

# 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

George Mason's Objections to the Constitution, 7 October 1787  
Richard Henry Lee to Edmund Randolph, New York, 16 October 1787  
An Old Whig IV, Philadelphia *Independent Gazetteer*, 27 October 1787  
Brutus (Melancton Smith?) II, *New York Journal*, 1 November 1787  
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  
Luther Martin: *A Citizen of the State of Maryland Remarks Relative to a Bill  
of Rights*, 12 April 1788

### Federalist Sources

James Wilson: Speech in the State House Yard, Philadelphia,  
6 October 1787  
James Wilson: Speech in the Pennsylvania Convention, 28 November 1787  
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><sup>1</sup> 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><sup>2</sup> 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><sup>3</sup> 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><sup>4</sup> as other men; they are as likely to use the power with which they are <given><sup>5</sup> 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><sup>6</sup> 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><sup>7</sup> 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><sup>8</sup> 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>.<sup>9</sup>

**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><sup>10</sup> 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><sup>11</sup> by which the people might at once determine when, and in what instance, their rights were violated is a <prerequisite><sup>12</sup> 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>,<sup>13</sup> 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>,<sup>14</sup> 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><sup>15</sup> the plainest rights in their net of <clever rhetoric>.<sup>16</sup>

**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><sup>17</sup> 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>,<sup>18</sup> 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><sup>19</sup> 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>?<sup>20</sup>

**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

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