

The Bill of Rights

10.1 Introduction

To James Madison, the creation of the Constitution seemed nothing less than “a miracle.” By 1788, however, it seemed that it would take another miracle to get it adopted.

The adoption of the Constitution depended upon ratification, or approval, by 9 of the 13 states. Ratification started off smoothly, with Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut all saying yes. Then came Massachusetts, where opposition ran strong.

When the Massachusetts ratification convention met early in 1788, defeat seemed certain. Opponents objected that the Constitution did not list the rights of the people. Many delegates said that they would not vote in favor of ratification unless such a list were added at once.

In desperation, the Constitution’s supporters, the Federalists, looked to John Hancock, the state’s governor. Hancock had stayed away from the convention, pleading a painful attack of gout. In fact, he was waiting to make an appearance until he could be sure to be on the winning side.

The Federalists tried to take advantage of Hancock’s vanity. Virginia, they hinted, might not ratify the Constitution. If it did not, then George Washington, a Virginian, could not run for president. And if Washington didn’t run, who was the best choice for the honor? Why, none other than the great governor of Massachusetts!

Hancock swallowed the bait. The governor was carried into the convention, his feet swathed in bandages. In a dramatic speech, he urged the delegates to approve the Constitution as it was. At the same time, he promised that the first task of the new Congress would be to amend the Constitution by adding a **bill of rights**.

The vote was close, but Massachusetts chose to ratify. The Federalists’ strategy, “Ratify now, amend later,” also worked well in other states. By the end of 1788, the Constitution was the law of the land.

In this chapter, you will learn how Federalists made good on their promise to add a list of rights to the Constitution. You will also learn how these rights work to protect Americans from abuses of government power.

10.2 Creating the Bill of Rights

For all his hopes, John Hancock never got to be president. By a narrow vote, Virginia did ratify the Constitution. In the first presidential election, held in 1789, George Washington became the nation’s first president. John Adams of Massachusetts was chosen to be vice president.

When the first Congress met that year, no one seemed in much of a hurry to amend the Constitution. Representative James Madison, however, did not forget the promises made during the ratification debate. Originally, he had opposed adding a bill of rights to the Constitution. Such a listing seemed unnecessary to him. Thomas Jefferson helped change his mind. In a letter to Madison, Jefferson argued that “a bill of rights is what the people are entitled to against every government on Earth...and what no just government should refuse.”

While Congress debated other issues, Madison sifted through nearly 100 proposed amendments. He chose those that seemed least controversial (likely to cause conflict) and presented them to Congress on June 8, 1789.

Critics jumped on Madison’s proposals as meaningless “milk and water” cures for imaginary problems. The debate that followed was, in Madison’s words, “extremely difficult.” As months dragged on with no agreement, he wrote to a friend that the Bill of Rights had become a “nauseous project.” Still, he persevered until Congress finally approved 12 amendments.

Ratification by the States Under the Constitution, three quarters of the states must ratify an amendment before it can become law. The states rejected the first two amendments, which dealt with the size of congressional districts and congressional pay raises. Both amendments were considered unnecessary. By 1791, the required number of states (nine) had approved the other 10 amendments. Together, these 10 amendments form the Bill of Rights.

When Madison first proposed the Bill of Rights, some people saw his amendments as useless “paper barriers” against abuses of government power. For more than 200 years, however, his “paper barriers” have proven far stronger than even Madison might have hoped.

10.3 First Amendment Rights

Madison combined five basic freedoms into the First Amendment. These are freedom of religion, of speech, of the press, and of assembly, and the right to petition the government. Many people consider these basic freedoms to be the most important part of the Bill of Rights.

These First Amendment rights would have been meaningless, however, without some way to protect them. When a person believes that the government has violated these rights, he or she may challenge the government's action in court. The same is true of all other rights protected in the Constitution.

If the case reaches the Supreme Court, the nine Supreme Court justices decide how the Constitution applies to the situation. After hearing both sides, the justices vote on their decision. One of the justices from the majority side then writes a majority opinion. This document explains how the Court interpreted the Constitution to reach its decision. Any justices who disagree with the majority decision may write minority opinions explaining their reasoning.

As you read about First Amendment rights, you will see how the Supreme Court has applied these rights to real-life situations.

The Right to Worship Freely The First Amendment has two guarantees of religious freedom. The first says, "Congress shall make no law respecting an establishment of religion." This means that Congress cannot make any faith the official religion of the United States. Nor can it make laws that favor any religion over another. In Thomas Jefferson's words, the amendment builds "a wall of separation between church and state."

How high should that wall be? The founders of the American republic disagreed about this question. For example, lawmakers in Virginia proposed using state taxes to help pay for teachers of religion. George Washington was among those who supported the idea as long as no particular church was favored. Opponents of the proposal, like James Madison, argued that government and religion should be completely separate.

In a 1971 case known as *Lemon v. Kurtzman*, the Supreme Court sided with Madison's view. This case challenged a Pennsylvania law that used public tax money to pay for books and teachers' salaries at private religious schools. The Court ruled that the law was unconstitutional because it allowed too close a connection between government and religion.

The second religious guarantee in the First Amendment says "Congress shall make no law ... prohibiting the free exercise" of religion. This means that people can believe whatever they want about religion, without fear of punishment. However, they can't necessarily do whatever they want in the name of religious freedom. For instance, the Supreme Court has ruled that parents are not free to deny their children medical treatment or vaccinations because of their religious beliefs.

The Right to Free Speech and Press The First Amendment protects freedom of speech and freedom of the press. The Supreme Court often treats these rights together as the right of free expression.

Freedom of the press is important because of the vital roles that the press plays in a democratic society. Newspapers, magazines, and other media such as books and television act as watchdogs on the government. They also allow for the free flow of ideas that citizens need to stay informed and to make up their own minds about important issues. Without a free press, democratic self-government would be impossible.

Americans had learned in colonial days that a free press was their best protection against abuse of government power. In 1735, John Peter Zenger was arrested for printing reports that the governor of New York had taken bribes. The prosecutors said that it was illegal to damage the governor's good name, even if Zenger had published the truth. Zenger's lawyer argued that no one should be jailed for "exposing and opposing arbitrary power by speaking and writing the truth." The jury agreed, and Zenger was freed.

Freedom of the press also brings responsibilities, such as taking care not to spread false accusations or publish information that would be helpful to an enemy in wartime. In a similar way, freedom of speech brings responsibilities as well. Although the First Amendment protects the right to speak freely in public places, like streets and parks, that right is not unlimited. The Supreme Court has allowed limits on some kinds of speech, such as speech that endangers public safety. As one justice said, "The most stringent [strongest] protection of free speech would not protect a man in falsely shouting, 'Fire!' in a theater and causing a panic."

The Supreme Court has ruled that "speech" means more than just words. Free expression includes "symbolic speech," or actions people take to express their opinions.

Protection of symbolic speech was an issue in the case of *Texas v. Johnson*. This case involved a man who had been convicted in Texas of burning an American flag as a form of protest. When he appealed his case to the Supreme Court, the justices overturned his conviction. No form of expression can be banned, the Court ruled, just because "society finds the idea itself offensive or disagreeable."

The Right to Assemble and Petition The final two rights protected in the First Amendment are the right to peaceably assemble (meet together with others) and to petition (appeal to) the government.

The right to assembly means that citizens can use public property for meetings and demonstrations. Parades, protest marches, and political rallies are all forms of peaceful assembly protected by the First Amendment.

While the First Amendment protects peaceful meetings, it does not give people the right to close streets or buildings, or to protest violently. Police can arrest a speaker who urges listeners to riot or to break the law.

What if an assembly is peaceful, but the people watching it are not? This question came up in the case of *Gregory v. Chicago*. The case began when comedian Dick Gregory led a protest march to the home of Chicago's mayor. Residents in the neighborhood began throwing eggs and shouting insults at the marchers. Fearful of a riot, the police asked the marchers to leave. When the marchers refused, the police arrested them.

The marchers challenged their arrests in court, claiming that their protest was protected under the First Amendment's right of assembly. The Supreme Court agreed that the marchers had assembled peacefully. If anyone should have been arrested, it was the mayor's neighbors.

10.4 Citizen Protections

The next three amendments protect citizens from different kinds of government abuse. All three reflect the unhappy experience of American colonists under British rule.

Second Amendment: The Right to Bear Arms During colonial times, Britain had used a standing (permanent) army to keep the colonists in line. After winning their independence, Americans remained suspicious of standing armies. They preferred to rely on volunteer state militias to protect their new nation. The Second Amendment states that "A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed [limited]."

The meaning of this amendment has been much debated. Some argue that it protects the right of people to own guns only if they are part of an organized militia. (An example is today's National Guard.) Others believe that the Second Amendment protects the right of individuals to own weapons for their own self-defense.

Third Amendment: Quartering Troops in Homes Before the Revolution, Britain had forced colonists to open their homes to British soldiers. The Third Amendment gave Americans the right to refuse such requests. "No soldier," it says, "shall...be quartered [housed] in any house, without the consent of the owner."

Today, soldiers are not quartered in homes. The Third Amendment remains important, however, as a warning to the government to respect the privacy of people's homes. As Justice Joseph Story said, "A man's house shall be his own castle, privileged against all civil and military intrusion."

Fourth Amendment: Searches and Seizures The Fourth Amendment protects people and their belongings from "unreasonable searches and seizures." (A seizure is the act of forcibly taking control of a person or property.) Before arresting a person or searching someone's home, the police must show a judge that there is good reason for allowing the action. The judge then issues a **warrant** that says exactly who will be arrested or what will be searched.

The purpose of protections such as this one, wrote Justice Louis Brandeis, is to guarantee "the right to be left alone—the most comprehensive of rights and the right most valued by civilized men."

10.5 Legal Rights and Protections

The next four amendments lay out the rights and protections that apply to people who are accused of crimes or are involved in other legal disputes.

Fifth Amendment: Legal Rights The Fifth Amendment is the longest amendment in the Bill of Rights. It lists five important rights of citizens involved with the justice system.

First, this amendment gives people who are accused of serious crimes the right to a grand jury hearing. A grand jury is a group of citizens who hear the government's evidence and decide whether it justifies a trial. If so, the grand jury issues an indictment, or formal charge. If not, the accused person is released.

Second, the amendment protects citizens from "double jeopardy." (Jeopardy means risk.) This means that a person who is tried for a crime and found not guilty cannot be tried again for that same crime.

Third, the amendment prohibits **self-incrimination**. This means that the police cannot force people to say things that might be used against them in a trial.

Today, police are required to remind people of their right to remain silent before they start to question them. They must also warn people that anything they do say can be used against them at a trial. This reminder is known as the "Miranda warning," after the case in which the Supreme Court defined this requirement.

The protection against self-incrimination also applies to **defendants** testifying in court. They may refuse to answer questions that might damage their case. This refusal is called "taking the Fifth."

Next, the amendment says that a person cannot be “deprived of life, liberty, or property, without due process of law.” The term due process means that the government must follow clear rules and act reasonably as it carries out the law. For example, the Supreme Court has ruled that every person should be presumed innocent until proven guilty. In addition, the government must prove its case against a defendant “beyond a reasonable doubt.”

Finally, the Fifth Amendment says that the government cannot take someone’s private property for public use “without just compensation.” This means that the government must pay a fair price when it takes over a person’s property for purposes such as building roads or parks.

Sixth Amendment: Criminal Trial Rights The Sixth Amendment lists a number of rights that are designed to provide accused persons with fair trials. It begins with the right to “a speedy and public trial, by an impartial jury.”

The right to a speedy trial means that people cannot be kept in jail for long periods before being judged at a trial. Speedy trials also ensure that witnesses testify while their memories of events are still fresh.

“Public” means that trials may not be held in secret. Citizens have a right to attend trials to make sure that justice is being done.

An accused person also has the right to be judged by a jury of people who live in his or her area. The jury must be “impartial,” which means that jurors are not prejudiced (influenced) against the defendant. Courts have also said that prosecutors cannot exclude potential jurors just because of their race or gender.

Before a trial, the prosecutor must tell the accused person not only the charge, but the time and place of the supposed crime. This information is essential to the accused person in preparing his or her defense.

A defendant also has the right to hear and question all witnesses who testify at the trial. In addition, the defendant can ask the court to order reluctant (unwilling) witnesses to testify against their wishes.

Lastly, a defendant has the right to an attorney to assist in his or her defense. The Supreme Court has called this the most important of all the rights of accused persons. Without legal help, an innocent person may all too easily be convicted of a crime. In the past, only people with money to hire lawyers enjoyed this important right. Today, people accused of crimes are provided with a lawyer if they cannot afford to pay for one.

Seventh Amendment: Civil Trial Rights Not all trials involve criminal actions. Some trials decide civil cases, or disputes between people or businesses. Civil cases typically involve money, property, or family matters, such as divorce. The Seventh Amendment says that in all but the most minor cases, people involved in a civil case have a right to a jury trial.

The Seventh Amendment also says that “no fact tried by a jury shall be otherwise reexamined.” This means that after a jury decides the facts of a case, no judge can overrule the jury’s decision.

Eighth Amendment: Bail and Punishments The Eighth Amendment protects an accused person’s rights both before and after trial. Before a trial, it forbids a judge from demanding “excessive” bail. Bail is money or property given to the court to hold until an accused person shows up at trial. If a defendant cannot pay bail, he or she stays in jail until trial. The Eighth Amendment prevents judges from using unreasonably high bail to keep someone in jail before his or her day in court.

After trial, if the person is found guilty, the Eighth Amendment forbids “excessive fines” and “cruel and unusual punishments.” It does not say what such punishments are. In 1791, physical punishments like whipping and branding were common. Today, they are considered cruel. As Justice Thurgood Marshall has written, “A penalty that was permissible at one time in our nation’s history is not necessarily permissible today.”

The Supreme Court has interpreted this amendment to mean that punishments must be “proportionate” to the crime. Judges cannot, for example, impose long prison terms on people convicted of minor crimes. The Court has also ruled that the amendment prohibits inhumane prison conditions, such as depriving prisoners of food.

Today, Americans continue to debate whether the death penalty should be banned under the Eighth Amendment. Opponents of the death penalty have argued that executing anyone is a cruel and unusual punishment, no matter how horrible their crime. The Supreme Court has disagreed. In a 1976 case known as *Gregg v. Georgia*, the Court ruled that “the punishment of death for the crime of murder does not under all circumstances, violate the Eighth Amendment.”

(Caption)

A lawyer tries to convince the jury to decide in his client’s favor during a trial. The right to a jury trial is one of a number of citizen protections found in the Sixth Amendment.

10.6 Other Rights and Powers

The last two amendments were included to help keep a proper balance of rights and power among the federal government, the people, and the states.

Amendment Nine: Rights Retained by the People One argument raised against putting a bill of rights in the Constitution was that no list could be complete. If some rights were listed and others were not, did this mean that people had only the listed rights?

The Ninth Amendment says that even though “certain rights” are listed in the Constitution, other rights not listed there are also “retained [kept] by the people.” An example of this is the right to privacy.

Amendment Ten: Powers Reserved to the States The Tenth Amendment was included to protect the states from excessive federal power. It says that powers not given to the national government by the Constitution are “reserved to the states...or to the people.”

This amendment was tested in *McCulloch v. Maryland*. The case began in 1816 when Congress chartered a national bank. Many states protested that the Tenth Amendment prohibited Congress from creating a bank because this power is not listed in the Constitution. In 1818, Maryland expressed its disapproval by levying a tax on the national bank.

James McCulloch, an officer of the Baltimore branch of the bank, refused to pay the tax. If the tax were set high enough, he protested, the state could drive the bank out of business. The effect would be the same as letting Maryland veto an act of Congress.

Maryland took McCulloch to court for failing to pay the tax. The state argued that not only was the bank unconstitutional, but under the Tenth Amendment, Maryland had the power to tax it.

The Supreme Court sided with McCulloch. It ruled that the Tenth Amendment did not forbid the chartering of a federal bank. The “necessary and proper clause” of the Constitution gave Congress the power to do so. The Court also ruled that when state and national power conflict, national power is supreme. Since Congress’s power to create a bank was superior to Maryland’s power to tax, the tax was unconstitutional.

10.7 Chapter Summary

In this chapter, you read about the Bill of Rights, the first 10 amendments to the Constitution. You used a visual metaphor to organize information about the amendments.

The promise of a bill of rights was key to getting the Constitution ratified by the states. As a member of the first Congress, James Madison proposed the amendments that guarantee the rights of citizens of the United States.

The First Amendment spells out five basic freedoms enjoyed by all Americans, from freedom of speech to the right to petition the government. The Second, Third, and Fourth Amendments specify protections for ordinary citizens against the abuse of government power.

The Fifth through Eighth Amendments are intended to guarantee fair treatment for people who are involved in legal actions.

The Ninth and Tenth Amendments concern the relationships among the federal government, the states, and the people.

As with other parts of the Constitution, the Supreme Court has interpreted the provisions of the Bill of Rights over time and applied them to new situations. But the spirit of these amendments remains much the same as when James Madison drafted them more than 200 years ago. His “unnecessary” addition to the Constitution has become the foundation of the rights and liberties Americans have learned to cherish.