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Idaho Common Sense™

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The Bill of Privileges

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The Bill of Rights, the first 10 amendments to the United States Constitution, was ratified by three-fourths of the states in 1791. The Constitution was ratified four years earlier in 1787.

Our Bill of Rights came into existence amid debate and deliberation. Many anti-federalists who supported it previously opposed ratification of the Constitution because that document did not provide many of the individual protections that would be guaranteed in the Bill of Rights.

But the federalists, voiced by Alexander Hamilton, considered the Bill of Rights unnecessary, believing "the people surrender nothing" in the Constitution, and offering protections of specific rights would imply that any unmentioned rights were not protected.

With obvious disagreements, the Bill of Rights, proponed by Thomas Jefferson, was introduced by James Madison during the First United States Congress in 1789. Near-prophetically, these anti-federalists feared the Constitution created too strong a national government which was a threat to individual rights and would lead to the President becoming a King. Thomas Jefferson offered this resigned assessment: "Half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can."

So was born the Bill of Rights, our constitutionally guaranteed rights protecting us from the government. And there lies the problem. Which government? Until the early 1900s, the Supreme Court held the view that the Bill of Rights only applied to the federal government, a fact supported by the failure of Madison to get any specific mention of state governments into the Bill of Rights.

The high court did not change its interpretation until decades after ratification of the 14th Amendment in 1868. Rep. John Bingham, the framer of the 14th Amendment, argued that it applied the first eight amendments of the Bill of Rights to the states, the ninth and tenth not referring to specific individual rights.

He believed the first eight amendments to the Constitution, ratified by the states, better represented the people's wishes than case-by-case rulings of the Supreme Court. He did not want the justices arbitrarily deciding how to apply the 14th Amendment to the states, contending the needed individual "due process" protections of the 14th Amendment were already present in the first eight amendments.

The Supreme Court disagreed. Justice Felix Frankfurter said the court would decide which sections of the Bill of Rights should apply to the states by determining if abridgment of the right would "shock the conscience," meaning the court would decide, case-by-case, if the Bill of Rights applied to the states.

The first real application of the Bill of Rights to the states occurred in 1925, when the Supreme Court ruled that states must uphold the First Amendment right of "freedom of speech." And so started an ongoing application of parts of the Bill of Rights to the states; most cases using the "Due Process Clause" of the 14th Amendment as the basis for the new application of the Bill of Rights.

The process continues today, the justices deciding our constitutional rights, injecting personal biases of what they want the Constitution to say. The court is currently hearing the case of McDonald v. Chicago, which asks the court if the Second Amendment "right of the individual to keep and bear arms" applies to states rather than just federal enclaves like Washington, D.C.

Some 218 years after the Bill of Rights was ratified, we continue going before the Supreme Court, trying to regain our rights. We the people "plead our case," hoping the court will return to us constitutionally guaranteed rights—constitutional rights that are to protect us as citizens of the United States, regardless of our state of residence.

Perhaps I was too hard on President Clinton. Perhaps he was truthful when he expressed confusion over "what the meaning of the word 'is' is." As it turns out, the Supreme Court can rule "is" to mean almost anything. Look no further than our Bill of Privileges.

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