

# Correcting the CONSTITUTION

## Was the Bill of Rights necessary?

by Richard Brookhiser

On September 12, 1787, in the home stretch of the Constitutional Convention—the delegates would finish their work five days later—George Mason, a self-educated Virginia planter, brilliant and gruff, raised an important point: The document they had been working on since May had no bill of rights.

By the late 18th century such bills had become a fixture of Anglo-American political thought. The first example was said to be Magna Carta, the list of pledges that rebellious barons extorted from an unpopular King John in 1215. But claiming Magna Carta as a bill of rights was a stretch. Most of it concerned strictly medieval matters—forestry law, how to treat England's Welsh neighbors—and the entire document was meant to secure the privileges of the upper nobility, not rights for everybody.

Yet some of its provisions anticipated elements of the United States' Bill of Rights—trial by jury (“no freemen shall be taken or imprisoned...except by the lawful judgment of his peers”) and the right to petition (barons could “petition to have...transgression[s] redressed”).

The king's subjects were to be the judges of each other's guilt or innocence, and the king had to listen to their grievances (at least the grievances of the powerful).

The Glorious Revolution of 1688 drove another unpopular king, James II, from his throne. The following year Parliament passed a true English Bill of Rights. It extended the right

*Above: The proposed amendments, marked up by the Senate, 1789. Opposite: Benjamin Franklin (center) and George Washington (right) are warmly greeted at the Constitutional Convention.*





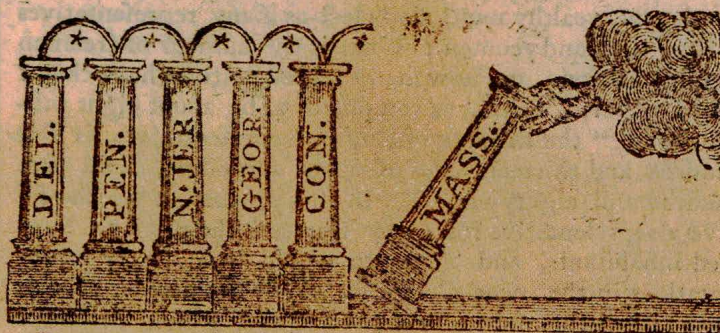


**BOSTON, Wednesday, January 30.**

*Extract of a letter from a gentleman of eminence, in the city of Philadelphia, to a gentleman in this town, dated Jan 14, 1788.*

"You will, no doubt, see by the papers, that our antifederalists—from the despair which their weakness has thrown them into, like an expiring taper, are making another struggle in order to dis-affect the people of the United States against the new Constitution. Under the mock appearance of extracts from a Carlisle paper, Judge B. has given the publick a long account of the *distraktion* which prevails in that place: But on the authority of a Rev. Clergyman from that country, I assure you, that it was a mere *fracas*, similar to which have happened there, ever since the Constitution of this State was adopted—between the Republicans and Constitutionalists—I do not know what to compare them to better than your Pope-mobs before the revolution."

#### FEDERAL SUPERSTRUCTURE.



From observation, and good information, we venture to assure the world, that the MASSACHUSETTENSIAN PILLAR of the GREAT FEDERAL EDIFICE rises daily—Thanks to the candour of those gentlemen who at first were opposed to its erection—and thanks to the unremitting exertions of those who have assisted in raising it.

The General Assembly of New-York, now in session at Poughkeepsie, we are assured by good authority, have resolved that a Convention be called, for the purpose of assenting to, and ratifying the Federal Constitution—to meet at a short day—and that the Constitution will be adopted by that State by two against one—which God grant. O—

We are told—and seriously too—that Mr. Bacon, has changed his political sentiments once more, and that he now believes the Constitution must go down.

MARRIED] At Dedham Monf. NICHOLAS DURIVAGE, to Miss NANCY BAKER.

DIED, last Sunday morning, Capt. RICHARD CHAPMAN, aged 27. His funeral will be this afternoon, at half past three o'clock, from his brother's house in Charlestown.

of petition beyond barons and reaffirmed trial by jury, especially in trials for high treason. It also guaranteed "freedom of speech" in Parliament and the right of Protestants to have "arms for their defence." (England's Protestants, the majority in the country, believed that James II, a Catholic convert, had staffed the army with Catholic officers in preparation for a religious coup.) One provision would reappear almost word for word in the U.S. Bill of Rights: "Excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The justice system should not torture Englishmen or crush them financially.

Similar bills of rights were passed by American states as soon as they declared their independence, as George Mason knew from personal experience. In May 1776 the Virginia Convention, the colony's revolutionary legislature, appointed him to a committee charged with producing a declaration of rights. Mason did most of the work, copying the English Bill of Rights' language on bail, fines and punishments. He called for "speedy" trials by juries in criminal cases and for juries in civil suits. He condemned "general warrants" allowing searches "without evidence" of particular offenses. He praised "freedom of the press," militias "composed of the body of the people, trained to arms" and "the fullest toleration" of religion. One of Mason's colleagues on the committee, young James Madison, amended this last clause to state that "all men are equally entitled to the free exercise" of religion. "Toleration" implied that religious liberty was a gift. Instead Madison made it an inherent right. Virginia's declaration, with Madison's change, was approved June 12, 1776, three weeks before the Declaration of Independence.

In Philadelphia in 1787 Mason said that the Constitutional Convention could add a bill of rights to its handiwork "in a few hours," using state bills as guides. But he found almost no takers. Elbridge Gerry, a quirky delegate from

On January 30, 1788, the Massachusetts Centinel expressed uncertainty over whether the state would ratify the Constitution.





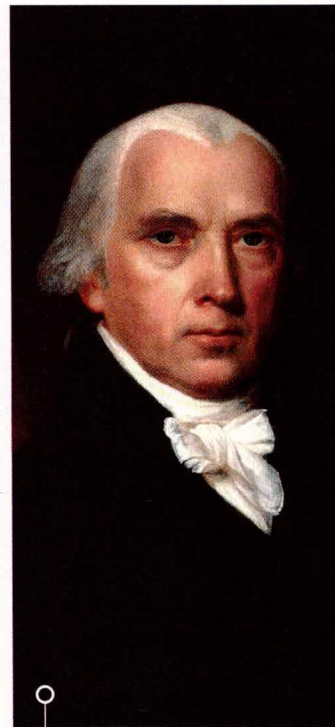
Patrick Henry feared that a strong central government would usurp individual and states' rights.



Alexander Hamilton argued against a bill of rights, claiming it would tempt government to test its limits.



George Mason refused to sign the Constitution because it did not include a bill of rights or restrict the slave trade.



James Madison came to accept that a bill of rights was necessary to assure ratification of the Constitution.

Massachusetts, moved for a committee to do as Mason had suggested. There was a quick vote, with every state delegation rejecting the idea.

The Constitution makers were tired. They had spent an entire Philadelphia summer cooped up in Independence Hall, orating, nitpicking and forging an elaborate web of compromises. They wanted to go home.

But why had they not thought of drafting a bill of rights in all the months they had been together? Once the Constitution went before the American people for ratification, its authors offered various excuses for their omission. During the ratification debate in Pennsylvania, James Wilson, a learned, Scottish-born lawyer, argued that the rights enshrined in Magna Carta and England's Bill of Rights had been carved from a background of royal power. In the United States, he said, power should remain "in the people at large, and by this Constitution they do not part with it." There was no reason to guard against the abuse of powers that the people had not surrendered.

Writing in New York's newspapers, Alexander Hamilton, a young veteran of George Washington's wartime staff, argued that a bill of rights could actually be "dangerous." By forbidding "abuse" of power, it would give ambitious sophists "a plausible pretence" for claiming that such powers existed. Drawing bright lines tempts governments to go right up to the edge of them.

James Madison had a different objection to bills of rights. He had labored in 1776 to perfect Virginia's. But years in state politics had shown him that such bills were "parchment barriers," easily broken. "I have seen the bill of rights violated in every instance where it has been opposed to a popular current."

Madison expressed his doubts in a letter to his friend Thomas Jef-

erson, who was in Paris at the time, serving as minister to France. Despite being an ocean away, he helped change Madison's mind: "A bill of rights," wrote Jefferson, "is what the people are entitled to against every government on earth."

Madison was hearing the same thing from the people of Virginia. The state's Baptists, a minority sect, feared the lack of a guarantee of religious liberty. And Patrick Henry, whom Madison disdained as a demagogue but could not ignore as an effective one, harped on the issue. A "bill of rights may be summed up in a few words," Henry said. So why not write it down? "Is it because it will consume too much paper?"

In the end, five of the first 11 states to ratify the Constitution—Massachusetts, South Carolina, New Hampshire, Virginia and New York—did so only with suggestions that it be amended. When the First Congress met in New York City in March 1789, it faced a blizzard of amendments—Virginia offered 20, New York 33.

James Madison, elected to Congress as a representative from Virginia, was now convinced of the need for a bill of rights. Over the summer, the House, prodded by Madison, and the Senate, prodded by the House, came up





BILL  
OF  
RIGHTS

FREEDOM  
OF SPEECH  
FREEDOM  
OF ASSEMBLY  
FREEDOM  
OF RELIGION  
FREEDOM  
OF THE PRESS

Howard Chandler Christy



with a list of 12 amendments. At the Constitutional Convention George Mason had wanted a bill of rights to precede the Constitution. Madison now wanted amendments inserted, wherever relevant, in the body of the document. But Roger Sherman, the crusty old patriot from Connecticut, suggested what was finally done: listing them at the end.

The first proposed amendment, regulating the size of congressional districts, was never approved by enough states; Congress later handled the matter by legislation. The second, regulating congressional pay raises, was not ratified until 1992, when it became the 27th Amendment (and the record holder for the longest trip to the Constitution). But by December 1791 enough states had approved the other amendments, which became the nation's Bill of Rights.

Six of the 10 amendments looked back to their long line of Anglo-American predecessors. The First Amendment prevented Congress from tampering with the "free exercise" of religion, freedom of speech and the press, the right to assemble and the right to petition for the redress of grievances. The Second Amendment extended the right to bear arms to "the people" as England's Bill of Rights had granted it to Protestants, adding a phrase from the Virginia declaration about the importance of "a well-regulated militia." The Fourth Amendment defined the scope of warrants. The Sixth and Seventh amendments provided for juries in both criminal and civil trials, and stipulated that criminal trials be "speedy." The Eighth virtually repeated the language of England's Bill of Rights in prohibiting excessive bail and fines and cruel and unusual punishments.

The other amendments broke new ground. The Third, addressing a grievance from the late colonial period, strictly regulated the army's power to quarter soldiers in private homes. The Fifth was an omnibus, concerning grand juries, double jeopardy, self-incrimination, due process of law and eminent domain. The Ninth addressed Hamilton's objection to a bill of rights: "The enumeration...of certain rights shall not be construed to deny or disparage others retained by the people." The Tenth addressed Wilson's: The people and the states retained all powers not delegated or prohibited by the Constitution.

After the Bill of Rights was ratified in 1791, it had a quiet legal history for many years. Constitutional scholar Akhil Amar finds only one reference to it in the legal arguments of the early 19th century (in 1840) and notes that as late as 1880 a justice of the Supreme Court denied that the Constitution had any bill of rights.

But this is being too literal. Words and thoughts, like seeds, can take a long time to germinate. Madison and Jefferson, Henry and Mason wanted to sow the fields. Their peers knew it. Lawyers could reap the harvest in time. ★

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*Richard Brookhiser is a regular contributor to American History and the author of several books about the founding era, including biographies of James Madison, Alexander Hamilton and George Washington.*

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*What are we fighting for? Howard Chandler Christy's 1942 oil, Bill of Rights, celebrates the First Amendment.*

## We Need an AMENDMENT...

It's not easy to amend the Constitution. Since 1789, 33 amendments have been passed by Congress and submitted to the states; 27 of those amendments have been ratified. The six failed amendments include proposals to revoke the citizenship of anyone accepting a title of nobility from a foreign country (1810), prohibit Congress from abolishing slavery (1861), enable Congress to regulate child labor (1924), and guarantee equal rights under the law regardless of sex (1985).

But thousands of amendments have been proposed—more than 11,600 of them according to a 2014 report by the U.S. Senate—which has led to robust debate over whether the amendment process is too cumbersome for our rapidly changing society. Consider how America might be different had any of these measures made it out of Congress and into the Constitution:

- **Replace the president with a three-member executive council (1878)**
- **Make divorce illegal (1914)**
- **Limit personal wealth to \$1 million (1933)**
- **Forbid drunkenness in the U.S. and its territories (1938)**
- **Limit the federal government's role in treaty-making (1951)**
- **Make flag burning illegal (1968)**
- **Abolish the death penalty (1990)**
- **Abolish the Electoral College (2004)**
- **Ban corporate donations to political candidates (2011).**

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