

Revolution and New Nation Module

The Bill of Rights

I see the Bill of Rights as part of a longer tradition. The colonists at the time of the Revolution were very sensitive to the issue of rights and so the first iteration was the adoption of Declarations of Rights when the states wrote their constitutions. One of the biggest criticisms of the federal Constitution when it was released was that it did not include a Bill of Rights and what we have is a huge debate during the ratification process from 1787 to 1788 over whether the Constitution should be amended to include a Bill of Rights.

The controversy was essentially over whether or not the people at the ratification conventions have the right to amend the Constitution. “Ratify” means to affirm and so the Federalists took the position (the Federalists being the people in favor of ratifying the Constitution), that while things could be discussed, that there was no room for modification; there was no room for amendment.

This turned out to be a very controversial problem because opponents to the Constitution argued that it was defective in a number of different ways. One was that it didn’t include a Bill of Rights. A second was that it gave too much power to the central government. At the earliest ratifying convention in Pennsylvania, the anti-Federalists came forward with recommendations for including individual liberties—that is, there should be a Bill of Rights. That was struck down by the Federalists and so after the ratification in Pennsylvania, the anti-Federalists published a pamphlet which criticized the Federalists for what they had done. But more importantly for the absence of a Bill of Rights. There’s a very strong public reaction to this throughout the nation for the need for a Bill of Rights.

It’s not until the Massachusetts convention in the spring of 1788 that they come up with a solution and the solution is that the Convention recommends to the First Congress that there should be additional amendments, either structural or individual.

The Federalists and anti-Federalists are very important to understand. The Federalists are the nationalists who in the 1780s criticized the structure of government under the Articles of Confederation and argued that there had to be a stronger central government. The Federalists were successful in getting Congress to call for a convention in Philadelphia, to meet to consider amending the Articles of Confederation.

The people who become the anti-Federalists are the states rights advocates who were generally happy with the state sovereignty of the Articles of Confederation. The Anti-Federalists at the state ratifying conventions were outspoken in their criticism of the national government as being too powerful and as not protecting the individual. They sent a series of proposed amendments to the First Congress.

The Federalists were opposed to the Bill of Rights for several different reasons. Led by Alexander Hamilton, who was an author of the Federalist Papers, and by James Wilson, who was a leading Federalist in Philadelphia, they argued that the Constitution was a document of enumerated specific powers. To enumerate means to write out, to elaborate. Therefore, since in Article I, Section 8 there

was no enumerated power for Congress to regulate the press or restrict religion or do anything, there was no danger. Isn't it dangerous to sit down, specify all those rights that are identified with the liberties of the people and then sign the document? What about those that were forgotten? The Federalists argued that the Bill of Rights was unnecessary because individual liberty was protected by your state Declaration of Rights. So as a Marylander, I could rely on a very broad definition of individual rights in the Maryland Constitution of 1776 and that was the appropriate place. There was no danger from the national government.

One of the frustrations in studying the Bill of Rights is that you would expect to go to the *Annals of Congress* and find a full discussion of people defending the freedom of religion or attacking the fact that it's too expansive a guarantee of individual liberties and things like that, but it's not the case. There seems to have been a consensus at the First Congress as to what a Bill of Rights should be, similar to the Declaration of Rights on the states.

So Madison is elected to the Congress and becomes an outspoken advocate of the adoption of the Bill of Rights by Congress.

What he did was to take all of the proposed amendments, something like 200 proposed amendments, and he separated them out. So what he cleverly did was to take all of those that went to the structure of the government and ignored them and he went to the others that guaranteed individual liberty and he incorporated them into his proposals. Madison doggedly insists that this thing be done and ultimately prevails.

I think Congress sent something like 17 amendments to the Senate in the final report and then the Senate, which met in secret session so we have no idea what they said. They stripped off, for instance, those amendments proposed by Madison to limit the states to protect such things as trial by jury, freedom of the press, and freedom of conscience. There were 12 amendments that were proposed by Congress and only 10 were immediately ratified in 1791.

One of the issues when Madison was trying to defend the adoption of the Bill of Rights, he articulated the central role of the courts and his argument would be that the courts would be the ultimate guarantors of individual liberty. And that's proven to be true.