

WebMemo



Published by The Heritage Foundation

No. 1747

December 14, 2007

Securing Liberty: The Purpose and Importance of the Bill of Rights

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National Bill of Rights Day customarily occupies a minor place on our calendars, if it occupies a place at all. It falls every year on December 15, commemorating the ratification of the first 10 amendments to our Constitution, which occurred on that day in 1791. Bill of Rights Day is a day for rising above the commotion over the meaning of each specific amendment. It is an opportunity for us to reflect upon the purpose of those amendments as a whole, to step back and consider the crucial questions that our Founders confronted in considering the idea of amending the Constitution to include a bill of rights.

Implicit in the story surrounding our Bill of Rights is the proposition that the liberties of a nation can only be secured by citizens of firm conviction who understand our rights and liberties and will actively defend them. As Americans studying this important document, we revivify in the public mind the rights and privileges set forth in these amendments. And in doing so, we dutifully fulfill its original purpose.

Parchment Barriers. Although the Founders had extensive experience with bills of rights in the various states, at the Constitutional Convention there was little support for, or even discussion of, placing a statement resembling a bill of rights in the Constitution. When two of the Convention's most influential delegates, Elbridge Gerry and George Mason, proposed adding a bill of rights to the Constitution, their proposal was rejected by a unanimous vote of the states after receiving very little discussion.

The story of the Bill of Rights can be told as the story of how and why the Convention did not support a bill of rights and how James Madison, the "Father of the Constitution," was persuaded to take on the duty of serving as the "Father of the Bill of Rights" in the First Congress.

The Founders' indifference toward a bill of rights in the national Constitution was premised on the idea that it would not be practically useful. The experience of the states in the 1780s demonstrated that bills of rights, though suitable for theoretical treatises, imposed no effective restraints on those who would be responsible for protecting rights in practice. As Alexander Hamilton wrote in *Federalist* 84, the provisions of the various state bills of rights "would sound much better in a treatise of ethics than in a constitution of government."¹ Benjamin Rush similarly stated that those states which had tried to secure their liberties with a bill of rights had "encumbered their constitutions with that idle and superfluous instrument."² The Founders at the Convention believed that a bill of rights would be merely another "parchment barrier" incapable of restraining those who would seek to violate its provisions, and thus it would fail to provide true security for liberty.

This paper, in its entirety, can be found at:
www.heritage.org/Research/Thought/wm1747.cfm

Produced by the B. Kenneth Simon
Center for American Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002-4999
(202) 546-4400 • heritage.org

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The Federalists' Opposition to a Bill of Rights.

The indifference of the Federalists—the defenders of the proposed Constitution—to a bill of rights turned into outright opposition when the Anti-Federalists denounced the Constitution and sought to obstruct its ratification. Near or at the top of most Anti-Federalists' lists of objections to the Constitution was the absence of a bill of rights. In response to this opposition, the Federalists argued that a bill of rights would be “not only unnecessary in the proposed constitution, but would even be dangerous.”³ Their arguments are worth considering for what they teach us about the central principles of our Constitution.

First and most importantly, the defenders of the Constitution argued that a bill of rights would undermine the idea of a government with limited powers. A bill of rights might betray the central principle of a written constitution as the product of a social compact, which affirms that all authority originally resides in the people and that the people create a government of *limited* and *enumerated* powers in a written constitution.

To suggest, for example, that the liberty of the press is not to be infringed upon might imply that, without such a provision, the federal government *would* possess that power. The Founders feared that we might infer that they created a government with unlimited power and that the specific provisions in the Bill of Rights denote particular reservations of power from an otherwise unlimited government. James Wilson made this argument most forcefully in speeches defending the Constitution in the state of Pennsylvania. The theory underlying the Constitution, he argued, is that “congressional power is to be collected, not from tacit implications, but from the positive grant expressed in the instrument of the

union. Hence...everything which is not given is reserved.”⁴ Therefore, the presence of a bill of rights “would have supposed that we were throwing into the general government every power not expressly reserved by the people.”⁵ Similarly, Alexander Hamilton contended that a bill of rights “would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?”⁶

Adding to this first difficulty was a second problem: A bill of rights, Federalists argued, could not sufficiently define the rights that individuals possess by nature and those rights and privileges which governments are obliged to secure to citizens. Thus, a bill of rights would not only “afford a colourable pretext” for the government to claim more power than was granted to it by the Constitution; it would also insufficiently enumerate the rights which ought to be protected by the government. This would imply that any right not explicitly mentioned in the Bill of Rights must not be protected by it. Due to the impossibility of defining all of the rights which government must respect, a bill of rights would leave a window open for government to infringe upon the rights of its citizens. The centuries-old history of American constitutional law serves to illustrate the force of this argument. Even the greatest American jurists disagreed about the meaning of the provisions of these amendments.

Federalists advanced a third and more subtle critique, namely that a bill of rights might confuse people about the ultimate source of their rights. Many Federalists thought there was no need for a declaration of rights in 1787, because the work had already been done in 1776. In the Declaration of Indepen-

1. See Alexander Hamilton, *The Federalist*, ed. Jacob E. Cooke (Middletown, Conn.: Wesleyan University Press, 1961), No. 84, p. 579. All citations to *The Federalist* will cite the paper number, followed by the page number in the Cooke edition.
2. Benjamin Rush, speech at Pennsylvania Ratification Convention, cited in Herbert Storing, *What the Anti-Federalists Were For* (Chicago and London: University of Chicago Press, 1981), p. 68.
3. *Federalist* No. 84, p. 579.
4. James Wilson, “State House Speech,” October 6, 1787, cited in *The Founders' Constitution*, eds. Philip B. Kurland and Ralph Lerner (Indianapolis, IN: Liberty Fund, 1987), Vol. I, p. 449.
5. James Wilson, Pennsylvania Ratifying Convention, November 28, 1787, cited in Thomas B. McAfee, “The Original Meaning of the Ninth Amendment,” *Columbia Law Review*, Vol. 90 (1990), p. 1233.
6. *Federalist* No. 84, p. 579.

dence, our Founders had declared that all human beings are endowed with natural and inalienable rights by virtue of their participation in the same fundamental human nature. What need was there to set forth these principles again, particularly in a document whose purpose was not to describe the natural state of man but to establish the institutional framework of the government? To declare our fundamental rights in a document subject to ratification by the people suggested a dangerous principle, namely that the *source* of rights lies in consent and agreement rather than nature. In other words, a bill of rights might suggest to the people that their rights come from positive law, agreement, and judicial enforcement rather than nature. As Jack Rakove writes, “By implying that traditional rights and liberties would be rendered insecure if they went undeclared, Anti-Federalists in effect suggested that the existence of these rights *depended* upon their positive expression.”⁷

Madison’s Change of Opinion. Ultimately, James Madison and most of the other Federalists changed their minds and favored ratification of the amendments we today call our Bill of Rights. While many historical accounts suggest that Madison and the Federalists acquiesced in the adoption of these amendments because it was the only pathway to ratification of the Constitution, they did not change their position due to mere political opportunism. As Rakove points out, “Contrary to the usual story, the concessions that Federalist leaders offered to secure ratification in such closely divided states as Massachusetts, Virginia, and New York did not establish a binding contract to provide a bill of rights.”⁸ In fact, by the time the First Congress met in April of 1789, the necessity of appeasing the Anti-Federalists on this point had subsided. Thus, the existence of the first 10 amendments to the Constitution cannot be explained merely as political maneuvering necessary to secure ratification.

Nor did the Federalists become persuaded that their objections to a bill of rights in the abstract were unfounded. They still believed that a bill of rights would be ineffective, even dangerous, if construed in an improper manner. Madison, announcing his change of mind in a letter to Thomas Jefferson, remarked, “My own opinion has always been in favor of a bill of rights, provided it be so framed as not to imply powers not meant to be included in the enumeration.”⁹ In other words, if a bill of rights could be framed in a way that avoided the Federalists’ objections, it might serve some useful purpose.

Madison’s statement explains why he took the lead in writing the amendments that were considered by the First Congress. His intent was to frame the amendments in a way that would not undermine what had been achieved at the Convention. For one, Madison proposed to insert the amendments in the body of the Constitution, alongside other rights and protections already in the text, rather than placing them outside the Constitution as amendments to it. This would avoid a central problem that we encounter today, namely that the public’s focus (and reverence) is drawn away from the Constitution and toward the amendments.

Second, having been rebuffed in that attempt by his colleagues in Congress, Madison was careful not to actually call the proposed amendments a bill of rights. Thus, the term “bill of rights” is not to be found in the preamble to the first 10 amendments to the Constitution. Strictly speaking, what we today call the Bill of Rights are 10 separate amendments, and they were to be considered as separate provisions rather than a single document. In a subtle but important move, the First Congress responded to the call for a bill of rights by providing a number of “declaratory and restrictive clauses” to be considered for ratification.¹⁰ This is also demonstrated by the fact that only 10 of the 12 proposed

7. Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Random House, 1997), p. 324 (italics in original).

8. *Ibid.*, p. 330.

9. Letter from James Madison to Thomas Jefferson, October 17, 1788, in *Founders’ Constitution*, eds. Kurland and Lerner, Vol. I, p. 477.

10. See Preamble to the Bill of Rights, available online at www.billofrights.org.

amendments were ratified in 1791. If the 12 amendments were to be considered as a single bill of rights, it would have been necessary to give an affirmative or negative vote to these amendments as a whole.

By framing the amendments in this way, Madison pointed back to the Declaration of Independence as the philosophic statement of rights and first principles; the amendments were not intended to replace or revise what had been set forth in that document. Therefore, the amendments should not be construed as enlarging the grant of power to the federal government by the Constitution, nor could they be thought to serve as a sufficient definition of all the rights and privileges of citizens.

These points illustrate the crucial importance of the Ninth and Tenth Amendments. Those amendments were drafted and ratified to prevent the Constitution from becoming a *carte blanche* of authority to an unlimited government. Neglect of these amendments by the public as well as the courts has been so conspicuous as to illustrate the force of the Federalists' original objections to a bill of rights. Yet for Madison, these amendments were central. They were intended to prevent the false interpretations that might be placed upon the provisions enumerating powers in the Constitution.

The Purpose of the Bill of Rights. There is one final question to be answered: Even if Madison believed that a bill of rights could be framed—as ours surely was—with the intent of preventing the implication of powers not granted to the government by the Constitution, what benefit could be gained by it? Was it not Madison who argued most forcefully that we cannot trust in parchment barriers? The answer is that Madison indeed thought ambition would counteract ambition, to “oblige the government to control itself”¹¹—this was the idea

of checks and balances. But it does not explain how the Founders proposed to safeguard individual liberty from tyranny of the majority, rather than tyranny of the rulers over the ruled. The safeguard of individual liberty, Madison reasoned, must lie with the people themselves. It is the people who must be responsible for defending their liberties. And a bill of rights, Madison and his colleagues finally concluded, might support public understanding and knowledge of individual liberty that would assist citizens in the task of defending their liberties.

A bill of rights, they saw, could serve the noble purpose of public education and edification. As Madison confided to Jefferson, “The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion.”¹²

From this view, our first 10 amendments are still important today, in their text and substance, beyond their legal effect. They still call upon us to study them for the sake of knowing our liberties and defending them from all encroachments. Although these amendments may be nothing more than “parchment barriers,” they can still provide a bulwark against encroachments on our rights. For as Hamilton wrote in *Federalist* 84, the security of liberty, “whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government. And here, after all... must we seek for the only solid basis of all our rights.”¹³

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11. *Federalist* No. 51, p. 349.

12. Letter from James Madison to Thomas Jefferson, October 17, 1788, in *Founders' Constitution*, eds. Kurland and Lerner, Vol. I, p. 477.

13. *Federalist* No. 84, p. 580.