SUFFICIENT BILLS OF RIGHTS

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Accepted wisdom dictates that the Anti-federalists fought *against* the Constitution and helped to secure a marked improvement on the Constitution via the Bill of Rights. Yet this account is incomplete. As early state constitution-writing illustrates culminating in the Massachusetts (1780) and New Hampshire (1784) Constitutions, it became normative to include both a "frame of government," or a structural plan for institutions, *and* a bill of rights in a constitution by the time the federal document was crafted. Proto Anti-federalists in the Constitutional Convention were aware of this trend and framed a movement which instantiated this new version of a constitution.

In this light, the Anti-federalist campaign was a movement in *favor* of the federal Constitution, but a completed one. To them, the US Constitution was not a "constitution" as it came to be known until it contained *both* a frame of government and a bill of rights. The Anti-federalists were thus not detractors and extremists but conformists and enforcers of the new norm, a norm forged and instantiated through state constitution-writing and culminating in the Massachusetts and New Hampshire constitutional texts and processes. This altered and corrected story marks the final shift from a once dominant definition of a common law constitution comprised of several documents that can be gradually changed to the connotation of a unified document wherein the structure of government is defined and rights are protected. This shift in dominant definitions culminating in the ratification of the Bill of Rights in the United States demonstrates a break with the past wherein constitutions and the bills of rights they included became fixed, fundamental texts requiring dualism.

INTRODUCTION

In *Loper Bright Enterprises v. Raimondo*, the Supreme Court justified overturning the decades-old *Chevron* doctrine deferring to administrative agencies in the absence of clear contrary Congressional statements by citing to the *Federalist*.[1] This they did six different times, and Justice Gorsuch twice in his concurrence.[2] This is not atypical. In fact, the United States Supreme Court cites to the *Federalist* two to three times more than any other source from the Founding.[3]

In contrast, the Anti-federalist Papers to which the *Federalist* were responding are almost never cited.[4] This for many reasons: the Anti-federalists lost, and history is written by its victors.[5] More, however, the Anti-federalists committed the cardinal sin of fighting *against* the sacred Constitution. As such, they are the red-headed stepchild of the Founding; the losers, the detractors, the rabble-rousers.

Or so we have always been taught. Yet, in a different light, the Anti-federalists were actually fighting in *favor* of the Constitution. To them, the Constitution could not *be* a constitution if it only addressed the structural provisions of government. For the Constitution to be a complete constitution and *the* Constitution of the new United States, it had to include a declaration of rights. This was the conception of a constitution that emerged in the 1770s and 1780s through state constitution-writing. Though Anti-federalists had beefs with the structure of the Constitution, their main impetus was the Constitution's lack of rights. It is, after all, the lack of a bill of rights that sparked the Anti-federalist movement within the closing days of the Constitutional Convention, when George Mason, Elbridge Gerry, and Edmund Randolph refused the conciliatory quill despite the desperate attempts of Benjamin Franklin to achieve total unanimity with the Philadelphia State House enclave before the Constitution went public.

Over the next two years, the three detractors' hesitation grew into an irresistible campaign which, with a little help from his arch-nemesis Patrick Henry and a failed senatorial bid, won over even the recalcitrant James Madison. In proposing and finally gaining acceptance from his fellow Federalists for the Bill of Rights in Congress, Madison's switch marked the final stage of linguistic drift for the meaning of a constitution not just in the U.S., but the world over.

Before state constitution-drafting, a constitution referred to the political organization of institutions worked out gradually over several documents, in common-law fashion.[6] This was its British meaning.[7] With the advent of state constitution-writing (called "instituting" or "taking up" government[8]), the meaning of a "constitution" shifted, and markedly. Constitutions quickly and exponentially began to mean something much more defined: a written, unitary document.[9] Initially, the fundamental laws that were written fell into two camps. Some merely outlined and delimited institutions of government.[10] Others, beginning with Virginia in June of 1776, self-identified as two parts: there first appeared a declaration of rights, then there was a "Constitution or form of

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[1] 603 U.S.___(2024), slip op.
[2] Id. at 7, 22, 26, 35; (J. Gorsuch, concurring), slip op. at 15, 17.
[3] Pamela Corley, Robert M. Howard, & David C. Nixon, The Supreme Court and Opinion Content: The Use of the Federalist Papers 58 Pol. Res. Quart. 329, 330 (2005) (showing that the Court cited the *Federalist* more than twice as many other founding sources between 1953-1984); Frank Cross, The Failed Promise of Originalism 125 (2011)(showing that the Rehnquist Court cited the *Federalist* nearly three times the number of other founding sources).
[4] Judge Andrew S. Oldham, The Anti-Federalists: The Past as Prologue, 12 New York University Journal of Law & Liberty 454 (2019).
[5] Id.
[6] Cite Becoming Written Constitutionalism.
[7] Id.
[8] Cite MA's petition and May 15 Congressional Declaration.
[9] Becoming Written Constitutionalism.
[10] NH, South Carolina, NJ, Georgia, New York, and 1778 MA draft and 1778 SC Constitution.

government," where "constitution" was referred to in its [verb gerund] sense.[11] Then, after Massachusetts attempted to pass a Constitution without a bill of rights in 1778 and New Hampshire attempted one almost without the same in 1779, the 1780 Massachusetts Constitution penned by John Adams clarified the state of affairs, or the state of a constitution: it self-identified as "A Constitution, or Bill of Rights and Frame of Government."[12] New Hampshire followed suit in its permanent constitution of 1784.[13]

As in many things, here the Massachusetts Constitution was precedential. It set the stage for the argument over what a constitution was in the ratification contests. Ultimately, in 1789 with the passage of the Bill of Rights (noting that it was not ratified until 1791), the definition of a Constitution that included *both* a frame or form of government and a bill of rights became normative and solidified. A constitution could not *be* a constitution otherwise.

The significance of this evidence is multi-faceted. First and foremost is that it helps us to reframe the Anti-federalist movement and perhaps take their writings and efforts more seriously. Secondly, it marks the final shift in the linguistic drift of a constitution to embrace both a frame of government and bill of rights. Finally, as written elsewhere by this author, embracing the Bill of Rights within the ambit of the Constitution should help to elevate the concepts and rights articulated therein to the status of fundamental law such that it had controlling impact on lower law. Though there remains a question here whether the Bill of Rights was conceptualized differently at the Framing than the original structural Articles, this question requires further study beyond the scope of this essay.[14]

This essay will proceed in three parts. In Part One, it will canvas the scant literature regarding the Anti-Federalist Papers and provide the briefest of overviews of the literature on constitutional conceptions. Part Two will provide the historical evidence of bills of rights being incorporated into the concept of a constitution through state constitution-writing beginning in 1776, the Anti-federalist campaign beginning with the three dissenters in Philadelphia and culminating in the passage of the Bill of Rights through Congress in 1789. Part Three will discuss the significance of these findings in helping us to reconceptualize the Anti-federalist movement as one in favor of a completed Constitution, in marking the culminating phase of linguistic drift from the English version of a constitution to American, and in likely elevating the Bill of Rights to the status of fundamental law.

I. BACKGROUND

This section will canvas the treatment of the Anti-federalists and, however, briefly, the conceptualization of the American, or large-C constitution. This part turns first to the Anti-federalists.

A. The "othering" of the Anti-federalists

The Anti-federalists published their polemics in one-off pamphlets and newspapers during the Ratification contest between 1787-1789.[15] Thus, the most copious volumes about the Anti-federalists are simply collections of their writings, often with some editorializing. Though some Anti-federalist

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[11] VA, DE, PA, MD, NC, VT.
[12] Cite.
[13] Cite.
[14] Scant early Bill of Rights cases and infamous apparent abrogations such as the Alien and Sedition Acts may provide evidence that the Bill of Rights was not initially considered legally enforceable. Though I very much hope I am wrong here, this question is raised here to be answered in later scholarship by this author or others.
[15] Cite.

papers were printed beforehand,[16] the most serious focused endeavor to date has been the seven volumes edited by Herbert Storing in the early 1980s, *The Complete Anti-Federalist*.[17] Shortly thereafter, a more condensed version of the Anti-federalist papers appeared in Ralph Ketchum's *The Anti-Federalist and the Constitutional Convention Debates*.[18] As the exhaustive *Documentary History of the Ratification of the Constitution*—edited initially by Merrill Jensen and eventually headed by John Kaminski[19]—approached completion, more selected readings appeared, such as Frohnen's *Selected Writings and Speeches* and Allen and Lloyd's *Essential Antifederalist*.[20] The most recent focused collected, edited by Zuckert and Webb, *The Anti-federalist Writings of the Melancton Smith Circle*, was published in 2009.

Historians have frequently downplayed the relevance of the Anti-federalists, casting them as losers who were "beaten, outgeneraled, and outclassed."[21] The Anti-federalists were cast as backwoods farmers with inferior organization and education.[22] However, even historians writing to vindicate the Anti-federalists have defended them in spite of their "other-ness." In the treatise accompanying his editing of seven-volume series of the Anti-federalist Papers, Herbert Storing indicates that the Anti-federalists should be studied even if they lost because they were in dialogue with the victors, and therefore changed the understanding of the Constitution through the Ratification contest.[23] Saul Cornell is not so dire: he emphasizes that the rotating importance of the Anti-federalists papers refracts the undulating values and political hues of American life.[24] Judge Andrew Oldham praises the Anti-federalists, though losers, as "predictive" Founding oracles through which we can understand their future and our present and as champions of the Bill of Rights.[25] Michael Faber does not count the Bill of Rights as any kind of achievement, it representing "little more than a token effort to quell opposition without yielding any substantive points or changes to the opposition."[26] Faber instead acts as an apologist for Anti-federalist thought which, he contends, imperceptibly permeates American thought.[27] Through all, the arch of historical treatment is consistent: the Anti-federalists were the non-winners, the "others," and championing their cause was therefore heavily self-conscious.

B. Changing Conceptions of the Constitution

This author and Robert Capodilupo have recently canvased the literature regarding changing connotation of "constitution" during the Founding in *Becoming Written Constitutionalism* and thus will refer the reader there and provide only the briefest overview here of the literature on point.[28] There is

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[16] [Paul Leicester Ford, Pamphlets on the Constitution (1888); Paul Leicester Ford, Essays on the Constitutions (1892); The Anti-Federalists: Excerpts from Papers of Leading Opponents of the Federal Constitution (T. Harry Williams, ed., 1940).

[17] I-VII The Complete Anti-Federalist (Herbert J. Storing, ed., 1981); see also The Anti-Federalist: An Abridgment of The Complete Anti-Federalist (Ed. Herbert J. Storing, 1985).

[18] Ralph Ketchum, The Anti-Federalists and the Constitutional Convention Debates (1986)

[19] [1-33] Documentary History of the Ratification of the Constitution (Merrill Jensen & John P. Kaminski, [XXXX-2025]).

[20] The Anti-Federalists: Selected Writings and Speeches (Bruce Frohnen, ed., 2001); The Essential Antifederalist (W.B. Allen & Gordon Lloyd, ed., 2002).

[21] Charles Beard, An Economic Interpretation of the Constitution ___ (1925).

[22] Michael J. Faber, An Anti-Federalist Constitution 5-7 (2019); but see Pauline Maier, Ratification (2010).

[23] Herbert Storing, What the Anti-Federalists were for 7 (1981).

[24] Saul Cornell, The Changing Historical Fortunes of the Anti-Federalists, 84 NW U. L. Rev. 39 (1989-1990).

[25] Judge Andrew S. Oldham, The Anti-Federalists: Past as Prologue, 12 New York University Journal of Law & Liberty 451 (2019).

[26] Faber, supra note __ at 2.

[27] Id.

[28] Becoming Written Constitutionalism.

in academic literature two conceptions of a constitution, one ancient and one originating in the American Founding.[29] The first may be described as a political constitution, and is descriptive of the organization of governmental institutions which evolves incrementally, common-law like, via a series of laws. It is generally the definition used by Aristotle and other ancient writers and that the British still use in describing their Constitution.[30] In modern academic parlance, this definition finds resonance in the "small-c" constitution, or those evolving background principles which have not been elevated to written format.[31] The second definition of a constitution refers to a unitary text which limits governmental institutions and protects individual rights, and first took hold during the Founding.[32] This will be called here the American definition. This definition also tracks the "large-C" constitution of those principles which are elevated to written form.[33]

Though academics agree on the existence of both connotations, there is disagreement on whether and to what extent the British connotation exists in parallel to the new American variant after the Framing. The theoretical thread which holds that the American Constitution retains British common-law qualities found recent expression in Stanford legal historian Jonathan Gienapp's *Against Constitutional Originalism*.[34] *Becoming Written Constitutionalism*, discussed above, directly counters this claim with a corpus linguistics analysis of the use of "constitution" between 1760 and 1799 in the Corpus of Founding Era American English (COFEA) and finds that constitution-writing in the states and on the federal level significantly impacted and caused linguistic drift of the meaning of a "constitution," introducing linguistic ambiguity in 1776 and rapidly rendering the American definition the dominant variant. The constitution drafting which motivated this change elevated principles of the small-c constitution to the large-C constitution and rendered them fundamental law and created constitutional dualism.

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This study is designed to de-"other" the Anti-federalists by demonstrating that they accepted and fought for the newly-evolved American definition of a constitution that included a bills of rights that was produced through , signifying the final shift in linguistic drift between British and American definitions whereby rights along with forms of government became fundamental law.

II. A CAMPAIGN IN FAVOR OF A CONSTITUTION WITH A BILL OF RIGHTS

Anti-federalists fought for the emerging conception of a constitution which included a bill of rights. This conception solidified with final Founding Era constitution-writings in Massachusetts and New Hampshire. This conception was accepted by the three dissenters at the end of the Constitutional Convention and provided the basis for their refusal to sign the Constitution, as it had no Bill of Rights and was therefore not complete. These three then began to organize opposition to the Constitution across the new United States centered around the idea of a constitution being incomplete without a bill of rights. This produced resistance first in Pennsylvania, whose vocal and articulate Minority made the case in a widely-circulated dissental proposing the addition of a bill of rights. Calls for such addition came through thereafter in quick succession and produced recommendatory amendments by

[29] Id. at ___.
[30] Id. at ____; Nicholas Barber.
[31] Becoming Written Constitutionalism; original.
[32] Becoming Written Constitutionalism.
[33] Id.; literature.
[34] Jonathan Gienapp, Against Constitutional Originalism: A Historical Critique (2024).
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majorities and minorities in five more states plus a call for another convention in New York to work out a bill of rights.[35] Finally, Madison, at first adamant that a bill of rights was unnecessary, accepted the definitional shift, convinced Washington of the same, and shepherded a bill of rights through Congress. Though at first Anti-federalists were unimpressed by this "Tub to a Whale," it was enough to produce a completed Constitution and satiate the country and its discontents.

A. State Bills of Rights and Forms of Government

The English Bill of Rights from 1688-1689 was enacted during the Glorious Revolution by Parliament in reaction to deprivations under the brief reign of James II.[36] It formed an essential piece, together with the Magna Charta, of the English common-law constitution.[37] Despite rights thereafter being conceptualized as part of the English Constitution, however, it took a century for the new conceptualization of constitutions to include bills of rights as a matter of course.

The first written state constitutions contained no bills of rights. This included the first state constitution written in New Hampshire in January of 1776.[38] It was a short, 911 word text prescribing a government with no independent executive, no checks and balances, and no identifiable rights.[39] South Carolina's temporary Constitution, passed in March of 1776, was a longer document with more distinct branches and separated powers.[40] However, it, too contained no bill of rights.[41]

The first state to draft a bill of rights was Virginia, which it did on June 29, 1776.[42] It was entitled a "Declaration of Rights" rather than a "bill," [43] which may have impacted its legal enforceability or role as fundamental law, passed as it was by a make shift legislature which had no special power from the people to draft a constitution.[44] It was published together but immediately prior to a "Constitution or Form of Government."[45] Additionally, the drafting committee of the Fifth Virginia Convention was appointed "to prepare a DECLARATION of RIGHTS, and such a plan of government as will be most likely to maintain peace and order in this colony."[46] The are also published as Chapter I (the Declaration of Rights) and Chapter II (The Constitution or Form of Government) in the Convention's Ordinances.[47] Though we today call them together the Virginia Constitution of 1776, it was clear they were considered related but separate documents.

It is clear Virginia did not have time to influence the creation of the New Jersey Constitution, passed three days later on July 2, 1776, which had no bill of rights.[48] However, Virginia's declaration and constitution would have had time to circulate before Delaware passed its "Declaration of Rights

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[35] A Tub to the Whale.
[36] Taking Rights Seriously British Library Syllabus.
[37] Cite?
[38] New Hampshire Constitution (Jan. 5, 1776), available at https://www.consource.org/document/constitution-of-new-hampshire-1776-1-5/ [accessed Feb. 28, 2026].
[39] Id.
[40] South Carolina Constitution (Mar. 26, 1776), available at https://www.consource.org/document/constitution-of-south-carolina-1776-3-26/ [accessed Feb. 28, 2026].
[41] Id.
[42] Virginia Constitution (June 29, 1776), available at https://www.consource.org/document/constitution-of-virginia-1776-6-29/
[43] Id.
[44] Thomas Jefferson, Notes on the State of Virginia (1784). The Virginia Constitution of 1776 was enacted by the Fifth Virginia Convention. Journal of the Fifth Virginia Convention (May-July 1776), X.
[45] Virginia Constitution (June 29, 1776).
[46] Journal of the Fifth Convention (May 15, 1776), in Journal of the Convention 1775-1776, 16 (published 1812).
[47] Id. at 3-4.
[48] New Jersey Constitution (July 2, 1776), available at https://www.consource.org/document/constitution-of-new-jersey-1776-7-2/ [accessed Mar 2, 2026].

and Fundamental Rules" together with a "Constitution, or System of Government" on September 21, 1776.[49] Throughout the Fall of 1776, declarations of rights seemed to be on the rise and preceded the next three Revolutionary forms of government in Pennsylvania,[50] Maryland,[51] and North Carolina.[52] For Pennsylvania, the manuscript is untitled, but a list of grievances appeared before a "A declaration of rights" followed by "A plan or frame of government." Thus here both parts were conceptualized as constituent parts of a completed document.[53] For Maryland, the document identified itself by its constituent parts "A Declaration of Rights, and the Constitution or Form of Government…"[54] Here, at least, the two parts were related but still distinct. In North Carolina, the [convention] followed Virginia's lead in having both a "Declaration of Rights" and "The Constitution, or Form of Government" in succession without any header linking the two.[55]

Yet the trend of linking a declaration of rights to a form of government did not quite seem to have staying power yet, as the constitutions of Georgia[56] and New York[57] in the Winter and Spring of 1777 were not accompanied by declarations. That said, the Vermont Constitution (self-styled the "Constitution of Vermont") drafted in the summer of 1777, mirroring as it did the Pennsylvania Constitution, included a declaration of rights as chapter one and its "Plan or Frame of Government" as chapter two.[58] Here, as with Pennsylvania, the two parts were both prefaced by a list of grievances and were composed and conceptualized as one document.[59] However, unlike Pennsylvania, the document was entitled "The Constitution of Vermont."[60] Thus for this would-be state (Vermont was not join as a state until 1791), a Constitution included both a declaration of rights and a form of government.

Vermont was an early adopter. The next two constitutional drafts—one of which was enacted by a state, one of which failed ratification—did not contain declarations of rights. South Carolina's permanent constitution of 1778, like its temporary expedient, also did not have a bill of rights.[61] The

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[49] Delaware Constitution (Sep. 21, 1776), available at https://www.consource.org/document/constitution-of-delaware-1776-9-21/ [accessed Mar. 2, 2026] (Declaration of Rights viewable in the image rather than the text).

[50] Pennsylvania Constitution (Sep. 28, 1776), available at https://www.consource.org/document/constitution-of-pennsylvania-1776-9-28/ [accessed Mar. 2, 2026].

[51] Maryland Constitution (Nov. 11, 1776), available at https://www.consource.org/document/constitution-of-maryland-1776-11-11/ [accessed Mar. 2, 2026].

[52] North Carolina Constitution (Dec. 18, 1776), available at https://www.consource.org/document/constitution-of-north-carolina-1776-12-18/ [accessed Mar. 2, 2026].

[53] Pennsylvania Constitution (1776).

[54] Maryland Constitution (1776).

[55] North Carolina Constitution (1776).

[56] Georgia Constitution (Feb. 5, 1777), available at https://www.consource.org/document/constitution-of-georgia-1777-2-5/ [accessed Mar. 2, 2026]. Interestingly, Georgia's Constitution did not contain a Bill of Rights till after the Civil War.

[57] New York Constitution (April 20, 1777), available at https://www.consource.org/document/constitution-of-new-york-1777-4-20/ [accessed Mar. 2, 2026].

[58] Vermont Constitution (July 8, 1777) https://www.consource.org/document/constitution-of-vermont-1777-7-8/ [accessed Mar. 2, 2026].

[59] Id.

[60] Id.

[61] South Carolina Constitution (1778), available at https://avalon.law.yale.edu/18th_century/sc02.asp [accessed Feb. 26, 2026]. Incidentally, though South Carolina enacted another Constitution in 1790, cite, it also did not boast a declaration of rights. Like Georgia, South Carolina's Constitution did not embrace a bill of rights until after the Civil War. Cite.

same was true of Massachusetts's draft Constitution of 1778, which styled itself "A Constitution and Form of Government."[62]

Interestingly, the lack of a declaration of rights in the 1778 Massachusetts Draft Constitution seems to be one of the main reasons for its rejection by the towns. Of the 174 town returns, 79%, or 134 towns rejected the draft constitution.[63] Of those 134 towns rejecting the draft, 72, or 54%, rejected it unanimously.[64] Twenty-one towns provided written reasons for their votes, and eight of those 21 listed the lack of a bill rights as one reason they rejected the draft.[65] Here, however, the semantics shift. Most towns did not ask for a "declaration of rights" as in previous constitutions, but a "Bill of Rights"[66] that would "Secure the rights of individuals"[67] in the "fullest and most unequivocall [sic] terms."[68] The one and only return among the eight that discussed a "declaration of rights" was Lexington (where first was hear the shot round the world[69]).[70] This linguistic shift from "declarations" to "bills" seems to indicate a shift from political declarations ala the Declaration of Independence (and the Declaration on the Rights of Man) as political aspirations to something more concrete and actionable. Something more than a "parchment barrier"[71] which could be secured to the individual via legal means. After all, the town of Concord had objected to a legislatively-created constitution, as such would afford no protection to rights, which could be un-made by the legislature under the theory that the power to create was the power to destroy.[72]

Indeed, Massachusetts towns' rejection of the 1778 Draft Constitution seemed to be a turning point in the conceptualization of a constitution to always include a bill or declaration of rights. Thereafter, all Founding Era constitutions save the 1790 South Carolina Constitution[73] contained bills or declarations of rights. Though it only protected a total of five individual rights—life, liberty and

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[62] Massachusetts: Colony to Commonwealth 51-58 (Robert J. Taylor, ed., 1961).

[63] Returns of the Towns on the Constitution of 1778, in The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780, 202-323 (Oscar and Mary Handlin, eds., 1966). Colony to Commonwealth puts the number of returns at 173, Colony to Commonwealth, supra note ___ at 49, but this author checked against the complete record of returns printed in Popular Sources to confirm the number of 174.

[64] Returns of the Towns, supra note ___ at 202-323.

[65] Those towns which listed a lack of a Bill of Rights as a primary reason for rejection include Westminster, Plymouth,, Boston, Lexington, Lenox, Beverly, Boothbay, and Spencer. Id. at 245 (Boothbay), 253 (Lenox), 291 (Plymouth), 295 (Beverly), 302 (Spencer), 309 (Boston), 312 (Westminster), 317 (Lexington).

[66] Return of Lenox (May 20, 1778), id. at 257 ("We furthermore suppose there ought to be a Bill of Rights, annexed to a Constitution and declared part of it."); Return of Plymouth (June 1, 1778), id. at 291 ("a bill, Clearly Ascertaining the rights of the people, as Men, Christians, and Subjects, aught to be have Preceeded the Constitution"); Return of Beverly (June 1, 1778), id. at 295 (calling for a separate convention "for the sole and entire purpose of forming a Bill of Rights and Constitution of Government"); Return of Spencer (June 8, 1778), id. at 302 ("And as there is no provision made in the Articles of this Constitution of the Right of Petitioning the General Court when Agrieved…or Otherwise Set forth in a Bill of Rights"); Return of Boston (June 11, 1778), id. at 309 ("all Forms of Government should be prefaced by a Bill of Rights; in this we find no Mention of any"); Return of Westminster (May 15, 1778), id. at 311 ("it is the opinion of the Committee that no Constitution Whatsoever ought to be Established, till previous theirto the bill of Rights to be Set forth, and the Constitution formed theirfrom: That so the Lowest Capacity may be able to Determine his Natural Rights, and judge of the acquiteableness of the Constitution theirby.").

[67] Return of Boothbay (May 20, 1778), id. at 245; see also Return of Lenox, id. at 253.

[68] Return of Plymouth (June 1, 1778), id. at 291.

[69] Cite.

[70] Return of Lexington, id. at 317 ("That the total Omission of a Declaration of Rights, of this Kind, is no small Objection to the Constitution before Us.").

[71] Cite – federalist papers?

[72] Return of Concord (Oct. 21, 1776), in Popular Sources, supra note ___ at 153 ("a Constitution alterable by the Supreme Legislative is no Security at all to the Subject against any Encroachment of the Governing part on any, or on all of their Rights and privileges").

[73] South Carolina Constitution (1790), available at _____.

property, conscience, and jury trials—the New Hampshire Draft Constitution of 1779's "Declaration of Rights" was a major improvement over the 1776 temporary "Form of Government," which included none.[74] Though town returns are not printed nor tabulated in any comprehensive fashion in primary sources,[75] at least ten towns rejected the draft unanimously,[76] and it is likely that, as in Massachusetts, New Hampshire towns did so at least in part because of the paltry protections of rights. The Massachusetts Constitution of 1780 was proceeded by an extensive "Declaration of Rights" penned by John Adams.[77] In penning rights, Adams' borrowed heavily from the Virginia Constitution,[78] and the New Hampshire drafters borrowed heavily from the Massachusetts Constitution for their "Bill of Rights" in the permanent Constitution of 1784, which this time included a full complement of rights.[79] In following years, Vermont and New York followed suit and made up for their initial rights deficiencies: Vermont's 1786 Constitution seems to borrow heavily from the Massachusetts' Declaration of Rights in their own,[80] and New York passed a statute "An Act concerning the Rights and Citizens of this State" in 1787, the year the federal Constitution was drafted.[81]

B. The Constitutional Convention's Final Dissenters call for a Bill of Rights

Thus states were actively seeking to protect rights and inculcate them as component parts of constitutions on the eve of the Constitutional Convention. There, as the Constitutional Convention closed out their discussion and prepared to sign September of 1787, three refused the quill. Two of this trifecta of delegates refused to sign for want of a Bill of Rights.

All but seven of the Federal Convention's 55 delegates supported the final Constitution.[82] Four of the seven had voted with their feet at various points during the Convention.[83] Of those who stayed till the very end, three refused to sign. These included Virginia Governor Edmund Randolph, who had proposed the Virginia Plan which served as the rough starting point for the Constitution, Virginian planter George Mason, author of the Virginia Constitution and likely drafter of the Virginia Plan,[84]

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[74] A Declaration of Rights, and Plan of Government for the State of New Hampshire, 9 New Hampshire State Papers 837, 838 (publication year)[hereinafter NHSP]; New Hampshire Constitution (1776), supra note ____.

[75] Jere R. Daniell, Experiment in Republicanism: New Hampshire Politics and the American Revolution, 1741-1794, 169n (1970).

[76] Id.; In what became the state capital, Concord, the draft passed by a narrow margin of one. Concord Town Records 176 (1894)("it was put to a vote to see if the Parish would Axcept of the Plan of Government and their appeared twenty six for receiving said plan and twenty five rejecting the same").

[77] Mass. Const. (Oct. 25, 1780), available at https://www.consource.org/document/constitution-of-massachusetts-1780-10-25/ [accessed Mar. 3, 2026]; John Adams to Edmund Jenings (June 7, 1780), in 9 Papers of John Adams 388-89 (year)("I was chosen by my native Town in the Convention 2 or 3 days after my Arrival. I was by the Convention put upon the Committee—by the Committee upon the sub committee—and by the sub Committee appointed to a Sub sub Committee—so that I had the honour to be principal Engineer.").

[78] Cite?

[79] Lorianne Updike Toler, In the Room, supra note ___ at 1474; New Hampshire Constitution (1784), in 9 NHSP 896.

[80] Vermont Constitution (July 4, 1786), available at https://avalon.law.yale.edu/18th_century/vt02.asp [accessed Mar. 3, 2026].

[81] The New York Bill of Rights Statute, L. 1787, Ch. 1 (1787), available at https://history.nycourts.gov/nys-bill-rights-1787/#:~:text=The%20New%20York%20Bill%20of%20Rights%20is,or%20death%20without%20due%20process%20of%20law** [accessed Mar. 3, 2026].

[82] Lorianne Updike Toler, Constitution-writing Rules.

[83] Id. at ___.

[84] Updike Toler, Un-Fathering the Constitution.

and Massachusetts merchant Elbridge Gerry who was one of three delegates to also sign the Declaration of Independence and participate in the First Congress which passed the Bill of Rights.[85]

Of these three, two were clear that their refusal was driven because the Constitution lacked a Bill of Rights. The first sign that trouble brewed for these three was on August 31, 1787.[86] This during the discussion of the calling of state ratifying conventions when George Mason proposed calling a second Convention because "he would rather than chop off his right hand than put it to the Constitution as it now stands."[87] This, as "He wished to see *some points* not yet decided brought to a decision, before being compelled to give a final opinion on this article."[88] These points of disagreement were elucidated on September 12 after a near-final draft was distributed to the delegates on September 10:[89] "He wished the plan had been prefaced with a Bill of Rights, & would second a Motion if made for the purpose."[90]

Elbridge Gerry from Massachusetts took up the challenge. He concurred in the need for a Bill of Rights and so moved.[91] George Mason provided the needed second.[92] The shoemaker-turned-almanac-maker-turned-judge from Connecticut, Roger Sherman,[93] cut off discussion by declaring that "State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient."[94] However, maintained George Mason, the new Constitution would be "paramount to State Bills of Rights," which would mean Congress could abrogate the people's rights unless limited by a federal corrolary.[95] Perhaps failing to understand the impact of the Supremacy Clause or constitutional dualism, the Convention summarily voted down the proposal by a 10-0 vote.[96] Gerry had other objections which he articulated a few days later, on September 15, two days before the Constitution was signed and the Convention adjourned sine die.[97] These he could "get over," "if the rights of the Citizens were not rendered insecure."[98] Including a bill of rights was essential for both Gerry and Mason, one who came from the state who rejected a constitution which also had no bill of rights, and the other from the state which boasted the first bill of rights (and was the author of it). Based on experience, they both understand the assignment: rights protections were essential parts of constitutions.

However, neither Gerry nor Mason got their wish: the Convention approved the Constitution by "Unanimous Consent of the States present"[99] but without the signatures of Randolph, Mason, or Gerry. This despite last-minute attempts by Benjamin Franklin to reconcile the three dissenters to the

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[85] [Richard Bernstein, Appendix, The Founding Fathers Reconsidered (2009).]
[86] James Madison's Notes of the Constitutional Convention (Aug. 31, 1787), in 2 Records of the Federal Convention 478-79 (Max Farrand, ed., 1966). [Hereinafter Farrand.]
[87] Id. at 479.
[88] Id. (emphasis added).
[89] For the Committee of Style's report, see Proceedings of Convention Referred to the Committee of Style and Arrangement, in Madison's Notes (Sep. 10, 1787), in 2 Farrand 565-80.
[90] Madison's Notes (Sep. 12, 1787), in 2 Farrand 587.
[91] Id. at 588.
[92] Id.
[93] Wiliam Pierce, Character Sketches of Delegates to the Federal Convention, 3 Farrand X.
[94] Madison's Notes (Sep. 12, 1787), in 2 Farrand 588.
[95] Id.
[96] Id.
[97] Madison's Notes (Sep. 15, 1787), in 2 Farrand 632-33.
[98] Id. at 633.
[99] U.S. Constitution Signing Page, 2 Farrand 663.

Measure.[100] Mason and Gerry (and Randolph) stood their ground, and refused to sign despite the pressure.[101]

In the end, the two dissenters did not convey their sentiments to the Convention alone, but quickly attempted to influence the Constitution's post-Convention after life. Before leaving Philadelphia, George Mason penned his "Objections to the Constitution."[102] He recrafted it upon his return to Gunston Hall and, on October 7, 1787, sent a copy to George Washington as well as others around the country.[103] His first objection? "There is no Declaration of Rights."[104] Likewise, Elbridge Gerry addressed the General Court (Massachusetts' legislature) in sharing the measures which prevented him from signing.[105] He also shared, though not necessarily first, that the want of "Security of a Bill of rights" as a main objection to the document.[106] Had this objection been overcome, he could have overlooked other deficiencies.[107]

Moving forward, the want of a Bill of Rights was the foremost objection to the Constitution. This objection had gestated and taken root within the cloistered halls of the Pennsylvania State House. This by delegates who would have otherwise been loyal and had invested much time and effort into crafting the Constitution. Mason had likely crafted the Virginia Plan. Gerry had been an active participant from the beginning of the Convention. Their desire for an appended Bill of Rights was in no way specious nor self-interested, but based in principle—not only in the protections it would afford, but in the way in which the inclusion of rights had become an essential part of what a Constitution was to do. And they had much to lose. In fact, George Mason lost one of his closest friends—George Washington—over the issue.[108] Gerry was excluded from the Massachusetts Ratification debate because of what was considered disloyalty to the Convention and Constitution.[109] As they shared their objections to the Constitution, the want of a Bill of Rights became the principle point of the movement that came to be known as the Anti-federalist cause, to which we now turn.

C. Anti-federalist Campaign for a Completed Constitution

Mason and Gerry launched what became a national debate over the nature of the Constitution. Mason's *Objections* were written first, on September 18, 1787, the day after the Convention concluded while still in Philadelphia.[110] It circulated privately for a month before a final draft was published on Nov. 21, 1787 in the *Massachusetts Centinel*.[111] In the meantime, Gerry's letter to the Massachusetts General Court containing a paragraph of his "principal objections" and based on Mason's *Objections*, was penned second, on October 18, 1787.[112] The letter was read in the Massachusetts Senate on

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[100] Madison's Notes (Sep. 17, 1787), in 2 Farrand 641-44.
[101] Id. at 644, 646, 648-649 ("The Constitution being signed by all the Members except Mr Randolph, Mr Mason, and Mr. Gerry who declined giving it the sanction of their names.").
[102] 8 Documentary History of the Ratification of the Constitution __n. (John P. Kamiski, et al. [year]) [hereinafter DHRC].
[103] Id.
[104] Id. at ___.
[105] 4 DHRC __(year).
[106] Id. at ___
[107] Madison's Notes (Sep. 15, 1787), in 2 Farrand 633.
[108] Mason and Washington's relationship was never quite the same after Mason's falling out over the Constitution. Cite.
[109] Pauline Maier, Ratification 165 (discussing how a motion inviting Gerry to observe the Ratification Convention in Massachusetts was voted down).
[110] George Mason, Objections to the Constitution (Oct. 7, 1787), 8 DHRC __n.
[111]
[112] Elbridge Gerry to the General Court (Oct. 18., 1787), in 6 DHRC __.

October 31 and the lower House on November 2, 1787.[113] Gerry's letter was then published in the *Massachusetts Centinel* on November 3, 1787.[114]

Mason and Gerry created a firestorm. Before Mason's *Objections* was printed, Gerry's letter was picked up by ten newspapers and, soon, almost all Massachusetts newspapers.[115] In quick succession after Mason's *Objections* were printed on November 21, 1787, two Virginia rags and another two dozen across the country picked it up.[116] As early as November 6, 1787, newspapers outside the state also began to pick up Gerry's letter.[117] The synchronized message, printed [almost contemporaneously with the Constitution itself[118]] framed the debate: the Constitution should be adopted once properly completed with, at base, a Bill of Rights.

Because Mason's *Objections* had circulated privately so early, they were anticipated and responded to by the Constitution's defenders. Though unwitting participants in framing the debate, such proto-federalists helped to further solidify and give credence to the debate's contours as set by Mason and Gerry. The foremost framer in this regard was James Wilson from Pennsylvania. Wilson authored the very first pro-federalist speech on October 6, 1787 that was more widely published than any other polemic during ratification, including the Federalist Papers.[119] There, the very first objection Wilson addresses is the "omission of a bill of rights."[120] Such, maintained Wilson, "it would be superfluous and absurd" because the power of the federal government was limited: "everything which is not given [to the federal government], is reserved [to the States]."[121] Wilson's argument was repeated by pro-federalist writers for the duration of the Ratification contest, further encrusting it as the main point of debate over the Constitution.[122] In framing the debate over the U.S. Constitution, the issue also framed the larger debate and evolving meaning of what a constitution was and should be.

One of the most famous and widely-published pseudonymous Anti-federalists, Brutus, also addressed the inclusion of a bill of rights front and center. Likely penned by Melancton Smith,[123] Brutus addressed the omission of a bill of rights for the entirety of Essay No. 2, [124] this after working through the preliminary, Montesquieuian question of whether the nature and extent of the United States was best suited to a confederation or a unity republic.[125] For Brutus, including a bill of rights was foundational to a constitution: "in forming a government on its true principles, the foundation should be laid in the manner I before stated, by expressly reserving to the people such of their essential natural rights, as are not necessary to be parted with."[126] Reserving and protecting rights was an essential function of a constitution. A constitution was no constitution without a reservation of rights.

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[113] Maier, supra note ___ at 87.
[114] Id.
[115] Id. at 87.
[116] Maier, supra note ___ at 86-87.
[117] Charles E. Clark, Elbridge Gerry's Dissent, in Printers, the People, & Politics: The New Hampshire Press and Ratification 39 (1989) (indicating that *The New Hampshire Spy* printed Gerry's letter on Nov. 6, 1787).
[118] [The Constitution was printed in late September and early October 1787. Article on printing.]
[119] Bernard Bailyn, Ideological Origins of the American Revolution __ (1969).
[120] James Wilson, State House Yard Speech (Oct. 6, 1787), in __ DHRC __.
[121] Id.
[122] [New Hampshire Freeman's Oracle (Jan. 18, 1788); Luther Martin, Ford, Essays 364-65.]; Storing, What the Anti-Federalist Were For 111 (198[5]); Alexander Hamilton, Federalist No. 84, in The Federalist Papers 509 (Kesler, ed., 1961)(2003).
[123] Michael P. Zuckert & Derek A. Webb, Melancton Smith as the Author of Essays of Brutus, Introduction, The Anti-Federalist Writings of the Melancton Smith Circle xxi-xxvii (Michael P. Zuckert & Derek A. Webb, eds., 2009).
[124] Brutus No. 2 in id. at 178-84.
[125] Brutus No. 1 in id. at 168-78.
[126] Brutus No. 2, in id. at 180.

While other issues featured in Anti-federalist arguments, amendments in the form of rights took center stage in Pennsylvania. The minority of the Pennsylvania Convention stepped up early in the national debate to not just frame the issue, but provide a template for what a national bill of rights could look like. In *The Address and Reasons of Dissent of the Minority of the Convention, of the State of Pennsylvania, to their Constituents* published December 12, 1787, the Pennsylvania Convention's minority published a first take on amendments to the Constitution, including, primarily, a bill of rights.[127] This after relaying their spell-binding tale of being physically extricated from Philadelphia boarding houses by "mobs collected for the purpose" and forcibly held against their will as state representatives in the Pennsylvania state house to achieve a quorum in order to call a state ratifying convention.[128] This procedural irregularity—the Constitution had not yet been referred to the states by Congress—was one of many the minority complained of before getting to their substantive crux: proposed amendments to the Constitution.[129] Ten of 14 proposed amendments were rights-based, ranging from freedom of conscience to jury and gun rights (both for self -defense and "fowl and hunt in seasonable times") were proposed.[130] In fact, parallel provisions are found in nine of ten of the federal Bill of Rights.[131] The Pennsylvania Minority's dissent, published as a stand-alone pamphlet to the chagrin of many Federalists who largely controlled the press,[132] was republished far and wide.[133]

The Pennsylvania minority's proposed bill of rights was not only published, but it was influential on convention minorities and majorities in other states. The Massachusetts Convention, which met in January 9, 1788,[134] was a close contest.[135] To bring in detractors, the majority compromised and proposed that the convention ratify and also passed "recommendatory amendments" to be considered by the new Federal Congress.[136] This was a route followed in four other states—South Carolina, New Hampshire, Virginia, and New York.[137] A minority in other state, Maryland, also proposed amendments,[138] and North Carolina approved not recommendatory, but *previous* amendments.[139] This meant that North Carolina would not—and did not—come into the union till after the Bill of Rights were sent out to the states for ratification.[140] Rhode Island, or Rogue Island as it was want to be called by others, would not even consider ratification till after a Bill of Rights completed the Constitution.[141]

Regardless of other topics of discussion throughout pamphlets and polemics—and there were many—the inclusion or omission of a bill of rights framed, shaped, and, ultimately, defined the Anti-federalist campaign, and the Bill of Rights was its crowning achievement. It is to this achievement that this Section now turns.

D. The majority's acceptance of a Completed Constitution

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127 The Address and reasons of dissent of the minority of the convention, of the state of Pennsylvania, to their constituents (Dec. 12, 1787), available at https://www.loc.gov/resource/bdsdcc.c0401?st=text
128 Id at 4.
129 Id. at 3-7.
130 Id. at 7-10.
131 Id.
132 Hutson, Documentary Integrity.
133 Cite.
134 Maier, supra note ___ a 159.
135 Id. at 159-165.
136 Massachusetts Form of Ratification (Feb. 6, 1788), in __ DHRC___.
137 Maier, supra note ___ at 155-400.
138 Id. at 241-47.
139 Id. at 403-23.
140 Id. at 459.
141 Id. at 223-25, 459.

Despite contemporaneously being considered a mere "tub to the Whale," or a distraction from what was actually desired,[142] the ratification and final inclusion of a Bill of Rights was really and truly a major achievement.[143] Story called the Bill of Rights the Anti-federalists' "legacy."[144]

However, Storing goes on to say that the Bill of Rights also reflected the Anti-federalists' "failure" in that preserving rights meant that the government was ultimately consolidated under the Constitution.[145] , Yet this characterization of the movement is inaccurate and perhaps loses sight of the larger arch of the campaign. This is possible as Storing edits and therefore focuses on the polemical writings of the Anti-federalists, rather than how the movement started and culminated. The Anti-federalist movement began as a movement in favor of a Bill of Rights which amended, and therefore *accepted*, an improved or completed Constitution. Gerry makes it clear on the Convention floor that, if rights could be secure, his other complaints could be overcome.[146] It remained the central theme of polemical writers, though not their only theme. Yet when convention minorities and then majorities assumed drafting proposed bills of rights,[147] such became the organizing theme of the Anti-federalist movement, and the rallying cry of the minority became the clarion call of the majority. Inclusion of the Bill of Rights was definitional to ratification of the Constitution, and defined the concept of a constitution.

Yet the First Congress was an altogether different story. Despite that Rhode Island and North Carolina remain excluded from the Union and Virginia and New York legislatures called for a second convention to deal with amendments,[148] ratification and the Constitution's instantiation swept in a robust Federalist Congress in both houses.[149] Federalists were emboldened and the mandate they perceived from the people did *not* include a Bill of Rights.[150]

Thankfully, Madison was on a mission. Initially, Madison believed individual rights could be best protected through a Congressional negative on state laws, his one original, passionate proposal that never saw the light of day.[151] When this proposal failed (and failed again) on the Convention floor, Madison shifted to the party line during Ratification staked out by Wilson: in a government of limited powers, protecting rights was unnecessary.[152] But, gradually, Madison changed his tune. The change in his thinking was first influenced by his mentor and friend, Thomas Jefferson. Writing from France in December 1787, Jefferson pooh-poohed Wilson's arguments: such "might do for the Audience to

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142 Kenneth R. Bowling, A Tub to the Whale: The Founding Fathers and Adoption of a the Federal Bill of Rights (Virginia Bicentennial Commission, 1986).

143 Oldham, supra note __ at 451. (Citing passage of the Bill of Rights as reasons to honor and study Anti-federalist writings);

144 Storing, What the Anti-Federalists Were For, supra note __ at a 64.

145 Id.

146 Supra note __ and accompanying text.

147 Amendments to the structure of the Constitution was also proposed—most especially moves to change representative calculus—but these constituted a minority of amendments rather than their main thrust.

148 Id at 5, 6.

149 Bowling, supra note ___ at 4 ("four states sent ten Antifederalists to a 59-man House and Virginia sent two Antifederalists to a 22-man Senate").

150 Id. at 7.

151 James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 Papers of James Madison 212 (J.C.A. Stagg, ed et al, year)[Hereinafter PoJM]. Madison foisted this proposal upon the Virginia Plan, Madison's Notes (May 29, June [8], 1787), in 1 Farrand __, worked out between Virgina and Pennsylvania delegates as they met pro forma in the Pennsylvania State House while waiting for a quorum to be achieved. Lorianne Updike Toler, Un-fathering the Constitution.

152 Supra note __and accompanying text; Bowling, supra note __ at 5.

whom it was addressed, but it is surely a gratis dictum."[153] The difference between national and state governments should make no difference: "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."[154]

Madison was surely impacted by Jefferson as evidenced by letters he wrote from Congress and statements made in June of 1788 in the Virginia Ratifying Convention indicating he was open to amendments.[155] However, he was stirred by North Carolina's move for previous amendments[156] and even more so by events in his home state. There, after losing a reluctant senate bid in the Virginia legislature due to Anti-federalist arch-nemesis Governor Patrick Henry's influence,[157] Madison was faced with the prospect of a close race in Piedmont County against Antifederalist James Monroe as the only way to secure a place for himself in the new federal government.[158] Reluctant no more, Madison campaigned hard, in eighteenth-century fashion: he participated in debates with Monroe and engaged in a letter-writing campaign to influencers he knew would get published.[159] In these, he made the modern day equivalent of a campaign promise: Amendments could be considered to safeguard all "essential rights."[160]

This was a switch in time that saved Madison, or at least saved his place in Congress.[161] But Madison was good on his word. Two months after Congress convened, Madison made his move. His draft Bill of Rights numbering nine amendments included Lockean provisions, a provision applying certain rights to the states, a proposal to rejigger the representation calculus after Congress reached critical mass, the current 27th Amendment, and early drafts of Amendments 1-10.[162] What Madison believed would be an easy push immediately encountered obstacles: no one wanted them.[163] Federalists thought amendments unnecessary, and Anti-federalists believed they did not go far enough.[164]

President Washington had entered the contest on the side of a Bill of Rights via amendment in his inaugural address.[165] Now, Madison needed his help. To help usher Madison's rights bill through the House floor and on to the Senate, Madison lobbied Washington for a letter of support which the latter provided.[166] In the end, the Senate and House agreed on twelve amendments,[167] ten of which were ratified by eleven of fourteen states by December 15, 1791.[168]

With the Amendments, North Carolina and Rhode Island came into the Union.[169] In the latter state, the legislature sent word the Bill of Rights "already afforded some relief and satisfaction in the

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[153] Thomas Jefferson to James Madison (Dec. 20, 1787) in 10 PoJM 336, 339n ("Jefferson had undoubtedly seen a newspaper report of James Wilson's speech of 6 Oct. 1787 attacking critics of the proposed constitution.").
[154] Id.
[155] Bowling, supra note __ at 5.
[156] Id.
[157] Id.
[158] Id.
[159] Id.
[160] Id.
[161] Id.
[162] Id. at 6; Madison's Resolutions for Amendments to the Constitution (June 8, 1789), available at https://www.consource.org/document/madisons-resolution-for-amendments-to-the-constitution-1789-6-8/ [accessed Mar. 6, 2026).
[163] Bowling, supra note __ at 6.
[164] Id. at 6-7.
[165] Id. at 10; George Washington, First Inaugural Address, (April X, 1789), in _ Papers of George Washington _ (year).
[166] Id. at 10.
[167] Senate Amendments (Sep. 9, 1789), available at https://www.consource.org/document/senate-amendments-1789-9-9/ [accessed Mar. 6, 2026].
[168] U.S. Const. Amend 1-X (1791); find cite for 11 state ratifications by Dec. 15, 1791.
[169] Tub to the Whale at 13.

minds of the people of this state."[170] Despite their initial lack of support in Congress, the amendments were warmly received out of doors.[171] However gained, Madison and Washington's new support for a Bill of Rights helped to win over reluctant Federalists in Congress. With the Bill of Rights passage, the Anti-federalist movement, its major objective obtained, petered out.[172] Peace prevailed.

III. ANTI-FEDERALISTS' SOLIDIFY THE MEANING OF A CONSTITUTION

The history presented here demonstrates that core to Anti-federalist conception of a Constitution was what had reached ascendance in state constitution-writing experiments: Constitutions were not merely frames of government, but protected rights. Thus their campaign was not *against* the Constitution *per se*, but for the Constitution, though one with a full complement of rights. The acceptance of this conception of a Constitution by key Federalists such as Madison and Washington marked the ascendance of this conception of a constitution, a shift that was completed through passage of the Bill of Rights. Finally, once a bill of rights became a normative part of a constitution, they shifted from being declarations to being legally-enforceable, justiciable *bills* of rights.

The Anti-federalists central argument from beginning to end was that the Constitution must include a bill of rights. It was the summum bono of their conception of a Constitution and the core motivator for what became the Anti-federalist movement. Had a bill of rights been achieved within the Convention, though opposition would surely have arisen for other reasons, there may have never been an Anti-federalist movement. Despite some Anti-federalists wanting more, once that objective was achieved, the entire movement ceased to exist. The reason for this was that Anti-federalists accepted what had become normative in Upper New England in the late 1770s and early 1780s through the Massachusetts and New Hampshire constitution-writing processes.

Such was clearly articulated by Brutus. The job of the Constitution was to limit government, and such a limit could not be effective unless it also created barriers around basic inalienable rights. Jefferson also understood this – every citizen of every government had a right to such protection. Thus Constitutions must outline, structure, and limit power by framing government, but they must also prescribe rights to limit the government from encroaching. The limit on government was otherwise meaningless in many respects.

Thus the Anti-federalists were pro-constitutionalists. They favored a different kind of constitution than the one emanating from Philadelphia. The document that was sent out to Congress and then to the states for ratification was only half a Constitution. Rights were so important that, in state constitutions, they came first. In England, one could argue their constitution—the one that was fixed, at least—was limited only to rights identified in the English Bill of Rights. The seven articles published in Philadelphia were not enough to be called a Constitution. The limits it provided for government—the government of limited powers it seemed to create—were necessary, but not sufficient. A bill of rights was essential to render the Constitution a completed document. Only a Bill of Rights could render it a *sufficient* Constitution.

This conception of a constitution—one with both a frame of government and a bill of rights—became the normative, standard definition of a constitution not only in the United States, but the world over.[173] Though the concept of a constitution with both components had emerged as standard in state constitution by 1787, it required the acceptance by Federalists through passage and then ratification in the states for the connotation and conception to reach hegemony. Passage of the Bill of

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[170] Id.
[171] Id. at 8.
[172] Id. at 14-15.
[173] Cite to Ginsburg and Elkins.

Rights marked the final stage in the shift in the conception of a constitution, solidifying the new conception as limiting government and protecting rights, breaking with the past conceptions of a constitution that referred to a slowly evolving constellation of rights and political institutions ala the British Constitution.[174] This shift can be seen linguistically in how constitutions self-identified in state iterations. First, declarations were followed by forms, then, in the late seventies and early eighties, both rights and forms, ala the Massachusetts and New Hampshire Constitutions, were embraced in the "Constitution."[175] This conceptual shift was imperfect, but it was one that Anti-federalists felt and accepted. Key here is that Gerry hailed from Massachusetts. George Mason was from Virginia, but he was an early adopter of the concept as the first to pen a declaration and form of government that was then copied again and again through the Founding period. Function followed form in this regard: how something was written up helped to change the thing itself. A rose by another name, it turns out, would likely not be a rose.

Finally, the shift in conceptions of a constitution marked by the passage of the Bill of Rights also marked another shift. As this author has written elsewhere, writing constitutions down served to raise small-c constitution concepts, principles, and structures into the large-C constitution, limiting their range of meanings and rendering them fundamental law, creating constitutional dualism. In embracing a Bill of Rights, it also shifted the legal meaning—and enforceability—of those rights which became part of the large-C constitution. Early in state constitution-drafting, before constitutions were called constitutions, lists of rights were dubbed "declarations of rights." The rejection of the 1778 Massachusetts Draft Constitution seems to mark a linguistic shift in calling such rights "bills" rather than "declarations." This is quite subtle, but the shift had legal implications. Declarations, like the Declaration of Independence, were political documents. Bills, on the other hand, were legally actionable. Including a right in a Bill of Right gave rise to a cognizable, justiciable right. This shift is adopted in the Ratification contest. Anti-federalists largely call for a bill of rights rather than a declaration. Their language about protections and security followed suit.

Rights that were included in a Constitution became fundamental law and thus governed what government could and could not do. As written elsewhere, the Framers understood they were creating a dualistic system of laws where the constitution governed lower laws.[176] This was evidenced by their understanding that an arbiter between the two types of laws was needed.[177] Though it took some time for the Courts to assert themselves in this regard in *Marbury v. Madison*, at the time of ratification of the Bill of Rights, such rights became legally actionable as fundamental law.

CONCLUSION

The Anti-federalists were not against the Constitution, but for it. However, they supported their concept of a Constitution, one that included both a structural frame of government like that contained in the Constitution's original articles *and* a bill of rights. Rights and completing the concept of a Constitution was the organizing principle of the Anti-federalist movement, which movement ceased to exist once a Bill of Rights was passed and Ratified. The success of the Anti-federalists through addition of a Bill of Rights marked the final stage in the shift in meanings between a British concept of a constitution wherein institutions and rights evolved, common law-like, over time, and an American concept of a unitary text which defined and limited government institutions and protected

[174] Becoming Written Constitutionalism.
[175] Cite to constitutions.
[176] Updike Schulzke, Becoming Written Constitutionalism.
[177] Id.

rights. By including a Bill of Rights in a concepts of a constitution, such became part of the fundamental law and became legally actionable upon ratification.