

Summer Institute Lecture (8/18, 10:00 am)

Bill of Rights

Bills of Rights were important part of British constitutional tradition

Magna Carta (1215) forced on king specifying a set of limits on monarchical power

Petition of Rights (1628) passed by Parliament to specify rights of subjects

Bill of Rights (1689) passed by Parliament as condition for William and Mary

Colonial legislatures began to assert bills of rights, limiting the general power of the colonial government and the particular power of the governor

Massachusetts Body of Liberties (1641) included various specific procedural rights and particular prohibitions

Declarations of Independence frequently included lists of complaints of rights violations, and frequently asserted rights based on nature rather than English custom

Virginia Declaration of Rights (1776) was first bill of rights grafted onto constitution and passed by convention

Early state constitutions often framed bills of rights in “ought” language, lists of fundamental principles

U.S. Constitution

George Mason, who had drafted the Virginia Declaration of Rights, objected to the lack of a bill of rights in the U.S. Constitution at the Philadelphia Convention, and other antifederalists joined in.

Primary justifications for leaving it out

- 1) Not needed in a popular government
- 2) Reserved by implication, not “necessary and proper”
- 3) By listing some rights might imply that others not reserved
- 4) Hard to frame adequately for big nation and unknown future
- 5) “parchment barriers” anyway

Primary response

- 1) if so unnecessary, why ex post facto clause
- 2) there are important and common rights that can be easily included
- 3) bills of rights clarify the fundamental principles
- 4) bills of rights are judicially enforceable

Madison pressured by Virginia electoral concerns, tight election against James Monroe – “circumstances are now changed” + North Carolina holding out

for amendments + satisfy the antifederalists who were large minority in some states

Content

Assembled by Madison from the proposals forwarded by the states

Most common – religion, press, jury trial, reserved powers, bear arms, troops, search

Not recommended by states – just compensation

Focus on those that guard private rights, reject those that alter the “theory of its structure” or “substance of its powers”

Some common ones left out – ban on standing army, limit on treaty power, limit on federal judicial jurisdiction, executive council, presidential term limits, limit on internal taxation, limit on control of militia, ban on monopolies, state control over federal elections, supermajority requirement for commercial and military decisions

First two amendments not ratified by enough states

1st – fixing size of House and number of constituents per member
(expands size early but caps later, Delaware & Pa reject)

2nd – no congressional pay raise until next session (subsequently ratified as 27th)

First Amendment – speech not well worked out yet (see Sedition Act)

Religious exercise – important nationalization of Virginia, but only applies to feds

Religious establishment – pure federalism clause

Second Amendment – protects armed citizenry

Third Amendment – limits reach of possible standing army

Fourth Amendment – strict limits on warrants, jury oversight of “reasonable searches”

Fifth Amendment – common law protections, takings tacked on

Sixth Amendment – secure local juries

Seventh Amendment – civil law juries

Eighth Amendment – constrains judges

Ninth Amendment – reemphasize enumerated powers & “necessary & proper

Tenth Amendment – reemphasize enumerated powers & “necessary & proper

