of constitutions for bad purposes.

For instance, Luther Martin thought that federalism was inextricably linked to protecting liberty, since it was "the State governments which are to watch over and protect the rights of the individual," as states were the proper guardians of liberty as seen in his discussion of trial by jury and his defense of state control of the militia to check tyrannical government.

STATE RATIFYING CONVENTIONS

Pennsylvania

James Wilson, as he had been in his "State House" speech in October, was clear that no Bill of Rights was needed, saying that while the English Declaration of Rights and Magna Carta were "concessions from kings," the Constitution was the work of the sovereign people and thus, the people did not need to protect their liberties against themselves. Wilson repeated his old arguments in late November once the convention opened, saying that the Constitution only had the powers specifically given to it and to declare that it could not exercise powers it did not have, like interfering with freedom of speech or the press, was "preposterous and dangerous."

Thus, Wilson thought a bill of rights was "an enumeration of the powers reserved" and if we tried an enumeration of rights, "everything that is not enumerated is presumed to be given" and thus "an imperfect enumeration would throw all implied power into the scale of government." Wilson concluded that the idea of a bill of rights was so obviously "absurd" that he claimed (wrongly) no convention member had proposed adding one to the Constitution or even had the idea of doing so. Wilson by this point may have even thought state bills of rights were unnecessary, since South Carolina and New York did not have them and their people were no less free.

Anti-Federalists responded that while the Constitution limited Congress's powers in some cases, such as the suspension of habeas corpus or any interference with trial by jury in *criminal* cases, those protections without a bill of rights under Wilson's theory that it was dangerous to enumerate some rights not others might "hereafter be construed to be the only privileges reserved by the people."

Pennsylvania Anti-Federalists thought Wilson was obviously wrong because Congress's powers were "so loosely, so inaccurately" defined that it would be impossible without a bill of rights to "declare when government has degenerated into oppression." Popular elections could never check such "extensive and undefined power" as the power to raise armies, regulate and command the militia, and tax.

Ultimately, the Pennsylvania convention by 46-23 ratified the Constitution, but three days later, the minority printed, "The Dissent of the Minority of the Convention." Much of "The Dissent" focused on the rights not protected by the Constitution: the right of conscience, the right to bear arms, the right to jury trial, prohibition

against excessive bail or unreasonable searches and seizures, and freedom of speech, along with proposals to limit Congress's power to tax, regulate and control the militia, and the federal judiciary.

Massachusetts

Massachusetts towns said the Constitution should include a bill of rights (was of "unspeakable importance"), but also wanted religious qualifications for federal offices (the town of Townshend thought "Atheists Deists Papists or abettors of any false religion" should not take office).

As the convention wound down to a final vote, Samuel Adams moved to amend the committee report and add explicit provisions barring Congress from interfering with a long list of civil liberties—which was ultimately defeated with Adams himself voting against it once he sense it sent a message that the Constitution posed a serious threat to civil liberties.

The vote in Massachusetts was quite close—187-168—and the convention was the first to issue a "qualified ratification." That is, they ratified but offered amendments to the Constitution. In such a close contest, leading state Federalists had to make key concessions—defending the Senate as what historian Pauline Maier calls the "bastion of state sovereignty and a barrier against national consolidation," while also asserting the right of conventions that spoke for the sovereign people to recommend amendments to the Constitution—previously a strictly Anti-Federalist position.

Virginia

As we talked in our class on ratification, this was another close contest. Patrick Henry, a leading Anti-Federalist, early on spoke at length at the dangers of the new Constitution and cited Thomas Jefferson, then the American minister to France, as in a letter expressing hope that four states would hold out from ratification until a bill of rights was attached to it. (Jefferson soon changed his position to qualified ratification.)

Henry consistently demanded a bill of rights, making the now familiar argument that Article I, Section 9, included "express restrictions" on Congress (limits on suspending habeas corpus, passing bills of attainder and ex post facto laws) but those restrictions were "so feeble and few" that it would have been "infinitely better to have said nothing about it" since now the people's "dearest privileges will depend on the consent of Congress."

Federalist George Nicholas, like James Wilson, observed that many states had no bill of rights and were just as free. Thus, the Virginia declaration of rights "gave no security" and was only a "paper check" on power often violated.

As Pauline Maier says, Henry realized he had a winning argument, since a bill of rights was a "favorite thing" for Virginians and citizens of other states. Bills of rights said that "our rights are reserved" and stated his mind would "not be quieted. . . until I see something substantial come forth in the shape of a Bill of Rights." Henry

and his Anti-Federalist allies, including James Monroe and George Mason, worried about the extensive power of the federal courts. In particular, Henry worried that the Constitution demanded "the surrender of our great rights" and while the Virginia courts were one of the "best barriers against strides of power," if the state courts were inferior to federal courts, that advantage would be lost and state courts would combine against the people with the national government.

John Marshall, the future chief justice, responded along with Edmund Pendleton to Henry, suggesting that the Magna Carta, English Bill of Rights and Virginia Declaration of Rights did not secure the right to a jury trial with the detail Henry demanded. Marshall thought the federal judiciary was a great improvement over the current system, thought that state courts and federal courts would work together to protect liberty and denied that states would be brought into court as sovereign powers. Marshall and Pendleton both felt there was no reason to think that federal judges were less willing to protect rights than state judges

Henry also believed that the idea of subsequent amendments—offering amendments after ratifying the Constitution—was dangerous to the people's liberties. Henry's draft Bill of Rights was closely patterned on Virginia's 1776 declaration of rights, including a reservation to the states of all powers not expressly granted to Congress, a restriction on Congress's taxing power, a requirement a 2/3 vote of the members in both houses to approve laws regulating commerce or raising armies and 3/4 to approve treaties ceding or restraining territorial rights.

The main responses came from Edmund Randolph, one of three non-signers of the Constitution, and James Madison, both arguing that the proposed bill of rights was unnecessary because "the General Government had no power but what was given it" and dangerous because "an numeration which is not complete, is not safe."

Ultimately, like Massachusetts, the vote was close—89-79—and the convention issued their ratification with a revised version of the Virginia Declaration of Rights as their proposed amendments and "Bill of Rights." 20 amendments were recommended in the name of the people and were said to "enjoin" their representatives in Congress to "exert all their influence and use all reasonable and legal methods" to have them enacted.

Soon after, New Hampshire, on June 21, 1788, became the ninth state to ratify and under Article VII, the Constitution's requirements for ratification were met. New Hampshire also offered amendments with ratification, mirroring for the most part those that Massachusetts gave—all powers not expressly granted were reserved to the states, banning Congress from creating commercial monopolies, guaranteeing grand juries in capital cases, assuring trial by jury in civil actions, but also adding a denial of quartering of soldiers in homes without consent, a requirement of 3/4 of both houses of Congress to raise a "standing army" in peacetime (Virginia asked for 2/3 vote), that Congress should make no laws "touching religion or to infringe the rights of Conscience," nor could it "disarm any Citizen unless such as are or have been in Actual Rebellion."

BILL OF RIGHTS OPPOSITION

Anti-Federalists even pushed for a "Second Convention Movement" to ensure structural changes to the Constitution with a Bill of Rights. The New York "Circular Letter" pushed for a second convention.

Five days before the convention adjourned, Gerry and Mason asked for a committee to be appointed to draft a bill of rights, rejected without a single state's support. Federalists during the Ratifying contest "staunchly resisted all proposals for amending the Constitution," whether securing individual rights or changing the structure and limiting the power of the federal government.

Only once facing defeat at the MA ratifying convention did Federalists promise to recommend subsequent amendments and include a bill of rights in exchange for support of unconditional ratification. This became the pattern for the remaining conventions.

Madison insisted that the first federal Congress recommend the amendments. After the New York Convention, the Virginia House of Delegates and Senate voted to petition Congress to call a second constitutional convention immediately and urged other states to do so.

The Virginia legislature had also voted for Anti-Federalists for the Senate over Madison, as Patrick Henry campaigned to keep Madison out of Congress. If a second convention were held, "everyone would immediately understand the stakes," in contrast to the Philadelphia convention, in which many convention delegates who resisted the nationalizing and "democracy-constraining efforts of the majority made the dubious tactical choice to leave the convention early, so as not to legitimize its handiwork."

Federalists won both on the issue of conditional ratification and a second convention. They managed to avoid offering the American people the option that most of them probably would have favored—ratification with amendments to significantly limit the power of the new national government and to alter its structure to permit greater populist influence. Federalist leaders sought to "minimize direct popular influence" over ratification and favored state conventions over referenda or decision by town meeting.

BILL OF RIGHTS PROPOSAL

The debate most self-consciously linked to the ratification contest was the amendments. Madison was given the job to frame amendments to satisfy Anti-Federalists. Madison wanted to prevent any structural changes to the federal system that would weaken the new government. Madison had already had a lengthy exchange with Thomas Jefferson, who was in France, in 1787 and 1788 over the lack of a Bill of Rights, which Jefferson considered one of the glaring defects in the Constitution (the other, no term limits for presidents).

In October 1788, Madison sent Jefferson a 32-page pamphlet that included the amendments recommended by the states, he observed that only the North Carolina and Virginia conventions had formally asked that a Bill

of Rights be added to the Constitution, although every state that recommended amendments demanded the direct tax amendment.

Jefferson's idea of a Bill of Rights would protect freedom of religion, the press, protection against standing armies, restrictions against monopolies, full protection for habeas corpus, and trial by jury in all matters. Madison, who had long also discounted the need for a Bill of Rights, by this point was running for congress and claimed he had "always been in favor of a bill of rights" if it was "so framed as not to imply powers not meant to be included in the enumeration."

Madison was also aware of the need to give comfort to the Anti-Federalists and bring them into the fold of the new Union and constitutional order. Federalists won a major victory in the first elections in the fall of 1788 but Madison still understood the political value of reaching out to Anti-Federalists. By doing so, he hoped that Anti-Federalists might act more like Patrick Henry and turn to reforming the constitutional order from within rather than questioning its legitimacy.

Jefferson replied again in March 1789, reaching Madison in May once Congress was in session just before he proposed amendments, answering Madison's argument that the danger lay in the oppression of the majority not the government acting against the people, with Jefferson saying that if not all rights could be stated, "half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can." A bill of rights, he thought, would safeguard against federal abuses of power and shore up issues in the Constitution—he predicted that the executive would gain in power over time and that a bill of rights' usefulness would increase over time.

William Grayson wrote to Patrick Henry that the amendments would only "affect personal liberty alone, leaving the great points of the judiciary and direct taxation etc. to stand as they are," and felt that they did more harm than good, taxes and impartial administration of justice still issues.

Anti-Federalists mounted a campaign within Congress to limit the powers of the new government. They wanted to limit the taxing over, but also federal oversight of elections and maintain state control of the militia. Aedanus Burke, for instance, sought an amendment to ensure "Congress shall not alter, modify or interfere in the times, places or manner of holding elections of senators or representatives, except when any state shall refuse, or neglect, or be unable by invasion or rebellion to make such election."

They also wished to bind legislators to the control of the people through the use of instructions. Thus, Anti-Federalist Thomas Tudor Tucker moved that the right of assembly be linked to the right to instruct representatives, a move supported by Elbridge Gerry who thought that the people should be able to bind representatives to particular positions.

Federal judicial power remained an issue, since only legal recourse to challenge federal authority would be in federal courts.

Madison played a critical role in the adoption of the Bill of Rights, just as he had in bringing about the Constitutional Convention, setting its agenda, ensuring its success, and securing the ratification of its handiwork in Virginia. In June 1789, he proposed his amendments, a condensed and rearranged version of the 1776 Virginia Declaration of Rights, including text stipulating for the separation of powers of the branches ("the legislative department shall never exercise the powers vested in the executive or judicial...."). In July, the House submitted Madison's proposed amendments along with those of the states to a select committee, where each state had a member, altering some of Madison's language but keeping it mostly the same.

Various proposed limitations, such as ones limiting Congress's power over elections under Article I, Section IV, or to require 2/3 of each house to raise or maintain a standing army in times of peace failed.

On August 24, the House agreed to a list of 17 amendments, sending them to the Senate where they got a cold reception—no account of the debates in the Senate exists, but Virginia's senators introduced all the amendments recommended by Virginia's ratifying convention and had them all rejected. On September 14, the Senate approved a revised, compressed list of 12 amendments, grouping the House's second and third amendments together into what would become the First Amendment, eliminated Madison's amendment that ruled out state infringements of basic rights, as well as the text asserting separation of powers, giving persons with religious scruples exemption from military service, and requiring criminal jury trials to be in the "vicinage" of the crime and for the verdicts to be unanimous.

The House agreed to most of the changes—as historian Pauline Maier puts it, they had "little interest in fighting for amendments it had adopted only reluctantly." President Washington forwarded them to the states without comment on October 2. It would take over two years until December 15, 1791, for enough states to ratify—and only 10 of the 12 proposed amendments would become the first 10 amendments to the Constitution known as the Bill of Rights. (One more became the 27th amendment in 1992.)

When Antifederalist congressmen proposed structural amendments that Madison deemed potentially harmful, he sometimes converted them into individual-rights guarantees that he considered innocuous. For example, while Anti-Federalists sought an amendment limiting Congress's power to raise standing armies in time of peace, Madison offered instead a guarantee of the right 'to keep and bear arms' in connection with militia service."

In another case, the Anti-Federalists wanted to limit the powers of the new government to those expressly delegated. Madison's language was, "The powers not delegated by this Constitution, nor prohibited by it to the states, are reserved to the states respectively." Anti-Federalists wanted it to say "not expressly delegated," thinking without the language it would be meaningless. They lost this fight over what would become the 10th Amendment.

The Anti-Federalist agenda was to limit the powers of the new government and bolster the states such that they, not the federal government, would be in position to protect the liberty of their citizens. Thus, Anti-Federalists still thought that the organization and limitation of federal authority was necessary to preserving liberty. Written guarantees of individual liberty were not meaningful if the new government had large, unlimited grants of authority in areas like taxation and raising armies.

During ratification (1789-1790), not treated as a Bill of Rights, many still demand a Bill of Rights be attached to the Constitution, especially New York/Rhode Island. Some of Madison's amendments that might appear to be about protecting individual rights were focused on protecting the structure of federalism:

- Second amendment: the right to 'keep and bear' arms prevented Congress from disarming state militias, which Anti-Federalists deemed critical to blocking possible oppression by the national government.
    - Anti-Federalist reminded Congress of the "indispensable role" of the militia in a republican government: "What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty" and "Whenever governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins."
    - Thus, Gerry and Anti-Federalists saw the role of the militia, like the jury, as one that must continue to be a creature of the states since republicanism understood standing armies to be dangerous to liberty.

Madison saw three dangers in 1787 under state constitutions: abuse of legislative power, true problem of rights was less to protect the rule from their rules than minorities and individuals against factious majorities, and that agencies were less dangerous than state and local despotism. Anti-Federalists were not satisfied with Madison's amendments. Elbridge Gerry told Congress that, "Those who were called anti-federalists at that time, complained that they had injustice done them by the title, because they were in favor of a federal Government, and the others were in favor of a national one." (Federal meaning a division of power between the states and federal government more like the Articles of Confederation.)

Thus, Gerry and other Anti-Federalists thought the amendments called the Bill of Rights thereafter failed to achieve the structure changes they thought necessary to protect both the power of the states and, as a result, the rights of individuals.

Aedanus Burke complained that the amendments were "very far from giving satisfaction to our constituents" and were not "those solid and substantial amendments which the people expect; they are little better than whip-syllabub, and frothy and full of wind, formed only to please the plate, or they are like a tub throw out to a whale, to secure the freight of the ship and its peaceable voyage."

Richard Henry Lee, the possible voice behind Federal Farmer, said that, "The idea of subsequent Amendments (during ratification) was delusion altogether, and so intended by the greater part of those who arrogated to themselves the name of Federalists. . . the great points of free election, jury trial in criminal cases much loosened, the unlimited right of taxation, and standing armies in peace, remain as they were. Some valuable rights are indeed *declared*, but the powers that remain are very sufficient to render them nugatory at pleasure."

George Mason felt that the federal judiciary was not limited enough and complained that there was no council created to the president to grant them powers given to the Senate (treaty making, appointments)

Even Federalist George Clymer thought "Madison's amendments," as he called them, were the work of a "sensible physician" who had "given his malades imaginaires bread pills powder of paste and neutral mixtures to keep them in play." He had given the people enough "medicine" to make the Constitution go down, in other words.

Language of 10th Amendment as example of most bitterly contested issue—desire of Anti-Federalists to limit the powers of the new government to those expressly delegated.

Taxing power seen as new government could weaken states, punish them, so wanted states to determine how taxes were assessed.

POST-CIVIL WAR APPLICATION

We will learn even more about the 14th Amendment in future classes, but we should understand how the Bill of Rights was key to what historian Eric Foner calls the "Second Founding." The central figure is Ohio Representative John Bingham—who Justice Hugo Black later describes as the "Madison" of the 14th Amendment. Bingham was the primary drafter behind the 14th Amendment and believed strongly that it should apply the Bill of Rights to the states.

This story comes after the events of the American Civil War and the end of slavery through the Emancipation Proclamation (granting freedom to all slaves in Confederate territory) and the 13th Amendment (ending slavery permanently). Recall the experience of the "Black Codes" following the Civil War and the return of Confederate states in the South to the Union. These codes, which were intended to so severely limit African Americans as to place them in a state close to slavery, denied a variety of civil liberties-the right to own property, make contracts, bear arms, et al. Thus, it denied them the protection of the Bill of Rights as well.

In 1866, after appointing a joint committee on Reconstruction, the Republicans in Congress first passed the Civil Rights Act of 1866, citing the enforcement clause of the 13th Amendment. For Bingham, **one clear**

purpose of the 14th Amendment was to apply the Bill of the Rights to the states through the "Privileges or Immunities Clause."

In a famous speech on the floor of the Senate, Senator Jacob M. Howard—a Republican from Michigan—said that the clause was difficult to define, but included "the personal rights guaranteed and secured by the first eight amendments of the Constitution."

What does the amendment do? The Citizenship Clause overruled *Dred Scott*, declaring that all persons born or naturalized in the United States and legally subject to its jurisdiction are U.S. citizens.

The amendment forced states to respect the "privileges or immunities" of U.S. citizens (generally, a substitute for the word "rights"), to ensure that citizens not be denied "equal protection of the laws," and assured that their rights could not be taken away without due process. In the end, the Reconstruction generation understood that they were framing (and ratifying) language to amend "our fundamental law" and were "making history and laying foundations for our future nation building."

A key point to understand is that as a result of the 14th Amendment, most "Bill of Rights" cases today come through the 14th Amendment. As we'll see, before the "Second Founding," if New Jersey's governor violated the First Amendment and banned certain speech in the public square, there would be no constitutional case against, but after the 14th Amendment and the Supreme Court's actions over the 20th century, the First Amendment now applied against the states.

Finally, the Supreme Court was also an important figure in Reconstruction, reading the Reconstruction Amendments quite narrowly. In other words, the Court weakened those protections.

SUPREME COURT CASES

In *The Slaughter-House Cases*, the Supreme Court all-but read Bingham's beloved Privileges or Immunities Clause out of the Constitution. We will talk about the *Slaughterhouse Cases* and other Reconstruction era cases in future classes, but the key here is that the Supreme Court initially declined to extend the Bill of Rights as Bingham intended under the "state action" doctrine (only applied if the state itself acted, so generally, the 14th Amendment did not apply or "incorporate" the bill of rights against the states), but over time, it has embraced expanding the Bill of Rights through what we call "incorporation."

In the 20th century, the Supreme Court began to reinvigorate Bingham's vision and apply key Bill of Rights protections to the states—a process that lawyers call "selective incorporation." The simple idea is that the Court would apply key Bill of Rights protections like free speech and religious liberty to the states on a case-by-case basis—one constitutional right at a time.

In 1908, in *Twining v. New Jersey*, the Court began to work around *The Slaughter-House Cases*, suggesting that incorporation could happen through the Due Process Clause of the 14th Amendment instead of the Privileges or Immunities Clause. The incorporation story could be traced to the 1897 case of *Chicago, Burlington, and Quincy Railroad v. City of Chicago*. But scholars often argue that the Court really began the process with *Gitlow v. New York* in 1925. There, the Court applied the First Amendment's protection for freedom of speech against the states.

From there, the Court began a process that remains ongoing through today. In fact, just this spring, the Court incorporated the Sixth Amendment's right to a unanimous jury verdict in *Ramos v. Louisiana*. And last year in *Timbs v. Indiana*, it applied the Eighth Amendment's right against excessive bail to the states. In many ways, Justice Hugo Black was the driving force in questioning the idea of "selective incorporation." With the legal establishment stacked against him, Justice Black led a dissenting line of thought between the 1940s and 1960s—growing out of his own analysis of the Reconstruction founders and beginning with his dissent in *Adamson v. California* (1947). Black argued that the 14th Amendment was designed to apply the first eight amendments from the Bill of Rights to the states. In *Duncan v. Louisiana* (1968), he argued that the Bill of Rights should be incorporated through the "Privileges or Immunities" Clause.

Black: *"'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' seem to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States."*

Black also argued that *The Slaughter-House Cases* never explicitly ruled that the Clause did not apply the Bill of Rights to the states.

Justice Clarence Thomas is currently one member of the Court who agrees that incorporation should come through the Privileges or Immunities Clause. Justice Neal Gorsuch has suggested he may as well. So, that's incorporation. It covers rights explicitly mentioned in the Constitution.

BILL OF RIGHTS TODAY

Hypothetical

The Supreme Court has heard several recent cases about the treatment of religious services under state "lockdown" orders. The argument is that through the 14th Amendment and the Equal Protection Clause, religious services and churches cannot be treated differently from other businesses without a good reason.

What about protests during the time of COVID-19? Lockdown and other COVID related orders and regulations are made by state legislatures and state governors (typically, legislatures give governors emergency powers and governors are using those powers now).

When they ban gatherings of over 50 people, does that violate the First Amendment's protection for the freedom of assembly? Churches have argued that religious services are also a form of assembly and that therefore emergency orders that are too broad violate both freedom of assembly and free exercise of religion under the First Amendment. Does the Bill of Rights see a difference between these activities during a public health emergency or are both protected (or not)?

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