

## Constitutional Ratification Arguments

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The ratification of the U.S. Constitution was a complex process requiring years of debate and numerous concessions. While some argued that a bill of rights wasn't necessary because the Constitution already offered all the protections necessary, others felt strongly that a bill of rights was essential to protect individual liberty and the sovereignty of states. While not perfect, history has proven the value of these "parchment barriers" in protecting individual rights from majority oppression and for keeping the balance of power in check. Had the U.S. Constitution been ratified without these protections; our present freedoms might have long ago been sacrificed to the tides of popular opinion or governmental expedience.

In the *Federal Farmer* letters, the author (thought by some to be Richard Henry Lee) points out potential problems with handing over so much power to a federal government. He questions the wisdom of giving this power, in the form of the Constitution, without protecting certain rights like freedom of religion and protection from unlawful search and seizure. He argues that a U.S. Constitution is a transfer of power from the many to the few and predicts that those newly empowered few will guard their power jealously, making future changes difficult.

When discussing freedom of the press, he describes a hypothetical situation wherein a printer might claim protection under his state's constitution but, "Congress might, and perhaps with great propriety, answer that the federal constitution is the only compact existing between them and the people; in this compact the people have named no others ... ". This example highlights the need for a counter-balancing safeguard to protect the rights individuals had been granted under state law (Lee 1787, online).

Thomas Jefferson argues for the inclusion of a Bill of Rights for protection of several freedoms from federal usurpation in his letter to James Madison. Among those were the right to a trial by jury which wasn't, at that time, guaranteed in each state's constitution. In securing a bill of rights, Jefferson hoped to prevent certain state laws being lowered to the standards of others and sought protection from what he viewed as a step backward in personal liberty. By insisting on uniformity, Jefferson argued that it was better to have "established general right instead of general wrong". Indeed, it's difficult to imagine all the difficulties that could have arisen from each state having its own choice of how (or if) to enforce such principles as habeas corpus, religious freedom and freedom of the press.

Jefferson argued that "A bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference" (Jefferson 1787, online).

In a later reply to Thomas Jefferson, James Madison expresses his reservations with Bills of Right. He calls such lists "parchment barriers" and fears that they would be in danger of becoming worthless when they are repeatedly ignored: "...experience proves the inefficacy of a bill of rights on those occasions when its control is most needed. Repeated violations of those parchment barriers have been committed by overbearing majorities in every State" (Madison 1788, online).

To Madison's point, there have been times in United States history when the Bill of Rights was cast aside in answer to a groundswell of public opinion. The internment of Japanese Americans during World War II was a trespass on several rights. But contrary to Madison's fears, these trespasses have generally been the exception and not the rule.

Arguing another perspective, Alexander Hamilton writes in *Federalist No. 84* that bills of rights are traditionally used between kings and subjects to help protect subjects from a government that holds all the power. In these cases, he claims that a bill of rights would act to set aside certain powers not surrendered by the subjects. He maintains that a bill of rights isn't necessary in a *popular* government since the power rests with the people already and says, "Here, in strictness, the people surrender nothing; and as they retain every thing [*sic*] they have no need of particular reservations" (Hamilton 1788, online).

Hamilton's line of reasoning fails to recognize that any government with power has the potential for oppression, even if it comes from one group of people oppressing another through simple majority. Madison's touches on this problem in his letter to Jefferson:

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents but from acts which the Government is the mere instrument of the major number of the constituents (Madison 1788, online).

Hamilton further argues that a bill of rights is "not only unnecessary in the proposed Constitution but would even be dangerous," and says, "For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"

Again, Hamilton's argument does not address the potential consequences of transferring so much power from the states to a federal government. Without boundaries to this transfer, it would have been far easier for Congress to deny individual rights and to keep adding powers to the federal government without checks and balances.

From a twentieth-first century perspective, one of the strongest arguments for the Bill of Rights was Madison's prediction about the document becoming a kind of standard to which

the people hold their government and, to some extent, themselves. When he lists the uses a bill of rights might serve in a popular government, the first item listed is, “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” (Madison 1788, online).

Many issues in the years since the ratification of the U.S. Constitution have had the power to create great divisions in American society. Topics like religious freedom, abortion, women’s suffrage, and marriage equality have had explosive potential both politically and socially. While the Constitution outlined the *methods* and *structure* of the government, the Bill of Rights has helped to curb political movements and prevent some popular ideas from becoming laws that would have trampled individual rights. These original ten amendments left a door open to continue refining this list of protections. After the Civil War, the fourteenth amendment was added to extend citizenship to freed slaves, among other things. This amendment also extended a layer of federal protection of basic rights between the individual and the state. Without the Bill of Rights, it’s difficult to imagine how United States would have evolved socially or politically into the twentieth, let alone the twenty-first century.

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