



The Bill of Rights

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CENTER FOR
CONSTITUTIONAL STUDIES

Did Anti-Federalists get what they wanted?



“Seamen have a custom, when they meet a whale, to fling him out an empty tub by way of amusement, to divert him from laying violent hands upon the ship.”

–Jonathan Swift, *Tale of a Tub* (1704)

“Like a barrel thrown to the whale, the people were to be amused with fancied amendments, until the harpoon of power, should secure its prey and render resistance ineffectual.”

–*Centinel* No. 19 (1788)


What are the first ten amendments? Are they rights or institutional arrangements?

*Congress shall make no law
respecting an establishment of
religion....*

Is this a right?

*... or **prohibiting** the free
exercise thereof*

Is this a right?



*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.*

Is this a right?

Does the Bill of Rights bind the states?

Barron v. Baltimore (1833)

“The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated.”

-C.J. John Marshall



How does the Constitution limit state power?

Article I, sec. 10

No state shall...pass any Bill of attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

14th Amendment, sec. 1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Does the amendment protect the conduct or prohibit the law?
Is the conduct protected from *state* action?

Penn Central v. New York (1978)

Is a regulation that diminishes the value of private property a “taking”?

McDonald v. Chicago (2010)

Is the right to keep and bear arms a *fundamental* right under the 14th Amendment?

Texas v. Johnson (1989)

Is burning a flag in protest protected expression?

Gideon v. Wainwright (1963)

Must the state provide legal counsel to all criminal defendants?

What counts as an establishment of religion?

What counts as a prohibition on free exercise of religion?

Engel v. Vitale(1961) and *Kennedy v. Bremerton* (2022)

May state officials lead prayers at school? May they pray publicly?

Trinity Lutheran v. Comer (2017)

May a state exclude churches from access to public resources?

Grant program? Tax exemption? Vouchers? Charter school contracts?

Employment Division of Oregon v. Smith(1990)

Does a generally applicable law prohibiting conduct violate free exercise?