

The Breakfast Club
Constitutional Minute for 27 December 2022
Life Without the Bill of Rights – Part 2

The 15th of December was National Bill of Rights Day, based on the fact that on that day in 1791, proposed amendments 3 through 12 received the required ratification of $\frac{3}{4}$ of the states. I hope you didn't celebrate by arguing with your spouse that the long shopping lines at this time of year constitute cruel and unusual punishment. There is typically a whole day of activities at the National Constitution Center in Washington – exhibits, seminars and presentations galore. If you didn't get there --maybe next year.

Last week we explored the idea of an America without the Bill of Rights. I argued that under the view of the Founders prevailing at the time the Constitution was drafted, our Bill of Rights could be entirely repealed without jeopardy because the federal government had been provided no power that would impinge on our rights. Thomas Jefferson stipulated in 1776 that our natural rights were unalienable, irrevocable.

Unfortunately, both the view of rights as unalienable gifts of God as well as the view of a government of limited enumerated powers no longer hold sway with either the ruling elite in Washington nor even many Americans. Many Americans seem to want a powerful central government, even if that power occasionally steps on the liberties of some of our less empowered citizens. We've subscribed to Mr. Spock's philosophy that "The needs of the many outweigh the needs of the few." This of course is the central tenant of democracy; a political system the Founders soundly rejected.

I also mentioned last week that had the Bill of Rights not been adopted, the State Constitutions would have still provided their citizens many protections, but these protections varied from state to state. There used to be a comparison of the rights contained in the various state declarations of rights. But the old link on <http://teachingamericanhistory.org> no longer seems to work. Pity, it was a good comparison.

Virginia's original Declaration of Rights, while superior to the Bill of Rights in many respects, had no protections for free speech, peaceable assembly, defense against double jeopardy or use of a Grand Jury. These deficiencies were ultimately corrected in later Constitutions, and the Virginia Supreme Court is on record as stating that Virginia's statement protecting free speech is now even stronger than that of the U.S. Bill of Rights.

But assuming that the Bill of Rights had never been adopted, and neither did state constitutions have rights protections, what could life be like in America?

Without a Sixth Amendment, criminal trials, if you got one at all, would not have to be conducted in public or be speedy, and a jury, again, if you got one, would have no requirement to be impartial (did you know there is no Constitutional requirement for "a jury of your peers?"). You could be tried

anywhere, even outside the jurisdiction where the crime was committed. You would have no right to be informed of the charges against you, no right to confront witnesses against you, nor any ability to compel witnesses in your behalf. If you could afford an attorney you'd probably have one, otherwise you'd go without -- echoes of England's infamous Star Chamber.

Without the Seventh Amendment there would be no requirement for a jury trial in common law matters, and if the prosecutor didn't like the innocent verdict you received he could try you again in another venue until he obtained the verdict he was looking for.

Without the Eighth Amendment, bail could be set way above any amount you could afford or borrow, thus ensuring your confinement until your trial date (remember, the trial needn't be "speedy," so you could be in jail quite a while). It would be interesting to see whether we the people would vote to resume drawing and quartering people for certain particularly heinous crimes. Probably not, but hangings, firing squads, maybe even the guillotine, all quick and cheap means of dispatching the condemned could certainly return.

Without the Ninth Amendment, we might easily forget that we have other unalienable rights that have not been heretofore specified. But here there is also danger. Under our Constitution, who has the authority to identify and define unenumerated rights – the people or the government? I answer: Whose document is it? Does it begin with "We the people" or "We the government?" If the people forsake their authority over the Constitution, government will gladly step in.

Take the case of *Griswold v. Connecticut*. Here the Supreme Court identified and defined a right of privacy that had thus far been unknown to the Constitution. The Court did not ask the American people whether a general right to privacy was to be protected or how it was to be defined, the Justices went ahead and defined it themselves.

From *Griswold* came *Roe v. Wade*. Did a majority of the American people want to have the Constitution protect an essentially unrestrained right to kill unborn babies? Clearly no, but that is what we now have thanks to the Supreme Court. Without the Court's usurpation of the people's authority there would likely be 50 million more wage earners in the workplace today, enough to keep Social Security solvent, for instance. I firmly believe in a natural right to privacy and that this privacy should be secured by our Constitution, but I also believe that the people have the sole power to determine how that right is to be defined and secured.

Without the Tenth Amendment, the idea of nullification would itself be nullified and states would be left without a basis for resisting the unlimited power of the federal government. All governmental power would clearly reside at the federal level; none would be retained by the states or the people.

I think you can see that without the Bill of Rights, government's power would grow unrestrained (Oh wait, that's happening already). We would still have a republic, but it would be anyone's guess as to what rights would be protected. On the plus side, we would certainly not be experiencing a flood of illegal immigrants coursing across our southern border to live "La Dolce Vita" -- there'd be little "dolce" in our "vita."

Perhaps if they had not ratified the Bill of Rights in 1791 the American people would have gradually seen the need for its protections and demanded amendments be added, one by one. Maybe we'd have ended up with something similar, perhaps something very different. But the fact remains: we do have the Bill of Rights, and it is incumbent upon all Americans to understand what it secures: unalienable rights.

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