

## **THE BILL OF RIGHTS**

### **PRECURSORS**

1215: Magna Carta (“The Great Charter”)

39. No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed--nor will we go upon or send upon him--save by the lawful judgment of his peers or by the law of the land.

40. To none will we sell, to none deny or delay, right or justice.

Rudyard Kipling: “What Say the Reeds at Runnymede?”

English Constitutional Documents (limited the Crown only)

1628: Petition of Right (incl. right to jury trial)

1679: Habeas Corpus Act

1689: Bill of Rights (incl. ban on excessive bail, fines, cruel and unusual punishments)

Colonial Charters and Statutes (limited the Legislature, as well as the Crown)

State Constitutions (8 Declarations of Rights)

1776: Virginia (freedom of the press, freedom of religion, ban on cruel and unusual punishments)

1776: Pennsylvania (adds freedom of speech, assembly, and petition; right to bear arms; right to travel)

1776: Delaware (adds ban on ex post facto laws)

1776: Maryland (adds ban on bills of attainder)

1780: Massachusetts (adds ban on unreasonable searches and seizures)

### **THE CONSTITUTIONAL CONVENTION**

At the Constitutional Convention of 1787, there was very little discussion of a Bill of Rights:

Elbridge Gerry (Mass.) and George Mason (Virginia) moved for a committee to prepare a Bill of Rights. Motion defeated: 10-0.

Charles Pinckney (S. Carolina) and Gerry moved for a declaration in favor of preserving the freedom of the press. Motion defeated: 7-4.

## **DEBATE OVER RATIFICATION: ANTI-FEDERALISTS**

Two main Anti-Federalist concerns

1. Federal encroachment on State sovereignty  
Commerce Clause: I.8.3
2. Rights Violations
  - a. Taxation Clause: I.8.1 (press, religion, privacy)
  - b. “Necessary and Proper” Clause: I.8.18 (procedural rights in criminal prosecutions)

## **FEDERALIST RESPONSES: BACKGROUND**

Two main classes of rights

Natural Rights: rights held from birth on (in a state of nature)

Social Rights: rights held after social compact that are designed to protect natural rights (e.g., procedural rights in criminal prosecutions)

## **FEDERALIST POSITION I**

1. Bill of Natural Rights is Unnecessary

The Constitution enumerates the powers of the Federal government. By implication, any unenumerated power is not granted. But the power to violate natural rights is not among those enumerated. So implicit in the Constitution is the fact that the Federal government has no power to violate natural rights.

## **ANTI-FEDERALIST REPLY I**

1. Bill of Natural Rights is Necessary

Although the proposed Constitution does not explicitly grant the power to violate natural rights to the Federal government, it DOES empower Congress to enact any laws it deems “necessary and proper” for executing the enumerated powers. Such laws could easily end up violating natural rights.

## **FEDERALIST POSITION II**

### 2. Bill of Social Rights is Unnecessary

The proposed Constitution already protects social rights (e.g., ban on bills of attainder, ban on ex post facto laws, habeas corpus, ban on religious tests for public office, ban on titles of nobility).

## **ANTI-FEDERALIST REPLY II**

### 2. Additional Bill of Social Rights is Necessary

Although the proposed Constitution does explicitly protect SOME social rights, there are many social rights it does NOT explicitly protect (e.g., freedom of the press, procedural rights in criminal prosecutions).

## **FEDERALIST POSITION III**

### 3. Bill of Rights is Unnecessary: States

Rights left unprotected by the proposed Federal Constitution are explicitly protected by State Constitutions (Declarations of Rights).

## **ANTI-FEDERALIST REPLY III**

### 3. Bill of Rights is Necessary: States

Although some of the rights that are left unprotected by the proposed Federal Constitution are explicitly protected by State Constitutions, all the State Declarations of Rights protect some rights but not others, some secure these rights improperly, and some States have no Bill of Rights.

## **FEDERALIST POSITION IV**

### 4. Bill of Rights is Dangerous

A Bill of Rights “would contain various exceptions to powers 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?” (Hamilton, Federalist #84)

## **ANTI-FEDERALIST REPLY IV**

### 4. If a Bill of Rights is Dangerous, then the proposed Constitution is Dangerous

The proposed Constitution “contains various exceptions to powers not granted” (e.g., habeas corpus, ban on titles of nobility, ban on bills of attainder, ban on ex post facto laws), and so, by Hamilton’s own argument, would “afford a colorable pretext to claim more than were granted”.

## **THE RATIFICATION DEBATES**

In 1787, the proposed Constitution was sent to the 13 State Legislatures for ratification. Anti-Federalists based their opposition to ratification almost entirely on the omission of a Bill of Rights. Federalists responded by proposing that the Constitution be ratified with the recommendation to Congress that it be immediately amended to include a Bill of Rights. The Federalists won the argument.

## **MADISON’S ABOUT-FACE**

Madison initially opposed the idea of including a Bill of Rights in the Constitution. But his friend, Thomas Jefferson, offered additional persuasive reasons favoring the addition of a Bill of Rights. And Madison realized that the political consequences of continued opposition to a Bill of Rights might well be worse than the alternative (threat of a 2nd Constitutional Convention).

## **MADISON’S SPEECH**

Elected to the First Congress, Madison (on June 8, 1789) proposed a set of amendments (very close to what we now know as the Bill of Rights) and explained why he had changed his mind on the issue. He criticized the Federalists’ argument that a Bill of Rights would be both unnecessary and dangerous (see above), and answered one further important objection.

## **USELESSNESS I**

One major concern (which Madison shared to some extent) was that a Bill of Rights is no more than words on parchment, and, especially in times of national crisis, would simply be disregarded by Congress and the President.

Adams: Alien and Sedition Acts (1798)  
Lincoln: Suspension of the Writ of Habeas Corpus (Civil War)  
FDR: Forced internment of Japanese Americans (World War II)

Bush: Warrantless spying on American citizens/enemy combatants doctrine (War on Terror)?

### **MADISON'S REPLY**

The Role of the Judiciary

If a Bill of Rights is “incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive” (Madison’s Speech: see Hamilton, Federalist #78)

### **USELESSNESS II**

Another major concern was that the Bill of Rights would be a mere “paper barrier” to the occasionally oppressive designs of the people. As Madison recognized, “the greatest danger [to rights] lies...in the body of the people, operating by the majority against the minority.”

### **MADISON'S REPLY**

Although Madison recognized that “paper barriers” cannot prevent every majority encroachment on minority rights, yet “as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one mean to control the majority from those acts to which they might be otherwise inclined.”

### **THE PEDAGOGICAL FUNCTION OF THE BILL OF RIGHTS**

The fundamental case for a bill of rights is that it can be a prime agency of that political and moral education of the people on which free republican government depends.  
(Storing)

### **CONCLUDING REMARKS**

Function of the Constitution and Bill of Rights

Enumerates powers of the Federal Government

Proscribes violation of enumerated natural and social rights of citizens by the Federal Government (I.9 and Amendments 1-8)

Proscribes violation of unenumerated natural and social rights of citizens by the Federal Government (Amendment 9)

Proscribes violation of a very limited number of enumerated social rights by the States (I.10)

#### Function of the U.S. Supreme Court

To say what the law is/to interpret the Constitution

To determine whether a given legislative or executive act is unconstitutional (to serve as the guardian of a limited Constitution)

To protect the rights of the minority against oppressive measures supported by the majority (the counter-majoritarian, anti-democratic function)