

The Breakfast Club

Constitutional Minute for 6 July 2021

Why Do We Have the “Bill of Rights?”

Many Americans have forgotten or were never taught why we have the Bill of Rights.¹ Some remember it was not part of the original Constitution but was added later. In 2016, 39% of Americans polled were unable to name any of the five different rights secured by the First Amendment. Many on the Left think that the 2nd Amendment created a right to keep and bear arms; and in fact for many years (at least during the Obama and Trump administrations) the White House website proudly (and sadly) proclaimed that *“The 2nd Amendment gives you the right to keep and bear arms.”* Let’s review some history:

The idea of a Bill of rights did not come up at the 1787 convention until a few days before the delegates concluded and signed the document. George Mason of Virginia, who had been the principal author of the Virginia Declaration of Rights of 1776, suggested that adding a Bill of Rights to the new Constitution would “give great quiet to the people” and that one could be prepared very quickly. Roger Sherman countered that most of the state constitutions had bills of rights; they would protect the essential rights of the people. The delegates had been at this for four months, long hot months, and everyone wanted nothing more than to wrap things up and go home. Mason’s motion to compose a committee to draft a Bill of Rights was defeated and a few days later they signed the Constitution without one.

The absence of a Bill of Rights did not keep some states from quickly ratifying the document but in Massachusetts there was strong anti-federalist sentiment among the delegates to their ratifying convention. It looked initially like ratification might go down to defeat, a bad omen since Massachusetts was a strong, prosperous state and defeat there would echo throughout the remaining states, perhaps leading to the entire document failing to be ratified. In exchange for support by the anti-federalists, the federalists promised there would be the opportunity to submit proposed amendments to the Constitution itself as well as proposed articles for a Bill of Rights -- and they kept their promise. Subsequent state conventions noted what had happened in Massachusetts and followed suit, including George Mason’s Virginia.

In the Virginia Convention, James Madison, who had initially been ambivalent on the subject, finally began to see a Bill of Rights as a political necessity. When campaigning for a seat in the first Congress, he promised that if elected he would work to draft one. By a slim margin of 336 votes he defeated his friend and neighbor James Monroe for the seat and headed to New York.

¹ It wasn’t called the Bill of Rights until the Civil War period. Before then they were simply the first ten amendments to the Constitution.

There he tirelessly worked to first draft many amendments to the Constitution, using the suggestions from the states as a guide, and then doggedly pushed the initiative through a reluctant Congress that felt assembling a government from the ground up was more pressing.

The main arguments for and against a Bill of Rights were these:

- **A Bill of Rights was essential** to restrain a too-powerful government; that all governments eventually seek to acquire greater powers and unless constrained by a guarantee of rights, will eventually find ways to abridge these rights. Besides, nearly every State constitution had an imbedded or attached bill of rights.
- **A Bill of Rights was unnecessary** since the Constitution described a government with only limited powers. Since Congress was given no power in the Constitution to restrict the ownership of guns, for instance, the Constitution posed no threat to a right of gun ownership. Adding to this was the view that, since it was impossible to list all human rights found in the concept of Natural Law, to omit certain rights from a Bill of Rights was to suggest that these rights were not protected. (Madison drafted what became the 9th Amendment to address this concern).

Ten of the twelve articles sent to the states for ratification achieved the necessary support of $\frac{3}{4}$ of the states when Virginia ratified on December 15, 1791. The original second article was ratified 203 years later, becoming the 27th Amendment.² The story of the 27th Amendment shows the power of one determined citizen.

The Bill of Rights was intended to apply only to the national government, not the states; the first words of the First Amendment make this clear, and the Supreme Court said so emphatically several times, as late as 1833.³ But 90 years later the Court decided the states needed to protect the rights secured by the Bill of Rights, even if state Constitutions did so as well. Beginning in 1925,⁴ the Court declared that the wording of the 14th Amendment “incorporated” the Bill of Rights and over many years, as cases presented themselves, they have “incorporated” nearly all (but not all) the clauses of the Bill of Rights against the states.

Bottomline: The Bill of Rights creates no rights; it merely (and thankfully) secures important rights against government intrusion. What would life in America be like without it?

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² https://en.wikipedia.org/wiki/Twenty-seventh_Amendment_to_the_United_States_Constitution

³ [Barron v. Baltimore, 32 U.S. 243 \(1833\)](#)

⁴ [Gitlow v. New York, 268 U.S. 652 \(1925\)](#)