02 2015

Document of the Month

Center *for the* Study *of the* American Constitution

No. 14: The Federalist and Antifederalist Debate Over a Bill of Rights

From the beginning of English settlement in America, colonists referred to the common law and specific English precedents that condemned the king for violating rights—Magna Carta (1215), the Petition of Right (1628), and the English Bill of Rights (1689) to mention but three. In America, colonists wrote and adopted a variety of documents (over 200 items) that in a preemptory fashion listed rights that should not be violated. All of these rights were based upon the rights of Englishmen. American colonists' assertion of their rights intensified as the imperial crisis mounted after 1763. In 1774, the First Continental Congress expanded the foundation of rights to include certain natural rights, while the Second Continental Congress totally abandoned any reference to the rights of Englishmen and relied exclusively on natural rights.

Beginning in 1776, Americans adopted new state constitutions that often contained separate bills of rights or specifically protected certain rights in the body of the constitution. Virginia's Declaration of Rights, adopted in June 1776, served as a model for others. The text asserted that men "have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely the enjoyment of life and liberty and the means of acquiring and possessing property."

The Articles of Confederation, approved by Congress in November 1777 and adopted by the states on 1 March 1781, did not contain a bill of rights because Congress had no authority to act directly on the people in the states. It could only act on the states themselves. Thus, the states stood as a buffer between the people and Congress in defending rights. However, the Northwest Ordinance of July 1787 did contain a partial bill of rights to protect inhabitants of the territory from possible despotic acts of the governor, the secretary of state and the judges for the territorial government, who were all appointed by Congress.

Throughout its sessions, the Constitutional Convention, which met between May and September 1787, accepted a variety of individual rights in the body of the new Constitution, particularly in Article I, sections 9 and 10. When, however, toward the end of the Convention, a motion was made to appoint a committee to draft a bill of rights, it was defeated (eleven states to none). Drafting a bill of rights would have been easy. George Mason of Virginia suggested that he could prepare such a document in two or three hours. But debating these rights would have been much more difficult, potentially unraveling some of the many compromises that had been made during the creation of the new Constitution. The exclusion of a bill of rights would become the single most important issue during the state-level debates over the ratification of the Constitution.

Antifederalists argued that in a state of nature people were entirely free. When forming a society, some rights of individuals had to be yielded in order to protect the balance of rights for all. But there were some rights so fundamental that to give them up would be contrary to the common good. These rights, which were always to be retained by the people, along with other rights, needed to be stated explicitly 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 know immediately 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 clause and the general welfare clause, allowed for implied powers that could endanger individual rights. Antifederalists also noted that the partial listing of rights in the body of the Constitution undermined the Federalist argument that a bill of rights would be dangerous since some rights might be excluded.

Federalists rejected the proposition that a bill of rights was needed. Traditionally, bills of rights were obtained by the people from monarchs who had violated rights. Federalists argued that bills of rights were not needed in republics because the people had nothing to fear from themselves. Antifederalists, and even some Federalists, like James Madison, acknowledged that the people could be despotic against minorities. Antifederalists felt that a bill of rights would protect minorities from overbearing majorities, while Federalists argued that checks and balances in government institutions would guard against despotic government.

Federalists also made a clear distinction between the state constitutions and the U.S. Constitution. Using the language of social compact, Federalists asserted that, when state constitutions were adopted, state governments possessed all powers which were not explicitly reserved to the people. State governments had broad authority to regulate even personal and private matters. The earliest expression of this Federalist view came from James Wilson. In his 6 October 1787 speech at the Pennsylvania State House he asserted that 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. In the new U.S. Constitution, the federal government only had delegated powers limited to the general interests of the nation. Consequently, a bill of rights was not necessary and was perhaps a dangerous proposition. Opponents of a bill of rights argued against its necessity because the new federal government could not endanger rights that it had no authority to regulate, like freedom of the press or of religion. Such a document might even cause harm, opponents suggested, because any partial listing of rights could be interpreted as exhaustive. Omitted rights could be considered as not retained. Listing rights might also be dangerous because it would imply that the federal government had some kind of power over those rights. Federalists also suggested that the rights of individuals were secure by various provisions in the Constitution, particularly Article I, sections 9 and 10, where the state and the national governments were prohibited from violating common rights—rights frequently infringed on by governments.

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 were 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, derived their power from the people, and would themselves suffer from the loss of basic rights. In this context, the Constitution as a whole served the purpose of a bill of rights.■

Antifederalist Documents

Richard Henry Lee to Edmund Randolph, New York 16 October 1787

. . . Yet there is no restraint in form of a bill of rights, to secure (what Doctor Blackstone calls) that residuum of human rights, which is not intended to be given up to society, and which indeed is not necessary to be given for any good social purpose.—The rights of conscience, the freedom of the press, and the trial by jury are at mercy. It is there stated, that in criminal cases, the trial shall be by jury. But how? In the state. What then becomes of the jury of the vicinage or at least from the county in the first instance, for the states being from 50 to 700 miles in extent? This mode of trial even in criminal cases may be greatly impaired, and in civil causes the inference is strong, that it may be altogether omitted as the constitution positively assumes it in criminal, and is silent about it in civil causes.—Nay, it is more strongly discountenanced in civil cases by giving the supreme court in appeals, jurisdiction both as to law and fact. Judge Blackstone in his learned commentaries, art. jury trial, says, it is the most transcendant privilege which any subject can enjoy or wish for, that he cannot be affected

either in his property, his liberty, his person, but by the unanimous consent of 12 of his neighbours and equals. . . .

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. If they yield up less than is necessary, the government is so feeble, that it cannot protect them.—To yield up so much, as is necessary for the purposes of government; and to retain all beyond what is necessary, is the great point, which ought, if possible, to be attained in the formation of a constitution. At the same time that by these means, the liberty of the subject is secured, the government is really strengthened; because wherever the subject is convinced that nothing more is required from him, than what is necessary for the good of the community, he yields a chearful obedience, which is more useful than the constrained service of slaves.—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. To these may be added in a bill of rights some particular engagements of protection, on the part of government, without such a bill of rights, firmly securing the privileges of the subject, the government is always in danger of degenerating into tyranny; for it is certainly true, that "in establishing the powers of government, the rulers are invested with every right and authority, which is not in explicit terms reserved."–Hence it is, that we find the rulers so often lording over the people at their will and pleasure. Hence it is that we find the patriots, in all ages of the world, so very solicitous to obtain explicit engagements from their rulers, stipulating, expressly, for the preservation of particular rights and privileges.

Brutus II, *New York Journal*
1 November 1787

I might proceed to instance a number of other rights, which were as necessary to be reserved, such as, that elections should be free, that the liberty of the press should be held sacred; but the instances adduced, are sufficient to prove, that this argument* is without foundation.—Besides, it is evident, that the reason here assigned was not the true one, why the framers of this constitution omitted a bill of rights; if it had been, they would not have made certain reservations, while they totally omitted others of more importance. We find they have, in the 9th section of the 1st article, declared, that the writ of habeas corpus shall not be suspended, unless in cases of rebellion—that no bill of attainder, or expost facto law, shall be passed—that no title of nobility shall be granted by the United States, &c. If every thing which is not given is reserved, what propriety is there in these exceptions? Does this constitution any where grant the power of suspending the habeas corpus, to make expost facto laws, pass bills of attainder, or grant titles of nobility? It certainly does not in express terms. The only answer that can be given is, that these are implied in the general powers granted. With equal truth it may be said, that all the powers, which the bills of rights, guard against the abuse of, are contained or implied in the general ones granted by this constitution.

*See James Wilson's 6 October 1787 Pennsylvania State House Speech in Federalist documents (below).

John Smilie's Speech in the Pennsylvania Convention
28 November 1787

The arguments which have been urged, Mr. President, have not, in my opinion, satisfactorily shown that a bill of rights would have been an improper, nay, that it is not a necessary appendage to the proposed system. As it has been denied that Virginia possesses a bill of rights, I shall on that subject only observe, that Mr. Mason, a gentleman certainly of great information and integrity, has assured me that such a thing does exist, and I am persuaded, I shall be able at a future period to lay it before the Convention. But, sir, the State of Delaware has a bill of rights, and I believe one of the honorable members (Thomas M'Kean) who now contests the necessity and propriety of that instrument, took a very conspicuous part in the formation of the Delaware government. It seems however 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. How does this indeed agree with the maxim that whatever is not given is reserved? Does it not rather appear from the reservation of these two articles that everything else, which is not specified, is included in the powers delegated to the government? This, sir, must prove the necessity of a full and explicit declaration of rights; and when we further consider the extensive, the undefined powers vested in

the administrators of this system, when we consider the system itself as a great political compact between the governors and the governed, a plain, strong, and accurate criterion by which the people might at once determine when, and in what instance, their rights were violated is a preliminary without which this plan ought not to be adopted. 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. In that event the contest will arise between the people and the rulers. "You have exceeded the powers of your office, you have oppressed us" will be the language of the suffering citizens. The answer of the government will be short: "We have not exceeded our power; you have no test by which you can prove it." Hence, sir, 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. . . .

Luther Martin: A Citizen of the State of Maryland Remarks Relative to a Bill of Rights, 12 April 1788

I do not perceive in the new constitution, *those uses named*, for which the administration of government is entrusted; no directing principles, sufficient for security of life, liberty, property, and freedom in trade; and therefore, as a supplement, a declaration or bill of rights is evidently wanting; otherwise, we shall have a legislature without check or controul; which if it should take place, it would open a door to every species of fraud and oppression.—Should the present system now proposed, pass without amendments, it would immediately constitute an aristocratic tyranny, a many-headed leviathan, an ungovernable monster, without constitutional checks, deplorable and to be deplored, dangerous and destructive, in proportion to the number of which it consists.

An eminent lawyer expressed an idea, which has been re-echoed, and become pretty general, "that what power was not expressly given, was retained by the people."—Another civilian, of equal standing and professional abilities, has asserted the reverse of this proposition, and insisted that what power was not expressly declared, was relinquished and given up:—Since then, the sentiments of men, respectable for their talents, are so discordant 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, the wantonness of power, and the base, licentious attempts of juvenile, daring ambition.

In fine, 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.

Federalist Documents

James Wilson's Speech in the State House Yard, Philadelphia 6 October 1787

. . . When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve; and therefore upon every question, respecting the jurisdiction of the house of assembly, if the frame of government is silent, the jurisdiction is efficient and complete. But in delegating federal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union. Hence it is evident, that in the former case everything which is not reserved is given, but in the latter the reverse of the proposition prevails, and everything which is not given, is reserved. This distinction being recognized, will furnish an answer to those who think the omission of a bill of rights, a defect in the proposed Constitution: for it would have been superfluous and absurd to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act, that has brought that body into existence. For instance, the liberty of the press, which has been a copious source of declamation and

opposition, what control can proceed from the federal government to shackle or destroy that sacred palladium of national freedom? . . .

A Countryman II, *New Haven Gazette* 22 November 1787

The only real security that you can have for all your important rights must be in the nature of your government. If you suffer any man to govern you who is not strongly interested in supporting your privileges, you will certainly lose them. . . . No bill of rights ever yet bound the supreme power longer than the *honey moon* of a new married couple, unless the *rulers were interested* in preserving the rights; and in that case they have always been ready enough to declare the rights, and to preserve them when they were declared.—The famous English *Magna Charta* is but an act of Parliament, which every subsequent Parliament has had just as much constitutional power to repeal and annul as the Parliament which made it had to pass it at first. But the security of the nation has always been, that their government was so formed, that at least *one branch* of their legislature must be strongly interested to preserve the rights of the nation.

You have a bill of rights in Connecticut (i.e.) your legislature many years since enacted that the subjects of this state should enjoy certain privileges. Every assembly since that time, could, by the same authority, enact that the subjects should enjoy none of those privileges; and the only reason that it has not long since been so enacted, is that your legislature were as strongly interested in preserving those rights as any of the subjects; and this is your only security that it shall not be so enacted at the next session of assembly: and it is security enough.

Marcus I *Norfolk and Portsmouth Journal* 20 February 1788

As to the want of a Declaration of Rights.

The introduction of these in England, from which the idea was originally taken, was in consequence of usurpations of the Crown, contrary, as was conceived, 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. Could this have been necessary, had there been a Constitution in being, by which it could have been clearly discerned whether the Crown had such authority or not? Had the people by a solemn instrument delegated particular powers to the Crown at the formation of their government, surely the Crown which in that case could claim under that instrument only, could not have contended for more power than was conveyed by it. So it is in regard to the new Constitution here: The future government which may be formed under that authority, certainly cannot act beyond the warrant of that authority. As well might they attempt to impose a King upon America, as go one step in any other respect beyond the terms of their institution. 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. This may occasion a ground of dispute–but 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. As well might a Judge when he condemns a man to be hanged, give strong injunctions to the Sheriff that he should not be beheaded.

Publius: *The Federalist* 51 New York *Independent Journal* 6 February 1788

. . . A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual, may be a centinel over the public rights. . . .

But it is not possible to give to each department an equal power of self defence. In republican government the legislative authority, necessarily, predominates. The remedy for this inconveniency is, to divide the legislature into different branches; and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit. It may even be necessary to guard

against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative, on the legislature, appears at first view to be the natural defence with which the executive magistrate should be armed. But perhaps it would be neither altogether safe, nor alone sufficient. On ordinary occasions, it might not be exerted with the requisite firmness; and on extraordinary occasions, it might be perfidiously abused. . . .

In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself.

PUBLIUS: *THE FEDERALIST* 84
NEW YORK, 28 MAY 1788

. . . the constitution proposed by the convention contains, as well as the constitution of this state, a number of such provisions.

Independent of those, which relate to the structure of the government, we find the following:—Article I. section 3. clause 7. "Judgment in cases of impeachment shall not extend further than to removal from office . . . but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law."—Section 9. of the same article, clause 2. "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."—Clause 3. "No bill of attainder or *ex post facto* law shall be passed."—Clause 7. "No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them, shall, without the consent of the congress, accept of any present, emolument, office or title, of any kind whatever, from any king, prince or foreign state."—Article III. section 2. clause 3. "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed."—Section 3, of the same article, "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."—And clause 3, of the same section. "The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."

It may well be a question whether these are not upon the whole, of equal importance with any which are to be found in the constitution of this state. The establishment of the writ of *habeas corpus*, the prohibition of *ex post facto* laws, and of TITLES OF NOBILITY, *to which we have no corresponding provisions in our constitution*, are perhaps greater securities to liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments have been in all ages the favourite and most formidable instruments of tyranny. . . .

Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the corner stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people. . . .

"WE THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this constitution for the United States of America." Here is a better recognition of popular rights than volumes of those aphorisms which made the principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government. . . .

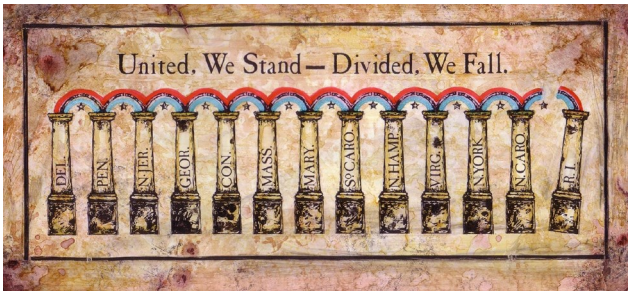
I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For 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? . . .

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 several bills of rights, in Great-Britain, form its constitution, and conversely the constitution of each state is its bill of rights. And the proposed constitution, if adopted, will be the bill of rights of the union. Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the plan of the convention, comprehending various precautions for the public security, which are not to be found in any of the state constitutions. Is another object of a bill of rights to define certain immunities and modes of proceeding, which are relative to personal and private concerns? This we have seen has also been attended to, in a variety of cases, in the same plan. Adverting therefore to the substantial meaning of a bill of rights, it is absurd to allege that it is not to be found in the work of the convention. . . .

Discussion Questions for a Socratic Seminar

- To what extent do you agree with the Federalist view that if rights are natural there is no need to list them?
- In your opinion, were Antifederalists correct in asserting that all social contracts should be accompanied by a bill of rights?
- In your view, does it follow that if certain rights are listed it makes those unlisted rights vulnerable to abuse by government?
- To what extent does the presence of a partial list of rights in the body of the Constitution undermine all Federalist arguments against adding a more thorough bill of rights?
- What are the strengths and weaknesses of the claim by "A Countryman" II that legislatures have proven themselves to be an effective protector of the rights of individuals? Would you agree with "A Countryman"?
- Does the Federalist argument of having multiple branches as the most effective way to secure rights undermine the arguments made in "A Countryman" II?



Teaching Tools

I. Comparing and Evaluating the Federalist and Antifederalist Arguments Over a Bill of Rights

1. Divide the class in half. One half will read the Antifederalist selections, and the other half will read the Federalist selections.
2. In the first part of the lesson, each half of the class should be divided into groups of 3-5 students. Each of these smaller groups should read its assigned selection(s), discussing and summarizing the arguments of its author(s) using the T-chart below.

Antifederalist Arguments		**Federalist Arguments**	
Richard Henry Lee	__	James Wilson	__
An Old Whig	__	A Countryman II	__
Brutus II	__	Marcus	__
John Smilie	__	Publius: *The Federalist* 51	__
Luther Martin	__	Publius: *The Federalist* 84	__

3. After each group has read and discussed its selection(s), all groups should meet together—Antifederalists with other Antifederalist groups and Federalists with other Federalist groups—to reach a consensus on the four best arguments by their authors.
4. Each half of the class should then select a student (or students) to present the arguments made by its authors.
5. During the presentation, the opposition should evaluate the strength of each argument. As students present Antifederalist arguments, the Federalists will listen and evaluate the arguments using the T-chart. Likewise, as students present Federalist arguments, the Antifederalists will listen and evaluate the arguments using the T-chart. Each side can use the score bar to rate the effectiveness of the opposition's arguments. Evaluators can use a 1-10 scale to rate arguments.

6. When all of the arguments have been presented, have the Federalists and the Antifederalists meet together to reach a consensus on the two best arguments from the opposition.
7. Once the Federalists and the Antifederalists have had an opportunity to discuss and rank the arguments of their opposition, have a spokesperson report the findings of each to the class.
8. After each side has reported its assessments, the teacher can lead a discussion using the following questions:
    - Ask the Federalists, "What would you say is the strongest argument made by the Antifederalists?"
    - Ask the Antifederalists, "What would you say is the strongest argument made by the Federalists?"
    - Is the opposition's ranking of your arguments consistent with your own ranking of them? Why or why not?

II. Converting Federalist and Antifederalist Ideas into Poetry

1. Divide the class into five groups. Each group should be assigned two selections: one Antifederalist item and one Federalist item. An example of how you might organize the groups and selections is as follows:

    Group 1: Richard Henry Lee and James Wilson

    Group 2: "An Old Whig" IV and "A Countryman" II

    Group 3: "Brutus" II and "Marcus" I

    Group 4: John Smilie and Publius: *The Federalist* 51

    Group 5: Luther Martin and Publius: *The Federalist* 84
2. Each group should read and identify the key ideas in its selections.
3. Divide students into smaller groups of 2-3 students. These groups will then begin to convert the major ideas in their selections into a poem. Students can structure their poems as they like. For example, a limerick from Luther Martin and "Publius" selections might be:

    Publius said listing rights posed great danger,

    like a pit bull in a manger,

    a list was not needed

    but L. Martin pleaded,

    without rights we have a game changer.
4. After students have had time to work on their poems you can have them share their work with the class.

III. Building the Bill of Rights: Comparing the Virginia Convention's Recommended Bill of Rights

1. All students should have copies of or access to these three items:

Virginia recommended bill of rights, 27 June 1788 (pdf)

U.S. Bill of Rights, 15 December 1791 (pdf)

Graphic organizer (pdf)

2. Divide the class into four groups. Each group should be assigned a specific section of the Virginia recommended bill of rights.

   The 1st group should read amendments 1-5.

   The 2nd group should read amendments 6-10.

   The 3rd group should read amendments 11-15.

   The 4th group should read amendments 16-20.

3. After groups have read their assigned amendments, they should read the entire U.S. Bill of Rights. As they read the U.S. Bill of Rights, they should use the graphic organizer to make notes of words or ideas from the Virginia recommended bill of rights that appear in the U.S. Bill of Rights. They should record their findings in the second column of the graphic organizer. (If the words or ideas appear in the Bill of Rights, they should circle "yes." If the words or ideas appear but are altered, they should circle "modified." If the words or ideas do not appear in the Bill of Rights, they should circle "no.")

4. Lead a brief discussion with the class using the following questions:

   What are some of the similarities and differences you see between the Virginia recommended bill of rights and the eventual wording of the U.S. Bill of Rights?

   To what extent do any modifications to the Virginia recommended bill of rights found in the U.S. Bill of Rights change the meaning of the original amendments?

   What might be the reasons why certain words or ideas were excluded or modified?

5. Students should now work in their groups to consider column three of the graphic organizer. Questions they should consider would be:

   Are any of the modifications in words or ideas improvements on the original amendments? If so, which ones and why?

   Are any of the modifications inferior versions of the original? If so, which ones and why?

6. Have groups report their findings to the class.

7. Conclude the lesson by leading a brief discussion using the following questions:

   What does this study suggest about the process of creating the Bill of Rights?

   Does the fact that some modifications occurred in the process diminish the importance of the Bill of Rights?

   Would you have been prone to alter the wording of Virginia's recommended bill of rights or not?

Note to Teacher: An excellent article outlining the roles of James Madison and the first federal Congress in creating the Bill of Rights is Kenneth R. Bowling's "'A Tub to the Whale': The Founding Fathers and Adoption of the Federal Bill of Rights." You may also want to consult three introductory essays in *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties,* Patrick T. Conley and John P. Kaminski, eds.

Vocabulary

Richard Henry Lee to Edmund Randolph

1. *residuum:* remainder
2. *vicinage:* local area
3. *discountenanced:* looked upon with disfavor
4. *transcendant:* superior or supreme

"An Old Whig" IV

1. *constrained:* forced
2. *solicitous:* eager to obtain; desirous

"Brutus" II

1. *adduced:* offered or presented
2. *writ of habeas corpus:* a judicial order requiring a person to be brought before a judge or court
3. *bill of attainder:* a legislative act finding someone guilty of a crime without a court trial
4. *ex post facto laws:* laws having retroactive force

John Smilie

1. *appendage:* attachment or addition
2. *propriety:* properness
3. *conspicuous:* obvious
4. *maxim:* saying or proverb

Luther Martin

1. *leviathan:* monster
2. *relinquished:* let go of; released
3. *wantonness:* depravity or immorality
4. *licentious:* wicked

James Wilson

1. *jurisdiction:* area of concern, interest, or authority
2. *criterion:* standard of measurement
3. *tacit:* unspoken
4. *superfluous:* unnecessary; excessive
5. *stipulated:* required; mandated
6. *divested:* deprived
7. *copious:* abundant or plentiful
8. *declamation:* outspokenness
9. *palladium:* safeguard

"A Countryman" II

1. *repeal:* cancel; roll back
2. *annul:* declare invalid

"Marcus" I

1. *usurpations:* wrongful or illegal seizures
2. *discerned:* perceived; understood
3. *contended:* argued; made a grab for
4. *conveyed:* given
5. *enumeration:* a list or inventory
6. *nugatory:* trivial or insignificant
7. *injunctions:* orders; commands

Publius: *The Federalist* 51

1. *auxiliary:* additional or supporting
2. *centinel:* a lookout or guard
3. *encroachments:* intrusions

Publius: *The Federalist* 84

1. *indictment:* formal charge
2. *levying:* waging or pursuing
3. *attainder of treason:* stain of treason
4. *corruption of blood:* inability to inherit, or pass on, family property because of treasonous action
5. *posterity:* descendants
6. *aphorisms:* sayings; adages
7. *declamation:* talk
8. *adverting:* referencing; referring