

The American Bill of Rights: 200 Years of Interpretation and Enduring Relevance

Introduction

There is perhaps nothing more uniquely American than the universally-revered, widely-interpreted Bill of Rights. This document – ten crucial addenda that failed to become part of the original draft of the United States Constitution – is at the heart of the American judicial process and a major part of what it means to be an American citizen. Its tenets, though frequently abused, are sacrosanct and inviolable. Its flexibility and adaptability have been proven over the past two centuries, as the United States has made a gradual transition from an irrelevant colonial patchwork to its current position of immense global power and domestic wealth.

Background

The Bill of Rights was not a part of the original United States Constitution. After the Constitution's ratification in 1776, murmurs that eventually grew to a roar demanded a bill of rights – or a detailed list of the new government's limits and the freedoms of individual citizens – be added to the Constitution.¹ The newly-minted Americans had endured decades of oppression and abuse of their rights under the British monarchy and were loath to repeat the experience. Opponents of the proposed bill of rights, specifically Alexander Hamilton, argued that a list detailing what the government could not do would inevitably either lead to abuses regarding what it could do or somehow hamper its effectiveness.² The Federalists (opponents) and Anti-Federalists (proponents) were deadlocked for four long years as the debate raged on in Congress. The strongest proponents, and those with the greatest amount of influence over the finished document, were James Madison, Thomas Jefferson and George Mason.³ The original

¹ Steve Mount, USConstitution.net, http://www.usconstitution.net/constop_bor.html (accessed September 27, 2010).

² Alexander Hamilton, The Federalist Papers: No. 84, The Avalon Project at Yale Law School, http://avalon.law.yale.edu/18th_century/fed84.asp (accessed September 28, 2010).

³ Akhil Reed Amar, "The Bill of Rights as a Constitution", Yale Law Journal (1991), <http://www.constitution.org/21l/2ndschol/1amar.pdf> (accessed September 27, 2010).

meeting took place in 1787; after repeated revisions, the Bill of Rights was finally ratified and officially added to the Constitution in December 1791.⁴

Early America

Under British rule, fledgling American colonies were at the mercy of a distant and foreign government that repeatedly took advantage of the distance and the colonists' lack of representation in Parliament to line its own pockets. In the years preceding the Declaration of Independence, Americans were subject to excessive taxation, arbitrary searches and a myriad of other injustices. The Stamp Act, enacted by Parliament in 1765, was the last straw.⁵ It required colonists to pay heavy taxes on all documents related to law and/or business; however, in reality virtually everything made of paper was taxed, including newspapers and books. British customs officials routinely abused their authority to punish Stamp Act violations to conduct searches of private residences. United in their hatred for the law and its accompanying "searches", the colonists' dissatisfaction with the British government grew until, finally, they declared independence in 1776.

Early Americans believed that freedom and power were by their respective definitions permanently at odds. The founding leaders, among them James Madison, Thomas Jefferson and George Mason, strongly believed that limiting the government and protecting individual rights were paramount. Out of this belief and the colonists' staunch determination to preserve individual freedoms came the Bill of Rights.

The Bill of Rights: An Enumeration of Personal Freedoms

The first and, to many, most important amendment protects freedom of speech, the press, assembly, petition and religion. The British government had for decades persecuted Christians

⁴ James McClellan, "Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government" (3rd ed.), The Online Library of Liberty, 2000, http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=679&layout=html (accessed September 28, 2010).

⁵ American Civil Liberties Union, *The Bill of Rights: A Brief History*. http://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/bill-rights-brief-history (accessed September 27, 2010).

(and all non-members of the Church of England), severely restricted the contents of newspapers and other publications and worked to silence opponents of the government by punishing those who criticized it. The First Amendment, therefore, helped to guarantee that the colonists would never again have to suffer such injustices.

The somewhat-controversial 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.”⁶ Congress added this amendment primarily so that the federal government could not disarm state-regulated militias. However, it had other reasons as well. In early conflicts with the British, the colonists had to use the militia to fight the established British army. The founding fathers, therefore, decided that in order to protect against conventional armies and military leaders (both at home and from abroad), each state would regulate its own militia.

The Third Amendment forbids Congress to use private residences to house soldiers without permission. During the War of Independence, British soldiers were routinely housed in American residences; by adding the Third Amendment to the Bill of Rights, early Americans sought to prevent their homes from ever again being so violated.

The Fourth Amendment requires search warrants when a legal matter necessitates a search of private property (including a person’s body). It sprang from the British adage that “Every man’s house is his castle” – meaning that private property is inviolate.⁷

The Fifth Amendment established the right of due process, protection from self-implication and the principle of double jeopardy. It also forbade the government from commandeering private property without providing “just compensation”.⁸ In the Fifth Amendment can be seen the early Americans’ strong distrust of those in power; they had grown suspicious of the often arbitrary and unfair practices of the British courts and judges and sought

⁶ U.S. Constitution, Amend. II, §1

⁷ McClellan, *The Fourth Amendment: Search and Seizure*.

⁸ U.S. Constitution, Amend. V, § 1

to ensure that the new American judicial process was weighted in favor of the individual.

The right to trial by jury, to receive legal counsel, to “be informed of the nature and cause of the accusation”⁹ and other rights of the accused were established with the adoption of the Sixth Amendment. Loosely related to the Fifth Amendment, the Sixth Amendment derives from the same fear of arbitrary arrest and imprisonment. The “Miranda” rule – whereby the police must inform a suspect of their rights prior to being questioned – comes from the Sixth Amendment.

The purpose of the Seventh Amendment, which guaranteed the right to trial by jury in civil cases “where the value in controversy shall exceed twenty dollars”¹⁰, was “to preserve the historic line separating the jury, which decides the facts, from the judge, who applies the law”.¹¹ A jury trial in a civil matter, however, is not required. It is merely an option.

Protection from “excessive” bail and “cruel and unusual” punishment was established by the Eighth Amendment. The subjective and constantly-evolving definition of both terms has been a source of dispute since the Bill of Rights was adopted; what qualifies as excessive? As cruel and unusual? The early Americans had no precise definition for either but they were determined to prevent their own abuse at the hands of the court.

The Ninth Amendment helped allay fears of Anti-Federalists, who claimed that a list of individual rights would negate the rights not expressly defined by the Constitution.¹² Amendments one through eight say nothing about the right to inheritance, marriage or any social custom. The Ninth Amendment, therefore, read “The enumeration of the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.”¹³

⁹ U.S. Constitution, Amend. VI, § 1

¹⁰ U.S. Constitution, Amend. VII, § 1

¹¹ McClellan, *The Seventh Amendment: Trial by Jury in Civil Cases*

¹² Jack N. Rakove, “James Madison and the Bill of Rights”, *American Political Science Association* (1985), <http://www.apsanet.org/imgtest/JamesMadison.pdf> (accessed September 29, 2010).

¹³ U.S. Constitution, Amend. VIII, § 1

Finally, the Tenth Amendment endowed individual states with a fair amount of power, eliminating the fear that the federal government would gradually become too powerful and oppressive toward the states. It states that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁴ With the Tenth Amendment, fears that centralized government would destroy the fragile unity of the new nation were assuaged.

Modern Application and Relevance

The American Bill of Rights (and the entire Constitution) is a political marvel for its incredible versatility. Although the founding fathers constructed the Constitution with a much different set of priorities and view of the world in mind, it has nonetheless survived and flourished for more than two centuries. That being said, the Supreme Court had little to adjudicate during the first hundred-odd years of its existence. In fact, for over a century after its enactment, the Supreme Court had almost no opportunities to enforce it. The arrival of the twentieth century saw little change. Sex and race discrimination were still as firmly entrenched as during the time of Madison and Jefferson. The Bill of Rights did not begin to gain relevance for an average American until the middle of the twentieth century, when racial segregation was illegalized and the civil rights movement reached full swing.¹⁵

In modern times, the First and Second Amendments are probably the most relevant to an average American because they protect freedoms that every individual will exercise at some point during their life. The freedoms guaranteed by the First Amendment give Americans tremendous freedom to make sweeping social change, but their everyday application is much more important.¹⁶ They enable high school students to write controversial articles in a school

¹⁴ U.S. Constitution, Amend. X, §1

¹⁵ American Civil Liberties Union, *Cases or Controversies*

¹⁶ William J. Brennan, Jr., “Why have a Bill of Rights?”, *Oxford Journals*, 1989, 9 (4): 425-440, <http://ojls.oxfordjournals.org/content/9/4/425.extract> (accessed September 27, 2010).

newspaper or to put on a play with a sensitive theme. In recent years, a shrinking world and an increasingly heavy emphasis on self-expression, however, have meant that these amendments are also the ones most often abused or misused. Freedom of speech, for example, is often used as an excuse for slander. Freedom of the press is often used to excuse publication of sensitive or harmful information. The courts, when petitioned, have generally decided in favor of those claiming to be exercising their First Amendment rights (except for some matters such as, for example, child pornography). The Second Amendment is stickier because its wording can be interpreted in a number of ways. Organizations such as the National Rifle Association (NRA) have argued for its literal interpretation. The NRA believes, for example, that citizens should have the right, without any government interference, to own anything from a slingshot to an AK-47.¹⁷ The Supreme Court has never dealt indulgently with extremist views and cases pertaining to the Second Amendment are no exception.

Amendments four, five, six and eight have retained all of their relevance from 1791 until today for the simple fact that crimes are still committed and people still disagree. The questions of bail, punishment, due process, illegal searches and the Miranda rule continue to plague the court system and are decided by individual judges.¹⁸ These four amendments also make frequent appearances in popular culture. The American public, it would appear, remains as concerned with rights regarding the judicial process today as it was 200-plus years ago.

The Ninth Amendment, a low-profile amendment because of its brevity and seemingly unremarkable content, has become quite relevant in recent years. Interpretations of the Ninth Amendment have become increasingly broad, resulting in the appearance of ambiguous “rights”;

¹⁷ National Rifle Association/Institute for Legislative Action, *The Constitution, Bill of Rights, and Firearms Ownership in America*. <http://www.nra.org/Issues/Articles/Read.aspx?id=192&issue=010> (accessed September 26, 2010).

¹⁸ Stephen Reinhardt, “Weakening the Bill of Rights: A Victory for Terrorism”, *Michigan Law Review*, <http://www.michiganlawreview.org/assets/pdfs/106/6/reinhardt.pdf> (accessed September 28, 2010).

for example, despite its clear absence from the Constitution, many Americans believe that the rather ambiguous right to privacy is constitutionally protected.¹⁹ Other views promulgate the right to have an abortion (for females) and the right to die.²⁰

The Tenth Amendment has gained immense importance and relevance in the past decade or so, as the federal government has moved toward a consolidation of power and a broader interpretation of its own constitutional rights (recalling the original fears of the states' leaders in 1787). The first ten years of the 21st century have also seen a dramatic expansion of presidential powers, resulting in laws and mandates that many states consider to be unconstitutional and/or in direct violation of states' rights.²¹

The Third Amendment is the only amendment that can be said to have no relevance to the America of today. There is not now and has not been for hundreds of years any fear that a government, either foreign or domestic, would station troops in private residences without the owner's permission. The Third Amendment "is the least-invoked provision of the Bill of Rights, and the Supreme Court has never had occasion to interpret or apply it."²²

Conclusion

Despite claims that the Bill of Rights lost its relevance long ago, the mere fact of its continued existence (and popularity) is sufficient evidence to the contrary. The Bill of Rights, along with the rest of the Constitution, is a living document. Two centuries of interpretation and sometime-abuse have proven its resilience and timeless relevance not only to the neophyte nation of 1791, but also to the world superpower of today.

That is, however, not to say that there is no room for continued interpretation or even

¹⁹ University of Missouri – Kansas City Law School, Exploring Constitutional Conflicts: The Right of Privacy. <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/rightofprivacy.html> (accessed September 29, 2010).

²⁰ Daniel Farber, "The 'Silent' Ninth Amendment Gives Americans Rights They Don't Know They Have", AlterNet, <http://www.alternet.org/rights/50404/> (accessed September 27, 2010).

²¹ Cheryl Splain, "Constitution still relevant today", Mount Vernon News (March 11, 2009), <http://www.mountvernonnews.com/local/09/03/11/constitution-still-relevant-today> (accessed September 27, 2010).

²² McClellan, *The Third Amendment: Quartering Troops*

improvement. The Bill of Rights was composed in a dramatically different time. In 1791, the world was bigger, the Internet did not exist, weapons were much more primitive and the issues America faced were much, much different. All things considered, the success of the American government in adapting the Bill of Rights to suit the needs of modern society is nothing short of remarkable. Today Americans enjoy all of the freedoms enumerated in the Bill of Rights; claims that the document is irrelevant often come from individuals or groups who wish to enjoy freedom wholly without responsibility. Is it still a flawed document? Absolutely; it was created by flawed humans. Those flawed humans, however, had planned for four long years to ensure that the rights set forth in the first ten amendments to the Constitution were the cornerstones of life in America – inalienable rights, of course, but also flexible, defensible, timeless and articulate.

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U.S. Constitution, Amend. I – X, § 1.