

Lessons on the American Constitution

Constitutional Conversations: Scripted Federalist and Antifederalist Debates

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General Introduction

Throughout the early years of the American experiment in republican government, the Founding generation pondered and intensely disputed the nature of man, power, and good governance. Perhaps the most thorough consideration of these issues took place during the debate over ratifying the Constitution when Federalists and Antifederalists launched and sustained what the late Pauline Maier described as the “greatest and most probing public debates in American history.” Polemics were pronounced in newspapers, broadsides and pamphlets, debates raged in taverns, around dinner tables, in ratifying conventions, and even from pulpits. The range and quality of rhetoric varied widely. From the high-toned prose of Publius’ eighty-five essays in *The Federalist* to the ad hominem attacks of Antifederalist writer Cincinnatus, the American public was privy to essays, extracts of letters, petitions, poems, songs, parades and even a few riots as this debate unfolded from 1787-1788.

If one wanted to read the entirety of the primary source material on the debates between Federalists and Antifederalists, the current thirty volumes of *The Documentary History of the Ratification of the Constitution* would be where one would find the complete written record. Since few have time to venture into such an undertaking, other smaller documentary editions have been published. Each seeks to “distill” the best material for students of the ratification debates. *The Debate on the Constitution* edited by Bernard Bailyn, Herbert Storing’s *The Complete Antifederalist*, and *Friends of the Constitution* by Colleen Sheehan and Gary McDowell are examples of these types of efforts. In 1989, John P. Kaminski and Richard Leffler, editors of *The Documentary History of the Ratification of the Constitution*, published *Federalists and Antifederalists: The Debate over the Ratification of the Constitution*. This single volume contained, in their view, the best writings culled from the vast resources at the Center for the Study of the American Constitution. Likewise, in 1998, Quentin Taylor published *The Essential Federalist*, in which he excerpted key passages from *The Federalist Papers*. Both of these volumes have done much to extract the basics of the ratification debates. Of equal note, both volumes have been invaluable to teachers seeking to use quality primary source materials in classrooms. The present effort follows in that tradition; it seeks to present original source material in an accessible format to a wider audience in a scripted “conversation” between leading Federalists and Antifederalists.

This volume addresses six issues of the ratification debate originally addressed in the Kaminski/Leffler volume; the nature of republican government, the House of Representatives, the Senate, the Executive, the Judiciary, and the Bill of Rights. Each of these issues originally covered in *Federalists and Antifederalists: The Debate over the Ratification of the Constitution* is adapted into a script that attempts to create the feel of a political roundtable discussion. These “conversations” are intended to be used as a pedagogical tool. By assigning roles and having students perform, the audience is exposed to the rhetoric and ideas in primary source materials from the Founding Period in an engaging and informative manner.

Primary Source Scripted Conversations

Much of the formal debate over the Constitution occurred in newspapers, broadsides, and pamphlets. Since the supporters and opponents of the Constitution expressed their views in writing, and often in different locations they could not appear together to debate the merits of the Constitution. These “conversations” are excerpted from primary source materials extant during the Federalist/Antifederalist debates. By converting these excerpts into a script format, we hope to illustrate what it may have been like if they had gathered in a single location using a discussion format. To a large extent, these conversations model the political talk show format.

A Note about the Editing

We have used ellipses when it served to render as clear a reading as possible. For example, Publius in the original version wrote:

“after all, as intimated upon another occasion, must we seek for the only solid basis of all our rights.”

We have opted to use ellipses and render it:

“after all . . . we seek for the only solid basis of all our rights.”

Occasionally, we have inserted words not found in the original text. These appear in [square brackets].

Example: Some [rights] are of such a nature that they cannot be surrendered.

Words that appear in <angle brackets>¹ with superscript footnotes are synonyms we have inserted because, in our estimation, the original word was too difficult or obscure.

Example: But experience assures us, that the <effectiveness>⁶ of the provision has been greatly over-rated.

In this specific case, the original word was “efficacy” which is seldom used in modern conversations.

For those wanting to see the original wording, we have provided them in endnotes at the end of each script.

Using this Volume

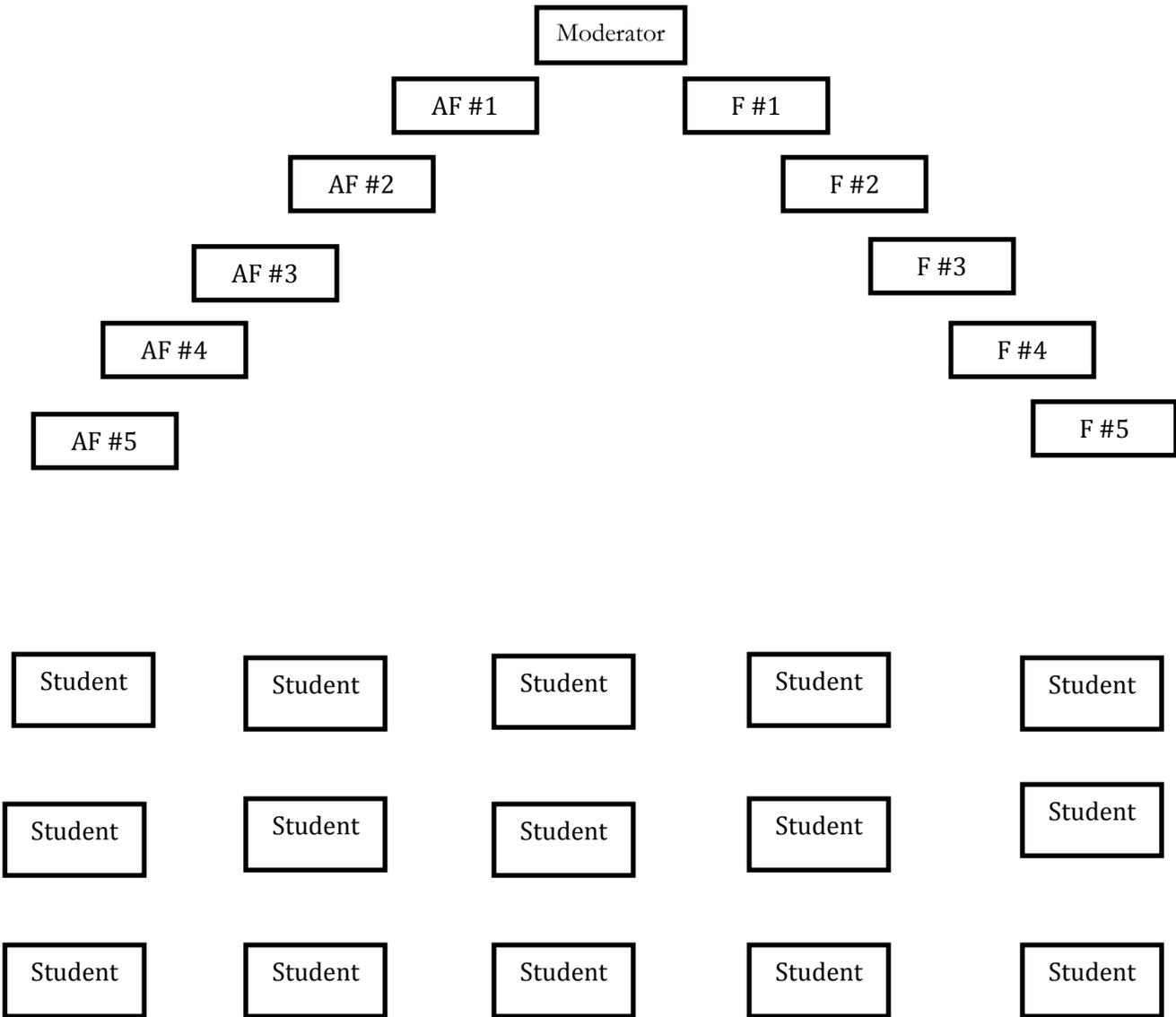
Each of these scripted conversations and follow-up discussions is designed to be used in a single class session. The scripts themselves are generally 20-25 minutes in length leaving another 20 minutes for discussion. However, teachers may want to modify this to suit their individual needs. For any script to work well, it is advisable to have students who are assigned roles to read through the script and their assigned parts prior to using the script. This serves to reduce errors in pronunciation as well as to facilitate a smoother presentation. Teachers also may want to consider briefing students on the general disagreements between Federalists and Antifederalists before using these scripts.

Each script requires students to play a role. Scripts have a listing of the names and number of participants needed for each presentation. Each script has a Moderator, Federalists, and Antifederalists. When assigning the roles teachers should keep in mind that larger roles are designated by an “L,” medium sized roles have an “M,” and smaller parts have an “S.” Following each script there are materials that can be used by students not participating in the reading.

These scripts can be used in a myriad of ways. Most often they can be used in US History courses or other courses that explore the formation and interpretation of the Constitution. Other uses might include cooperative school projects and presentations integrating the literature, theater,

and history curriculums. Librarians and civic groups desiring to host local Constitution Day events have used these scripts as the basis for educational outreach programming in their communities.

Suggested Classroom Layout for Scripted Conversations



The Nature of Republican Government

Introduction

Antifederalists argued that the Constitution would destroy the states and create one large, consolidated republic that would deteriorate into a despotic monarchy or aristocracy. They espoused a traditional position based on Montesquieu and other political theorists that a republic—by which they meant a government in which the people consent to be governed by representatives they elect either directly or indirectly on a regular basis—could exist only in a relatively small territory populated by people who shared similar values and interests.

Antifederalists believed that in a small republic the representatives know the minds of their constituents and the people know their representatives. This enables the people to understand their government and the laws. Such a government commands the confidence and support of the people.

This intimacy between the people and their representatives is impossible in a large republic, in which representatives would be little known and distant, and the government and laws would become complex. A large country would contain a diverse population, with different, sometimes conflicting, interests. The result would be a constant clashing and disorder. A large, peacetime standing army would be needed to enforce the central government's laws, especially on the periphery.

Instead of the single large republic, Antifederalists advocated a confederacy of smaller republics (the states), which would delegate to the central government only such powers as were required to maintain the Union. The central government, like the Confederation Congress, would act, not directly on the people, but through the states.

Federalists believed that a confederacy was not an adequate government for the United States. They denied that the Constitution would destroy the states or create one large, consolidated republic. The Constitution, they said, would create a government that was partly national and partly federal.

Federalists denied the charge that the Constitution violated traditional republican theory, citing Montesquieu whenever possible. Federalists argued that the states were appropriately-sized federal republics that under the Constitution united to form a limited central government with only delegated powers. Interestingly, James Madison devised a theory that valued a large and diverse polity as the solution to the great problem of republican government: to secure the public good and private rights from the tyranny of the majority while still retaining popular government. The clashing of diverse interests in a large republic becomes not an evil to be avoided, but a cure for the ancient disease afflicting republican government. Thus, representatives in this extended republic would effectively filter the varied interests so as to “refine and enlarge the public views.” Madison's interpretation, embodied in *The Federalist* #10, fell on deaf ears as virtually no one either supported or attacked his theory.

Sources

Antifederalist

- Cato (George Clinton?) III, *New York Journal*, 25 October 1787
Federal Farmer (Elbridge Gerry?): *Letters to the Republican*, c. 8 November 1787
Cato (George Clinton?) V, *New York Journal*, 22 November 1787
Brutus (Melancton Smith?) IV, *New York Journal*, 29 November 1787
Federal Farmer (Elbridge Gerry?): *An Additional Number of Letters to the Republican*,
New York, 2 May 1788
George Mason: Speech in the Virginia Ratifying Convention, 4 June 1788

Federalist

- Publius (John Jay): The Federalist 2, *New York Independent Journal*, 31 October 1787
Publius (James Madison): The Federalist 10, *New York Daily Advertiser*,
22 November 1787
James Wilson: Speech in the Pennsylvania Convention, 24 November 1787
A Landholder (Oliver Ellsworth) IV, *Connecticut Courant*, 26 November 1787
Publius (Alexander Hamilton): The Federalist 35, *New York Independent Journal*,
5 January 1788
Publius (James Madison): The Federalist 39, *New York Independent Journal*,
16 January 1788
Publius (James Madison): The Federalist 56, *New York Independent Journal*,
16 February 1788

Roles in Script–8 (L–large role; M–medium role; S–small role)

- Moderator (L)
Antifederalist Panel
 Cato (M)
 Brutus (S)
 Federal Farmer (L)
 George Mason (S)
Federalist Panel
 A Landholder (S)
 Publius (L)
 James Wilson (M)

Script

Moderator: Good evening and welcome. Tonight we have a group of individuals with differing views regarding the Constitution that was proposed by the recent convention that gathered in Philadelphia. Federalists maintain that the Constitution is the solution to many of our country's problems. Antifederalists insist the Constitution is deeply flawed and dangerous and requires revision or needs to be rejected. In tonight's discussion we will focus our attention on what many believe to be a core issue in the events leading to the American Revolution. Our consideration is, what constitutes a legitimate system of representation within a republic? Gentlemen, welcome.

Panelists: Hello, Pleased to be here, etc.

Moderator: I would like to start our discussion by starting with a simple question that seems to be the central dilemma in not just this particular Constitution but in all forms of government. Given the size of our country, is it possible for Americans to be united in a republican form of government?

Cato: Whoever seriously considers the immense extent of territory comprehended within the limits of the United States . . . will receive it as an intuitive truth, that a consolidated republican form of government therein, can never form a perfect union, establish justice, insure domestic tranquility, promote the general welfare, and secure the blessings of liberty to you and your posterity.

Moderator: Then why is unity impossible for the United States?

Cato: [Well for starters,] the variety of its climates, productions, and commerce, the difference of extent, and number of inhabitants in all; the dissimilitude of interest, morals, and policies, in almost every one. . . .

Publius: [I need to interrupt here.] It has until lately been a received and uncontradicted opinion, that the prosperity of the people of America depended on their continuing firmly united . . . and efforts of our best and wisest Citizens have been constantly directed to that object.

Cato: The extent of many of the states in the Union, is at this time, almost too great for the superintendence of a republican form of government, and must one day or other, revolve into more vigorous ones, or by separation be reduced into smaller . . . ones.

James Wilson: [However,] animosities, and perhaps wars, would arise from . . . different confederacies. . . . [There is a real] danger resulting from foreign influence and mutual dissensions [which could happen if we have] different confederacies.

Moderator: Good point, Mr. Wilson.

Publius: [But,] Providence has been pleased to give this one connected country, to one united people, a people descended from the same ancestors, speaking the same language, professing the

same religion, attached to the same principles of government, very similar in their manners and customs.

Cato: [Any] legislature [created for this nation, will be] . . . composed of interests opposite and dissimilar in their nature, will in its exercise [of power], emphatically be, like a house divided against itself.

Publius: America was not composed of detached and distant territories, but that one connected, fertile, wide spreading country was the portion of our western sons of liberty. Providence has in a particular manner blessed it with a variety of soils and productions, and watered it with innumerable streams. . . . A <series>¹ of navigable waters forms a kind of chain round its borders, as if to bind it together.

Cato: The <frontiers>² are also too remote from the usual seat of government, and the laws therefore too feeble to afford protection to all its parts, and insure domestic tranquility without the aid of another principle.

Moderator: And what is that other principle?

Cato: Will this consolidated republic, if established, [get any] compliance, among the citizens of these states . . . without the aid of a standing army—I deny that it will.

James Wilson: And [the] connection of lakes and rivers . . . all indicate an enlarged government to be fit and advantageous for them.

Publius: [This] present[s] them with highways for the easy communication of friendly aids, and the mutual transportation and exchange of their various commodities.

Moderator: OK, OK, OK, We get it. You believe that Americans are united!

Publius: By their . . . counsels, arms and efforts, fighting side by side throughout a long and bloody war, have nobly established their general Liberty and Independence.

Moderator: Yes, we understand, can we . . .

Publius: They formed [this nation] almost as soon as they had a political existence; at a time, when their habitations were in flames, when many of their Citizens were bleeding. . . .

Cato: [The foundation] on which this new form of government is erected, declares a consolidation or union of all the thirteen parts, or states, into one great whole, under the firm of the United States.

Moderator: And the problem with this would be?

Cato: [I would repeat,] from the vast extent of your territory, and the complication of interests, the science of government will become intricate and perplexed, and too misterious for you to understand, and observe; and [eventually] . . . be conducted into a monarchy.

Moderator: Wow. That seems to be a stretch.

Cato: What [else] can you promise yourselves, on the score of consolidation of the United States, into one government . . . your freedom [is] insecure.

Publius: [Do we need any] further proof . . . of the republican complexion of this system, [than the Constitution's] absolute prohibition of titles of nobility, both under the federal and the State governments; and in its express guaranty of the <representative>³ form to each of the <states>?⁴

Cato: You must risque much, by . . . placing trusts of the greatest magnitude, into the hands of individuals, whose ambition for power, and agrandisement, will oppress and grind you.

Moderator: This seems to be a valid point? When you look at history what examples are there to serve as a guide for us?

James Wilson: [Cato's opinions] seem to be supported . . . by the history of governments in the Old World.

Narrator: But, isn't Cato's point valid regardless of time and location?

George Mason: It is ascertained by history, that there never was a Government [that existed] over a very extensive country, without destroying the liberties of the people.

James Wilson: The situation and dimensions of those [past] <systems>,⁵ and the state of society, manners, and habits in them, were so different from those of the United States, that the most correct descriptions could have supplied but a very small fund of applicable remark.

Moderator: But what, if anything can we glean from the past?

James Wilson: [We could] adopt any one of four different systems. [We] may become consolidated into one government, in which the separate existence of the states shall be entirely absorbed. [We] may . . . act as separate and unconnected states. [We] may form two or more confederacies. [We] may unite in one federal republic. Which of these systems ought to have been formed by the Convention?

Federal Farmer: [But for us,] in erecting the federal government . . . each state must be known as a sovereign body.

James Wilson: [But,] Devoid of national power, we could not . . . derive a revenue. Devoid of national importance, we could not procure, for our exports, a tolerable sale at foreign markets. Devoid of national credit, we saw our public securities melt in the hands of the holders, like snow before the sun.

Federal Farmer: [Any time you] form a consolidated, or one entire government, there must be no state, or local governments, but all things, persons and property, must be subject to the laws of one. . . . Each state government . . . is consolidated, or one entire government.

James Wilson: Devoid of national dignity, we could not . . . perform our treaties, on our parts . . . nor compel the performance of them on the part of others. Devoid of national energy, we could not carry into execution our own resolutions, decisions, or laws.

Moderator: OK, let's step back a bit. Perhaps it might be best for us to define what a republic actually is. Another way to approach this might be, what is a republic and how does your definition influence your views on how representation would work within your definition of a republic?

Publius: [Absolutely.] We may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices . . . for a limited period [of time], or during good behavior.

Moderator: OK. That sounds good, but I am pretty sure Antifederalists see it differently. What is the problem with this definition Publius has offered?

Federal Farmer: [The problem lies in how representation works in this proposed Constitution.] In this extensive country it is difficult to get a representation sufficiently numerous. . . . A free elective government cannot be extended over large territories . . . one government and general legislation alone never can extend equal benefits to all parts of the United States: Different laws, customs, and opinions exist in the different states.

Moderator: In other words you believe that the United States is too big for a truly representative government to work.

Federal Farmer: [Yes.] The people in a small <republic>⁸ can unite and act <cooperatively>⁹ and with vigour; but in large territories . . . one part is often played off against the other.

George Mason: [Precisely,] history shew[s] us, that monarchy may suit a large territory, and . . . popular Governments can only exist in small territories.

Moderator: So what is it about smallness that is important when considering how the people are to be represented?

Federal Farmer: A full and equal representation, is that which possesses the same interests, feelings, opinions, and views [of] the people themselves . . . were they all assembled.

George Mason: Representatives . . . ought to mix with the people, think as they think, feel as they feel, ought to be perfectly <cooperative with>¹⁰ them, and thoroughly acquainted with their interest and condition.

Moderator: So we can conclude that you want representatives to mirror the interests of their constituents, correct?

Federal Farmer: [Correct. The problem is that] the United States contain about a million of square miles, and in half a century will, probably, contain ten millions of people; and from the center to the extremes is about 800 miles.

Moderator: And for you the size of the nation presents a challenge to this type of representation. Would it follow then that you would suggest increasing the number of representatives in the legislature of this Constitution?

Cato: [Certainly.] It is a very important objection to this government, that the representation consists of so few; too few to resist the influence of corruption, and the temptation to treachery . . . and yet the number of senators and representatives proposed for this vast continent, does not equal those of your own state.

Moderator: But, if we commit to your preferences, wouldn't the number of representatives in the legislature be huge since the country itself is so large?

A Landholder: [Exactly.] If so numerous a representation were made from every part, [city, and district] of the United States, with our present population, the new Congress would consist of three thousand men.

Moderator: Publius, you seem to be anxious to address these issues. If I am not mistaken, you are not as committed to a direct form of representation that is espoused by Antifederalists.

Publius: [Correct. Direct] democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths.

Moderator: In other words, you think direct representation in democracies ends up in chaos.

A Landholder: [Correct.] Were it possible for all the people to convene and give their personal assent, some would think this the best mode of making laws, but in the present instance it is impracticable.

Moderator: And since it's impossible logistically to gather the people, I assume you think it's better for a smaller group to assemble and sift through or filter the wishes of the people.

Publius: [Yes. Representatives in the United States should] refine and enlarge the public views, by passing them through the medium of a chosen body of citizens.

Federal Farmer: [That's the problem.] A small representation can never be well informed as to the circumstances of the people, the members of it must be too far removed from the people, in general, to sympathize with them, and too few to communicate with them.

Moderator: Am I correct in assuming that you fear these representatives would essentially form an aristocracy?

Brutus: [Certainly. These representatives] will not be viewed by the people as part of themselves, but as a body <disconnected>¹¹ from them.

Federal Farmer: It is deceiving a people to tell them they . . . can chuse their legislators, if they cannot . . . chuse men from among themselves, and genuinely like themselves: . . . the yeomanry . . . the fishermen, mechanics and traders . . . the merchants.

Moderator: What makes these types of individuals preferable as representatives?

Federal Farmer: They possess less <self-interest>¹² and a larger share of honesty: their dependence is principally on middling and small estates, industrious pursuits, and hard labour.

Moderator: Is it possible to over state the virtues of the common man?

Publius: [I believe it is.] At present some of the states are little more than a society of <farmers>.¹³ Few of them have made much progress in those branches of industry, which give a variety and complexity to the affairs of a nation.

Moderator: So, I assume you would insist that this type of representative lacks the necessary knowledge needed to govern a nation?

Landholder: [A few] wise men chosen from each state . . . will be more competent than an hundred.

Publius: [Precisely.] A few representatives . . . from each state may bring with them a due knowledge of their own state, every representative will have much information to acquire concerning all the other states.

Moderator: OK. But, Publius, why do you think there needs to be a filtering of the views of the people? Many believe that direct democracies are preferable.

Publius: [Yes. But, in a democracy a] faction . . . whether amounting to a majority or minority of the whole, who are united and <motivated>¹⁴ by some common impulse of passion, or of interest . . .

Moderator . . . Will probably oppress the rights of others?

Publius: [Yes. This factious spirit is] chiefly . . . [responsible for] the unsteadiness and injustice which has <ruined>¹⁵ recent <policies made by our state governments>.¹⁶

Moderator: And I presume you would suggest the purpose of representation is to control factions rather than reflect the natural tendencies of factions?

Publius: [Exactly. It's very simple. A legislature should consist of those] whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations. Under such . . . the public voice pronounced by the representatives of the people, will be more <in agreement>¹⁷ to the public good, than if pronounced by the people themselves.

Moderator: So, essentially, a representative body in the American context should serve a different purpose?

Publius: [In] a pure Democracy, a Society consisting of a small number of citizens, who assemble and administer the Government in person, can <not claim to>¹⁸ cure . . . the mischiefs of faction.

Federal Farmer: [But if we aspire to have a democratic system] representation . . . [representation in this system will] be extremely imperfect . . . the representatives are not circumstanced to make the proper communications to their constituents, and where the constituents in turn cannot, with tolerable convenience, make known their wants, circumstances, and opinions, to their representatives.

Moderator: In other words, you are suggesting that if the interests of the people are not directly reflected in government policy, you question whether you can call it a democratic system?

Federal Farmer: [Exactly.] By the proposed system . . . I think it has been fully shewn, the people will have but the shadow of representation, and but the shadow of security for their rights and liberties.

Brutus: [Here is another way to think about this.] In order for the people safely to <trust>¹⁹ their rulers . . . They should be satisfied that those who represent them are men of integrity, who will pursue the good of the community with <faithfulness>.²⁰

Publius: [But I would ask this of Brutus.] Is the man whose situation leads to extensive inquiry and information less likely to be a competent judge . . . than one whose observation does not travel beyond the circle of his neighbours and acquaintances?

Moderator: So, in other words Publius, you prefer those that can see the bigger picture to filter through all the issues before reaching a decision?

Publius: [Yes.] The representatives . . . will not only bring with them a considerable knowledge . . . of their respective districts; but will probably . . . have been members . . . of the state legislature, where all the local information and interests of the state are assembled, and . . . they may easily be conveyed by a very few hands into the legislature of the United States.

Brutus: [Let me conclude here with this analogy using an employer and employee relationship.] If the person confided in, be a neighbour with whom his employer is intimately acquainted, whose talents, he knows . . . his honesty and <faithfulness>²¹ unsuspected, and his friendship and zeal for the service of this principal unquestionable, he will commit his affairs into his hands with unreserved confidence, and feel himself secure.

Moderator: And I would conclude that for you the kind of representation espoused by Federalists lacks this type of close relationship.

Brutus: [Yes.] If the person employed be a stranger, whom he has never seen, and whose character for ability or <trustworthiness>²² he cannot fully learn. If he is constrained to choose him, because it was not in his power to procure one more agreeable to his wishes, he will . . . be suspicious of all his conduct.

Publius: [But, in this system] it will be more difficult for unworthy candidates to practise with success the vicious arts . . . [and it] will be more likely to centre on men who possess the most attractive merit, and the most diffusive and established characters.

Moderator: We need to wrap up this session. Let's have representatives from each side offer concluding statements.

Publius: It is essential to . . . government that it be derived from the great body of the society. . . It is sufficient for such a government that the persons administering it be appointed, either directly or indirectly, by the people . . . otherwise every government in the United States . . . would be degraded from the republican character.

James Wilson: The facts recorded concerning [past] constitutions are so few and general, and their histories are so unmarked and defective . . . [when] forming this system, we were deprived of many advantages, which the history and experience of other ages and other countries would, in other cases, have afforded us. . . . The extent of territory, the diversity of climate and soil, the number, and greatness all indicate an enlarged government to be fit and advantageous for them. The principles and dispositions of [our] citizens indicate that in this government, liberty shall reign triumphant. . . . If those opinions and wishes are as well-founded . . . the late Convention was justified in proposing to their constituents, one confederate republic as the best system of a national government for the United States.

Moderator: Federal Farmer, it looks like you have the last word.

Federal Farmer: The . . . people have acquired large powers and substantial influence by the revolution. In the unsettled state of things, their numerous representatives, in some instances, misused their powers, and have induced many good men suddenly to adopt ideas unfavourable to such republics, and which ideas they will discard on reflection. Without scrutinizing into the particulars of the proposed system, we immediately perceive that its general tendency is to collect the powers of government, now in the body of the people in reality, and to place them in the higher orders and fewer hands; no wonder then that all those of and about these orders are attached to it: they feel there is something in this system advantageous to them. On the other hand, the body of the people evidently feel there is something wrong and disadvantageous to them [and they rightfully oppose this consolidated system].

Moderator: And with that we conclude our discussion. Gentlemen, thank you for sharing with us and we hope the conversation continues.

Panelists: You're Welcome. Thank you. It's been a pleasure.

Endnotes

- ¹ succession
- ² extremes
- ³ republican
- ⁴ latter
- ⁵ confederacies
- ⁶ animates
- ⁷ votary
- ⁸ state
- ⁹ in concert
- ¹⁰ amenable to
- ¹¹ distinct
- ¹² ambition
- ¹³ husbandmen
- ¹⁴ actuated
- ¹⁵ tainted
- ¹⁶ public administration
- ¹⁷ consonant
- ¹⁸ admit of no
- ¹⁹ repose themselves on
- ²⁰ fidelity
- ²¹ fidelity
- ²² fidelity

Pedagogical Materials

T-Chart for Notes—The Nature of Republican Government

Instructions: As students listen to the scripted debate, they should take notes using the T-Chart below. Notes should summarize the key ideas from both Federalist and Antifederalist speakers. You may also want to assess the strength of each argument using a numerical ranking system. This chart can also be used when using the discussion questions below.

<u>Federalist Arguments</u>	<u>Antifederalist Arguments</u>

Discussion Questions—The Nature of Republican Government

1. In your opinion, were Antifederalist concerns over the size of the nation a legitimate issue as they considered the nature of representative government? To what extent do Federalists effectively address these concerns?
2. Is the Federalist view of filtered representation an effective solution to the difficulties arising in a country as large as the United States?
3. In your opinion, is the Federalist idea of filtered representation synonymous with aristocracy? If so, would it be problematic?
4. What are the similarities and differences in how Federalists and Antifederalists use historical evidence in their reasoning?
5. To what extent would you say Federalist views are optimistic? To what extent would you say Antifederalist views are pessimistic?

Extension Activities

1. Create a Political Cartoon. Students can create political cartoons from the following passages from the script that illustrate two individuals and their different points of view:

On pages 8-9, Publius and Brutus have very different views about representation.

On pages 3-4, Cato and Publius have very different views on the unity/disunity of the nation.

2. Create a Graphic novel. Instead of creating traditional book reports or writing summaries, get "graphic" by creating a comic book adaptation of an important section in the script. Characters in the story could include James Wilson, Publius, Brutus and Federal Farmer.

3. Converting speeches into poetry. Students could take lines from the script and convert them into various types of poems. For example a limerick from Publius' view of how representation should work might be:

Publius read plenty-o-books and digested
Views that were seldom suggested
This nation of great size
Needs reps that are wise
Replacing ones that merely reflected

The House of Representatives

Introduction

During the Revolution all of the American states established republican forms of government where the people chose representatives to attend state legislatures. The lower houses of the legislatures, generally the centers of power in the state governments, were often large and represented most segments of society.

Delegates to the Confederation Congress were usually elected by the state legislatures. (In Connecticut and Rhode Island the people elected their congressional delegates directly.) Each state could elect two to seven delegates, but generally states sent no more than three delegates to Congress at any one time. Thus Congress was usually composed of fewer than forty delegates—more commonly fewer than thirty. The unicameral Confederation Congress voted by state—not by delegate—and each state had one vote. Delaware, the smallest state in the Union, therefore, had as much voting power in Congress as Virginia, the largest, wealthiest state. Delegates to the Constitutional Convention from the three large states—Virginia, Massachusetts, and Pennsylvania—opposed this method of representation and suffrage in Congress.

The Constitution called for a bicameral Congress composed of a House of Representatives and a Senate. Representation in the House was to be based on population, while the states were to continue to remain equal in the Senate. Representatives would be apportioned among the states based on a census taken every ten years with no more than one representative for every 30,000 people. No state, however small its population, was to be deprived of at least one representative. Per capita voting in both houses of Congress replaced the Confederation's state voting.

Small-state Antifederalists opposed the inequality of state representation in the House. They maintained that the states were distinct political units and ought to be so represented. Obviously Antifederalists in large states did not share this view.

Opponents of the Constitution charged that the House of Representatives was too small to represent adequately all segments of American society. The Constitution provided that the first U.S. House of Representatives would be composed of 65 members. Even tiny Rhode Island had more assemblymen than that. Consequently, Antifederalists wanted safeguards built into the Constitution guaranteeing immediate and regular increases in the number of representatives as the country's population increased.

Antifederalists also attacked the biennial elections of Representatives. Delegates to the Confederation Congress had one-year terms as did most state legislators. Two-year terms seemed another step to remove representatives from the control of the people, especially since the Confederation's mandatory rotation in office and the right of state legislatures to recall their congressmen were abandoned by the new Constitution.

The Constitution was also criticized for not giving the House of Representatives a role in treaty-making. Since treaties were part of the supreme law of the land, Antifederalists charged that treaties could arbitrarily affect the lives of all Americans without direct input from the immediate representatives of the people. Furthermore, money bills—frequently a prerogative of the lower houses of legislatures—would now involve the approbation of the Senate.

Federalists answered these criticisms forcefully. For the first time, they said, the people for the first time would elect representatives and would be represented proportionately by their numbers. The House of Representatives would indeed grow as the nation enlarged, but this increase would have to be controlled so that the House could function properly. The two-year term of office was also necessary to assure Representatives of a certain degree of continuity. One-year terms would

mean that Representatives from the more distant states would spend most of their time travelling back and forth to Congress and running for reelection rather than serving in office. Furthermore, it would require more time for Representatives to familiarize themselves with the complexities of national issues.

Federalists also argued that, although the House of Representatives had no direct involvement in treaty-making, it still had influence over treaties through its control over the appropriations of funds. In addition, the House's power to impeach officeholders who violated their trusts gave the House considerable power in all governmental affairs. Antifederalists discounted the House's power to impeach insisting the Senate would never convict.

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Roles in Script–14 (L–large role; M–medium role; S–small role)

Moderator (L)

Antifederalist Panel

Brutus (L)

Cato (S)

Centinel (S)

Cincinnatus (M)

Federal Farmer (S)

Patrick Henry (S)

George Mason (L)

Federalist Panel

“A.B.” (M)

A Friend (M)

An American Citizen (S)

A Landholder (M)

James Madison (S)

Publius (L)

Script

Moderator: Good evening and welcome. Tonight we are gathered to discuss the proposed Constitution. Specifically, our thoughts tonight are centered on the legislature and especially the House Representatives. In another conversation we discussed in abstract terms the nature of representation and discovered that both sides had very different views as to what constituted good representation. So as a follow up, I would like for us to look at some of the details of how those views apply when Federalists and Antifederalists approach the provisions in the Constitution that relate to the lower house in this bicameral system. Gentlemen, is it fair to say that Federalists view the provision in the Constitution related to representation and powers in the House favorably whereas Antifederalists do not?

All Panelists: Certainly, Absolutely, Yes, Without a doubt, etc.

Moderator: Well, Let's start with an issue I have seen discussed in other places; the issue of ratios. The Constitution says that representatives in the lower house "shall not exceed one for every thirty Thousand." I would like to point out that many suggest that the most important words here are "shall not exceed." Is this correct?

George Mason: What [is] so dangerous, is the provision with respect to the number of Representatives: It does not expressly provide, that we shall have one for every 30,000, but [instead it says] that the number shall not exceed that proportion.

Federal Farmer: [Yes.] The representation is unsubstantial and ought to be increased.

Moderator: So, for those who may be mathematically challenged, explain the problem. I take it that there is a big difference in the words of the Constitution when it states, "shall not exceed" and your insistence that it ought to say explicitly that representatives "will be firmly set" at a specific ratio?

George Mason: [Correct.] Suppose [in the future] Congress should say, that we should have one for every 200,000, will not the Constitution be complied with? For one for every 200,000 does not exceed one for every 30,000.

Moderator: So if I hear you correctly, the possibility of ratios being ridiculously low, say like 1:600,000, it would not exceed the 1:30,000. Only ratios like 2:30,000 or 3:30,000 would exceed what is stipulated in the Constitution. Right?

Patrick Henry: [Exactly.] When it says, that there shall not be more Representatives, than one for every 30,000 . . . how easy is it to evade this? [Theoretically] this [ratio] may be satisfied by one Representative from each State. . . [In the future] our numbers be ever so great, [on] this immense continent, may, by this <deceptive rhetoric>¹ be reduced to have but 13 Representatives.

Moderator: And as a result representation would be so diluted as to make it no representation at all?

Publius: Within three years a census is to be taken . . . and within every successive period of ten years, the census is to be renewed, and <increases>² may continue to be made. . . It <is reasonable

to assume³ that the first census, will, at the rate of one for every thirty thousand raise the number of representatives to at least one hundred.

Patrick Henry: Why was it not clearly and unequivocally expressed, that they should be entitled to have one for every 30,000? This would have obviated all disputes; and was this difficult to be done? What is the inference? When population increases, and a State shall send Representatives in this proportion, Congress may <send them back to home>⁴ them, because the right of having one for every 30,000 is not clearly expressed.

Moderator: Then I suppose, this presents the problem of too few representatives, which in turn could be labeled an aristocratic system?

Federal Farmer: A small representation can never be well informed as to the circumstances of the people, the members of it must be too far removed from the people, in general, to sympathize with them, and too few to communicate with them. . . . where there is but one representative to 30,000, or 40,000 inhabitants . . . he can only mix, and be acquainted with a few respectable characters among his constituents.

Moderator: Well, we've heard from Antifederalists quite a bit; let's hear from some Federalists.

A Landholder: Considering the immense territory of America, the objection with many will be . . . that when the whole is populated it will constitute a legislature unmanagable by its numbers. The Convention foreseeing this danger, have so worded the article, that if the people should at any future time judge necessary, they may diminish the representation.

Moderator: But, I think this is exactly what Antifederalist fear. It might mean that someday the ratios could be something ridiculous like 1:500,000 or even 1 for each state.

George Mason: [Exactly.] Congress may reduce the number from 65, to one from each State, without violating the Constitution.

An American Citizen: Each member of this truly popular assembly will be chosen [in reality] by about six thousand <voters>⁵ by the poor as well as the rich. No <unpopulated districts; the way representation works in Parliament>⁶ will have an unjust share in their determinations—No <unpopulated area>⁷ will send . . . a representative by the voice of a single <voter>⁸. As we shall have no royal ministries to purchase votes, so we shall have no votes for sale. . . . The <votes>⁹ of six thousand enlightened and independent Freemen are above all price.

A Landholder: Every freeman is an elector. The same qualifications which enable you to vote for state representatives, give you a federal voice. It is a right you cannot lose, unless you first annihilate the state legislature.

Moderator: But how would you address the concerns of Antifederalists that representation in the House is not truly reflective of the people? I suppose, Publius, this comes back to your theory of filtered representation?

Publius: [Indeed it does.] Is it not natural that a man who is a candidate for the favour of the people and who is dependent on the <votes>¹⁰ of his fellow-citizens [for him to] take care to inform

himself of their dispositions and inclinations and should be willing to allow them their proper degree of influence upon his conduct? This dependence . . . [creates] strong chords of sympathy between the representative and the constituent.

Moderator: And that thought is a good transition to the issue of elections. Since we have been speaking of how representatives know the interests of their constituents, let's talk about terms.

Cato: [Yes. Let's talk about the terms of office.] Biennial elections for representatives are a departure from the safe democratical principles of annual ones.

Moderator: And why are annual elections so important?

Cato: [Well, let's consider what Montesquieu said.] He remarks . . . that free cities by frequent elections of magistrates became nurseries of great and able men, every man endeavoring to excel others, that he might be advanced to the honor he had no other title to, than what might arise from his merit, or reputation.

Moderator: So for you, frequent elections ensure a certain vitality and accountability that will not occur if terms are longer?

Cato: [Exactly.] The framers of this [so called] perfect government . . . have departed from this democratical principle.

Moderator: Well, if I am not mistaken, most states have practiced annual elections, so why would we want to change accepted practices?

Publius: The people of England, whose house of commons is filled with military and civil officers and pensioners, say their liberties would be perfectly secured by triennial parliaments.

Moderator: But, we

Publius: It was provided by a statute in the reign of Charles the second [in the 1600s], that <the same Parlaiment>¹¹ should not be <extended>¹² beyond a period of three years.

Moderator: But, we are not

Publius: By another statute . . . later in the same reign [of Charles the second], the term . . . expressly enacted that a new parliament shall be called within three years after the <end of the previous Parliament>.¹³

Moderator: But we are not . . .

Publius: Let us bring our enquiries nearer home.

Moderator: Thank you. Thank you. Thank you.

Publius: The periods of election were different [in the American context.] They varied from one to seven years. Have we any reason to infer from the spirit and conduct of the representatives of the

people, prior to the [American] revolution, that biennial elections would have been dangerous to the public liberties?

Moderator: How about Virginia? What was the policy there?

Publius: In Virginia . . . elections under the former government were <every seven years>.¹⁴ This is not . . . proof of any peculiar merit . . . but merely as a proof, and I conceive it to be a very substantial proof, that the liberties of the people can be in no danger from biennial elections.

Moderator: OK, you have established that a two-year election cycle is acceptable, but are there any advantages that would make it preferable?

Publius: In a single state the <necessary>¹⁵ knowledge . . . [needed to run] the general affairs of the state . . . are not very diversified, and occupy much of the attention and conversation of every class of people. The great theatre of the United States presents a very different scene.

Moderator: I'm not sure I follow.

Publius: [Think of it this way.] How can foreign trade be properly regulated . . . without some acquaintance with the commerce: the ports, the usages, and the regulations, of the different states. How can the trade between the different states be duly regulated without some knowledge of . . . other points?

Moderator: In other words . . .

Publius: Few of the <representatives>¹⁶ . . . will by frequent re-elections become members [and be able to be] . . . masters of the public business.

Moderator: Let me take us in another direction related to elections. I recall reading some Antifederalist literature that said that Congress could also control their elections. Am I right in this?

Cincinnatus: [Yes, you are correct.] In the 4th section [of the first Article of the Constitution], it is said "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations.

Moderator: It sounds like this clause gives the national legislature control over its elections in the states.

Centinel: [Additionally,] the Congress . . . under the pretence of <a fear>¹⁷ of invasion, upon the pretence of the turbulence of what they may stile a faction . . . may postpone the time of the election of the senators and the representatives from period to period <endlessly>¹⁸; thus . . . they certainly will from the lust of <domination>,¹⁹ so inherent in the mind of man, relieve the people from the trouble of attending elections.

Publius: Elections in Ireland till of late were regulated entirely by the discretion of the crown.

Moderator: But what is the likelihood of Congress doing this?

Centinel: This section cannot be too often repeated, as it gives such a latitude to the <conniving politicians>²⁰ . . . as it may enable the administration under it, to complete the system of despotism.

Moderator: But, aren't people in this system able to keep track of the actions of their representatives?

An American Citizen: [Yes.] The vote of each representative can be always known, as well as the proceedings of the house, that so the people may be acquainted with the conduct of those in whom they repose so important a trust.

Cincinnatus: Nothing can be plainer than that Congress . . . might in various ways annihilate the freedom of elections. [This] right of election . . . is but a shadow in the people; while the substance will necessarily reside with those to whom the regulation of it is resigned.

Moderator: What about this? It seems to me that Antifederalists are over stating their fears about this clause? As I understand it, the Constitution says that Congress has the authority to control elections in the states if there is an invasion or if a state refuses to hold elections.

A Friend: [Precisely. Not only are they overstating the case, they are not telling you the full truth as to reasons we have this provision in the Constitution. States were preventing] legal requisition[s] to perform this and other acts of duty to the union and our foreign friends.

Cincinnatus: [Need I remind our audience that] in all our constitutions, the regulation of elections is fixed; not left to the legislature, because it is a fundamental right, in which the essence of liberty resides.

A Friend: The [true] meaning . . . is this clause is

Cincinnatus: This power over elections is another proof of a . . . determination to have a complete controul over the people.

A Friend: [The] members of the general convention

Cincinnatus: [The control of elections are] in fact the root of all rights.

Moderator: Let's stop using clichés. No one is running for office here tonight. Go ahead A Friend.

A Friend: The [true] meaning . . . is this. [The] members of the general convention . . . saw plainly that Pennsylvania and several other states had paid up about their proportion of the interest on the continental debts, and that some other states, such as Rhode-Island, had not done the . . . just thing, and that they omitted to send their delegates to Congress, in order that there might not be a due representation in that body.

Moderator: And what does this have to do with providing for Congressional control of their elections in the states?

A Friend: [Well, it's not fair.] This fell hard upon Pennsylvania and other honest states, and yet the old confederation being defective in not giving power to Congress to remedy the evil, we must have groaned under the hardship for ever, had not the states adopted that article in the new constitution.

Moderator: Oh, you mean states that did not send representatives to Congress could by their negligence avoid paying any of the national debt?

A Friend: [Exactly.]

Moderator: So Congress needed some leverage over states to ensure representation at the national level?

A Friend: [Yes.] If any <state>²¹ refuses or neglects to perform its duty . . . Congress can say, that the people of each election district in each state shall chuse, in their proper district, the Fœderal representatives, to which by the new constitution . . . they are justly entitled. This is the true meaning of the clause.

Moderator: Another clause in the proposed Constitution that causes concern for Antifederalists is the necessary and proper clause. Brutus, is this the case?

Brutus: [Yes.] The powers given by this <clause>²² are very general and comprehensive, and it may receive a construction to justify the passing almost any law.

Moderator: And the problem with this is?

Brutus: [Congress] by this clause invested with the power of making all laws, proper and necessary, for carrying all these into execution . . . may so exercise this power as entirely to annihilate all the state governments, and reduce this country to one single government.

James Madison: [This is nothing less than a scare tactic.] But it gives no supplementary power: It only enables them to execute the delegated powers. If the delegation of their powers be safe, no possible inconvenience can arise from this clause.

Moderator: But how can you be sure that the clause won't be used by Congress to expand its powers? In other words, why wasn't this spelled out literally in the text of the Constitution?

Brutus: [This is precisely my point.] Suppose the legislature of a state should pass a law to raise money to support their government and pay the state debt, may the Congress repeal this law, because it may prevent the collection of a tax which they may think proper and necessary to lay, to provide for the general welfare of the United States?

James Madison: Should Congress attempt to extend it to any power not enumerated, it would not be warranted by the clause. [This clause] is at most but explanatory.

Brutus: [In the future] the clause . . . may operate to do away all idea of confederated states, and to effect an entire consolidation of the whole into one general government.

Moderator: It certainly seems possible that the necessary and proper clause could be used in such a way.

Publius: I am unable to conceive that the people . . . in their present <mindset>²³ . . . will chuse . . . men who would be disposed to form and pursue a scheme of tyranny or treachery. . . . I am equally unable to conceive that there are . . . men who would either desire or dare . . . to betray the solemn trust committed to them.

Brutus: This [clause allows the] government to possess absolute and uncontrollable power. . . . And by the 6th article, it is declared “that this constitution . . . shall be the supreme law of the land” . . . It appears . . . that the constitution and laws of every state are nullified and declared void.

James Madison: The [necessary and proper] clause under consideration . . . was a restraint on the exercise of a power expressly delegated to Congress, namely, that of regulating commerce with foreign nations.

Brutus: [Let’s be honest here. Congress under this clause] has authority to make laws which will affect the lives, the liberty, and property of every man in the United States; nor can the constitution or laws of any state, in any way prevent or impede the full and complete execution of every power given . . . there is no limitation to this power.

Moderator: Brutus does make a good point. What assurances do we have that in the future this clause will not be used for all kinds of purposes?

Brutus: It is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way.

A.B.: [Representatives in Congress] are limited [to certain delegated powers], they extend only to certain objects, and these objects [are] particularly stated and clearly defined by the constitution.

Brutus: [Mark my words.] This <tendency>²⁴ [to abuse power], which is implanted in human nature, will operate in the federal legislature to lessen and ultimately to subvert the state authority.

A.B.: The national welfare clearly requires that the <states>²⁵ should yield to the <nation>²⁶ and be controlled thereby: the reason is obvious, viz. the welfare of the whole is of more value than the imaginary welfare of a part.

Brutus: [Again, I would repeat.] The powers of the general legislature extend to every case that is of the least importance. — there is nothing [that is not] within its power.

A.B.: Let the reader look over and take an impartial view of the powers given to the federal government, and see for himself, whether these powers extend to . . . murder, adultery, theft, robbery, burglary, lying, perjury, defamation: does it make any provision at all whereby men shall be quieted in their title to their lands and other property, in the possession of their houses, wives, children! [All of this rhetoric of Brutus seems to be “full of sound and fury, signifying nothing.”]

Moderator: Let's move on to another contentious issue that divides this panel: taxation. What exactly do Antifederalists fear in the Constitution relating to the taxing power of this national government?

George Mason: I candidly acknowledge the <ineffectiveness>²⁷ of the confederation; but requisitions have been made, which were impossible to be complied with.

Moderator: How so?

George Mason: [Well for one,] Requisitions [were made by Congress] for more gold and silver than were in the United States.

Moderator: OK, but would you agree there needs to be some sort of taxing power for the national government?

George Mason: [Certainly, but] Why then not leave this power to be exercised by those who know the mode most convenient for the inhabitants.

Moderator: Meaning, the states?

George Mason: Why then should we give up this dangerous power of individual taxation? Why leave the manner of laying taxes to those, who in the nature of things, cannot be acquainted with the situation of those on whom they are to impose them.

Publius: There can be no doubt that in . . . [an] exercise of the power of taxation it is necessary that the person . . . be acquainted with the general genius, habits and modes of thinking of the people at large and with the resources of the country.

Moderator: So, I assume you have doubts about the abilities of the states to tax properly.

Publius: The men who understand those principles best will be least likely to resort to oppressive expedients, or to sacrifice any particular class of citizens to the procurement of revenue.

Moderator: And who might these individuals be?

Publius: [Individuals that have] a more <intermingled>²⁸ knowledge of the circumstances of the state may be necessary.

Moderator: In other words, you don't think elected officials at the state level have the vision to see the bigger picture of national interests.

Publius: [Exactly.] This [wisdom will not] . . . be possessed in sufficient degree by . . . men diffusively elected within the state[s].

George Mason: Sixty-five members cannot possibly know the situation and circumstances of all the inhabitants of this immense continent . . . they will lay the tax on that article . . . without consulting the real circumstances or convenience of a country, with which, in fact, they cannot be sufficiently acquainted.

Moderator: So give us a solution, Mr. Mason.

George Mason: If we give the General Government the power of demanding their quotas of the States, with an alternative of laying direct taxes, in case of non-compliance, then the mischief would be avoided.

Moderator: But, this is a big problem. As I understand it, the central government under the Articles didn't have the power to tax if the states refused to supply the requested funds from Congress.

George Mason: [Look at it this way.] Will the people of this great community submit to be individually taxed by two different and distinct powers? . . . These two concurrent powers cannot exist long together; the one will destroy the other.

Moderator: I have heard that some have suggested that revenues for the national government should be limited to taxing imports rather than through a power to levy direct taxes on people, land, and goods. Is this a proposal worth considering?

Publius: [Absolutely not!] Exorbitant duties on imported articles would <create>²⁹ a general spirit of smuggling; which is always prejudicial to the fair trader, and eventually to the revenue itself.

George Mason: The assumption of this power of laying direct taxes, does of itself, entirely change the confederation of the States into one consolidated Government. . . . The very idea of converting what was formerly a confederation, to a consolidated Government, is totally subversive of every principle which has hitherto governed us.

Publius: [Additionally,] the <limiting>³⁰ of the national revenues to . . . <tarrifs>³¹ would be <unfair>³² from a different cause between the manufacturing and the non-manufacturing States.

Moderator: How is this so?

Publius: The States which . . . supply . . . their own wants, by their own manufactures, will not . . . consume so great a proportion of imported articles, as those States which are not in the same favourable situation; they would not therefore in this mode alone contribute to the public treasury in a ratio to their abilities. [This burden is unfairly distributed throughout the nation.]

Moderator: Sadly, I see we are nearly out of time. If I could ask if each side could offer an concluding statement. Let's begin with the Federalists.

A.B.: [We have been lacking a] controuling power in our federal government, we have [seen] from sad experience of the evils that have <resulted without this controlling power>.³³ This . . . has produced the present feeble state of our federal union, and brought it to the very point of dissolution: occasioned the violation of public justice, the extermination of public credit, the insecurity of domestic tranquility, the loss of national dignity, rendered us the sport and derision of neighbouring nations, and our general defence, safety and welfare unprovided for, and the blessings of liberty exceedingly precarious.

Publius: The representatives of each state will . . . bring with them a considerable knowledge of its laws, and a local knowledge of their respective districts . . . [and] will probably . . . have been members . . . of the state legislature. . . . Representatives therefore from each state . . . bring with them a due knowledge of their own state. [All the other] representative[s] will have much information to acquire concerning all the other states.

Moderator: And the Antifederalists?

George Mason: Gentlemen may talk of public virtue and confidence; we shall be told that the House of Representatives will consist of the most virtuous men on the Continent, and that in their hands we may trust our dearest rights. . . . I fear the thirst of power will prevail to oppress the people. [And on the issue of taxation,] the mode of levying taxes is of the utmost consequence. [The essential question is this;] why shall we give up to the National Government, this power, so dangerous in its nature. If Congress hath this power . . . taxes will be laid by those who have no fellow-feeling or acquaintance with the people.

Brutus: In order for the people safely to repose themselves on their rulers, they should not only be of their own choice. But it is requisite they should be acquainted with their abilities to manage the public concerns with wisdom. They should be satisfied that those who represent them are men of integrity, who will pursue the good of the community with <faithfulness>³⁴ and will not be . . . corrupted by undue influence.

Cato: [This] Congress have the improper power of making or altering . . . elections for representatives . . . [establishing] standing armies . . . and appropriation of money made for their support. These are [but a few] of the many evils that will attend the adoption of this government.

Moderator: And with that we have come to the end of our discussion. I would like to thank each of the panelists for spending time with us tonight. I would encourage each and everyone of us to continue this discussion as we consider the merits of this Constitution. Good night and good luck.

Endnotes

- ¹ artful expression
- ² augmentations
- ³ will not be thought an extravagant conjecture
- ⁴ remand them
- ⁵ electors
- ⁶ decayed and venal borough
- ⁷ old Sarum
- ⁸ elector
- ⁹ suffrages
- ¹⁰ suffrages
- ¹¹ the intermissions
- ¹² protracted
- ¹³ determination of the former
- ¹⁴ septennial
- ¹⁵ requisite
- ¹⁶ members
- ¹⁷ an apprehension
- ¹⁸ to perpetuity
- ¹⁹ dominion
- ²⁰ designing
- ²¹ one
- ²² article
- ²³ temper
- ²⁴ disposition
- ²⁵ former
- ²⁶ latter
- ²⁷ inefficacy
- ²⁸ diffusive
- ²⁹ beget
- ³⁰ confinement
- ³¹ imposts
- ³² be attended with inequality
- ³³ occasioned by the want of it
- ³⁴ fidelity

Pedagogical Materials

T-Chart for Notes—The House of Representatives

Instructions: As students listen to the scripted debate, they should take notes using the T-Chart below. Notes should summarize the key ideas from both Federalist and Antifederalist speakers. You may also want to assess the strength of each argument using a numerical ranking system. This chart can also be used when using the discussion questions below.

<u>Federalist Arguments</u>	<u>Antifederalist Arguments</u>

Discussion Questions—The House of Representatives

1. To what extent are the Federalist arguments on ratios related to their arguments that a large republic is preferable? To what extent are the Antifederalist arguments on ratios related to their arguments that a small republic is preferable?
2. In your view, is it logical to have a statement in the Constitution like the necessary and proper clause? Which side do you find most persuasive on this issue?
3. Would you, like Antifederalists, consider biennial elections a dangerous feature in the Constitution? Why or why not?
4. In what ways are Antifederalist fears about elections a result of the problems colonists faced before the Revolutionary War?
5. To what extent should the central government be allowed to control the elections of U.S. representatives?
6. Would you agree or disagree that the concerns of the Antifederalist fears about the House of Representatives are all based on their fears of a consolidated government?

Extension Activities

1. Create a Political Cartoon. Students can create political cartoons from the following passages from the script that illustrate two individuals and their different points of view:

On page 5, Federal Farmer and A Landholder, have very different views about representation.

On pages 5-6, Cato and Publius have very different views on annual elections.

On pages 9-10, Brutus and James Madison have different opinions on the necessary and proper clause.

2. Create a Graphic novel. Instead of creating traditional book reports or writing summaries, get "graphic" by creating a comic book adaptation of an important section in the script. Characters in the story could include Cato, Federal Farmer, James Madison, and A Landholder.

3. Converting speeches into poetry. Students could take lines from the script and convert them into various types of poems. For example a limerick expressing the view of George Mason on the taxing power on pages 12-13 might be:

George Mason pronounced with vexation
The 'stution had a clause of abomination
This assumption of power
Causes people to cower
And groan under the weight of taxation

The Senate

Introduction

During the Confederation period most of the states had bicameral legislatures. Only Pennsylvania and Georgia had single-house assemblies. The Confederation Congress was also unicameral in which each state had only one vote despite the discrepancies in size, population and wealth among the states. The shortcomings of these few unicameral legislatures were so apparent that there was virtually no debate in the Constitutional Convention over the establishment of a bicameral Congress. There was, however, considerable debate over representation in each house.

Early in the Convention it was agreed that the House of Representatives should be apportioned among the states on the basis of population. Large-state delegates wanted the representation in the Senate based upon the same principle, but small-state delegates wanted the states to be equally represented in the Senate. Eventually a compromise determined that the Senate would in fact be composed of two Senators from every state while the House of Representatives would be apportioned by population. In both houses of Congress, voting would be by individual—not by states.

During the debate over ratification, Antifederalists from the large states attacked the equality of the states in the Senate as oppressive to their populations. If Delaware, with less than ten percent of Virginia's population, had the same representation as the Old Dominion, how could anyone imagine that Virginians were properly represented?

Antifederalists also denounced the aristocratic nature of the Senate. Senators were to be elected by their state legislatures for six-year terms. Neither mandatory rotation in office nor recall was provided for by the Constitution. Thus, once Senators got in office, it was feared they might be reelected perpetually, serving for life.

The combination of the Senate and President in appointments and treaty-making was denounced as a violation of the principle of separation of powers. How could the Senate be expected to convict impeached officeholders after confirming their appointments? Who would be held responsible for unwise treaties? The shared responsibility of the Senate and Presidency meant, in essence, that there would be no responsibility for malfeasance in office. A privy council, Antifederalists argued, would more adequately serve as advisor to the President.

Antifederalists also decried the office of the Vice President of the United States who would act as president of the Senate with the power to cast the deciding vote when the Senate deadlocked. Not only did this placement violate the separation of powers principle, but it gave one state an extra vote in the Senate. The Senate, Antifederalists argued, should elect its own presiding officer from among its members.

Federalists justified the equality of the states in the Senate on the basis of expediency. Without this concession to the small states, agreement in the Constitutional Convention would have been unobtainable. Furthermore, the different constituency of the Senate, coupled with the six-year term with one-third of the Senators being elected every two years, promised greater stability for Congress.

The Senate's role in advising the President on appointments and treaties was justified in several ways. The Senate, with its six-year term, it was suggested, would be the repository of much wisdom and experience, both of which should be made available to the President. A privy council would be expensive, would add another layer onto the government, and would not necessarily be an improvement on the Senate as a means of advising the President.

To counter the charge of the Senate's aristocratic nature, Federalists pointed out that the Senate could do nothing by itself. In passing legislation, the Senate needed the agreement of the House of Representatives. In treaty-making and appointments, the Senate acted in conjunction with, and most probably in response to, the actions of the President. If Senators violated their trust, they would not be reelected by their state legislatures.

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Roles in the Script—12 (L—large role; M—medium role; S—small role)

Moderator (L)

Antifederalist Panelists

Brutus (M)

Cato (S)

Cincinnatus (M)

Federal Farmer (S)

Hampden (S)

Luther Martin (L)

An Old Whig (S)

Federalist Panelists

An American Citizen (M)

Marcus (M)

Publius (L)

Remarker (S)

Script

Moderator: Good Evening. We are joined tonight by some of the nation's most distinguished political thinkers who have been involved in what has become a national debate over the Constitution. I would like to offer a warm welcome to all our distinguished guests on this panel.

All Panelists: Good evening, Hello, It's a pleasure to be here, etc.

Moderator: We hope that our conversation tonight is both thought provoking as well as engaging. We have chosen to focus our attention on the provisions in the Constitution relating to the upper house of the legislature, the Senate. Well, gentlemen, where should we begin?

Cincinnatus: [I would like to pose several questions to my Federalist friends.] Is a body so vested with means to soften & seduce—so armed with power to screen or to condemn—so fortified against suspicion and enquiry—so largely trusted with legislative powers—so independent of and removed from the people—so tempted to abuse and extend these powers—is this a body which freemen ought ever to create, or which freemen can ever endure?

Moderator: Whoa there! Slow down, Cincinnatus!

An American Citizen: [Well, well, well. Let's look at some of these claims.] First [the Senate is] not . . . hereditary, their collective knowledge, wisdom and virtue . . . have none of the peculiar follies and vices of those men, who possess power merely because their fathers held it before them.

Brutus: [Well, to that end] a rotation in the senate, would also in my opinion be of great use.

An American Citizen: [Senators] will be educated (under equal advantages and with equal prospects) among and on a footing with the other sons of a free people.

Brutus: [Senators] will possess very little of the feelings of the middling class of people.

An American Citizen: As their sons are not to succeed them, they will not be induced to aim at an increase or perpetuity of their powers, at the expence of the liberties of the people.

Brutus: I hope it is evident from reason and authority, that in . . . the senate there is much cunning and little wisdom; that we have much to fear from it, and little to hope, and then it must necessarily produce a baneful aristocracy, by which the democratic rights of the people will be overwhelmed.

An American Citizen: Senators are . . . to be elected by the legislatures of the states.

Cincinnatus: [Exactly.] It is removed from the people, being chosen by the legislatures.

Moderator: OK, let's catch our breath for a minute. There is a lot to digest in that exchange. Perhaps we should go in a different direction for a bit. I've heard that Federalists argue the Senate will provide a more stable government. Is this true?

Publius: The necessity of a senate is <obvious when you consider>⁶ the propensity of <larger>⁷

assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders, into intemperate and pernicious <actions>.⁸

Moderator: But, as you describe it, this sounds suspiciously like an elitist institution. We seem to be back to the point Cincinnatus made at the outset.

Brutus: [Yes. Members of the Senate will be] very <likely>⁹ to feel themselves independent; To form and pursue interests separate from those who appointed them. And this is more likely to be the case with the senate, as they will for the most part of the time be absent from the state they represent.

Moderator: But, I think the point Publius is making is that stability is an important consideration in governance.

Publius: [Absolutely.] The internal effects of a <fluctuating>¹⁰ policy are still more calamitous. . . . It will be of little avail to the people that the laws are made by men of their own choice . . . if they be repealed or revised before they are <put in force>¹¹ or undergo such incessant changes that no man who knows what the law is to day can guess what it will be tomorrow.

An American Citizen: The senate though more independent of the people as to the free exercise of their judgement and abilities, than the house of representatives, by the longer term of their office. . . . They may restrain the <abundance>¹² of errors of the house of representatives.

Luther Martin: Sir, for six years the senators are rendered totally and absolutely independent of their States, of whom they ought to be the representatives, without any bond or tie between them . . . and their States cannot recall them, nor exercise any controul over them.

Moderator: These six-year terms do seem to be perilously close to being an aristocracy.

Remarker: The properties of an aristocracy, we take to be these,—1st, It is independent; 2d, Permanent; 3d, Uncontroulable, and 4th, Not responsible. It derives its existance from an inherent right of succession, that does not come within the prescription of the people.

Moderator: But, what about six years?

Remarker: This . . . an idea, thrown out on purpose to excite the jealousy of the people, and could proceed only from a heart . . . deeply tinged with depravity. . . . Unhappily, fear is a contracting principle, and suspicion a poisoning quality.

Luther Martin: [As you notice, Remarker has not addressed your question. Listen.] a senator, especially from the States remote from the seat of empire, will accept of an appointment which must estrange him for six years from his State. . . . If he has a family, he will take his family with him to the place where the government shall be fixed, that will become his home, and there is every reason to expect that his future views and prospects will centre in the favours and <benefits>¹³ . . . of the general government.

Remarker: [Senators] derive their origin from the people; their power is limited by the people, and they are responsible to the people. It is easy to convince any honest mind, that the Senate is by no means a-kin to a body of nobles.

Moderator: Forgive me Remarker, but you seem to be stuck in denial mode. The question before us is whether the six-year term for Senators is aristocratical.

Remarker: The manner of inheriting [property] . . . in this country, would not admit the amassing of wealth among any number of citizens, to a degree bordering upon aristocracy. Estates are not here entailed, and the dispersion of the fathers among his children, creates such a fluctuation of property, as will not give room for a permanent superiority in fortune.

Moderator: Stop! Can anyone address the Antifederalist charges here?

Publius: All that need be remarked is that [the Senate] . . . ought moreover to possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration.

Moderator: And specifically, why?

Publius: It is not possible that an assembly of men called for . . . a short time . . . to a study of the laws, the affairs and . . . interests of their country, should . . . escape a variety of important errors in the exercise of their legislative trust.

Moderator: So, in other words, they need more time to think about the complexities of the whole nation especially the complexities of dealing with other nations?

Publius: It may be affirmed . . . that no small share of the present embarrassments of America is to be charged on the blunders of our governments. . . . What indeed are all the repealing, explaining and amending laws, which fill and disgrace our <mountain of>¹⁴ codes, but so many monuments of deficient wisdom.

Moderator: So, in short . . . ?

Publius: . . . No government any more than an individual will long be respected, without being truly respectable, nor be truly respectable without possessing [an] order and stability.

Brutus: [Granted] it seems fit they should possess more stability, and so continue a longer period than that branch who represent the <people directly>.¹⁵ [Their] business . . . requires that they should have experience, and therefore that they should remain some time in office to acquire it.— But still it is of equal importance that they should not be so long in office as to be likely to forget the hand that formed them, or be insensible of their interests.

Moderator: So what is an alternative?

Brutus: I conceive it would be wise . . . that a senator should not be eligible after he had served for the period assigned by the constitution for a certain number of years; perhaps three would be sufficient.

Moderator: And what's the benefit of this rotation of office?

Brutus: It would give opportunity to bring forward a greater number of men to serve their country, and would return those, who had served, to their state, and afford them the advantage of becoming better acquainted with the condition and politics of their constituents.

Moderator: Do you other suggestions you have in regards to modifying the Senate?

Brutus: It . . . appears to me proper, that the [state] legislatures should retain the right . . . of recalling their [Senators]. It seems [obvious] that when a person authorises another to do a piece of business for him, he should retain the power to displace him, when he does not conduct according to his pleasure. This power in the state legislatures, under confederation, has not been exercised to the injury of the government, nor do I see any danger of its being so exercised under the new system. It may operate much to the public benefit.

Moderator: And, is that all?

Brutus: [No.] I would shorten the term of their service to four years. Six years is a long period for a man to be absent from his home, it would have a tendency to wean him from his constituents.

Moderator: Let's change course a bit. The powers given to the Senate in the Constitution have been the source of debate. As Antifederalists consider the Senate in this vein, what are your concerns?

Cincinnatus: [All I need to do is remind our audience what the great Montesquieu said.] When the legislative and executive powers are united in the same person, or in the same corps, there can be no liberty. Because, it may be feared, that the same monarch or senate will make tyrannical laws, that, they may execute them tyrannically.

Hampden: I see nothing to hinder the President and Senate, at a convenient crisis, to declare themselves hereditary and supreme, and the lower house altogether useless.

Moderator: So it's the blending of powers that concerns you?

Cincinnatus: [Yes.] These powers should be forever separate. . . . But the frame of the proposed constitution, should have had that separation religiously in view. . . . This was not the <purpose>¹⁶ of its framers, but, that on the contrary there is a studied mixture of them in the senate.

Moderator: So I take it you have plenty of problems with the Senate's role in making treaties especially since they are declared to be the supreme law of the land?

Hampden: This power of making treaties, the House of Representatives, which hath the best chance of possessing virtue and public confidence is entirely excluded.

An Old Whig: Treaties [should be] made by the same authority which makes the laws.

Moderator: So I take it, you too would like the House of Representatives involved in the treaty-making process?

An Old Whig: [I will go you one better. Certainly] the approbation of the legislature ought to be had, before a treaty should have the force of a law. [But here is what I would ask.] Are treaties to be sent to all the different state legislatures for their approbation? By no means. No treaty ought . . . to alter the law of the land, without the consent of the continental legislatures.

Moderator: And, I assume you believe this because you believe state legislatures will best represent the interests of the people?

An Old Whig: [Absolutely!]

Publius: [You can't be serious.] The fluctuating and . . . the <multifaceted>¹⁷ composition of that body, forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character, decision, secrecy and dispatch; are incompatible with the genius of a body so variable and so numerous.

Cato: [It's pretty simple, Publius.] Treaties < impact the entire nation>¹⁸ . . . engagements may be made to raise an army, and you may be transported to Europe, to fight the wars of ambitious princes; money may be contracted for, and you must pay it; and a thousand other obligations may be entered into; all which will become the supreme law of the land, and you are bound by it.

Marcus: The power of making treaties is so important, that it would have been highly dangerous to vest it in the Executive alone, and would have been the subject of much greater clamour. From the nature of the thing, it could not be vested in the popular Representative. It must therefore have been provided for, with the Senate's concurrence.

Moderator: So, in you opinion, it is good to share this power.

Publius: Whoever has maturely weighed the circumstances, which must concur . . . [that] in the formation of treaties . . . the joint possession of the power . . . by the president and senate would afford a greater prospect of security, than the separate possession of it by either of them.

Moderator: Another blended power that Antifederalists have criticized is the power to confirm appointments.

Federal Farmer: The president can appoint no officer, civil or military, who shall not be agreeable to the senate.

Moderator: And the problem with this would be?

Cincinnatus: [I would look at it this way.] Their advice and consent being necessary to the appointment of all the great officers of state, both at home and abroad, will enable them to win over any opponents to their measures in the house of representatives and give them the influence which, we see, accompanies this power in England.

Moderator: And this influence is a problem because?

Cincinnatus: [This sharing of power could] <cause>¹⁹ constant contentions . . . [and] clog the execution of government to a mischievous, and sometimes to a disgraceful degree, and if they should unhappily <unite in a common selfish agenda>²⁰ [tyranny would result].

Moderator: In other words, a lack of accountability is the problem.

Cincinnatus: [Yes. Accountability] is one of the great securities of good, and restraints on bad governments.

Publius: [I think Cincinnatus is missing the point.] In every exercise of the power of appointing to offices . . . we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly.

Moderator: So Publius, for you, the shared responsibility ensures a fuller disclosure of the persons being nominated.

Publius: [Precisely.] It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an <effective>²¹ source of stability in the administration.

Luther Martin: [No. No. No.]

Moderator: Let me guess. Mr. Martin, you would predict the opposite will occur?

Luther Martin: [Yes.] If [a Senator] places his future prospects in the favours and emoluments of the general government, he will become the dependant and creature of the President . . . he will favour the wishes of the President, and concur in his measures.

Publius: Not only that it will be impracticable to the Executive to corrupt or seduce a majority of its members, but that the necessity of its co-operation, in the business of appointments, will be a considerable and <beneficial>²² restraint upon the conduct of that magistrate.

Fabius: Tho' small, let it be remembered, [Senators are] created by the sovereignties of the . . . states; that is, by . . . the people of each state [who] shall judge to be most worthy, and who . . . will be . . . attentive to . . . the interest and honour of their state.

Cincinnatus: One thing at least is certain, that by making this branch of the legislature participant in the executive, you not only prevent the legislature from being a check upon the executive, but you inevitably prevent its being checked or controuled by the other branch.

Moderator: So if I could summarize this disagreement, for Antifederalists, the blending and sharing power is no way to have checks and balances in any system of government since there is not enough separation of powers. For Federalists, the blending and sharing of powers is in fact a very effective way to check the powers of another branch of government since they have to work together and in doing so they can keep tabs on each other.

All Panelists: Yes. Well said. Exactly. Precisely, etc.

Moderator: It looks like we are rapidly coming to the end of our allotted time. I would like to ask each side to present a closing statement. Let's start with the Antifederalists.

Brutus: [Senators] are to be elected by the legislatures of the States and not by the people, and each State is to be represented by an equal number. [Senators] are to serve for six years. [This] is in my judgment too long.

Luther Martin: Senators when elected are made independent of the State they represent. They are . . . to pay themselves out of the General Treasury, and are not paid by the State, nor can [they] be recalled for any misconduct or sacrifice of the Interest of their State that they make before the expiration of that period.

Cato: The mode in which they are appointed and their duration, will lead to the establishment of an aristocracy; that the senate and president are improperly connected, both as to appointments, and the making of treaties, which are to become the supreme law of the land.

Federal Farmer: The executive is, in fact, the president and senate in all transactions of any importance; the president is connected with, or tied to the senate; he may always act with the senate, never can effectually counteract its views.

Brutus: This body will possess a strange mixture of legislative [and] executive [powers], which in my opinion will . . . clash with each other.

Moderator: And now the Federalists.

Remarker: My fellow-citizens, for a moment call to mind the origin, the mode of existence, and the power of the Senate in this Constitution. Their very being is derived from the people, their power is limited, and after all, they are obliged to render an account to the people for their conduct. . . . If . . . there were any qualifications of wealth required, there would be . . . an aristocracy.

An American Citizen: As the Senators are still to be elected by the legislatures of the states, there can be no doubt of equal safety and propriety in their future appointment. . . . They can hold no other office civil or military under the United States.

Publius: The . . . advantage . . . of giving to the state governments such <a stake>²³ in the formation of the federal government, as must secure the authority of the <states>,²⁴ and may form a convenient link between the <national and local governments>.²⁵

Marcus: Considering that in every popular government the danger of faction is often very serious and alarming, if such a danger could not be checked in its instant operation by some other power more independent of the immediate passions of the people, and capable therefore of thinking with more coolness, the government might be destroyed by a momentary impulse of passion. . . . The institution of the Senate seems well calculated to answer this <beneficial>²⁶ purpose.

Publius: It was wise, therefore, in the convention to provide . . . sufficient time to become perfectly

acquainted with our national concerns. . . . The duration [of their terms] . . . is such as will give them an opportunity of greatly extending their political information, and of rendering their accumulating experience more and more beneficial to their country.

Moderator: And with that we need to end tonight's discussion. I trust you have found it to be helpful. Again, I would like to thank our panelists for spending this time with us.

All Panelists: Thank you for inviting me. It's a pleasure to be here, etc.

Moderator: I know many of you have very busy schedules these days as you are involved in writing opinion pieces for various newspapers. I hope we can meet again soon. Good night and good luck.

Endnotes

- ¹ suffrage
- ² shew
- ³ instrument
- ⁴ residuary
- ⁵ be obtained from
- ⁶ is not less indicated by the
- ⁷ numerous
- ⁸ resolutions
- ⁹ apt
- ¹⁰ a mutable
- ¹¹ promulgated
- ¹² profusion
- ¹³ emoluments
- ¹⁴ voluminous
- ¹⁵ democracy
- ¹⁶ object
- ¹⁷ multitudinous
- ¹⁸ you may defalcate part of the empire
- ¹⁹ must be productive of
- ²⁰ harmonize in the same objects of ambition
- ²¹ efficacious
- ²² salutary
- ²³ an agency
- ²⁴ former
- ²⁵ two systems
- ²⁶ salutary

Pedagogical Materials

T-Chart for Notes—The Senate

Instructions: As students listen to the scripted debate, they should take notes using the T-Chart below. Notes should summarize the key ideas from both Federalist and Antifederalist speakers. You may also want to assess the strength of each argument using a numerical ranking system. This chart can also be used when using the discussion questions below.

<u>Federalist Arguments</u>	<u>Antifederalist Arguments</u>

Discussion Questions—The Senate

1. In your estimation, are Antifederalists overstating their case that the Senate was aristocratic?
2. In your estimation, are Federalists overstating the value of the Senate providing stability in governance?
3. Do you find the arguments for states deserving equal status in the Senate convincing? Are some arguments more convincing than others?
4. To what extent does the blending of powers between the Senate and the Executive create a stable system of government?
5. In your opinion, is the blending of powers between separate branches ever appropriate?

Extension Activities

1. Create a Political Cartoon. Students can create political cartoons from the following passages from the script that illustrate two individuals and their different points of view:

On page 4, Brutus and An American Citizen have very different views about the aristocratic nature of the Senate.

On page 7, Luther Martin and Remarker have very different views on the accountability of Senators.

On page 10, Publius and Luther Martin have different views on the blending of powers between the Executive and the Senate.

2. Create a Graphic novel. Instead of creating traditional book reports or writing summaries, get "graphic" by creating a comic book adaptation of an important section of the script. Characters in the story could include Luther Martin, Brutus, Publius, and Marcus.

3. Converting speeches into poetry. Students could take lines from the script and convert them into various types of poems. For example a limerick from Brutus view of terms of Senators might be:

Long terms of these Senators is elitist
These shall detach and ne'r ever meet us
Go from six years to four
It's enough to restore
A balance and destroy the monarchial foetus

The President

Introduction

The Constitutional Convention had more difficulty drafting provisions for the election and responsibilities of the President than for any other part of the Constitution. Americans had considerable experience with executives—they had lived under the British king, who had power to veto colonial acts of legislation even before they went into effect. The Articles of Confederation provided for no separate executive, but the Confederation Congress did elect its own president who served more or less as the Speaker of Congress. Congress also created outside executive departments in charge of foreign affairs, finance, war and the post office. The secretaries of these departments and their small staffs were not members of Congress. The states under the Articles each had a governor or president. Most were relatively weak in comparison to their state assemblies. The governors of New York and Massachusetts served as the best models for the Constitutional Convention in shaping the image of the new American President.

Soon after it convened, the Constitutional Convention agreed to have a single executive as opposed to the plural executive favored by a handful of delegates who feared the reinstatement of the monarchy. Greater disagreement persisted on the manner of electing the President. Some delegates wanted a President elected by Congress for a long term but ineligible for reelection. Others favored direct election by the people for short terms and with no restrictions on the number of consecutive terms. A compromise eventually provided that the President would have a four-year term and would be elected by electors chosen in a manner prescribed by the states legislatures. No restrictions were placed on the President's eligibility to be reelected.

During the debate over the ratification of the Constitution, Antifederalists charged that the President would become a king—in fact, he would be the worst kind of a king: an elected one. Cabals and intrigues would surely develop over the reelection of the incumbent. Some even charged that the orderly transfer of power from a defeated incumbent was too much to expect, especially since the President had complete control over the country's military and the states' militia when called up for federal service.

Antifederalists also charged that the Constitution was defective in that it violated the commonly held belief that the three branches of government ought to be separate. The mixture of power and responsibility over appointments to office and treaty-making bothered many Americans. Would the Senate really exercise authority in the appointment of officers or would the President's power to nominate be tantamount to the power to appoint? Who would be responsible if corrupt individuals were appointed—the President, the Senate or both? And could it be expected that Senators who had confirmed officeholders would convict those same individuals on impeachment?

Similar fears were expressed over the treaty-making power. The Constitution declared that treaties should be the supreme law of the land. Yet, the House of Representatives, elected directly by the people, played no role in the drafting or adoption of treaties. Only the President and the Senate had responsibility in this important area that could affect the lives of every American.

Several critics of the Constitution suggested that the dangerous connection between the President and the Senate could be eliminated by substituting a privy council for the Senate. This council, which had precedents in both the British and American state governments, would advise the President on both appointments and treaty-making. If privy councillors gave faulty advice, they could be held accountable.

Antifederalists charged that the President would have too much influence over legislation through his veto power over acts of Congress and that the President's pardoning power was

dangerous. He could conspire with others in treasonable activities and guarantee his co-conspirators pardons if their activities were discovered.

Federalists praised the Presidency. They pointed to the weakness of the Confederation and state governments with their almost powerless executives. America needed a separate President with executive powers to enforce federal laws and conduct foreign policy. Federalists contrasted the President with the British monarch. The former had limited power checked by two other branches of government, while the latter had almost limitless power. Some state executives even had greater power in certain areas than the President.

The President, it was argued, would be accountable to both the people and Congress. If he failed to satisfy the people, he would not be reelected; if he committed crimes, he could be impeached by Congress. Furthermore, everyone realized that George Washington would be elected the first President. This great man had already once voluntarily given up total power in 1783, preferring a rural retirement; he could be expected to follow a similar course of action after he set the new government under the Constitution in motion. Washington's example would be followed by his successors.

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Roles in Script–12 (L–large role; M–medium role; S–small role)

Moderator (L)

Antifederalist Panelists

- Cato (M)
- A Columbian Patriot (S)
- Luther Martin (M)
- George Mason (M)
- James Monroe (S)
- An Old Whig (M)
- Philadelphiensis (S)

Federalist Panelists

- An American Citizen (M)
- Fabius (L)
- James Madison (L)
- Marcus (S)
- Publius (L)

Script

Moderator: Welcome and good evening. Tonight we have with us a group of individuals that have been involved in the debate over the Constitution. Antifederalists contend that the Constitution should not be adopted without amendments; while Federalists maintain that it is in the best interest of the nation to ratify the Constitution. Today we will address Article II, the section that outlines the executive branch. Gentlemen, welcome.

All Panelists: Hello, Thank you, It's good to be here, etc.

Moderator: Let's begin with An Old Whig. You contend that the executive as designed in the Constitution is nothing less than a monarch. Is this correct?

An Old Whig: [Yes.] In the first place the office of President of the United States appears to me to be clothed with such powers as are dangerous. [He is the] <source>¹ of all honors in the United States, commander in chief of the army, navy and militia, with the power of making treaties and of granting pardons, and to be vested with an authority to <veto>² all laws. . . . [He] is in reality to be a king as much a King as the King of Great Britain, and a King too of the worst kind;—an elective King.

Moderator: And Cato, you have suggested that there are additional dangers associated with this provision?

Cato: [Absolutely. When you consider that the Constitution also provides for a] ten miles square, which [will] become the seat of government. [This] will of course be the place of residence for the president and the great officers of state; the court of a president possessing the powers of a monarch, ambition with idleness—baseness with pride—the thirst of riches without labour—aversion to truth—flattery—treason—<treachery>³—violation of engagements— <dislike>⁴ of civil duties—hope from the magistrates weakness; but above all, the <continual>⁵ ridicule of virtue—these . . . are the characteristics by which the [royal] courts in all ages have been distinguished.

Moderator: I presume that Federalists maintain this is hyperbole?

An American Citizen: [Most certainly.] In Britain their king is for life—In America our president will always be one of the people at the end of four years. In that country the king is hereditary and may be an idiot, a knave, or a tyrant by nature, or ignorant from neglect of his education, yet cannot be removed, for [in theory] “he can do no wrong.” In America, as the president is to be one of the people at the end of his short term, so will he and his fellow citizens remember, that he was originally one of the people; and that he is created by their breath.

Moderator: So, is it your <argument>⁶ that Antifederalists exaggerate in their fears about the Executive?

Publius: [The Executive] has been shown to us with the <jeweled head band>⁷ sparkling on his brow, and the imperial purple flowing in his train. He has been seated on a throne surrounded with <servants>⁸ and mistresses; giving audience to the <ambassadors>⁹ of foreign <rulers>¹⁰, in all the

<arrogant display>¹¹ of majesty. The images of Asiatic despotism and <sensual pleasure>¹² have . . . been . . . the exaggerated scene. We have been taught to tremble at these terrific <pictures of murdering fanatics>.¹³

Moderator: Mr. Martin, you were at the Convention when the Executive was being discussed. Was there any talk of creating an American monarch?

Luther Martin: There was a party who attempted to have the president appointed during good behaviour, without any limitation as to time, and not being able to succeed in that attempt, they then endeavoured to have him re-eligible without any <limits>.¹⁴

Moderator: But, when we look at the Constitution now, is it your view that those individuals got what they wanted?

Luther Martin: [When looking at Article II as a whole] these circumstances, combined together, will enable him, when he pleases, to become a king in name, as well as in substance, and . . . have that authority perpetuated to his family.

Cato: [We must remember that Montesquieu said] the deposit of vast trusts in the hands of a single magistrate, enables him . . . to create a numerous train of dependants—this tempts his ambition . . . he therefore fancies that he may be great and glorious by oppressing his fellow citizens, and raising himself to permanent grandeur on the ruins of his country.

Moderator: I think this is a good transition point in our discussion to consider a related issue; the term of office of the Executive. It seems to me that this is fundamental to the question of whether Article II creates a monarchy?

Publius: [The President] is to be elected for four years; and is to be re-eligible as often as the People of the United States shall think him worthy of their confidence. In these circumstances, there is a <complete difference>¹⁵ between him and a King of Great-Britain; who is an hereditary monarch, possessing the crown as <an inheritance>¹⁶ to his heirs forever.

Moderator: But, aren't Antifederalists correct in viewing the possibility of re-eligibility as the problem here? Mr. Mason, your thoughts?

George Mason: Nothing so strongly impels a man to regard the interest of his constituents, as the certainty of returning to the general mass of the people, from whence he was taken; where he must participate [in] their burdens.

Cato: [And again Montesquieu said] that in all magistracies, the greatness of the power must be compensated by the brevity of the duration; and that a longer time than a year, would be dangerous. It is therefore obvious to the least intelligent mind . . . great power in the hands of a magistrate . . . with a considerable duration, may be dangerous to the liberties of a republic.

Fabius: If any person . . . shall say, there will be more danger to our freedom under the proposed plan, than to that of Britons under their constitution, he must mean, that Americans are . . . inferior to Britons in understanding and virtue. [We have] a constitution and government, [where] every

branch is <elective>.¹⁷ [We can] certainly guard rights, at least as well, as Britons can guard their rights.

Moderator: Let's turn to perhaps the most critical part of our discussion. For many, the powers of the Executive branch are more important than the term of office. Central to this issue is the vagueness of the text in Article II, which leads many to conclude that the Presidency is dangerous. I know that Publius has insisted that the Executive cannot be compared to the British monarchy. Is this the case?

Publius: [To begin with,] the President of the United States would be liable to be impeached, tried, and upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the King of Great-Britain is sacred and <secure from being checked>.¹⁸

Moderator: True. What are some other limits?

Publius: The King of Great Britain has an absolute <veto>¹⁹ upon the acts of the two houses of Parliament. The President of the United States is to have power to return a bill, which shall have passed the two branches of the Legislature, for re-consideration; but the bill so returned is to become a law, if upon that re-consideration it be approved by two thirds of both houses.

Philadelphiensis: [However,] the two branches of the legislature, will be at his service. . . . As a body, and as individuals, they will be his <cronies>²⁰ and flatterers.

Publius: The President is to have power with the advice and consent of the Senate to make treaties; provided two thirds of the Senators present concur. The King of Great-Britain is the sole and absolute representative of the nation in all foreign transactions.

Moderator: Another area where Antifederalists have expressed great concerns about the powers of the Executive is the military powers. According to An Old Whig, this should be scrutinized carefully.

An Old Whig: [That's an understatement.] Let us suppose this man to be a favorite with his army, and that they are unwilling to part with their beloved commander in chief; or . . . let us suppose, a future President and commander in chief adored by his army and the militia to as great a degree as our late illustrious commander in chief; and . . . that this man is without the virtue, the moderation and love of liberty which possessed the mind of our late general . . . this country will be involved at once in war and tyranny.

Luther Martin: [Additionally,] the officers . . . from the highest to the lowest, are all to be appointed by him and dependent on his will and pleasure, and commanded by him in person, will, of course, be <submissive>²¹ to his wishes, and ready to execute his commands; in addition to which, the militia also are entirely subjected to his orders.

Publius: [Again, let me point out that my colleagues are overstating the case.] The President will have only the **occasional** command of such part of the militia of the nation, as by legislative provision may be called into the actual service of the Union—The King of Great-Britain and the

Governor of New-York have at **all times** the entire command of **all** the militia within their several jurisdictions.

Fabius: Is there more danger to our liberty, from such a president as we are to have, than to that of Britons, from an hereditary monarch, with a vast revenue; in the command of the militia, fleets, and armies, and the direction of their operations; . . . who can call parliaments with a breath, and dissolve them with a nod; who can at his will, make war, peace, and treaties <unbreakably>²² binding the nation . . . as it pleases him?

Moderator: But, Fabius, doesn't this assume that future Presidents will possess <discretion>²³ and virtue that would prevent the abuse of these military powers?

An Old Whig: [Exactly.] So far is it from its being improbable that the man who shall hereafter be in a situation to make the attempt to <continue>²⁴ his own power, should <lack>²⁵ the virtues of General Washington; that it is perhaps a chance of one hundred millions to one that the next age will not furnish an example of so disinterested a use of great power.

Marcus: [Let's look at it this way. Let's consider] the improbability of a man honored [by being elected the President] . . . by his country . . . [risking,] like General [Benedict] Arnold, the damnation of his fame to all future ages.

Moderator: But, isn't this the point Antifederalists are making? No one has a crystal ball. How are we to reasonably assume that future presidents will not abuse these military powers? Or to put it a different way, can historical precedents guide us as to the actions of future presidents?

Marcus: The probability of the President of the United States committing an act of treason against his country is very slight; he is so well guarded by the other powers of government, and the natural strength of the people at large must be so weighty, that in my opinion it is the most <unrealistic fantasy>²⁶ that can be entertained.

Fabius: [It is crucial to remember that the sovereignty, will, and great generosity of the people matter. Even in England,] this taught Charles the first, that he was but a royal servant; and this caused James the second's army, raised, paid and kept up by himself, to confound him with <shouts>²⁷ for liberty.

An American Citizen: [Another consideration is that] in all royal governments an helpless infant or an inexperienced youth, may wear the crown. Our president must be matured by the experience of years, and being born among us, his character at thirty-five must be fully understood. Wisdom, virtue, and active qualities of mind and body can alone make him the first servant of a free and <open-minded>²⁸ people.

Fabius: Americans, who have the same blood in their veins [as Britons,] have, it seems, very different heads and hearts. We shall be enslaved by a president . . . chosen by ourselves, and continually rotating? [Again, this is ridiculous.] 'Tis strange.

Moderator: Philadelphiensis, are you willing to accept this line of reasoning?

Philadelphiensis: Who can [in their right mind] deny but the president general will be a king to all intents and purposes, and one of the most dangerous kind too; a king elected to command a standing army?

Cato: [These powers are clearly dangerous. Let's face it,] he is the <supreme commander>²⁹ of the nation, and of course, has the command & controul of the army, navy and militia; he is the general <protector>³⁰ of the peace of the union. . . . Will not the exercise of these powers therefore tend either to the establishment of a vile and arbitrary aristocracy, or monarchy?

Philadelphiensis: His officers can wantonly inflict the most disgraceful punishment on a peaceable citizen, under pretence of disobedience, or the smallest neglect of militia duty [even during peacetime].

Moderator: I suppose this leads us to another issue that divides this panel. It has been said that this Executive will control a vast network of government officials. Mr. Martin, why is this patronage such a problem for you?

Luther Martin: Though . . . chosen for a limited time . . . his having the appointment of all officers in every part of the civil department for the union, who will be very numerous—in them and their connexions, relations, friends and dependants, he will have a formidable host devoted to his interest, and ready to support his ambitious views.

Moderator: What assurances do the American people have that this patronage doesn't become a reality? Can we be confident that we'll not have the equivalent of the British Monarchy?

An American Citizen: The British King is the great Bishop or Supreme Head of an established church, with an immense patronage annexed. In this capacity he commands a number of votes in the House of Lords, by creating Bishops, who, besides their great incomes, have votes in that assembly.

Moderator: But, what about the American context? I presume you are aware that we are **not** British.

All Antifederalist Panelists: Raucous laughter!

An American Citizen: In America . . . all religious funds, honors and powers, are in the gift of numberless, unconnected, disunited, and contending corporations, wherein the principle of perfect equality universally prevails. In short, danger from ecclesiastical tyranny . . . that <profane>³¹ engine of royal power in some countries, can be feared by no man in the United States.

Moderator: Let's turn our attention to the last issue that divides our panelists. The manner in which the Executive is elected has generated a substantial amount of debate. Again, in Article II, the Constitution stipulates that Each State shall appoint . . . a Number of Electors, equal to the whole Number of Senators and Representatives . . . in Congress. These electors are to meet in their respective States, and vote by Ballot for two Persons. And as I understand it, one of those votes cannot be for a candidate from their state. The candidate receiving the highest number of votes is to be President and the person receiving the next highest number of votes becomes Vice-President. If

no candidate receives a majority of the votes the decision then goes into the House of Representatives. This is a pretty complicated method, but Mr. Monroe, what other objections do you have with this system?

James Monroe: [Well first of all,] he is to be elected by **Electors**, in a manner perfectly dissatisfactory to my mind. I believe that he will owe his election, in fact, to the State Governments, and not to the people at large.

A Columbian Patriot: If the <ultimate authority>³² of America is designed to be elective, the <limiting of>³³ the votes to only ten electors in my state [of Massachusetts], and the same proportion in all the others, is <equivalent>³⁴ to the exclusion of the voice of the people in the choice of their first magistrate.

Moderator: And the specific problem with this is?

George Mason: This mode of election [is] . . . a mere <deception of>³⁵ the people of America, and thrown out to make them believe they were to choose him.

A Columbian Patriot: It is vesting the choice solely in an aristocratic junto, who may easily combine in each State to place at the head of the Union the most convenient instrument for despotic sway.

Moderator: It seems that Mr. Madison wants to weigh in on this?

James Madison: [Yes.] I would not contend against some of the[se] principles.

Moderator: But I assume you will explain where you differ with Antifederalists on this?

James Madison: [Certainly. In this country] there is a great diversity of interests.

Moderator: Meaning?

James Madison: It will be found impracticable to elect [the President] by the immediate suffrages of the people. Difficulties would arise from the extent and population of the States. Instead of this, the people choose the Electors.—This can be done with ease and convenience, and will render the choice <sensible and wise>.³⁶

Moderator: But doesn't this take us back to the point that your opponents are making; that the Electoral College is a secretive aristocrat plot?

Fabius: [No, not at all.] As these electors are to be appointed, as the legislature of each state may direct . . . they will be appointed by the people of the state. Thus, the fairest, freest opening is given, for each state to chuse such electors for this purpose, as shall be most <uniquely>³⁷ qualified to fulfil the trust.

Moderator: But doesn't that still leave the process open to the possibility that some sort of chicanery or bribery will enter this procedure of electing the President?

Fabius: To guard against undue influence these electors . . . are to meet in their respective states, and vote by ballot; and still further to guard against it, Congress may determine the time of chusing the electors, and the day on which they shall give their votes—**WHICH DAY SHALL BE THE SAME THROUGHOUT THE UNITED STATES.**

Moderator: So if I understand this, you are suggesting that when you consider the size of the country and the improbability of any one being able to influence the votes in all the states on the same day, we don't have to worry?

James Madison: [In a nation so large,] there can be no union of interests or sentiments between States so differently situated. I have found no better way of selecting the [President] than that delineated in the plan of the Convention.

Moderator: With that, we need to conclude our discussion. I would like to have a representative from each side leave us with a closing thought. Publius, would you like to start?

Publius: [Thank you. We need not fear this Executive. The powers are all checked in some manner.] The President of the United States would be an officer elected by the people for four years . . . and would be <subject>³⁸ to personal punishment and disgrace . . . the President would be liable to be impeached, tried, and upon conviction . . . removed from office. . . The President is to nominate with the advice and consent of the Senate. . . [he has] has no particle of spiritual jurisdiction . . . [has] a concurrent power with a branch of the Legislature in the formation of treaties . . . the [veto] of the President [is checked] by two thirds of each of the component members of the legislative body. [In conclusion I would like to address the tactics of our opposition.] [Antifederalists] so far exceed the usual <over blown rhetoric of mindless hacks>³⁹ that . . . it is impossible <to not accuse them of deliberately deceiving us with their suggestions that there is>⁴⁰ a similitude between a King of Great-Britain and . . . the President of the United States. It is still more impossible to withhold that imputation from the rash and <obvious tactics>⁴¹ which have been employed to give success to the attempted imposition.

Moderator: For Antifederalists, An Old Whig.

An Old Whig: [Thank you.] When I say that our future President will be as much a king as the king of Great-Britain, I only ask of my readers to look into the constitution of that country, and then tell me what important <powers>⁴² the King of Great-Britain is entitled to, which does not also belong to the President during his continuance in office. I would therefore advise my countrymen seriously to ask themselves this question;—Whether they are prepared to receive a king? If they are to say at once, and make the kingly office hereditary; to frame a constitution that should set bounds to his power, and, as far as possible secure the liberty of the subject. If we are not prepared to receive a king, let us call another convention to revise the proposed constitution, and form it anew on the principles of a confederacy of free republics; but by no means, under <the disguise>⁴³ of a republic, to lay the foundation for a military government, which is the worst of all tyrannies.

Moderator: I hope that our discussion here will prove helpful as Americans continue to debate the ratification of the Constitution in the state conventions. Good night and good luck.

Endnotes

- ¹ fountain
- ² negative
- ³ perfidy
- ⁴ contempt
- ⁵ perpetual
- ⁶ contention
- ⁷ diadem
- ⁸ minions
- ⁹ envoys
- ¹⁰ potentates
- ¹¹ supercilious pomp
- ¹² voluptuousness
- ¹³ visages of murdering janizaries
- ¹⁴ restraint
- ¹⁵ dissimilitude
- ¹⁶ patrimony descendible
- ¹⁷ popular
- ¹⁸ inviolable
- ¹⁹ negative
- ²⁰ sycophants
- ²¹ subservient
- ²² irrevocably
- ²³ prudence
- ²⁴ perpetuate
- ²⁵ want
- ²⁶ chimerical apprehension
- ²⁷ huzzas
- ²⁸ enlightened
- ²⁹ generalissimo
- ³⁰ conservator
- ³¹ sacrilegious
- ³² sovereignty
- ³³ circumscribing
- ³⁴ tantamount
- ³⁵ ignus fatuus
- ³⁶ judicious
- ³⁷ signally
- ³⁸ amenable
- ³⁹ licenses of party-artifice
- ⁴⁰ to bestow the imputation of deliberate imposture and deception upon the gross pretence of
- ⁴¹ barefaced
- ⁴² prerogatives
- ⁴³ pretence

Pedagogical Materials

T-Chart for Notes–The President

Instructions: As students listen to the scripted debate, they should take notes using the T-Chart below. Notes should summarize the key ideas from both Federalist and Antifederalist speakers. You may also want to assess the strength of each argument using a numerical ranking system. This chart can also be used when using the discussion questions below.

<u>Federalist Arguments</u>	<u>Antifederalist Arguments</u>

Discussion Questions–The President

1. To what extent, do Federalists effectively refute Antifederalist charges that the President was monarchical?
2. In your opinion, are the blended powers between the President and Senate an effective rebuttal to those who made the accusation that the President was a monarchy?
3. In your view, do Federalists effectively make the case for the practicality of the Electoral College? Do Antifederalists effectively make the case that it is an elitist group?
4. Was the re-eligibility of the President a mistake of the framers at the Philadelphia Convention?
5. Which Presidential powers in the Constitution are most alarming to you?

Extension Activities

1. Create a Political Cartoon. Students can create political cartoons from the following passages from the script that illustrate two individuals and their different points of view:

On page 4, Cato and An American Citizen have very different views about the nature of the Executive.

On page 10-11, Fabius and A Columbian Patriot have very different views on the Electoral College.

2. Create a Graphic novel. Instead of creating traditional book reports or writing summaries, get "graphic" by creating a comic book adaptation of an important section in the script. Characters in the story could include An Old Whig, Luther Martin, Publius, and James Madison.

3. Converting speeches into poetry. Students could take lines from the script and convert them into various types of poems. For example a limerick from An Old Whig's views of the Executive might be:

Old Whig saw a monarchical future
On the 'stution we needed a suture
We'd have no relief
From this commander in chief
Hark and take heed of this dastardly creature

4. Have student groups do research about the executives of other nations. They could focus on issues of:

- a) mode of election
- b) terms
- c) re-eligibility
- d) removal process
- e) powers

Students could present their findings to the class through simple reports, roundtable discussions, or a debate. If you wanted to have a debate, the resolve could be, "The design of the US Presidency is flawed and should be modified to reflect characteristics of other executives."

The Judiciary

Introduction

Antifederalists viewed the federal judiciary as a source of danger to individual liberty and to the independent existence of the states. They were concerned that the judicial power of the United States would compromise the right to trial by jury in civil cases: though the Constitution guaranteed jury trial in criminal cases, it said nothing about civil cases. Even in criminal cases, the Constitution did not guarantee juries of the “vicinage,” but only that trials would take place in the state in which a crime was committed. This might entail a distance of hundreds of miles. And in matters that might come before the Supreme Court, travel of thousands of miles would be involved making the entire system costly, perhaps prohibitively so for those who weren’t wealthy.

The Constitution gave the federal courts appellate jurisdiction not only in matters of law, which was traditional, but also in determining matters of fact that would normally have been decided by a jury in the lower court. Through the appellate jurisdiction, the federal courts could undermine verdicts of local juries and state court systems altogether. This potential threat to the local jury tradition was profoundly disturbing to Antifederalists.

Antifederalists worried that the jurisdiction of the federal courts was too broad, and as federal power grew, which they believed was inevitable, more cases would be taken to federal courts rather than state courts, thus reducing the importance of the state courts. Antifederalists insisted that to prevent this consolidation, state courts should serve as the inferior courts within the federal system. Federalists, suspicious about the objectivity of decisions made at the state level, opposed such an arrangement. Aristides noted that the purpose of the jurisdiction of the federal courts was to “give every assurance . . . of a faithful execution of its laws, and to give citizens, states, and foreigners, an assurance of the impartial administration of justice.”

As Antifederalists surveyed the Constitution, among the most troublesome features was the high degree of judicial independence accorded to federal judges. The Constitution had no clear statement that judges could be impeached, Antifederalists were wary of the independence of the judicial branch. They fully expected the federal courts to encourage their own aggrandizement of power. As interpreters of the ambiguities in the Constitution, federal courts would accrue more power to themselves as they allowed federal power to expand at state expense. Antifederalist also expressed concerns over the shared responsibility of the executive nomination and the Senate’s confirmation process.

Federalists responded that of the three branches, the judicial branch was the “least dangerous,” because it had only the power of judgment. They denied that jury trials were always necessary or were endangered, either by the silence of the Constitution or by the appellate jurisdiction of the federal courts in matters of fact. They defended the jurisdiction of the federal courts as the only means to provide justice in foreign and interstate cases, and to impose uniform obedience to the Constitution and to federal law. Federalists viewed the courts as the intermediary between the people and the Congress. The courts, through judicial review, would uphold the Constitution against the attempts by Congress to enlarge its power or threaten the rights of individuals. Additionally, since federal judges had terms of “good behavior,” they were shielded from political pressures and as such; the national courts were the protector of the people, not a danger.

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Roles in Script–11 (L–large role; M–medium role; S–small role)

Moderator

Antifederalist Panelists

- Brutus (L)
- Samuel Bryan (M)
- Centinel (M)
- Federal Farmer (M)
- Luther Martin (M)
- An Old Whig (S)

Federalist Panelists

- Aristides (M)
- John Marshall (M)
- Publius (L)
- Hugh Williamson (S)

Script

Moderator: Good evening and welcome. We have assembled this panel to discuss the proposed Constitution. Specifically, we have asked these individuals to address the judicial branch. Federalists, of course, maintain that the design of the federal courts in the document is not only defensible but also preferable. Antifederalists, on the other hand, have many concerns about the courts and urge Americans to reject the Constitution because of these and other deficiencies. Welcome gentlemen.

All Panelists: Hello. Good Evening. It's a pleasure to be here, etc.

Moderator: Let's begin with Brutus who has written extensively on this issue. As we begin, let's focus on one specific issue. In a word, what is your objection to the authority or, in legal terms, the jurisdiction of the national courts in this proposed Constitution?

Brutus: The appellate jurisdiction granted to the supreme court . . . has justly been considered as one of the most objectionable parts of the constitution: under this power, appeals may be had from the inferior courts to the supreme, in every case to which the judicial power extends.

Moderator: And what is the problem with this?

Brutus: [Well, the problem] is, that in all the civil causes enumerated, the supreme court shall have authority to re-examine the whole merits of . . . case[s], both with respect to the facts and the law which may arise under it, without the intervention of a jury.

Samuel Bryan: The judicial powers . . . are also so various and extensive, that by legal ingenuity they may be extended to every case, and thus absorb the state judiciaries, and when we consider the decisive influence that a general judiciary would have over the civil polity of the several states . . . this power . . . would effect a consolidation of the states under one government.

Moderator: I see you have honed in on the appellate jurisdiction right away. I suppose we should back track a bit and ask if there are any objections to the cases that the federal courts can hear as a part of their original jurisdiction?

Federal Farmer: I do not . . . see the need . . . of opening a new scene of expensive law suits—of <allowing>¹ foreigners, and citizens of different states, to drag each other many hundred miles into the federal courts. It is true, those courts may be so organized . . . as to make the obtaining of justice in them tolerably easy, . . . But this benefit is by no means secured by the constitution.

Centinel: [Certainly.] This . . . is a very <mean>² jurisdiction, implying an improper distrust of the impartiality and justice of the <courts>³ of the states. It will include all legal debates between foreigners in Britain, or elsewhere, and the people of this country.

Moderator: But isn't there a need for a truly national court system?

Publius: [Absolutely.] The <basic>⁴ necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes,

arising upon the same laws, is a <multi-headed monster>⁵ in government, from which nothing but contradiction and confusion can proceed.

Hugh Williamson: And the <cases>⁶ . . . to be submitted to the Supreme Judiciary, or to the Inferior Courts, are those which naturally arise from the constitutional laws of Congress. [If you think about it, these courts will enhance our national reputation]. Foreigners, with whom we have treaties, will trust our citizens on the faith of this engagement. And the citizens of different States will do the same.

Federal Farmer: [Mr. Williamson, we have thought about it. The question is essentially this: Is it] proper . . . to humble a state, as to bring it to answer to an individual in a court of law? The states are now subject to no such actions; and this new jurisdiction will subject the states and many defendants to actions, and processes, which were not <considered by>⁷ the parties [when they entered into contracts.]

Moderator: So, is it your view that states and state courts should be sovereign and national courts have no jurisdiction over them?

Federal Farmer: [Yes.]

Moderator: And I take it that Federalists disagree?

Aristides: [Yes.] The purpose of extending . . . the jurisdiction of the federal judiciary, is to give every assurance to the general government, of a faithful execution of its laws, and to give citizens, states, and foreigners, an assurance of the impartial administration of justice. Without this . . . the federal government might frequently be obstructed.

Publius: [Additionally,] the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. . . . [This national] <court system,>⁸ which, having no local attachments, will . . . be impartial between the different states and their citizens.

Aristides: [And as a practical matter,] let not the officers of state courts be overmuch alarmed! . . . In the course of ten years, not one action, that I know of, in [my state of] Maryland, has concerned either another state, or an ambassador, consul, or other minister.

Moderator: But in regards to the future, I am assuming that Antifederalists see all sorts of problems?

Centinel: To manage the various and extensive judicial authority . . . there will be one or more inferior courts immediately requisite in each state; and laws and regulations must be forthwith provided to direct the judges—here is a wide door for inconvenience to enter.

Brutus: [And, I will go one further.] I will venture to predict . . . that if [this Constitution] is adopted without amendments . . . the same gentlemen who have employed their talents and abilities with such success to influence the public mind to adopt this plan, will employ the same to persuade the people, that it will be for their good to abolish the state governments as useless and burdensome.

Samuel Bryan: The consequence of this establishment will be an absolute confirmation of the power of aristocratical influence in the courts of justice; for the common people will not be able to contend or struggle against it.

Publius: [Since we are speculating about the future, even] the most discerning cannot foresee how <widespread the>⁹ local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes. [While on the other hand all can see] . . . that courts constituted <by>¹¹ the states, would be improper <courts for>¹² the union.

John Marshall: [I would ask,] are not the Judges of the Federal Court chosen with as much wisdom, as the Judges of the State Governments? . . . If so, shall we not conclude, that they will decide with equal impartiality and <honesty>?¹³ If there be as much wisdom and knowledge in the [whole] United States, as in a particular State, shall we conclude that that wisdom and knowledge will not be equally exercised in the selection of the Judges?

Moderator: Let's move to another related topic. As I understand it, Antifederalists have objections regarding the geographic implications when considering the appellate jurisdiction in the proposed Constitution. Federal Farmer, you have written on this subject. Could you explain?

Federal Farmer: [Certainly.] I think it one of the greatest benefits in a good government, that each citizen should find a court of justice within a reasonable distance, perhaps, within a day's travel of his home; so that, without great inconveniences and enormous expences, he may have the advantages of his witnesses and jury—it would be <unlikely>¹⁴ to derive these advantages from [this] judiciary. . . . Inferior courts might be properly placed in the different counties, and districts of the union, the appellate jurisdiction would be intolerable and expensive.

Moderator: Can you give us an example of how this might be a problem? Centinel?

Centinel: [Certainly. Let's use Pennsylvania as an example.] An inhabitant of Pennsylvania residing at Pittsburgh, finds the goods of his debtor, who resides in Virginia, <has a legitimate claim>¹⁵ but no <court order>¹⁶ can be had to authorise <federal marshalls,>¹⁷ to seize the property . . . nearer than 200 miles.

Moderator: Is this probable?

Samuel Bryan: [I think it is very probable.] The intolerable delay, the enormous expences and infinite vexation to which the people of this country will be exposed from the <mountain of>¹⁸ proceedings of the courts . . . a man may be drawn from the utmost boundaries of this extensive country to the seat of the supreme court of the nation to contend, perhaps with a wealthy and powerful adversary.

Luther Martin: [Additionally,] Should any question arise between a foreign <diplomat>¹⁹ and any of the citizens of the United States, however remote from the seat of empire . . . in the first instance [the case is] to be heard in the supreme court, however inconvenient to the parties, and however trifling the subject of dispute.

Moderator: So I take it that you also have concerns about the single Supreme Court as outlined in the Constitution?

Federal Farmer: [Even more so.] The one supreme court at most could only set in the centre of the union, and move once a year into the centre of the eastern and southern extremes of it—and, in this case, each citizen, on an average, would travel 150 or 200 miles to find this court.

Moderator: Mr. Williamson, you have some thoughts on this?

Hugh Williamson: We are told that justice will be delayed, and the poor will be drawn away by the rich to a distant Court. The authors of this remark have not fully considered the question, else they must have <remembered>²⁰ that the poor of this country have little to do with [the kinds of issues that are of national concern.] They do not consider that . . . appeals . . . [in these courts] will never be permitted [by Congress] for trifling sums, or under <insignificant situations>,²¹ unless we can suppose that the national Legislature shall be composed of knaves and fools.

Publius: I am . . . sure . . . it will be found highly expedient and useful to divide the United States into four or five, or half a dozen districts; and to institute a federal court in each district, in lieu of one in every state.

Moderator: And how does this address Antifederalist concerns?

Publius: [Essentially,] the judges of these courts, with the aid of the state judges, may hold circuits for the trial of causes in the several parts of the respective districts. Justice through them may be administered with ease and dispatch.

Moderator: And, I presume you also believe that because these courts can potentially be created by Congress, it assures the liberties of the people are safe.

Publius: [Absolutely.] The power of constituting inferior courts is evidently calculated to <avoid>²² the necessity of having recourse to the supreme court. . . . It is intended to enable the national government to institute or authorise in each state or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits.

Luther Martin: [Even if a person was successful in the lower courts] . . . an appeal lies to the supreme court, in which case the citizen must at once give up his cause, or he must attend to it at the distance of perhaps more than a thousand miles from the place of his residence, and must take measures to procure before that court . . . all the evidence necessary to support his action, which even if ultimately prosperous must be attended with a loss of time, a neglect of business, and an expence which will be greater than the original grievance. [Isn't it obvious that geography is a problem here?]

John Marshall: Will a man on the Eastern Shore [of Virginia], be sent to be tried in Kentucky; or a man from Kentucky be brought to the Eastern Shore to have his trial? A Government by doing this, would destroy itself. I am convinced, the trial by jury will be regulated in the manner most advantageous to the community.

Moderator: Another concern Antifederalists have about the proposed judiciary is jury trials; specifically, the lack of provisions in the Constitution protecting the right to a jury trial in civil cases. Aristides, this seems to be a major omission in the proposed Constitution.

Aristides: The institution of the trial by jury has been sanctified by the experience of ages. It has been recognised by the constitution of every state in the union. It is deemed the birthright of Americans; and it is imagined, that liberty cannot subsist without it.

Moderator: Yes, but you have not addressed my question about the lack of protection for jury trials in civil cases.

Aristides: Is there not a great variety of cases, in which this trial is taken away in each of the states? Are there not many more cases, where it is denied in England? For the [Philadelphia] convention to <determine all the types of cases in which the right would and wouldn't operate>²³ was impracticable. On this subject, a future congress is to decide; and I see no foundation under Heaven for the opinion, that congress will despise the known prejudices and inclination of their countrymen.

An Old Whig: [We fear Congress, too.] As to the trial by jury, the question may be decided in a few words. Any future Congress sitting under the authority of the proposed new constitution, may . . . enact that there shall be no more trial by jury, in any of the United States; except in the trial of crimes; and this "SUPREME LAW" will at once annul the trial by jury, in all other cases.

Aristides: But again, I would remind everyone that] the proposed <Constitution>²⁴ expressly adopts it, for the decision of all criminal accusations . . . and is silent with respect to the determination of facts in civil causes.

Moderator: And I think therein lays an additional problem for Antifederalists. I think they fear that the right to jury trials in criminal cases is undermined by the appellate jurisdiction to determine facts in the federal courts. Is this the case?

Luther Martin: [Bingo.] Since . . . [the Constitution] expressly declares the supreme court shall have appellate jurisdiction both as to law and fact. Should . . . a jury [in a criminal case] be adopted [and reach a decision] in the inferior court . . . on an appeal [the Supreme Court could issue a] determination . . . as if [there] had never been [a trial] by a jury.

Samuel Bryan: We abhor the idea of losing the <ultimate>²⁵ privilege of trial by jury, with the loss of which . . . in Sweden, the liberties of the commons were extinguished by an aristocratic senate: and that trial by jury and the liberty of the people went out together.

Centinel: [Look, an authority no less than Blackstone once said that] this right of juries is founded on this: "That if the power of judging were entirely trusted with the magistrates, or any select body of men . . . their decisions, in spite of their own natural integrity, would have a bias towards those of their own rank and dignity. This therefore preserves in the hands of the people, that share which they ought to have in the administration of justice, and prevents the <intrusions>²⁶ of the more powerful and wealthy citizens."

Brutus: I believe it is a new and unusual thing to allow appeals in criminal matters. . . . As our law now stands, a person charged with a crime has a right to a fair and impartial trial by a jury of his <state,>²⁷ and their verdict is final. . . .

Moderator: This almost seems like this could be double jeopardy; being tried twice for the same crime.

Brutus: [Exactly.] But by this system, a man may . . . have been acquitted by ever so respectable a jury of his <state;>²⁸ and still the officer of the government who prosecutes, may appeal to the supreme court.

John Marshall: [I know in my state, Patrick Henry made the argument that this right] . . . was secure in England. What makes it secure there?—Is it their Constitution?—What part of their Constitution is there, that the Parliament cannot change?—As the preservation of this right is in the hands of Parliament, and it has ever been held sacred by them, will the Government of America be less honest than that of Great-Britain?

Aristides: [Let's face it. It is possible to overestimate the purity of juries.] A jury, whose legal qualifications are only property and ripe age, may more probably, <be susceptible to biases and excessive pressures.>²⁹ [And again,] . . . congress is to make such regulations and exceptions, as upon mature deliberation, it shall think proper.

Federal Farmer: [I would conclude by saying we are overlooking an important practical consideration.] The trial by jury is . . . the wisest and most fit means of [the people] protecting themselves in the community. Their situation, as jurors . . . enables them to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as the centinels and guardians of each other. I am very sorry that even a few of our countrymen should consider jurors and representatives in a different point of view, as ignorant, troublesome bodies, which ought not to have any share in the concerns of government.

Moderator: Another issue that divides this panel is the question of independence of federal judges. Am I correct in saying that Federalists are content with the good behavior provision in Article III and Antifederalists have concerns? Am I correct in assuming Antifederalists want some sort of legislative review of judicial decisions?

Brutus: [Yes. Judges] are . . . totally independent, both of the people and the legislature, both with respect to their offices and salaries. No errors they may commit can be corrected by any power above them, if any such power there be, nor can they be removed from office for making ever so many <incorrect decisions>.³⁰

Moderator: But isn't it a good thing for judges to have some degree of independence? As I recall the English system had this feature.

Brutus: The framers of this constitution appear to have followed that of the British, in rendering the judges independent, by granting them their offices during good behaviour.

Moderator: So what specifically is the problem here?

Brutus: The judges in England, it is true, hold their offices during their good behaviour, but then their determinations are subject to correction by the house of lords; and their power is by no means so extensive as that of the proposed supreme court of the union.

Moderator: But, isn't this difference in the American system warranted? I presume you would suggest that we do not want to replicate the mistakes of the English system.

Brutus: [True, but] the judges in England are under the controul of the legislature, for they are bound to determine according to the laws passed by them. But the judges under this constitution will controul the legislature, for the supreme court are authorised in the last resort, to determine what is the extent of the powers of the Congress; they are to give the constitution an explanation, and there is no power above them to set aside their judgment.

Publius: Which is <like>³¹ . . . most . . . of the state constitutions.

Brutus: [Let me finish.] There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.

Publius: [This] objection . . . disorders their imaginations and judgments.

Brutus: [Do I have to challenge you to a duel to shut you up?]

Moderator: Publius you'll have your chance. Let Brutus finish.

Brutus: [Thank you.] The <decisions>³² of this court are final and irreversible, for there is no court above them to which appeals can lie, either in error or on the merits.—In this respect it differs from the courts in England.

Moderator: Publius, you obviously have a rebuttal to this.

Publius: [Finally!] Whoever attentively considers the different departments of power must perceive . . . the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them.

Moderator: I am not sure I follow.

Publius: The executive . . . holds the sword of the community. The legislative not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse . . . and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the <enforcement>³³ of its judgments.

Brutus: There is no power provided in the constitution, that can correct their errors[!]

Publius: The judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is <required>³⁴ to enable it to defend itself against their attacks.

Brutus: From this court there is no appeal[!]

Moderator: Brutus, I must ask you to allow Publius to continue.

Brutus: [This constitution has] made the judges independent, in the fullest sense of the word. There is no power above them, to controul any of their decisions[!]

Moderator: Brutus, again, let Publius speak.

Publius: If . . . the courts of justice are to be considered as the <foundations>³⁵ of a limited constitution against legislative <intrusions,>³⁶ this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges.

Brutus: I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers.

Aristides: Away then with your trumpery of fictions! [Don't] accuse . . . the illustrious members of the convention of having in their contemplation such sophistry, pettifogging and <trickery!>³⁷

Moderator: Gentlemen. Gentlemen. Can we tone it down? Let's try to keep this civil. These types of attacks should not get in the way of our discussions.

Brutus: [OK, but again I would point out that] the supreme court . . . [has] a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their [decisions.] . . . The judges are supreme—and no law, explanatory of the constitution, will be binding on them.

John Marshall: [But let's remember a critical point here.] What is the service or purpose of a Judiciary, but to execute the laws in a peaceable orderly manner, without shedding blood . . . or availing yourselves of force? . . . To what <sector>³⁸ will you look for protection from an infringement on the Constitution, if you will not give the power to the Judiciary? There is no other body that can afford such a protection.

Moderator: At this point I would like us to consider the related issue of what many label “judicial review.” As I understand it both sides are generally in agreement that this power is implicit within the powers assigned to the courts in this Constitution. If this is the case, what then separates Federalists and Antifederalists on the issue?

Brutus: If . . . the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature.

Publius: It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order . . . to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and <unique job>³⁹ of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law.

Brutus: [But,] under this system [the national courts] have . . . power which is above the legislative [branch], and which indeed transcends any power before given to a judicial by any free government under heaven.

Publius: No legislative act . . . contrary to the constitution can be valid. To deny this would be to affirm . . . that the servant is above his master; that the representatives of the people are superior to the people themselves.

Brutus: [But again,] the legislature themselves, cannot set aside a judgment of this court, because they are authorised by the constitution to decide in the last resort.

Publius: [Consider this.] There is no liberty, if the power of judging be not separated from the legislative and executive powers. And . . . liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments.

Brutus: [The danger is that these courts] will <interpret>⁴⁰ every article of the constitution, that may . . . come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court.

Moderator: But Brutus, it seems that you are elevating the legislature above the judiciary?

Publius: [That's exactly my point;] that where the will of the legislature . . . stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the <constitution,>⁴¹ rather than the <legislature.>⁴² They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

Moderator: And Brutus, I presume you would suggest an even worse scenario?

Brutus: [Absolutely, mark my words.] The judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner . . . I mean, an entire subversion of the legislative, executive and judicial powers of the individual states.

Moderator: I see that we have come to the end of our time. It would be good for both sides to give us a summary of their views. Let's start with the Federalists.

Hugh Williamson: Questions that are of a national concern . . . are to be referred to the national Judiciary, but they have not anything to do with a single case either civil or criminal, which respects the private and particular concerns of a State or its citizens.

Aristides: I can . . . with confidence, maintain, that, as there is no express clause, or necessary implication, to oust the jurisdiction of state courts.

John Marshall: [In my state, Virginia just] look at the dockets. You will find them crowded with suits. . . . If some of these suits be carried to other Courts, will it be wrong?

Publius: According to the plan of the convention, all the judges who may be appointed by the United States are to hold their offices during good behaviour, which is <similar>⁴³ to most . . . of the state constitutions.

John Marshall: Are not the Judges of the Federal Court chosen with as much wisdom, as the Judges of the State Governments? Are they not equally, if not more independent?

Publius: Through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing. [This is] indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.

Moderator: And let's conclude with several Antifederalists?

Samuel Bryan: The lengthy proceedings [will be] . . . such that few men of moderate fortune can endure the expence . . . the poor man must therefore submit to the wealthy. Length of purse will too often prevail against right and justice.

Federal Farmer: All those numerous actions, now brought in the state courts between our citizens and foreigners, between citizens of different states, by state governments against foreigners, and by state governments against citizens of other states, may also be brought in the federal courts; and an appeal will lay in them from the state courts, or federal inferior courts, to the supreme judicial court of the union.

Centinel: There will be . . . inferior courts . . . in each state; and laws and regulations . . . provided to direct the judges—here is a wide door for inconvenience to enter. The state courts of justice, like the barony and hundred courts of England, will be eclipsed and gradually fall into disuse.

An Old Whig: Judges may sit in the United States, as they did in some instances before the war, without a jury to condemn people's property and extract money from their pockets, to be put into the pockets of the judges themselves who condemn them.

Brutus: Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the . . . judicial [branch.] . . . In this situation . . . neither people, nor state legislatures, nor the general legislature can remove them or reverse their decrees . . . [and] when this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to controul them but with a high hand and an outstretched arm.

Moderator: Well, we have come to the end of our time together. I hope we have been able to frame the critical issues that surround the national courts as proposed in the Constitution. I would like to again thank our panelists. Gentlemen, it has been a pleasure.

All Panelists: Thank you. It's been a pleasure. Good to be here. Thanks for having me. etc.

Endnotes

- ¹suffering
- ²invidious
- ³tribunals
- ⁴mere
- ⁵the question
- ⁶hydra
- ⁷objects
- ⁸in the contemplation of
- ⁹tribunal
- ¹⁰far the prevalency of a
- ¹¹like those of some of
- ¹²improper channels of the judicial authority of
- ¹³candour
- ¹⁴impracticable
- ¹⁵within the reach of his attachment
- ¹⁶writ
- ¹⁷the marshal, sheriff, or other officer of Congress
- ¹⁸voluminous
- ¹⁹consul
- ²⁰recollected
- ²¹trivial pretences
- ²²obviate
- ²³ascertain in what cases it shall prevail, and in what others it may be expedient to prefer other modes
- ²⁴plan
- ²⁵transcendant
- ²⁶encroachments
- ²⁷country
- ²⁸country
- ²⁹incur the imputation of weakness, partiality, or undue influence
- ³⁰erroneous adjudications
- ³¹conformable
- ³²adjudications
- ³³efficacy
- ³⁴requisite
- ³⁵bulwarks
- ³⁶encroachments
- ³⁷chicane
- ³⁸quarter
- ³⁹peculiar province
- ⁴⁰give the sense of
- ⁴¹latter
- ⁴²former
- ⁴³conformable

Pedagogical Materials

T-Chart for Notes–The Judiciary

Instructions: As students listen to the scripted debate, they should take notes using the T-Chart below. Notes should summarize the key ideas from both Federalist and Antifederalist speakers. You may also want to assess the strength of each argument using a numerical ranking system. This chart can also be used when using the discussion questions below.

<u>Federalist Arguments</u>	<u>Antifederalist Arguments</u>

Discussion Questions–The Judiciary

1. To what extent, do you find Antifederalists speculations about the jurisdiction of the federal courts convincing? Do Federalists have reasonable rebuttals to these concerns?
2. Do you agree with Antifederalist argument that judicial independence is the same as judicial supremacy? If not, why not?
3. Do you agree with Federalist arguments that judicial review is an essential feature in a constitutional government?
4. In your opinion, is the rule of law undermined by the practice of judicial review?
5. To what extent were Antifederalist concerns over the jurisdiction of the national courts rooted in their fears about states losing powers?

Extension Activities

1. Create a Political Cartoon. Students can create political cartoons from the following passages from the script that illustrate two individuals and their different points of view:

On page 6, Federal Farmer and Hugh Williamson have very different views about the accessibility of federal courts for the common man.

On page 11, Brutus and Publius have very different views on the independence of the Judiciary.

2. Create a Graphic novel. Instead of creating traditional book reports or writing summaries, get "graphic" by creating a comic book adaptation of an important portions in the script. Characters in the story could include Publius, Brutus, and Centinel.

3. Converting speeches into poetry. Students could take lines from the script and convert them into various types of poems. For example a limerick from Brutus' view of the Judicial Branch might be:

Brutus future was full of dark taint
Distant justice would cause us to faint
They're too independent
Their decisions resplendent
Mark my words we shall see no restraint

The Bill of Rights

Introduction

Antifederalists argued that in a state of nature people were entirely free. In society some rights were yielded for the common good. But there were rights that were so basic and important that to give them up would be contrary to the common good. These rights, which should always be retained by the people, had to be precisely stated in the form of a bill of rights. A bill of rights would be a landmark, clearly defining limits for those in power, and would be a firebell for the people, enabling them at once to know when their rights were threatened.

The protection of a bill of rights was especially important in the new Constitution, which was an original compact with the people. State bills of rights offered no protection from oppressive acts of the federal government because the Constitution, treaties and laws made in pursuance of the Constitution were declared the supreme law of the land. The Constitution, Antifederalists maintained, was so ambiguous and the powers that could be construed by implication were so broad that a bill of rights, a guidepost, was necessary. They also noted that the Constitution's limited list of rights was insufficient to protect the people against both the federal and state governments. Therefore, Antifederalists insisted a more complete listing was warranted.

Federalists rejected the proposition that a bill of rights was needed. They made a clear distinction between the state constitutions and the U.S. Constitution. Using the language of social compact, Federalists asserted that when the people formed their state constitutions, they delegated to the states all rights and power which were not explicitly reserved to the people. The state governments had authority to regulate even personal and private matters. But in the U.S. Constitution, the people or the states retained all rights and powers that were not positively granted to the federal government. In short, everything not given was reserved. The U.S. government had only delegated powers, limited to the general interests of the nation.

Therefore, Federalists argued, a bill of rights was not only unnecessary, but might even be dangerous. Unnecessary, because the new federal government could in no way endanger the freedom of the press or religion, for instance, since it was given no constitutional power to regulate either. Dangerous, because a listing of rights could be interpreted as all inclusive. Rights omitted might be considered as not retained. And the listing of rights, such as freedom of the press, might imply that a power to regulate the press existed absent the provision.

Finally, Federalists believed that bills of rights were paper protections, useless just when they were most needed: in times of crisis they would be overridden. The people's rights are best secured not by bills of rights but by a representative form of government in which officeholders are responsible to the people, derive their power from the people, and would themselves suffer from the loss of basic rights.

Sources

Antifederalist Sources

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Cincinnatus (Arthur Lee) II: To James Wilson, Esquire, *New York Journal*,
8 November 1787
John Smilie: Speech in the Pennsylvania Convention, 28 November 1787
A True Friend, Richmond, 6 December 1787
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of Rights*, 12 April 1788

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James Wilson: Speech in the State House Yard, Philadelphia,
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From Roger Sherman, New Haven, 8 December 1787
Marcus (James Iredell) I, *Norfolk and Portsmouth Journal*, 20 February 1788
Fabius (John Dickinson) IV, *Pennsylvania Mercury*, 19 April 1788
Publius (Alexander Hamilton): The Federalist 84, Book Edition, 28 May 1788
James Madison to Thomas Jefferson, 17 October 1788

Roles in Script–15 (L–large role; M–medium role; S–small role)

Moderator (L)

Antifederalist Panelists

Brutus (M)
Cincinnatus (S)
Richard Henry Lee (S)
George Mason (S)
Luther Martin (M)
An Old Whig (M)
John Smilie (M)
A True Friend (S)

Federalist Panelists

Fabius (S)
James Madison (M)
Marcus (S)
Publius (L)
Roger Sherman (S)
James Wilson (L)

Script

Moderator: Good Evening. Tonight we are joined by several leading figures that represent two different sets of opinions about the proposed Constitution. As you know, last summer delegates from 12 states gathered in Philadelphia and, after four months of deliberation, have turned their work over to the states and the people to consider its adoption. Among the many issues that divide this gathering is that the Constitution lacks a bill of rights. We have invited this panel to share their perspectives on this issue. In short, Antifederalists maintain that the Constitution should not be adopted because the document is fatally flawed without a statement of rights. On the other hand, Federalists reason that the Constitution should be ratified without a bill of rights and suggest that one is unnecessary and potentially dangerous. Gentlemen, welcome.

Panelists: All panelists nod and say “Good evening.”

Moderator: I would like to begin our discussion with a question posed to Antifederalists. Why, in your opinion, are bills of rights so important? Let’s start with George Mason who suggested that the Constitution needed a bill of rights while at the Philadelphia Convention. For you, this is a pretty basic issue.

George Mason: [Yes, it is very simple.] There is no declaration of rights, and the laws of this general government being paramount to the laws and constitutions of the several States, the declarations of rights in the separate States are no security.

An Old Whig: [Additionally, it is critical to note that,] men when they enter into society, yield up a part of their natural liberty, for the sake of being protected by government. If they yield up all their natural rights they are absolute slaves to their governors.

Brutus: The principles, therefore, upon which the social compact is founded, ought to have been clearly and precisely stated, and the most express and full declaration of rights to have been made.

An Old Whig: In like manner the people of this country, at the revolution, having all power in their own hands, in forming the [state] constitutions . . . took care to secure themselves by bills of rights, so as to prevent . . . the encroachments of their future rulers upon the rights of the people.

Moderator: Yes. But, don’t individuals already know their rights?

An Old Whig: Some of these rights are said to be unalienable, such as the rights of conscience: yet even these have been often invaded, where they have not been carefully secured by express and solemn bills and declarations in their favor.

Moderator: At this point it may be important to have Federalists address this matter. It is my understanding that you maintain that written statements of rights are unnecessary.

James Wilson: The doctrine and practice of declarations of rights have been borrowed from the conduct of the people of England . . . but the principles and maxims, on which their government is constituted, are widely different from those of ours.

Roger Sherman: Declarations of rights in England were charters granted by Princes, or Acts of Parliament made to limit the <powers>¹ of the crown.

Marcus: [That's right.] These in England . . . were in consequence of usurpations of the Crown, contrary . . . to the principles of their government. But there, no original constitution is to be found, and the only meaning of a declaration of rights in that country is, that in certain particulars specified, the Crown had no authority to act.

Moderator: But, if I understand Antifederalists correctly on this point, isn't there a tendency of all rulers of all types to abuse the rights of the people?

Brutus: [Absolutely!] Those who have governed, have been found in all ages ever active to enlarge their powers and abridge the public liberty. This has induced the people in all countries, where any sense of freedom remained, to fix barriers against the encroachments of their rulers.

An Old Whig: In England we find the people, with the Barons at their head, <demanding that they be given>² their rights from king John, in their celebrated Magna Charta, which was many times renewed in Parliament, during the reigns of his successors. The petition of rights was afterwards consented to by Charles the first, and contained a declaration of the liberties of the people. The habeus corpus act, after the restoration of Charles the Second, the bill of rights, which was obtained from the Prince and Princess of Orange on their accession to the throne. . . .

James Wilson: But . . . we shall find that those rights, and liberties, are claimed only on the foundation of an original contract, supposed to have been made at some former period, between the king and the people.

Publius: Such was Magna Charta, obtained by the Barons, sword in hand, from King John.

Moderator: And if I am not mistaken, didn't John violate the agreement shortly thereafter?

Publius: [Yes. And] such was the petition of right <agreed>³ to by Charles the First.

Moderator: And the Stuart kings of the 1600s refused to abide by those provisions?

Publius: [Yes.] Such also was the declaration of rights presented by the lords and commons to the prince of Orange in 1688.

Moderator: And isn't it true that the Hanoverian kings of the 1700s violated many traditional statements of rights including the Magna Charta, the Petition of Right and the English Bill of Rights.

Brutus: But rulers have the same <tendencies>⁴ as other men; they are as likely to use the power with which they are <given>⁵ for private purposes, and to the injury and oppression of those over whom they are placed.

An Old Whig: Before we establish a government, whose acts will be THE SUPREME LAW OF THE LAND, and whose power will extend to almost every case without exception, we ought carefully to guard ourselves by a BILL OF RIGHTS.

Publius: There remains but one other view of this matter to conclude the point. The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS. . . . And the proposed Constitution, if adopted, will be the bill of rights of the Union. . . .

Moderator: I suppose. Is this a part of the argument that you make about the structure of the Constitution and the provisions for the separation and division of power between the federal and state governments is a better way to secure the liberties of the people?

Publius: [Yes. The design of the Constitution is critical here. Is it reasonable] to trust . . . these parchment barriers against the encroaching spirit of power? This . . . appears to have been principally relied on by the compilers of most of the American Constitutions. But experience assures us, that the <effectiveness>⁶ of the provision has been greatly over-rated.

Moderator: Mr. Madison, do you have a thought in this regard?

James Madison: Experience proves the <ineffectiveness>⁷ of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by <dominating>⁸ majorities in every State.

Moderator: For example?

James Madison: [Well, in my state of] Virginia I have seen the bill of rights violated in every instance where it has been opposed to the will of the majority. . . . [This is despite] the explicit provision contained in . . . [our Constitution] for the <freedom of thought>.⁹

Moderator: So, you are suggesting that if a majority wants to run rough shod over the rights of minorities, a bill of rights is of little use?

James Madison: [Correct.] 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 . . . from acts in which the Government is the mere instrument of the major number of the constituents. [In short, there is a real danger of a tyranny of the majority.]

Moderator: This may be backtracking a bit here but I think many would like to know why a bill of rights was not included in the Constitution proposed by the Convention? Mr. Wilson, you were there, can you explain this?

James Wilson: I believe the truth is, that such an idea never entered the mind of many of them. I don't recollect to have heard the subject mentioned, till within about three days of the time of our rising.

Brutus: In all the constitutions of our own states; there is not one of them but what is either founded on a declaration or bill of rights, or has a <specific declaration>¹⁰ of rights interwoven in the body of them.

James Wilson: [However,] let it be remembered then, that the business of the Federal Convention was not local, but general; not limited to the views and establishments of a single state, but coextensive with the continent, and comprehending the views and establishments of thirteen independent sovereignties.

Moderator: Antifederalists also maintain that the powers in the Constitution are threats to the liberties of the people.

John Smilie: [Absolutely.] So loosely, so inaccurately are the powers which are enumerated in this Constitution defined, that it will be impossible . . . to ascertain the limits of authority and to declare when government has degenerated into oppression.

Luther Martin: Let me caution the supreme power, the people, to take care how they part with their birth-right; that they do not, like Esau, sell it for a mess of pottage and let them reflect, seriously reflect, on the inestimable value of the least atom of their liberty; she is more precious than rubies, and all the things that can be desired, are not to be compared unto her.

John Smilie: This . . . prove[s] the necessity of a full and explicit declaration of rights . . . a plain, strong, and accurate <standard>¹¹ by which the people might at once determine when, and in what instance, their rights were violated is a <prerequisite>¹² without which this plan ought not to be adopted.

James Wilson: A bill of rights is by no means a necessary measure. In a government having <powers that are listed>,¹³ such a measure would be not only unnecessary, but preposterous and dangerous.

Narrative: Forgive me, but this seems to be the Federalists' weakest argument. Isn't it true that the states have bills of rights?

Publius: There is not a syllable concerning . . . [the freedom of the press] in the constitution of . . . [New York], and . . . I contend that whatever has been said about it in that of any other state, amounts to nothing.

James Wilson: Have the citizens of South Carolina no security for their liberties? They have no bill of rights. Are the citizens on the eastern side of the Delaware less free, or less secured in their liberties, than those on the western side? The State of New Jersey has no bill of rights. The State of New York has no bill of rights. The states of Connecticut and Rhode Island have no bills of rights.

Moderator: But does it automatically follow that this particular national Constitution does not need a full bill of rights? In fact, the Constitution does list some protections. Doesn't it follow that a full listing of rights is necessary?

A True Friend: [Exactly.] Let us then insert in the first page of this constitution, as a preamble to it, a declaration of our rights, or an enumeration of our <privileges>,¹⁴ as a sovereign people; that they may never hereafter be unknown, forgotten or contradicted by our representatives, our delegates, our servants in Congress.

James Wilson: If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete.

John Smilie: It seems . . . that the members of the Federal Convention were themselves convinced, in some degree, of the expediency and propriety of a bill of rights, for we find them expressly declaring that the writ of habeas corpus and the trial by jury in criminal cases shall not be suspended or infringed.

Moderator: Again, doesn't this suggest that a fuller listing of rights is needed? Publius?

Publius: 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?

A True Friend: The rights of the people should never be left subject to problematical discussion: They should be clear, precise and authenticated: They should never . . . need comments or explanations of lawyers or political writers . . . [who] . . . <tangle>¹⁵ the plainest rights in their net of <clever rhetoric>.¹⁶

Moderator: So, is it fair to say that the difference of opinion here is a so-called silence of the Constitution? Meaning, for Federalists, the silence or the lack of a bill of rights, means that people are safe because they retain all their rights. For Antifederalists the silence means the rights of the people are at risk or given up because they are not explicitly stated?

Publius: [We believe that] whatever fine declarations may be inserted in any constitution . . . it must altogether depend on public opinion, and on the general spirit of the people . . . after all, we seek for the only solid basis of all our rights.

Cincinnatus: But you comfort us by saying, "there is no reason to suspect so popular a privilege will be neglected." The wolf, in the fable, said as much to the sheep, when he was persuading them to trust him as their protector. Do you indeed suppose . . . that if the people give up their privileges to these new rulers they will <give>¹⁷ them back again to the people?

Moderator: I would like to turn our attention to this issue Antifederalists have raised about the listing of rights in the body of the Constitution.

John Smilie: [Again I would repeat that,] it seems . . . that the members of the Federal Convention were themselves convinced, in some degree, of the expediency and propriety of a bill of rights.

Moderator: Yes, doesn't this suggest that a fuller listing of rights is needed?

James Wilson: In all societies, there are many powers and rights, which cannot be particularly enumerated.

Roger Sherman: [And ultimately you must remember,] one excellency of the constitution is that when the government of the united States acts within its proper bounds it will be the interest of the

legislatures of the particular States to Support it, but when it over leaps those bounds and interferes with the rights of the State governments they will be . . . powerful enough to check it.

Luther Martin: [This assertion] . . . that a bill of rights was altogether useless . . . such an opinion is evidently calculated to mislead the people, and to take off the necessary checks from those who will be entrusted with the administration of government.

James Wilson: To every suggestion concerning a bill of rights, the citizens of the United States may always say, WE reserve the right to do what we please. [Therefore, we do not need a list of rights.]

Luther Martin: Should the [Constitution], pass without amendments, it would immediately constitute an aristocratic tyranny, a many-headed <huge beast>,¹⁸ an ungovernable monster, without constitutional checks, deplorable and to be deplored, dangerous and destructive.

Moderator: I am still troubled by the Federalist view. On the one hand, you suggest that a list of rights is not necessary, but the fact still remains; the Constitution contains some rights. And as I understand it, Antifederalists have been fierce critics of the provisions relating to jury trials; specifically, the lack of a provision that guarantees the right to jury trials in civil cases. Mr. Wilson?

James Wilson: The Convention found the task too difficult for them, and they left the business as it stands, in the fullest confidence that no danger could possibly ensue, since the proceedings of the Supreme Court are to be regulated by the Congress, which is a faithful representation of the people.

Richard Henry Lee: [This is a ridiculous argument.] It is . . . unfortunate that this great security of human rights, the trial by jury, should be weakened in this system.

Moderator: Mr. Wilson, what about this? Antifederalists seem to have a good point here.

James Wilson: When . . . this subject was in discussion . . . no precedent could be discovered to direct our course. The cases open to a trial by jury differed in the different states, it was therefore impracticable on that ground to have made a general rule.

Moderator: Is it true that Federalists have argued that Antifederalists have jumped to conclusions regarding the right to jury trials in civil cases? As I understand it, Federalists maintain that just because the Constitution is silent on the issue, doesn't automatically mean they are at risk.

Cincinnatus: [Again, this is ridiculous.] It is a law maxim, that the expression of one part is an exclusion of the other. In legal [reasoning, by stating that a person has a right to a jury trial in a criminal case, it is logically excluded in civil cases if it is not listed in the text.] Therefore . . . we must suppose the Convention . . . meant to exclude it in civil cases.

Moderator: We are close to the end of our allotted time. I would like Mr. Martin and Fabius to leave us with their concluding thoughts.

Luther Martin: [It seems to me that the reasons Federalists have for not including a bill of rights] are so <conflicting>¹⁹ on essential points surely, the common people may well be at a loss in a choice of their political guides,—and the safest way for them must be, to insist upon a solemn

declaration of their rights and privileges, as the substantial and unalterable parts of the constitution: for such a declaration cannot be prejudicial; but may restrain the growth of despotism.

Fabius: [Look.] We need to look at the historical record and recall that ultimately all rights including] trial by jury . . . were not obtained by a bill of rights, or any other records, and have not been and cannot be preserved by them. They and all other rights must be preserved, by soundness of sense and honesty of heart. Compared with these, what are a bill of rights, or any characters drawn upon paper or parchment . . . <feeble reminders>?²⁰

Moderator: And with that thought, we have come to the end of our allotted time. Gentlemen, thank you.

All Panelists: You're welcome. My pleasure. It has been great to be here. etc.

Moderator: I hope that our discussion here will prove helpful as Americans continue to debate the ratification of the Constitution in the state conventions. Good night and good luck.

Endnotes

- ¹ prerogatives
- ² exacting a solemn resignation of
- ³ assented
- ⁴ propensities
- ⁵ vested
- ⁶ efficacy
- ⁷ inefficacy
- ⁸ overbearing
- ⁹ rights of Conscience.
- ¹⁰ certain express reservation
- ¹¹ criterion
- ¹² preliminary
- ¹³ possessed of enumerated powers
- ¹⁴ prerogatives
- ¹⁵ entangle
- ¹⁶ sophistry
- ¹⁷ render
- ¹⁸ leviathan
- ¹⁹ dissordant
- ²⁰ those frail remembrancers

Pedagogical Materials

T-Chart for Notes–The Bill of Rights

Instructions: As students listen to the scripted debate, they should take notes using the T-Chart below. Notes should summarize the key ideas from both Federalist and Antifederalist speakers. You may also want to assess the strength of each argument using a numerical ranking system. This chart can also be used when using the discussion questions below.

<u>Federalist Arguments</u>	<u>Antifederalist Arguments</u>

Discussion Question–The Bill of Rights

1. To what extent do you agree with the Federalist view that if rights are natural, there is no need to list them?
2. In your view, does it follow that if certain rights are listed, it makes those that were not listed vulnerable to being abused by government?
3. Ironically, both sides make their case by citing the fact that many states have bills of rights. In your view, who makes a better argument in citing this fact?
4. Does it follow that since states have bills of rights in their constitutions, the national constitution should have one as well?

Extension Activities

1. Create a Political Cartoon. Students can create political cartoons from the following passages from the script that illustrate two individuals and their different points of view:

On page 5, James Wilson and John Smilie have very different views on the necessity of a bill of rights.

On page 9, Luther Martin and Fabius have very different views on the effectiveness of bills of rights.

2. Create a Graphic novel. Instead of creating traditional book reports or writing summaries, get "graphic" by creating a comic book adaptation from an important section in the script. Characters in the story could include James Wilson, Publius, Brutus and Luther Martin.

3. Converting speeches into poetry. Students could take lines from the script and convert them into various types of poems. For example a limerick from the views of Publius and Brutus on the lack of a bill of rights in the Constitution might be:

Publius opined rights as ridiculous luxury
The 'stution needed no such foam and such frothy
Only kings needed this check
Brutus replied "What the Heck?"
The past abounds with abuses aplenty!

4. Have students do research looking at the various recommendatory amendments that states attached to their forms of ratification. Students could:

- a) look at different types of recommendations.
- b) categorize the recommendations.
- c) compose their own Bill of Rights based on the various recommendations from the states. They should be able to justify their selections.

