

Activity 2. Is a Bill of Rights necessary?

Student Name _____ Date _____

Directions: Read the following documents and complete the questions on the assigned worksheet.

James Wilson, State House Speech, 6 October 1787

http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1670&chapter=1967&layout=html&Itemid=27

It will be proper, however, before I enter into the refutation of the charges that are alleged, to mark the leading discrimination between the state constitutions, and the constitution of the United States. 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...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 the 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 and 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 of that act that has brought that body into existence. For instance, the liberty of the press, which has been a copious subject of declamation and opposition -- what control can proceed from the federal government, to shackle or destroy that sacred palladium of national freedom?

...I will confess, indeed, that I am not a blind admirer of this plan of government, and that there are some parts of it, which, if my wish had prevailed, would certainly have been altered. But...I am satisfied that anything nearer to perfection could not have been accomplished. If there are errors, it should be remembered, that...the concurrence of two thirds of the congress may at any time introduce alterations and amendments. Regarding it, then, in every point of view, with a candid and disinterested mind, I am bold to assert, that it is the BEST FORM OF GOVERNMENT WHICH HAS EVER BEEN OFFERED TO THE WORLD.

Alexander Hamilton, *The Federalist* No. 84

http://avalon.law.yale.edu/18th_century/fed84.asp

The most considerable of the remaining objections is that the plan of the convention contains no bill of rights...

To the first I answer that 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 1, section 3, clause 7 — "Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; 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

The Creation of The Bill of Rights: "Retouching the Canvas"

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 3, 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..."

But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns...

I go further and affirm that bills of rights, in the sense and to 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 not granted; and, on this very account, would afford a colorable 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?...[I]t is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power....

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. 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...

The Creation of The Bill of Rights: "Retouching the Canvas"

Student Name _____ Date _____

Supplemental Activity One: Is a Bill of Rights necessary? The Federalist and Anti-federalist debates

Reading Set A: The Federalist argument against a Bill of Rights

Directions: Read the documents assigned for reading set A and answer the questions on the worksheet.

Question	Answer
According to James Wilson, what difference between the national and state governments makes a bill of rights unnecessary in the proposed Federal Constitution?	
Why does Wilson approve of the Constitution even though it is not perfect?	
Why does Hamilton believe that a specific listing of rights "is far less applicable" to the Federal Constitution than to state constitutions?	
Why does Hamilton argue that a bill of rights might be dangerous to the liberties of citizens?	

The Creation of The Bill of Rights: "Retouching the Canvas"

Student Name _____ Date _____

Reading Set B: The Anti-federalist arguments supporting a Bill of Rights

Directions: Read the following document and complete the questions on the assigned worksheet.

Centinel No. II, 24 October 1787

<http://www.teachingamericanhistory.com/library/index.asp?document=1939>

The reason assigned [*by Federalists*] for the omission of a *bill of rights*, securing the *liberty of the press*, and *other invaluable personal rights*, is an insult on the understanding of the people...

Mr. *Wilson* has recourse to the most flimsey sophistry in his attempt to refute the charge that the new plan of general government will supersede and render powerless the state governments... Mr. *Wilson*, asks, "What controul can proceed from the federal government to shackle or destroy that *sacred palladium* of national freedom, the *liberty of the press*?" What!—Cannot Congress, when possessed of the immense authority proposed to be devolved, restrain the printers, and put them under regulation.—Recollect that the omnipotence of the federal legislature over the State establishments is recognized by a special article, viz.—"that) this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the *supreme law* of the land; and the judges in every State shall be bound thereby, any thing in the *Constitutions* or laws of any State to the contrary notwithstanding."—After such a declaration, what security does the *Constitutions* of the several States afford for the *liberty of the press and other invaluable personal rights*, not provided for by the new plan?—Does not this sweeping clause subject every thing to the controul of Congress?...[T]he *laws* of Congress are to be "the *supreme law* of the land, any thing in the *Constitutions* or laws of any State to the contrary notwithstanding;" and consequently, would be *paramount* to all *State* authorities. The lust of power is so universal, that a speculative unascertained rule of construction would be a *poor* security for the liberties of the people.

Such a body as the intended Congress, unless particularly inhibited and restrained, must grasp at omnipotence, and before long swallow up the Legislative, the Executive, and the Judicial powers of the several States... From the foregoing illustration of the powers proposed to be devolved to Congress, it is evident, that the general government would necessarily annihilate the particular governments, and that the security of the personal rights of the people by the state constitutions is superseded and destroyed...

But Mr. *Wilson*, says, the new plan does not arrogate perfection, for it provides a mode of alteration and correction, if found necessary. This is one among the numerous deceptions attempted on this occasion. True, there is a mode prescribed for this purpose. But it is barely possible that amendments may be made... For to effect this (Art. 6.) it is provided, that if *two thirds* of both houses of the federal legislature shall propose them; or when two thirds of the several states by their legislatures, shall apply for them, the federal assembly shall call a convention for proposing amendments, which when ratified by three fourths of the state legislatures, or conventions, as Congress shall see best, shall controul and alter the proposed confederation...

Brutus No. II, 1 November 1787

<http://www.teachingamericanhistory.com/library/index.asp?document=1669>

[I]n forming a constitution for such a country, great care should be taken to limit and definite its powers, adjust its parts, and guard against an abuse of authority...

[R]ulers have the same propensities as other men; they are as likely to use the power with which they are vested for private purposes, and to the injury and oppression of those over whom they are placed, as individuals in a state of nature are to injure and oppress one another. It is therefore as proper

The Creation of The Bill of Rights: "Retouching the Canvas"

that bounds should be set to their authority, as that government should have at first been instituted to restrain private injuries. This principle, which seems so evidently founded in the reason and nature of things, is confirmed by universal experience. 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. . . It is therefore the more astonishing, that this grand security, to the rights of the people, is not to be found in this constitution.

It has been said, in answer to this objection, that such declaration[s] of rights, however requisite they might be in the constitutions of the states, are not necessary in the general constitution, because, "in the former case, every thing which is not reserved is given, but in the latter the reverse of the proposition prevails, and every thing which is not given is reserved." It requires but little attention to discover, that this mode of reasoning is rather specious than solid. The powers, rights, and authority, granted to the general government by this constitution, are as complete, with respect to every object to which they extend, as that of any state government—It reaches to every thing which concerns human happiness—Life, liberty, and property, are under its controul. There is the same reason, therefore, that the exercise of power, in this case, should be restrained within proper limits, as in that of the state governments. To set this matter in a clear light, permit me to instance some of the articles of the bills of rights of the individual states, and apply them to the case in question.

For the security of life, in criminal prosecutions, the bills of rights of most of the states have declared, that no man shall be held to answer for a crime until he is made fully acquainted with the charge brought against him; he shall not be compelled to accuse, or furnish evidence against himself—The witnesses against him shall be brought face to face, and he shall be fully heard by himself or counsel. That it is essential to the security of life and liberty, that trial of facts be in the vicinity where they happen. Are not provisions of this kind as necessary in the general government, as in that of a particular state?...

For the security of liberty it has been declared, "that excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted—That all warrants, without oath or affirmation, to search suspected places, or seize any person, his papers or property, are grievous and oppressive." These provisions are as necessary under the general government as under that of the individual states; for the power of the former is as complete to the purpose of requiring bail. imposing fines, inflicting punishments, granting search warrants, and seizing persons, papers, or property, in certain cases, as the other. . .

So far it is from being true, that a bill of rights is less necessary in the general constitution than in those of the states, the contrary is evidently the fact. . . This is expressed in positive and unequivocal terms, in the 6th article, "That this constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the *constitution*, or laws of any state, *to the contrary* notwithstanding. . . It is therefore not only necessarily implied thereby, but positively expressed. that the different state constitutions are repealed and entirely done away, so far as they are inconsistent with this, with the laws which shall be made in pursuance thereof. . . [O]f what avail will the constitutions of the respective states be to preserve the rights of its citizens? . . .

Ought not a government, vested with such extensive and indefinite authority. to have been restricted by a declaration of rights? It certainly ought. So clear a point is this, that I cannot help suspecting, that persons who attempt to persuade people, that such reservations were less necessary under this constitution than under those of the states, are wilfully endeavouring to deceive, and to lead you into an absolute state of vassalage.

The Creation of The Bill of Rights: "Retouching the Canvas"

Student Name _____ Date _____

Supplemental Activity One: Is a Bill of Rights necessary? The Federalist and Anti-federalist debates

Reading Set B: The Anti-federalist arguments supporting a Bill of Rights

Directions: Read the document assigned for reading set B and answer the questions on the worksheet.

Question	Answer
What reasons does Centinel give for the necessity of a Bill of Rights?	
Why does Centinel believe that the "supremacy" clause in the Constitution especially makes a bill of rights necessary?	
Why does Centinel reject James Wilson's argument that a bill of rights can be added later in the form of amendments to the Constitution?	
Why does Brutus believe a bill of rights is just as necessary in the Federal Constitution as in state constitutions?	

The Creation of The Bill of Rights: "Retouching the Canvas"

Why does Brutus believe the Federalists are really against a bill of rights in the Constitution?	
--	--