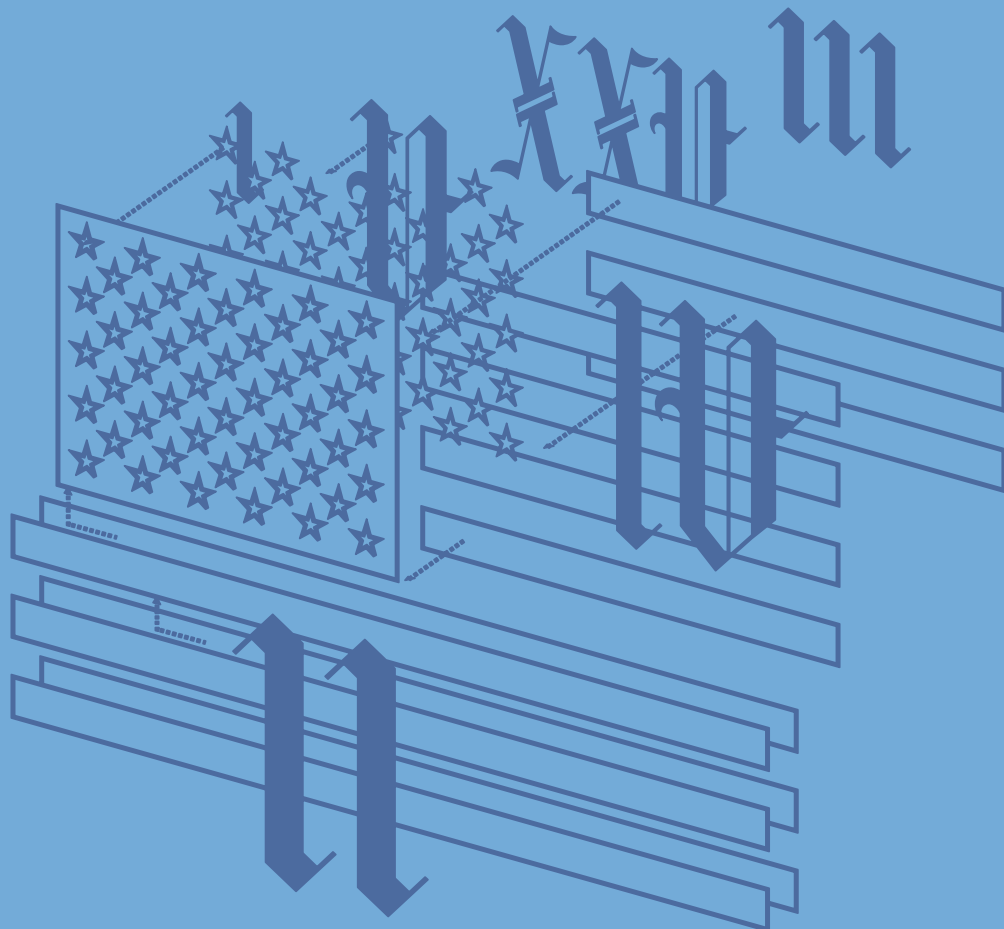


CONSTITUTION

MODULE 5

THE BILL OF RIGHTS



THE BILL OF RIGHTS

Shortly after the ratification of the U.S. Constitution, the Founding generation added the Bill of Rights—the Constitution’s first 10 amendments. These amendments guarantee many of our most cherished liberties, including the freedom of religion, the freedom of speech, the right to keep and bear arms, and the right to a jury trial. After the Constitutional Convention, the absence of a bill of rights emerged as a key part of the debates over ratification. Anti-Federalists—those who opposed the Constitution—pointed to the missing bill of rights as a fatal flaw in the new document. Several states ratified the Constitution with an understanding that amendments would be promptly added by the new government. This module will explore the origins of the Bill of Rights, explain its importance to the debate over the ratification of the U.S. Constitution, and walk through the specific rights enshrined in each of the first 10 amendments.

Learning Objectives

At the conclusion of this module, you should be able to:

1. Define the Bill of Rights and explain why the Founding generation added it to the Constitution.
2. Identify the factors influencing the Founding generation’s move to add a bill of rights to the new Constitution.
3. Describe the rights enshrined in the Bill of Rights.
4. Describe the role that the battle over ratification (and the views of the Anti-Federalists) played in creating a bill of rights.
5. Describe how the 14th Amendment and later Supreme Court decisions transformed the Bill of Rights through the process of incorporation.

5.1 Activity: Dissenters at the Constitutional Convention

Purpose

Despite Benjamin Franklin’s closing speech calling for all delegates to unite in signing the new Constitution, the dissenters refused to sign it on September 17, 1787—the final day of the Constitutional Convention. They worried that the delegates had created a new national government with too much power. As part of this decision, they criticized the delegates for leaving out a bill of rights. This act of dissent was central to the later framing and ratification of the Bill of Rights. Think back to our earlier discussions about the Constitutional Convention in

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light of these objections. Do you think that you would have joined George Mason, Elbridge Gerry, and Edmund Randolph in dissenting?

Process

Think about the significance of the U.S. Constitution. Share the first idea or part of the Constitution that comes to mind.

Then, look at the [Visual Info Brief: Three Delegates](#) image of three delegates to the Constitutional Convention taken at the National Constitution Center's Signers' Hall Exhibit.



Answer the following questions and be prepared to engage in a classroom discussion:

1. How would you describe the delegates' postures and stances?
2. What do you think their body language indicates about what they're thinking and feeling?
3. Why do you think they may feel this way at the end of the Constitutional Convention?
4. These are statues of George Mason, Elbridge Gerry, and Edmund Randolph. Today, we refer to them as the "dissenters." What does dissent mean to you?

Activity 5.1 Notes & Teachers Comments

Launch

Share the [Visual Info Brief: Three Delegates](#) image of three delegates to the Constitutional Convention taken at the National Constitution Center's Signers' Hall Exhibit.

Record student thoughts about the Constitution on the board. After a few minutes, recognize how many ideas, concepts, or rights are found in the Bill of Rights.

Ask students if they recognize these delegates (George Mason, Elbridge Gerry, and Edmund Randolph). If not, review delegate information in the [Info Brief: Meet the Dissenters](#) document. Share with the class and emphasize that these delegates are known as the "dissenters." Give

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some information about who they were, what states they represented, and their views of the Constitution.

Activity Synthesis

Quickly show the students the listing of rights in the Bill of Rights (short form ideas listing). Ask the students the following questions:

- Do you agree or disagree with the dissenters' critique of the Constitution—that it should have included a bill of rights?
- Why do you think that the delegates left a bill of rights out of the Constitution?
- Following [Primary Source: Dissenters at the Constitutional Convention](#) at the Convention, would you have joined the dissenters? Would you have refused to sign the Constitution? Why, or why not?

Activity Extension (Optional)

Have students choose one of the dissenters and learn more about him. Ask students to reflect on another moment when dissent has played an important role in American history, or in their own life.

5.2 Video Activity: The Bill of Rights

Purpose

The First Congress formally approved the Bill of Rights on September 25, 1789, and sent it to the states for ratification. On December 15, 1791—so, over two years later—the first 10 amendments to the Constitution were ratified. In this activity, you will learn about the rights guaranteed by the Bill of Rights and the story behind its creation, including the key role played by the dissenters at the Constitutional Convention.

Process

Watch [the video](#) about the Bill of Rights.

Then, complete the [Video Reflection: The Bill of Rights](#) worksheet.

Identify any areas that are unclear to you or where you would like further explanation. Be prepared to discuss your answers in a group and to ask your teacher any remaining questions.

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Activity 5.2 Teachers Notes & Comments

Launch

Give students time to watch the video and answer the questions.

Activity Synthesis

Have students share their responses in small groups and then discuss as a class.

Activity Extension (Optional)

Now that students have a better understanding of the Bill of Rights, ask the following question:

- What important historical events are needed to better understand the amendments in the Bill of Rights?

5.3 Activity: The Origin of the Bill of Rights

Purpose

Before there was a national bill of rights, some of the states had drafted their own declarations of rights. In this activity, you will examine one of the most influential documents in the Founding era—the Virginia Declaration of Rights. Through studying the core rights enshrined in this historic document, you will highlight the similarities and differences between the Virginia Declaration of Rights and the Bill of Rights.

Process

Read the following documents:

- [Info Brief: Key Anti-Federalists](#)
- [Primary Source and Activity Guide: Virginia Declaration of Rights and the Bill of Rights](#)

Identify similarities and differences between the content of the documents.

Record the progression of ideas in the [Primary Source and Activity Guide: Virginia Declaration of Rights and the Bill of Rights](#) worksheet.

Activity 5.3 Notes & Teachers Comments

Launch

The goal is for the students to examine the Virginia Declaration of Rights and the core rights it protected and how these ideas manifested in the Bill of Rights. Ask students what is similar about the Virginia Declaration of Rights and the Bill of Rights and what is different between the two documents. Students can match up the text in the Virginia Declaration of Rights with the Bill of Rights and build a flash card view (physically or digitally) of the Bill of Rights. One side is

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labeled “How it started” (Virginia Declaration of Rights) and the other side is “How it’s going” (Bill of Rights).

The Primary Source and [Primary Source and Activity Guide: Virginia Declaration of Rights and the Bill of Rights](#) worksheet will allow students to move sections of the Virginia Declaration of Rights to align with the Bill of Rights. Students can also find key sources from the [Writing Rights interactive](#) to add to the document.

Activity Synthesis

As a summary activity, play a game with students by reading a section of the Virginia Declaration of Rights out loud. Then have students buzz in to see who is first to answer the correct amendment connection in the Bill of Rights.

Activity Extension (Optional)

Now that students have a better understanding of the origins of the Bill of Rights, encourage them to explore the [Writing Rights interactive](#) to examine other sources influencing the framing of the Bill of Rights. Ask them to choose another state’s bill of rights and use the Writing Rights interactive to analyze its connection to the Bill of Rights in the U.S. Constitution.

5.4 Activity: Madison’s Reluctance to Add a Bill of Rights

Purpose

This activity aims to help students understand a surprising fact: The framers did not include a bill of rights in the original Constitution. Furthermore, some key founders even argued that a bill of rights was unnecessary and, possibly, dangerous. This activity will re-introduce students to two key founders, James Madison and James Wilson, and explore their critique of a federal bill of rights.

Process

In your group, brainstorm reasons why the delegates to the Constitutional Convention might have left out a bill of rights.

Then, brainstorm reasons why members of the Founding generation may have believed that it was not necessary to include the Bill of Rights in the Constitution. Why could it have been dangerous?

Read the three documents below and list key arguments for and against adding a bill of rights. Date each argument to show the transition from opposition to support.

1. [Primary Source: State House Yard Speech by Wilson](#)
2. [Primary Source: Thomas Jefferson and James Madison, Correspondence on a Bill of Rights \(1787–89\)](#)

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3. [Primary Source: James Madison's Speech in Support of Amendments \(1789\)](#) (where he introduces his draft of the Bill of Rights to the House of Representatives)

Activity 5.4 Notes & Teachers Comments

Launch

Review the delegates who were at the Constitutional Convention, especially James Madison and James Wilson. Assign students to groups to complete the activity.

Activity Synthesis

Ask the following questions and follow up as necessary on students' findings:

1. What were James Wilson's key arguments against a bill of rights?
2. Why was Madison reluctant to include a bill of rights at the outset?
3. What were Jefferson's responses to Madison's arguments? What counter arguments might he have found persuasive?
4. What arguments did Madison give to Congress for eventually adopting a bill of rights?

Activity Extension (Optional)

Encourage students to reference their ratification timeline from Module 4 and look for any turning point connections.

Inform students that following the pivotal Massachusetts ratification convention, many leading Federalists compromised with their opponents and agreed to add new amendments to the Constitution once it was ratified. This cleared the way for the Bill of Rights. Madison was influenced by his friend, Thomas Jefferson, who was serving America in Paris and who strongly supported a bill of rights.

5.5 Activity: Big Ideas of the Bill of Rights

Purpose

In this activity, you will explore the big ideas for each of the 10 amendments in the Bill of Rights.

Process

Read the text of your assigned amendment and complete the task in the [Activity Guide: Big Ideas of the Bill of Rights](#) document.

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Activity 5.5 Notes & Teachers Comments

Launch

Assign each student/group one of the first 10 amendments to the Constitution.

Students are encouraged to research information on the National Constitution Center website—especially the [Constitution Common Interpretation essay](#) on their assigned amendment.

Activity Synthesis

Have students/groups share their big ideas and visual representation with the class. This may be shared digitally or image collages may be added around the room for a gallery or story walk.

Activity Extension (Optional)

Now that students have a better understanding of one of the amendments in the Bill of Rights, ask them to read about the Matters of Debate essays for that amendment on [The Constitution](#) webpage.

5.6 Summary Activity: Incorporation

Purpose

As ratified, the Bill of Rights only applied to abuses by the national government—not the states. However, following the ratification of the 14th Amendment and later decisions by the Supreme Court, the Bill of Rights became a charter of national freedom—applying key Bill of Rights protections (like free speech and religious liberty) to abuses by all levels of government: national, state, and local. This process is known as incorporation. Today, virtually all of the key protections enshrined in the Bill of Rights apply with equal vigor against all levels of government.

In this activity, you will explore the relationship between the Bill of Rights and the 14th Amendment and study the process of incorporation.

Process

Read and interpret the language from [Section 1 of the 14th Amendment](#) then review the [Info Brief: Incorporation](#).

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.”

Then, read and take notes on the following essays:

- [Activity Guide: Incorporation Essay by Akhil Amar and Note Catcher](#)

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- [Activity Guide: Privileges or Immunities Clause Essay by Akhil Amar and John C. Harrison and Note Catcher](#)
- [Activity Guide: Due Process Clause Essay by Nathan S. Chapman and Kenji Yoshino and Note Catcher](#)

After you have finished reading these essays, identify the relationship between the Bill of Rights and the 14th Amendment. Describe how the 14th Amendment transformed the Bill of Rights.

Record your answers and be prepared to engage in classroom discussion.

Activity 5.6 Notes & Teachers Comments

Launch

Ask the class to list the most important Supreme Court cases of the last century. Take the list and circle each one that is a 14th Amendment case.

If students are having trouble naming cases, read from the Supreme Court case list and see if they recognize any names.

- [Reynolds v. United States \(1879\)](#)
- [Schenck v. United States \(1919\)](#)
- [Gitlow v. New York \(1925\)](#)
- [Olmstead v. United States \(1928\)](#)
- [West Virginia Board of Education v. Barnette \(1943\)](#)
- [McDonald v. City of Chicago \(2010\)](#)
- [Cantwell v. Connecticut \(1940\)](#)
- [DeJonge v. Oregon \(1937\)](#)
- [Mapp v. Ohio \(1961\)](#)
- [Gideon v. Wainwright \(1963\)](#)
- [Miranda v. Arizona \(1966\)](#)
- [Katz v. United States \(1967\)](#)
- [Terry v. Ohio \(1968\)](#)
- [Brandenburg v. Ohio \(1969\)](#)
- [New York Times Co. v. United States \(The Pentagon Papers Case\)](#)
- [Wisconsin v. Yoder \(1972\)](#)
- [Texas v. Johnson \(1989\)](#)
- [Carpenter v. United States \(2018\)](#)
- [Timbs v. Indiana \(2019\)](#)
- [Ramos v. Louisiana \(2020\)](#)

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Activity Synthesis

Choose 2–3 cases to review as a group and ask if these cases involve the 14th Amendment or are solely about the Bill of Rights. Are these cases about the national government infringing on people’s fundamental rights found in the Bill of Rights, or are they cases where the states are infringing on people’s rights?

5.7 Test Your Knowledge

Purpose

Congratulations for completing the activities in this module! Now it’s time to apply what you have learned about the basic ideas and concepts covered.

Process

Complete the questions in the following quiz to test your knowledge.

- [Test Your Knowledge: The Bill of Rights](#)



Elbridge Gerry

Edmund Randolph

George Mason

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MEET THE DISSENTERS

ELBRIDGE GERRY (1744–1814) **MASSACHUSETTS**

Small, thin, with a hawklike nose and a squint in his eye, this Marblehead native was the third of twelve children of a wealthy merchant-shipper. When Gerry graduated from Harvard College, he joined his father and his brothers in the family export business. Despite a slight stutter, Gerry entered politics in 1772 and, as a protégé of Samuel Adams, became an outspoken advocate of independence. In 1776, Gerry became a member of the Continental Congress, where he focused his attention on military and financial matters. His steady call for better pay and equipment for the Continental troops earned him the name “Soldiers’ Friend.” Although he sat in the Confederation Congress from 1783 to 1785, Gerry found himself less suited to governing than to agitating for revolution. Dour, suspicious, and aggressive, Gerry made many enemies during his political career, but even his foes conceded that he was politically shrewd and clever. At the Constitutional Convention, Gerry managed to antagonize almost everyone with his unpredictable stances on key issues. Although he began the Convention as an advocate of a strong central government, he ultimately refused to sign the Constitution that it produced and worked against ratification in his home state. In 1789, however, he declared himself a supporter of the new government and was elected to the first Congress. Here he became a strong advocate of Federalist policies. By 1789, Gerry had shifted political loyalties once again. After several failures to win the governorship of his home state, Gerry at last took that office in 1810. When the Democratic-Republicans attempted to hold on to political power in Massachusetts by redistricting measures, Gerry’s Federalist opponents coined the phrase “gerrymandering” to describe this political ploy. Nearly seventy years old, Gerry nevertheless agreed to serve as James Madison’s vice president in 1813, the last political office of his long and stormy career.

GEORGE MASON (1725–1792) **VIRGINIA**

Perhaps the most effective opponent of Madison and the Federalists, Mason was raised by his uncle, John Mercer, following his father’s death when Mason was a young boy. Mercer boasted one of the largest private libraries in the colonies, and Mason read widely in these fifteen hundred volumes. As the owner of Gunston Hall, one of Virginia’s largest plantations, Mason was a wealthy and socially influential man. He became involved in western land speculation, buying an interest in the Ohio Company, and wrote a stinging defense of colonial entitlement to the Ohio Valley region when the Crown revoked the company’s rights. Mason served as a justice of the peace before taking a seat in 1759 in the House of Burgesses. He took up his pen

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5.1 Info Brief

once again to defend the colonial position on the Stamp Act, and by 1774, he had emerged as a leader of the patriot movement in Virginia. Mason drafted the Virginia Declaration of Rights in 1776. By the early 1780s, Mason had grown disillusioned with public life and retired to Gunston Hall. He agreed to attend the Mount Vernon conference in 1785 but did not go to Annapolis despite his appointment as a delegate to that convention. Mason played a leading role at the Constitutional Convention, speaking frequently and exerting considerable influence over the deliberations. He became increasingly critical of the direction the Convention was moving, however, and in the end, Mason refused to sign the Constitution. Among his primary objections was the absence of a bill of rights. Mason actively campaigned against ratification in Virginia, causing a breach in his friendships with both Washington and Madison.

EDMUND RANDOLPH (1753–1813) **VIRGINIA**

Born into a prosperous planter family, Randolph received his education at the College of William and Mary and then went on to study law with his father. When the Revolution began, Randolph's father chose to remain loyal to the Crown; the younger Randolph supported independence. He served as one of General Washington's aides-de-camp during the war. At twenty-three, Randolph was the youngest member of the state convention that adopted Virginia's first constitution in 1776. Soon afterward he became mayor of Williamsburg and then the state's attorney general. He entered national politics with his election to the Continental Congress in 1779. In 1786, Randolph became governor of Virginia. It was Randolph who presented the Virginia Plan to the Constitutional Convention, but as the weeks went by, his support for a strong central government diminished. He reluctantly declared his unwillingness to sign the Constitution at the Convention, but when the ratification battle began in Virginia, Randolph once again returned to the Federalist camp. He served as President Washington's first attorney general, and when Jefferson resigned from his cabinet post as secretary of state in 1794, Randolph stepped into that position. He attempted to remain neutral in the growing political division between Jefferson and Hamilton, and perhaps because of the strain this caused, he decided to retire from public life in 1795. He returned to the practice of law and devoted his free time to writing a history of Virginia.

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5.1 Primary Source

DISSENTERS AT THE CONSTITUTIONAL CONVENTION

Benjamin Franklin, *Closing Speech at the Constitutional Convention (1787)*.

View the document on the National Constitution Center's website [here](#).

The Constitutional Convention ended on September 17, 1787. As the Convention was reaching its close, Benjamin Franklin rose with a speech in his hand. Franklin was the oldest Convention delegate and one of America's most beloved leaders. Franklin handed his speech to his friend and fellow Pennsylvania delegate, James Wilson, who read it aloud to the Convention. Franklin himself admitted that the new Constitution was not perfect, but he asked his colleagues to approach the document with humility. Franklin praised the work of his fellow delegates and urged them to sign the new Constitution—asking anyone “who may still have Objections” to “on this Occasion doubt a little of his own Infallibility.” Later that day, 39 delegates signed the new Constitution. But even following Franklin's powerful speech, George Mason, Elbridge Gerry, and Edmund Randolph refused. Together, these three dissenters were concerned that their fellow delegates had refused to write a Bill of Rights into the new Constitution and had crafted a powerful national government that was destined to seize political power, swallow up the states, and abuse the rights of the American people. The Convention's closing days were a sneak peek of the looming battle over the ratification of the Constitution.

Excerpt:

I confess that I do not entirely approve of this Constitution at present, but Sir, I am not sure I shall never approve it: For having lived long, I have experienced many Instances of being oblig'd, by better Information or fuller Consideration, to change Opinions even on important Subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow the more apt I am to doubt my own Judgment and to pay more Respect to the Judgment of others. Most Men indeed as well as most Sects in Religion, think themselves in Possession of all Truth, and that wherever others differ from them it is so far Error. [Sir Richard] Steele, a Protestant, in a Dedication tells the Pope, that the only Difference between our two Churches in their Opinions of the Certainty of their Doctrine, is, the Romish Church is infallible, and the Church of England is never in the Wrong. But tho' many private Persons think almost as highly of their own Infallibility, as that of their Sect, few express it so naturally as a certain French lady, who in a little Dispute with her Sister, said, I don't know how it happens, Sister, but I meet with no body but myself that's always in the right.

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5.1 Primary Source

In these Sentiments, Sir, I agree to this Constitution, with all its Faults, if they are such: because I think a General Government necessary for us, and there is no Form of Government but what may be a Blessing to the People if well administred; and I believe farther that this is likely to be well administred for a Course of Years, and can only end in Despotism as other Forms have done before it, when the People shall become so corrupted as to need Despotic Government, being incapable of any other. I doubt too whether any other Convention we can obtain, may be able to make a better Constitution: For when you assemble a Number of Men to have the Advantage of their joint Wisdom, you inevitably assemble with those Men all their Prejudices, their Passions, their Errors of Opinion, their local Interests, and their selfish Views. From such an Assembly can a perfect Production be expected? It therefore astonishes me, Sir, to find this System approaching so near to Perfection as it does; and I think it will astonish our Enemies, who are waiting with Confidence to hear that our Councils are confounded, like those of the Builders of Babel, and that our States are on the Point of Separation, only to meet hereafter for the Purpose of cutting one another's Throats. Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure that it is not the best. The Opinions I have had of its Errors, I sacrifice to the Public Good. I have never whisper'd a Syllable of them abroad. Within these Walls they were born, & here they shall die. If every one of us in returning to our Constituents were to report the Objections he has had to it, and endeavour to gain Partizans in support of them, we might prevent its being generally received, and thereby lose all the salutary Effects & great Advantages resulting naturally in our favour among foreign Nations, as well as among ourselves, from our real or apparent Unanimity. Much of the Strength and Efficiency of any Government, in procuring & securing Happiness to the People depends on Opinion, on the general Opinion of the Goodness of that Government as well as of the Wisdom & Integrity of its Governors. I hope therefore that for our own Sakes, as a Part of the People, and for the Sake of our Posterity, we shall act heartily & unanimously in recommending this Constitution, wherever our Influence may extend, and turn our future Thoughts and Endeavours to the Means of having it well administred.

On the whole, Sir, I cannot help expressing a Wish, that every Member of the Convention, who may still have Objections to it, would with me on this Occasion doubt a little of his own Infallibility, and to make manifest our Unanimity, put his Name to this Instrument.

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5.2 Video Reflection

THE BILL OF RIGHTS

The First Congress formally approved the Bill of Rights on September 25, 1789, and sent it to the states for ratification. On December 15, 1791—so, over two years later—the first 10 amendments to the Constitution were ratified. In this activity, you will learn about the rights guaranteed by the Bill of Rights and the story behind its creation, including the key role played by the Dissenters at the Constitutional Convention.

After you watch [the video](#), answer the following questions.

Why did the delegates to the Constitutional Convention leave out a bill of rights?

Who was the primary author of the Bill of Rights?

What sources influenced him when he wrote his first draft of the Bill of Rights?

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5.2 Video Reflection

What were the arguments in favor of adding the Bill of Rights? (Mason)

What were the arguments against the Bill of Rights? (Madison)

KEY ANTI-FEDERALISTS

Who were the Anti-Federalists?

The Anti-Federalists opposed the new Constitution.

The Anti-Federalist camp included a group of founding-era heavyweights, including:

- Virginia's George Mason, Patrick Henry, and Richard Henry Lee
- Massachusetts's Samuel Adams, Elbridge Gerry, and Mercy Otis Warren
- New York's powerful Governor George Clinton

What about the rank-and-file Anti-Federalists? Generally speaking, Anti-Federalists were more likely to be small farmers than lawyers or merchants.

In addition, Anti-Federalist support was stronger:

- Out West rather than in the East
- In rural areas rather than in the cities
- In large states rather than in small states

While many Americans know about the *Federalist Papers*, the Anti-Federalists included their own set of powerful authors—every bit as politically potent and theoretically sophisticated as their Federalist opponents. For instance, there's "Brutus"—usually thought to be leading New York Anti-Federalists (and one-time Constitutional Convention delegate) Robert Yates—and his influential set of essays. In addition, Massachusetts poet, historian, and patriot Mercy Otis Warren penned her own widely read *Observations on the New Constitution*, using the pen name "A Columbian Patriot." Finally, other key Anti-Federalist writers included Federal Farmer (likely New York's Melancton Smith or Virginia's Richard Henry Lee) and Centinel (Pennsylvania's Samuel Bryan).

What were some of the Anti-Federalists' main reasons for opposing the new Constitution?

In many ways, the ratification battle was a debate over political power—and where to place it. In other words, it was a battle over federalism—the question of how much power to give to the national government and how much power to keep with the states.

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5.3 Info Brief

While the Federalists argued for a stronger national government, the Anti-Federalists defended a vision of America rooted in powerful states.

The Anti-Federalists feared that the new Constitution gave the national government too much power. And that this new government—led by a new group of distant, out-of-touch political elites—would:

- Seize all political power
- Swallow up the states—the governments that were closest to the people themselves
- Abuse the rights of the American people

For the Anti-Federalists, this was the road to tyranny.

Remember, Americans at the founding rarely traveled outside of their own towns. For them, the nation's capital—though located in New York, Philadelphia, and (eventually) Washington, D.C.—might as well have been in London. So, the Anti-Federalists weren't interested in replacing a powerful, out-of-touch, distant government in Great Britain with a new one in some distant American city. Better to keep most political power at the state and local level—where it had always been in America—and limit the powers of the national government.

In the end, the Anti-Federalists faced an uphill fight during the battle over ratification. Americans had largely concluded that the Articles of Confederation had serious problems. Even many key Anti-Federalists agreed with that.

Furthermore, to win political battles, it often takes a plan to beat a plan. The Federalists had a plan—the new Constitution. The Anti-Federalists didn't.

As a result, it was easy for the Federalists to frame the ratification fight as a battle between a new Constitution and the deeply flawed Articles of Confederation.

Even so, the Anti-Federalists almost won.

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5.3 Primary Source and Activity Guide

VIRGINIA DECLARATION OF RIGHTS AND THE BILL OF RIGHTS

Before there was a national bill of rights, some of the states had drafted their own declarations of rights. In this activity, you will examine one of the most influential documents in the Founding era— the Virginia Declaration of Rights. Through studying the core rights enshrined in this historic document, you will highlight the similarities and differences between the Virginia Declaration of Rights and the Bill of Rights.

Identify similarities and differences between the content of the Virginia Declaration of Rights and the Bill of Rights.

<i>Example:</i> SIMILARITIES	
How It Started The Virginia Declaration of Rights	How It's Going The Bill of Rights
Section 8. That in all capital or criminal prosecutions a man has a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty;	Sixth Amendment In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

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5.3 Primary Source and Activity Guide

SIMILARITIES	
How It Started The Virginia Declaration of Rights	How It's Going The Bill of Rights

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5.3 Primary Source and Activity Guide

DIFFERENCES	
How It Started The Virginia Declaration of Rights	How It's Going The Bill of Rights

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Module 5: The Bill of Rights

5.3 Primary Source and Activity Guide

PRIMARY SOURCES

The Virginia Declaration of Rights (1776)

View the document on the National Constitution Center's website [here](#).

During the American Revolution, the Continental Congress called on the states to write new constitutions. Many of these state constitutions included their own Declarations of rights. The most influential of these charters of freedom was the Virginia Declaration of Rights—authored primarily by George Mason. Adopted by the Virginia House of Delegates in June 1776, the Virginia Declaration of Rights was part of the 1776 Virginia Constitution. Later, Thomas Jefferson drew inspiration from the Virginia Declaration's vision of natural rights when drafting the Declaration of Independence. State constitution writers borrowed language from the Virginia Declaration when framing their own state constitutions. And a little over a decade later, James Madison kept the Virginia Declaration by his side when crafting the Bill of Rights for the U.S. Constitution.

Excerpt:

(1) That all men are by nature equally free and independent, and 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, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

(2) That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

(3) That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration; and that, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal. . . .

(5) That the legislative and executive powers of the state should be separate and distinct from the judicative; and, that the members of the two first may be restrained from oppression by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

(6) That elections of members to serve as representatives of the people, in assembly ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assembled for the public good.

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(7) That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights and ought not to be exercised.

(8) That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land or the judgment of his peers.

(9) That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

(10) That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted. . . .

(12) That the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments.

(13) That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and be governed by, the civil power. . . .

(15) That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles.

(16) That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

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The Bill of Rights (1791)

View the document on the National Constitution Center's website [here](#).

First Amendment Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Second Amendment A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Third Amendment No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Fourth Amendment The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Seventh Amendment In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Eighth Amendment Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Ninth Amendment The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

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STATE HOUSE YARD SPEECH BY WILSON

James Wilson, “Speech at a Public Meeting in Philadelphia” (October 6, 1787)

View the document on the National Constitution Center’s Website [here](#).

Summary Language: As soon as the Constitution was presented to the public, it was met with an onslaught of criticism that its defenders would need to counter. It initially fell to the Constitution’s champions based in Pennsylvania, site of the Constitutional Convention, to devise a response, and no response proved more influential than the one issued by James Wilson in a public speech delivered in the Pennsylvania State House Yard. The first public defense of the Constitution, Wilson’s speech would be reprinted in over 30 newspapers across every state in the next two months alone. The speech became best known for Wilson’s justification for why the Constitution lacked a bill of rights. Wilson asserted that in constituting a federal government, any powers not positively delegated were reserved by the people, hence, a bill of rights was unnecessary—and worse, dangerous—for anything omitted from an enumeration of rights could be treated as undeserving of protection.

Excerpt:

I represented Pennsylvania as a convention delegate, and many have asked me to outline the principles enshrined in the new Constitution; I will do so, especially since critics are already attacking it. Mr. Chairman and Fellow Citizens, Having received the honor of an appointment to represent you in the late convention, it is perhaps, my duty to comply with the request of many gentlemen whose characters and judgments I sincerely respect, and who have urged, that this would be a proper occasion to lay before you any information which will serve to explain and elucidate the principles and arrangements of the constitution, that has been submitted to the consideration of the United States. I confess that I am unprepared for so extensive and so important a disquisition; but the insidious attempts which are clandestinely and industriously made to pervert and destroy the new plan, induce me the more readily to engage in its defence; and the impressions of four months constant attention to the subject, have not been so easily effaced as to leave me without an answer to the objections which have been raised.

The Constitution creates a new national government of limited powers; this is different from the state governments, which have broad powers. It will be proper however, before I enter into the refutation of the charges that are alledged, 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

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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 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.

This is a key reason why a bill of rights is not necessary; the Constitution itself already limits the powers of the national government; and the national government has no power to violate key liberties like the freedom of the press. 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 foederal 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 controul can proceed from the foederal government to shackle or destroy that sacred palladium of national freedom?...it would have been merely nugatory to have introduced a formal declaration upon the subject—nay, that very declaration might have been construed to imply that some degree of power was given, since we undertook to define its extent.

...

It shouldn't surprise us that some criticize the new Constitution; many of these critics value their own private self-interest over the common good; the new Constitution disrupts the status quo, and some powerful people will lose power under it. After all, my fellow citizens, it is neither extraordinary or unexpected, that the constitution offered to your consideration, should meet with opposition. It is the nature of man to pursue his own interest, in preference to the public good; and I do not mean to make any personal reflection, when I add, that it is the interest of a very numerous, powerful, and respectable body to counteract and destroy the excellent work produced by the late convention. All the offices of government, and all the appointments for the administration of justice and the collection of the public revenue, which are transferred from the individual to the aggregate sovereignty of the states, will necessarily turn the stream of influence and emolument into a new channel. Every person therefore, who either enjoys, or expects to enjoy, a place of profit under the present establishment, will object to the proposed innovation; not, in truth, because it is injurious to the liberties of his country, but because it affects his schemes of wealth and consequence.

There are certainly flaws in the new Constitution; but it is an amazing achievement, and we probably can't do any better; plus, even if we ratify it, we can continue to improve it through the amendment process. I will confess indeed, that I am not a blind admirer of this

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plan of government, and that there are some parts of it, which if my wish had prevailed, would certainly have been altered. But, when I reflect how widely men differ in their opinions, and that every man (and the observation applies likewise to every state) has an equal pretension to assert his own, I am satisfied that any thing nearer to perfection could not have been accomplished. If there are errors, it should be remembered, that the seeds of reformation are sown in the work itself, and 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.

***Bold sentences give the big idea of the excerpt and are not a part of the primary source.**

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THOMAS JEFFERSON AND JAMES MADISON, CORRESPONDENCE ON A BILL OF RIGHTS (1787-89)

View the document on the National Constitution Center's Website [here](#).

Within the First Congress, James Madison emerged as the leader of the effort to pass a bill of rights. In many ways, the “Father of the U.S. Constitution” was an unlikely “Father of the Bill of Rights.” Like many leading Federalists, Madison did not believe that the Constitution needed a bill of rights. First, Madison argued that one was unnecessary. In his view, a bill of rights would serve as a mere parchment barrier—providing no real protections for the American people. Madison argued that to limit abuses of power, the key was constitutional structure, *not* a bill of rights: limit the powers of the national government, divide those powers between three branches, and give those branches the power to check one another. Second, Madison argued that a bill of rights might even be dangerous. For Madison, the American people's rights were so numerous that to write them down would be to limit them. In this series of letters, Madison's friend Thomas Jefferson—who was abroad in France—urged Madison to support a bill of rights. Eventually, Madison did just that—leading the push for a bill of rights in the First Congress.

Excerpt:

Thomas Jefferson to James Madison, December 20, 1787:

There are many things that I like about the new Constitution. The season admitting only of operations in the Cabinet, and these being in a great measure secret, I have little to fill a letter. I will therefore make up the deficiency by adding a few words on the Constitution proposed by our Convention. I like much the general idea of framing a government which should go on of itself peaceably, without needing continual recurrence to the state legislatures. I like the organization of the government into Legislative, Judiciary & Executive. I like the power given the Legislature to levy taxes, and for that reason solely approve of the greater house being chosen by the people directly. For tho' I think a house chosen by them will be very illy qualified to legislate for the Union, for foreign nations &c. yet this evil does not weigh against the good of preserving inviolate the fundamental principle that the people are not to be taxed but by representatives chosen immediately by themselves. I am captivated by the compromise of the opposite claims of the great & little states, of the latter to equal, and the former to proportional influence. I am much pleased too with the substitution of the method of voting by persons, instead of that of voting by states: and I like the negative given to the Executive with a third of either house, though I should have liked it better had the Judiciary been associated for that purpose, or invested with a similar and separate power. There are other good things of less moment. I will now add what I do not like.

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But it was a mistake to leave out a bill of rights. First the omission of a bill of rights providing clearly & without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal & unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land & not by the law of Nations. To say, as Mr. Wilson does, that a bill of rights was not necessary because all is reserved in the case of the general government which is not given, while in the particular ones all is given which is not reserved, might do for the Audience to whom it was addressed, but is surely a gratis dictum, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation which had declared that in express terms. . . . Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse or rest on inference. . . .

But you are better informed than me; as you know, I am not a fan of a strong government; plus, I think that Shays' Rebellion is overblown. I have thus told you freely what I like & dislike: merely as a matter of curiosity, for I know your own judgment has been formed on all these points after having heard every thing which could be urged on them. I own I am not a friend to a very energetic government. It is always oppressive. The late rebellion in Massachusetts has given more alarm than I think it should have done. Calculate that one rebellion in 13 states in the course of 11 years, is but one for each state in a century & a half. No country should be so long without one. Nor will any degree of power in the hands of government prevent insurrections. . . .

But I leave the fate of the Constitution in the hands of the people; plus, we can amend the Constitution later to correct for any defects; the American republic will thrive if we commit to agriculture and education. [I]t is my principle that the will of the Majority should always prevail. If they approve the proposed Convention in all it's parts, I shall concur in it cheerfully, in hopes that they will amend it whenever they shall find it work wrong. I think our governments will remain virtuous for many centuries; as long as they are chiefly agricultural; and this will be as long as there shall be vacant lands in any part of America. When they get piled upon one another in large cities, as in Europe, they will become corrupt as in Europe. Above all things I hope the education of the common people will be attended to; convinced that on their good sense we may rely with the most security for the preservation of a due degree of liberty. I have tired you by this time with my disquisitions & will therefore only add assurances of the sincerity of those sentiments of esteem & attachment with which I am Dear Sir your affectionate friend & servant.

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James Madison to Thomas Jefferson, October 17, 1788:

There were many objections to the new Constitution; at this point, we will probably add amendments that protect some rights, but some argue that this move is unnecessary and improper. The little pamphlet herewith inclosed will give you a collective view of the alterations which have been proposed for the new Constitution. Various and numerous as they appear they certainly omit many of the true grounds of opposition. The articles relating to Treaties—to paper money, and to contracts, created more enemies than all the errors in the System positive & negative put together. It is true nevertheless that not a few, particularly in Virginia have contended for the proposed alterations from the most honorable & patriotic motives; and that among the advocates for the Constitution, there are some who wish for further guards to public liberty & individual rights. As far as these may consist of a constitutional declaration of the most essential rights, it is probable they will be added; though there are many who think such addition unnecessary, and not a few who think it misplaced in such a Constitution. There is scarce any point on which the party in opposition is so much divided as to its importance and its propriety.

A bill of rights is fine with me if we craft it wisely; but I don't think that it's a big deal, either way; I'm happy to add one if it will help convince more people to support the new Constitution; overall, it might be of some use, and, if constructed properly, it won't do any great harm. My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by *subsequent* amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and if properly executed could not be of disservice.

But I don't think it's important because we have created a national government of limited powers; I also fear that we won't be able to craft language that captures the full breadth of our rights; plus, history shows that bills of rights aren't very effective when we most need them. I have not viewed it in an important light 1. because I conceive that in a certain degree, though not in the extent argued by Mr. Wilson, the rights in question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of Conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power. . . . 3. because the limited powers of the federal Government and the jealousy of the subordinate Governments, afford a security which has not existed in the case of the State Governments, and exists in no other. 4. because experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. . . .

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Here, the majority rules; a bill of rights can only do so much to stop a powerful majority.

In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents. This is a truth of great importance, but not yet sufficiently attended to: and is probably more strongly impressed on my mind by facts, and reflections suggested by them, than on yours which has contemplated abuses of power issuing from a very different quarter. Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful & interested party than by a powerful and interested prince. The difference, so far as it relates to the superiority of republics over monarchies, lies in the less degree of probability that interest may prompt abuses of power in the former than in the latter; and in the security in the former agst. oppression of more than the smaller part of the society, whereas in the former it may be extended in a manner to the whole.

In many ways, a bill of rights may be better suited to a monarchy than a republic. The difference so far as it relates to the point in question—the efficacy of a bill of rights in controuling abuses of power—lies in this, that in a monarchy the latent force of the nation is superior to that of the sovereign, and a solemn charter of popular rights must have a great effect, as a standard for trying the validity of public acts, and a signal for rousing & uniting the superior force of the community; whereas in a popular Government, the political and physical power may be considered as vested in the same hands, that is in a majority of the people, and consequently the tyrannical will of the sovereign is not [to] be controuled by the dread of an appeal to any other force within the community.

But a bill of rights can serve an important educational function, reminding the people of their most cherished liberties; plus, it can also provide the people with a set of criteria to use when criticizing the government for its abuses. What use then it may be asked can a bill of rights serve in popular Governments? I answer the two following which though less essential than in other Governments, sufficiently recommend the precaution. 1. The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion. 2. Altho' it be generally true as above stated that the danger of oppression lies in the interested majorities of the people rather than in usurped acts of the Government, yet there may be occasions on which the evil may spring from the latter sources; and on such, a bill of rights will be a good ground for an appeal to the sense of the community. Perhaps too there may be a certain degree of danger, that a succession of artful and ambitious rulers, may by gradual & well-timed advances, finally erect an independent Government on the subversion of liberty. Should this danger exist at all, it is prudent to guard agst. it, especially when the precaution can do no injury. At the same time I must own that I see no tendency in our governments to danger on that side.

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Thomas Jefferson to James Madison, March 15, 1789

The judiciary can use a bill of rights to check the government. Your thoughts on the subject of the Declaration of rights in the letter of Oct. 17. I have weighed with great satisfaction. Some of them had not occurred to me before, but were acknowledged just in the moment they were presented to my mind. In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity. . . .

Declarations of Rights don't solve all of our problems, but they do more good than harm. The Declaration of rights is like all other human blessings alloyed with some inconveniences, and not accomplishing fully it's object. But the good in this instance vastly overweighs the evil. I cannot refrain from making short answers to the objections which your letter states to have been raised.

We may have created a limited government, but a bill of rights can give us an extra layer of protection. 1. That the rights in question are reserved by the manner in which the federal powers are granted. Answer. A constitutive act may certainly be so formed as to need no declaration of rights. The act itself has the force of a declaration as far as it goes: and if it goes to all material points nothing more is wanting. . . . But in a constitutive act which leaves some precious articles unnoticed, and raises implications against others, a declaration of rights becomes necessary by way of supplement. This is the case of our new federal constitution. This instrument forms us into one state as to certain objects, and gives us a legislative and executive body for these objects. It should therefore guard us against their abuses of power within the field submitted to them.

We may not perfectly state our rights when we craft our bill of rights, but let's secure whatever rights we can. 2. A positive declaration of some essential rights could not be obtained in the requisite latitude. Answer. Half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can.

The states can rely on a bill of rights to check abuses by the national government. 3. The limited powers of the federal government and jealousy of the subordinate governments afford a security which exists in no other instance. Answer. The first member of this seems resolvable into the 1st. objection before stated. The jealousy of the subordinate governments is a precious reliance. But observe that those governments are only agents. They must have principles furnished them whereon to found their opposition. The declaration of rights will be the text whereby they will try all the acts of the federal government. In this view it is necessary to the federal government also: as by the same text they may try the opposition of the subordinate governments.

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It's true that sometimes our bills of rights fail us, but sometimes they succeed, they rarely do harm, and it's far more dangerous to leave one out than to include one in a framework of government. 4. Experience proves the inefficacy of a bill of rights. True. But tho it is not absolutely efficacious under all circumstances, it is of great potency always, and rarely inefficacious. A brace the more will often keep up the building which would have fallen with that brace the less. There is a remarkable difference between the characters of the Inconveniencies which attend a Declaration of rights, and those which attend the want of it. The inconveniences of the Declaration are that it may cramp government in it's useful exertions. But the evil of this is shortlived, moderate, and reparable. The inconveniencies of the want of a Declaration are permanent, afflicting and irreparable: they are in constant progression from bad to worse. . . .

***Bold sentences give the big idea of the excerpt and are not a part of the primary source.**

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JAMES MADISON'S SPEECH IN SUPPORT OF AMENDMENTS (1789)

View the document on the National Constitution Center's Website [here](#).

The original Constitution did not include a bill of rights. Within the First Congress, James Madison emerged as the leader of the effort to pass one—serving as its primary author and as the driving force pushing for congressional approval. In many ways, the “Father of U.S. Constitution” was an unlikely “Father of the Bill of Rights.” Like many leading Federalists, James Madison did not believe that the Constitution needed one. However, in the face of opposition from key Anti-Federalists like George Mason, supportive letters from Thomas Jefferson, and at the strong urging of his own constituents in Virginia, Madison changed his mind. In this speech before the U.S. House of Representatives, Madison explained his support for a bill of rights. Madison understood the political value of reaching out to the Anti-Federalists from the very beginning of the new government. To that end, he was aware that a bill of rights would give comfort to many Anti-Federalists and help bring them into the fold of the new constitutional system. By securing a bill of rights, Madison hoped that many Anti-Federalists would work to reform the Constitution from within the system rather than oppose the Constitution from outside of it.

Excerpt:

Congress should devote time to proposing constitutional amendments that will address the concerns of the Constitution's critics. I will state my reasons why I think it proper to propose amendments; and state the amendments themselves, so far as I think they ought to be proposed. If I thought I could fulfill the duty which I owe to myself and my constituents, to let the subject pass over in silence, I most certainly should not trespass upon the indulgence of this house. But I cannot do this; and am therefore compelled to beg a patient hearing to what I have to lay before you. And I do most sincerely believe that if congress will devote but one day to this subject, so far as to satisfy the public that we do not disregard their wishes, it will have a salutary influence on the public councils, and prepare the way for a favorable reception of our future measures.

These amendments will show those who oppose the Constitution that we are committed to liberty and republican government, not tyranny and government by a distant elite. It appears to me that this house is bound by every motive of prudence, not to let the first session pass over without proposing to the state legislatures some things to be incorporated into the constitution, as will render it as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them. I wish, among other reasons why something should be done, that those who have been friendly to the adoption of this constitution, may have

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the opportunity of proving to those who were opposed to it, that they were as sincerely devoted to liberty and a republican government, as those who charged them with wishing the adoption of this constitution in order to lay the foundation of an aristocracy or despotism.

We can craft amendments that win over the Constitution’s critics without undermining the new government; and these new amendments will prove to our opponents that we have listened to them and heard their concerns. It will be a desirable thing to extinguish from the bosom of every member of the community any apprehensions, that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled. And if there are amendments desired, of such a nature as will not injure the constitution, and they can be engrafted so as to give satisfaction to the doubting part of our fellow citizens; the friends of the federal government will evince that spirit of deference and concession for which they have hitherto been distinguished.

Even after ratification, the Constitution still has its critics, including many honest, wise, and virtuous people who value liberty; they are misguided, but I respect them; if we can convinced these critics that these amendments secure their liberties, we can win many of them over and convince them to support the new Constitution. It cannot be a secret to the gentlemen in this house, that, notwithstanding the ratification of this system of government by eleven of the thirteen United States, in some cases unanimously, in others by large majorities; yet still there is a great number of our constituents who are dissatisfied with it; among whom are many respectable for their talents, their patriotism, and respectable for the jealousy they have for their liberty, which, though mistaken in its object, is laudable in its motive. There is a great body of the people falling under this description, who as present feel much inclined to join their support to the cause of federalism, if they were satisfied in this one point: We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under this constitution. The acquiescence which our fellow citizens show under the government, calls upon us for a like return of moderation.

These amendments may also convince North Carolina and Rhode Island to ratify the Constitution. But perhaps there is a stronger motive than this for our going into a consideration of the subject; it is to provide those securities for liberty which are required by a part of the community. I allude in a particular manner to those two states who have not thought fit to throw themselves into the bosom of the confederacy: it is a desirable thing, on our part as well as theirs, that a re-union should take place as soon as possible. I have no doubt, if we proceed to take those steps which would be prudent and requisite at this juncture, that in a short time we should see that disposition prevailing in those states that are not come in, that we have seen prevailing [in] those states which are. . . .

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Some critics oppose the Constitution because of structural concerns; but even more critics oppose it because it doesn't protect their most cherished liberties; these amendments secure them. There have been objections of various kinds made against the constitution: Some were levelled against its structure, because the president was without a council; because the senate, which is a legislative body, had judicial powers in trials on impeachments; and because the powers of that body were compounded in other respects, in a manner that did not correspond with a particular theory; because it grants more power than is supposed to be necessary for every good purpose; and controls the ordinary powers of the state governments. I know some respectable characters who opposed this government on these grounds; but I believe that the great mass of the people who opposed it, disliked it because it did not contain effectual provision against encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercised the sovereign power: nor ought we to consider them safe, while a great number of our fellow citizens think these securities necessary.

We can have a Constitution that secures the people's liberties, while still achieving the goals of the Federalists. It has been a fortunate thing that the objection to the government has been made on the ground I stated; because it will be practicable on that ground to obviate the objection, so far as to satisfy the public mind that their liberties will be perpetual, and this without endangering any part of the constitution, which is considered as essential to the existence of the government by those who promoted its adoption.

Here are my proposed amendments. The amendments which have occurred to me, proper to be recommended by congress to the state legislatures are these. [Madison introduces the proposed amendments.] . . .

Some argue that a bill of rights is not necessary. It may be said, because it has been said, that a bill of rights is not necessary, because the establishment of this government has not repealed those declarations of rights which are added to the several state constitutions: that those rights of the people, which had been established by the most solemn act, could not be annihilated by a subsequent act of the people, who meant, and declared at the head of the instrument, that they ordained and established a new system, for the express purpose of securing to themselves and posterity the liberties they had gained by an arduous conflict.

Even though many state constitutions include declarations of rights, there's still value in adding a national Bill of Rights. I admit the force of this observation, but I do not look upon it to be conclusive. In the first place, it is too uncertain ground to leave this provision upon, if a provision is at all necessary to secure rights so important as many of those I have mentioned are conceived to be, by the public in general, as well as those in particular who opposed the adoption of this constitution. Beside some states have no bills of rights, there are others provided with very defective ones, and there are others whose bills of rights are not only

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5.4 Primary Source

defective, but absolutely improper; instead of securing some in the full extent which republican principles would require, they limit them too much to agree with the common ideas of liberty.

***Bold sentences give the big idea of the excerpt and are not a part of the primary source.**

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BIG IDEAS OF THE BILL OF RIGHTS

In this activity, you will explore the big ideas for each of the 10 amendments in the Bill of Rights.

Review the amendments in the Bill of Rights, then circle the amendment you were assigned. Highlight or underline important words in the text. List any words you have questions about, or that seem unclear.

Then, summarize your amendment with a statement of the big ideas and create a collage of images to visually represent the big ideas. Be prepared to share your big idea and visual representation with the class.

The Bill of Rights (1791)	Notes
<p>First Amendment Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.</p> <p>Second Amendment A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.</p> <p>Third Amendment No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.</p>	

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Fourth Amendment The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.[95]

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Seventh Amendment In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Eighth Amendment Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Ninth Amendment The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

INCORPORATION

INCORPORATION

The case-by-case process of applying key Bill of Rights protections against state abuses.

THE HISTORY OF THE BILL OF RIGHTS, THE 14TH AMENDMENT, AND INCORPORATION

For much of American history, the Bill of Rights didn't play the central role that it plays today—both at the Supreme Court and in the American public imagination. When it was added to the Constitution in 1791, its protections applied only to the national government. So, before the 14th Amendment was ratified, the Bill of Rights only protected us against abuses by the *national* government, not by our *state* governments.

That was what Chief Justice John Marshall and his Court said in *Barron v. Baltimore* in 1833.

So, throughout the pre-Civil War period, if a state—like New Jersey—violated free speech rights, a person would have no legal claim under the U.S. Constitution. They may have had one under their *state* constitution, but *not* under the U.S. Constitution. And many Southern states *did* violate core Bill of Rights protections like free speech rights throughout the pre-Civil War period—for instance, by banning abolitionist speech.

However, today, the Bill of Rights represents a charter of national freedom—protecting us from abuses by *both* the national government *and* our state governments. Scholars refer to this as the process of **incorporation**—the case-by-case process of applying key Bill of Rights protections against state abuses.

Who can we thank for this transformation?

Above all, we can thank the Reconstruction Republicans—who rebuilt America after the Civil War—and, most notably, Ohio Representative **John Bingham**. Who is this forgotten American figure, and why should we care about him? Justice Hugo Black later described Bingham as the James Madison of the 14th Amendment. And so he was.

Ratified after the Civil War, the 14th Amendment wrote the Declaration of Independence's promise of freedom and equality into the U.S. Constitution.

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Through the 14th Amendment, Bingham and many of his fellow 14th Amendment drafters sought to protect the American people, in part, from state abuses of key Bill of Rights protections like religious liberty and free speech.

THE 14TH AMENDMENT AND THE PROCESS OF INCORPORATION

Incorporation is one of the most important topics in constitutional law and is a key reason why many scholars refer to the Reconstruction Amendments—including the 14th Amendment—as a key part of our nation’s “second founding.”

How did this process work on the ground?

Interestingly, in early cases like *The Slaughter-House Cases* (1873), the Supreme Court limited the 14th Amendment’s reach—rejecting early efforts to apply the 14th Amendment to abuses of key rights in the states.

These decisions continued to limit the Bill of Rights to abuses by the national government for decades.

THE 20TH CENTURY AND SELECTIVE INCORPORATION

In the 1900s, the Supreme Court began to reinvigorate Bingham’s vision and apply key Bill of Rights protections to the states—a process that lawyers call “selective incorporation.”

During this period, the Court applied key Bill of Rights protections like free speech and religious liberty to the states on a case-by-case basis—one constitutional right at a time.

The incorporation story could be traced to the 1897 case of *Chicago, Burlington, and Quincy Railroad v. City of Chicago*.

But scholars often argue that the Court really began the process in earnest with *Gitlow v. New York* in 1925. There, the Court applied the First Amendment’s protection of the freedom of speech/press against the states.

Although Gitlow lost his case, the Court would build on this doctrinal framework in a series of 14th Amendment rulings that would strike down state laws that restricted speech, press, and assembly rights.

Later, it expanded the list of incorporated rights to include the First Amendment’s Free Exercise Clause (*Cantwell v. Connecticut*, 1940) and Establishment Clause (*Everson v. Board of Education*, 1947).

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Interestingly, in these early years, the Court also held that certain other Bill of Rights protections like the Fifth Amendment's protection against double-jeopardy did *not* fully apply against the states.

But, beginning in the early 1960s, the Court would move to apply most of the remaining provisions of the Bill of Rights against the states, as the Court proceeded clause-by-clause and case-by-case, incorporating those rights in the Bill of Rights that it deemed "fundamental."

And, once a clause was deemed "fundamental," it had to be incorporated fully against the states in every aspect.

During this incorporation revolution in the 1960s, the Warren Court applied the following protections against state abuses:

- The federal exclusionary rule in Fourth Amendment cases (*Mapp v. Ohio*)
- The Sixth Amendment's right to counsel (*Gideon v. Wainwright*)
- The Fifth Amendment's right against self-incrimination (*Malloy v. Hogan* and *Miranda v. Arizona*)

The Sixth Amendment's rights to a jury trial in criminal cases (*Duncan v. Louisiana*)

- The Fifth Amendment's Double Jeopardy Clause (*Benton v. Maryland*)
- The Eighth Amendment's bans on excessive bail and cruel and unusual punishments (*Robinson v. California*)

The Warren Court also strengthened the protections of other rights that had already been incorporated by the Court, including:

- Free speech/press (*New York Times v. Sullivan* and *Brandenburg v. Ohio*)
- The Religion Clauses (*Engel v. Vitale* and *Abington School District v. Schempp*)

By the end of this incorporation revolution, the Court had used the Bill of Rights to strike down *many* state and local practices in a number of different contexts—never before had the Court been so active in protecting freedom. During this period, the Bill of Rights truly became a charter of *national* freedom.

Today, virtually *all* of the Bill of Rights protections apply equally against abuses by state and local government.

And this process remains ongoing through today. In fact, over the last few years, the Court incorporated the Sixth Amendment's right to a unanimous jury verdict in *Ramos v. Louisiana* and

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the Eighth Amendment's protection against excessive fines in *Timbs v. Indiana*. And in 2010, it incorporated the Second Amendment's right to keep and bear arms in *McDonald v. City of Chicago*.

And there are only a few rights that the Supreme Court still hasn't applied to the states—the Third Amendment (quartering of troops), the Fifth Amendment (grand jury right), and the Seventh Amendment (civil jury right).

In the end, the Court continues to use the 14th Amendment's Due Process Clause in these cases. But it's important not to get tripped up by legal jargon and technicalities.

BIG IDEA

Just remember the big idea: Through incorporation, the 14th Amendment applies key Bill of Rights protections (like free speech and religious liberty) to abuses by state governments. With incorporation, the Bill of Rights became a powerful charter of national freedom—applying to abuses by all levels of government: national, state, and local.

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INCORPORATION ESSAY BY AKHIL AMAR

As ratified, the Bill of Rights only applied to abuses by the national government—not the states. However, following the ratification of the 14th Amendment and later decisions by the Supreme Court, the Bill of Rights became a charter of national freedom—applying key Bill of Rights protections (like free speech and religious liberty) to abuses by all levels of government: national, state, and local. This process is known as incorporation. Today, virtually all of the key protections enshrined in the Bill of Rights apply with equal vigor against all levels of government.

In this activity, you will explore the relationship between the Bill of Rights and the 14th Amendment and study the process of incorporation.

Read the following essay and record your notes using the tool below.

- Reading: ["The Privileges or Immunities Clause: America's Lost Clause" by Akhil Reed Amar](#)

Key Terms and Questions: <i>(After you've read the essay, write down key words or terms, and big ideas or questions.)</i>	Notes: <i>(While you read the essay, take notes in an outline format.)</i>
Summary: <i>(After you've read the essay, write a short paragraph summarizing it.)</i>	

DUE PROCESS CLAUSE ESSAY
BY NATHAN S. CHAPMAN AND KENJI YOSHINO

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Read the following essay and record your notes using the tool below.

- Reading: [The Fourteenth Amendment Due Process Clause Common Interpretation by Nathan S. Chapman and Kenji Yoshino](#)

Key Terms and Questions: <i>(After you've read the essay, write down key words or terms, and big ideas or questions.)</i>	Notes: <i>(While you read the essay, take notes in an outline format.)</i>
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PRIVILEGES OR IMMUNITIES CLAUSE BY AKHIL AMAR AND JOHN C. HARRISON

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5.7 Test Your Knowledge

THE BILL OF RIGHTS

Complete the questions in the following quiz to test your knowledge of basic ideas and concepts covered in this module.

1. Despite Benjamin Franklin's closing speech at the Constitutional Convention calling for all delegates to unite in signing the new Constitution, three delegates refused to sign it on September 17, 1787—the final day of the Convention. These three are known today as _____.
 - a. The Dissenters
 - b. The Troublemakers
 - c. The Rebels
 - d. The Loyalists
2. What is the Bill of Rights?
 - a. The first 10 amendments to the Constitution
 - b. A document declaring independence from England
 - c. A list of rights and freedoms
 - d. Both A and C
3. Which Convention delegate and author of the Virginia Declaration of Rights could accurately be described as the true father of the Bill of Rights?
 - a. George Washington
 - b. George Mason
 - c. Thomas Jefferson
 - d. James Madison
4. The language of the Virginia Declaration of Rights can be seen as the inspiration for which founding document?
 - a. The Declaration of Independence
 - b. The Bill of Rights
 - c. Both A and B
 - d. Neither A nor B
5. Which of these is not a freedom found in the First Amendment?
 - a. Freedom of speech
 - b. The right to remain silent
 - c. The right to assemble
 - d. Free exercise of religion

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6. The text of the Fourth Amendment says that the people shall be secure against _____.
 - a. All searches and seizures
 - b. Warrantless searches and seizures
 - c. Unreasonable searches and seizures
 - d. Inconvenient searches and seizures

7. Amendments that deal with fair process, jury rights, and the rights of the accused include all of the following except the _____.
 - a. Third Amendment
 - b. Fifth Amendment
 - c. Seventh Amendment
 - d. Eighth Amendment

8. The Sixth Amendment provides what rights for criminal defendants?
 - a. A speedy trial
 - b. An impartial jury
 - c. The right to counsel
 - d. All of the above

9. The Seventh Amendment protected the right to a trial by jury in civil cases where the amount in question was worth a certain amount of money. What was that amount?
 - a. At least \$20
 - b. At least \$100
 - c. At least \$1,000
 - d. At least 1 million dollars

10. Which amendment responded to Madison's concern that a written bill of rights might undermine other rights retained by the people?
 - a. Third Amendment
 - b. Sixth Amendment
 - c. Seventh Amendment
 - d. Ninth Amendment

11. What year was the Bill of Rights adopted?
 - a. 1776
 - b. 1787
 - c. 1791
 - d. 1800

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5.7 Test Your Knowledge

12. Who played a key role in the creation of the Bill of Rights?
 - a. Anti-Federalists
 - b. Populists
 - c. Democrats
 - d. Republicans

13. Which Pennsylvania founder offered arguments against a bill of rights in his State House Yard Speech?
 - a. Benjamin Franklin
 - b. Robert Morris
 - c. Gouverneur Morris
 - d. James Wilson

14. What was a key argument against having a bill of rights?
 - a. It was unnecessary.
 - b. It could be dangerous.
 - c. The Constitution already protected the rights of the people.
 - d. All of the above

15. James Madison gave a speech in support of adding amendments to the Constitution in 1789. This is particularly significant because Madison _____.
 - a. Had always supported a bill of rights
 - b. Had originally been reluctant to support a bill of rights
 - c. Had joined the dissenters in refusing to sign the Constitution
 - d. Was the oldest and most experienced delegate at the Convention

16. The protections of the Bill of Rights originally applied against abuses by which level of government?
 - a. All levels of government
 - b. Only local government
 - c. Only state government
 - d. Only the federal government

17. Which amendment has “incorporated” the rights in the Bill of Rights against abuses by state governments?
 - a. 12th Amendment
 - b. 14th Amendment
 - c. 19th Amendment
 - d. 27th Amendment

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5.7 Test Your Knowledge

18. Which famous founder, living in France at the time of the Convention, corresponded with James Madison on the subject of including a bill of rights and may have helped convince him of the value of a bill of rights?
- Samuel Adams
 - Patrick Henry
 - John Adams
 - Thomas Jefferson
19. What political term was coined after the political maneuverings of dissenter Elbridge Gerry?
- Gerrymandering
 - Gerrybuster
 - Elbridgement
 - Gerry-packing
20. Which article of the Constitution outlines the process for adding amendments like the Bill of Rights?
- Article I
 - Article II
 - Article III
 - Article V

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5.7 Test Your Knowledge

Answer Key

1. A
2. D
3. B
4. C
5. B
6. C
7. A
8. D
9. A
10. D
11. C
12. A
13. D
14. D
15. B
16. D
17. B
18. D
19. A
20. D