

Lesson Six: *The Debate over the Bill of Rights*

BACKGROUND INFORMATION FOR INSTRUCTOR

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 some rights so fundamental that to give them up would be contrary to the common good. These rights, which should always be retained by the people, needed to be explicitly stated in a bill of rights that would clearly define the limits of government. A bill of rights would serve as a fire bell for the people, enabling them to immediately know when their rights were threatened.

Additionally, some Antifederalists argued that the protections of a bill of rights were especially important under the 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 to be the supreme law of the land. Antifederalists argued that a bill of rights was necessary because, the supremacy clause in combination with the necessary and proper and general welfare clauses would allow implied powers that could endanger rights.

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 state all rights and powers which were not explicitly reserved to the people. The state governments had broad 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 only had strictly delegated powers, limited to the general interests of the nation. Consequently, a bill of rights was not necessary and was perhaps a dangerous proposition. It was unnecessary because the new federal government could in no way endanger the freedoms of the press or religion since it was not granted any authority to regulate either. It was dangerous because any listing of rights could potentially be interpreted as exhaustive. Rights omitted could be considered as not retained. Finally, Federalists believed that bills of rights in history had been nothing more than paper protections, useless when they were most needed. In times of crisis they had been and would continue to be overridden. The people's rights are best secured not by bills of rights, but by auxiliary precautions: the division and separation of powers, bicameralism, and a representative form of government in which officeholders were responsible to the people, derive their power from the people, and would themselves suffer from the loss of basic rights.

KEY IDEAS IN PRIMARY SOURCE DOCUMENTS

An Old Whig IV, Philadelphia *Independent Gazetteer*, 27 October 1787

Original Contracts Need Rights Stated/Listed

Brutus II, *New York Journal*, 1 November 1787

Not Stating Rights May Mean Rights are Surrendered

Robert Whitehill Speech: Pennsylvania Ratifying Convention, 28 November 1787

Original Contracts Need Rights Listed; Listed Rights are Reminders to Rulers

John Smilie Speech: Pennsylvania Ratifying Convention, 28 November 1787

Partial Listing of Rights is Insufficient; Vagueness of Powers is a Threat to Liberty

James Wilson Speech: Pennsylvania Ratifying Convention, 28 November 1787

Bill of Rights not a Task of Convention; Some States do not have Bills of Rights

Marcus I, *Norfolk and Portsmouth Journal*, 20 February 1788

Bills of Rights are only Needed in Monarchy System

Publius: The Federalist 84, New York, 28 May 1788

The Structure of the Constitution Makes Bill of Rights Unnecessary

THE PRIMARY SOURCE DOCUMENT EXCERPTS

An Old Whig IV, Philadelphia *Independent Gazetteer*, 27 October 1787

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. . . . To define what portion of his natural liberty, the subject shall at all times be entitled to retain, is one great end of a bill of rights. . . . Without such a bill of rights, firmly securing the privileges of the subject, the government is always in danger of degenerating into tyranny.

Brutus II, *New York Journal*, 1 November 1787

In a state of nature every individual pursues his own interest; in this pursuit it frequently happened, that the possessions or enjoyments of one were sacrificed to the views and designs of another. . . . In this state of things, every individual was insecure; common interest therefore directed, that government should be established. . . . It is not necessary, for this purpose, that individuals should relinquish all their natural rights. Some are of such a nature that they cannot be surrendered. . . . To surrender them, would counteract the very end of government, to wit, the common good. From these observations it appears, that in forming a government on its true principles, the foundation should be laid . . . expressly reserving to the people such of their essential natural rights, as are not necessary to be parted with.

John Smilie Speech: Pennsylvania Ratifying Convention, 28 November 1787

It seems however that . . . the Federal Convention were themselves convinced . . . 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. . . . This, sir, must prove the necessity of a full and explicit declaration of rights. . . . So loosely, so inaccurately are the powers which are enumerated in this Constitution defined, that it will be impossible, without a test of that kind, to ascertain the limits of authority and to declare when government has degenerated into oppression. . . . It will be impracticable to stop the progress of tyranny, for there will be no check but the people, and their exertions must be futile and uncertain; since it will be difficult indeed, to communicate to them the violation that has been committed, and their proceedings will be neither systematical nor unanimous.

Robert Whitehill Speech: Pennsylvania Ratifying Convention, 28 November 1787

If indeed the Constitution itself so well defined the powers of the government that no mistake could arise, and we were well assured that our governors would always act right, then we might be satisfied without an explicit reservation of those rights with which the people ought not, and mean not to part. . . . In entering into the social compact, men ought not to leave their rulers at large, but erect a permanent landmark by which they may learn the extent of their authority, and the people be able to discover the first encroachments on their liberties.

James Wilson Speech: Pennsylvania Ratifying Convention, 28 November 1787

I cannot say . . . what were the reasons, of every member of that Convention, for not adding a bill of rights; I believe the truth is, that such an idea never entered the mind of many of them. . . . If the powers of the people rest on the same establishment, as is expressed in this Constitution, a bill of rights is by no means a necessary measure. In a government possessed of enumerated powers, such a measure would be not only unnecessary, but preposterous and dangerous. Whence comes this notion, that in the United States there is no security without a bill of rights? 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. But in a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. . . .

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. . . .

Marcus I, *Norfolk and Portsmouth Journal*, 20 February 1788

The introduction of these [i.e. a bill of rights] in England . . . was in consequence of usurpations of the Crown, contrary, as was conceived, to the principles of their government. . . . The question then only is, whether more power will be vested in the future government than is necessary for the general purposes of the Union. . . . After expressly defining the powers that are to be exercised, to say that they shall exercise no other powers (either by a general or particular enumeration) would seem to me both nugatory and ridiculous.

Publius: The Federalist 84, New York, 28 May 1788

It has been several times truly remarked, that bills of rights are in their origin, stipulations between kings and their subjects. . . . Such was MAGNA CHARTA, obtained by the Barons, sword in hand, from king John. Such was the *petition of right* assented to by Charles the First, in the beginning of his reign. Such also was the declaration of right presented by the lords and commons to the prince of Orange in 1688, and afterwards thrown into the form of an act of parliament, called the bill of rights. It is evident, therefore, that according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations.

There remains but one other view of this matter to conclude the point. The truth is, after all the declamation we have heard, that the constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS.

THE LESSON PLAN—The Critical Passage and the “Found Poem”

OBJECTIVES OF THE LESSON

- * Students will read Federalist and Antifederalist views on adding a bill of rights to the Constitution.
- * Students will discuss and identify the critical idea in various documents relating to the debate between the Federalists and Antifederalists.
- * Students will create limericks from primary source materials.

THE LESSON

1. Divide the class into groups of 3-5 students. Half of the groups should be groups that will work with the Antifederalist documents. The other half will be working with Federalist documents. Each group should use the appropriate graphic organizer below.

<u>Antifederalist Documents</u>	<u>Critical/Important Phrase(s) in Documents</u>
An Old Whig IV, <i>Philadelphia Independent Gazetteer</i> , 27 October 1787	
Brutus II, <i>New York Journal</i> , 1 November 1787	
Robert Whitehill Speech: Pennsylvania Ratifying Convention, 28 November 1787	
John Smilie Speech: Pennsylvania Ratifying Convention, 28 November 1787	

<u>Federalist Documents</u>	<u>Critical/Important Phrase(s) in Documents</u>
James Wilson Speech: Pennsylvania Ratifying Convention, 28 November 1787	
Marcus I, <i>Norfolk and Portsmouth Journal</i> , 20 February 1788	
Publius: The Federalist 84, New York, 28 May 1788	

2. Have the groups read their documents and discuss which lines they believe to be the most essential to the argument the author is making. Have each group record those passages in the second column of their worksheets. For example, the groups might identify the critical portion of Antifederalist “Brutus” as “expressly reserving to the people such of their essential natural rights.” Groups working with Federalist documents might select “such a measure would be not only unnecessary, but preposterous and dangerous” from James

Wilson. Groups can and should be encouraged to come to different conclusions as to the critical passage in each of their selections.

3. After groups have completed their discussions you can have them report their findings to the class.
4. To conclude the lesson, you can have individual students create a poem that restates the critical passages from the documents. For example, a limerick based on Antifederalist passages might be:

In a state of nature, my rights are at risk	(from Brutus II "In a state of nature every individual pursues his own interest.")
Without a bill, violations are brisk	(from John Smilie "It will be impracticable to stop the progress of tyranny.")
The constitution is vague	(from John Smilie "so inaccurately are the powers which are enumerated.")
All governments a plague	(from An Old Whig IV "government is always in danger of degenerating into tyranny.")
List them, lest we see them gone in a whisk	(from John Smilie "It will be impracticable to stop the progress of tyranny.")

5. You could conclude the lesson by having students share their poems with the class.