



## Essential Question

In what ways did British history influence American constitutionalism?

### Learning Objectives (cont'd)

- **Evaluate**, take, and defend positions on the influence of the Magna Carta on the development of rights and the importance of habeas corpus and trial by jury
- **Define** key words: common law, Magna Carta, precedent, redress of grievances, rights of Englishmen, rule of law, stare decisis, writ of habeas corpus

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### Introduction

This lesson describes the evolution of British constitutional government. It examines the early stages of English government in the feudal period, concluding with the **Magna Carta** of 1215. It traces the development of representative institutions in England, English **common law**, and the relationship between legal and constitutional structures. It also examines some of the differences between British and American constitutionalism.

### How Did English Government Begin?

For several centuries after the fall of the Roman Empire, England was divided among a number of tribes. A king or other leader ruled each tribe. Eventually all the tribes of England were united under one king. But unification into a single kingdom did not significantly change most people's lives. England was too large for one person to rule. The English monarch had to let people in local areas tend to their own affairs according to customs they had developed over the years.

A major change in the way England was ruled took place in 1066, when William the Conqueror (c. 1028–1087), the leader of the Normans—people from Normandy in France—invaded England and defeated King Harold II (c. 1022–1066) at the Battle of Hastings. As king of England William introduced feudalism into the country, but he and his successors

### Key words

#### **Magna Carta:**

A charter that granted certain civil rights and liberties to English nobles and to all "freemen," such as the right to a jury of one's peers and the guarantee against loss of life, liberty, or property except in accordance with law

#### **common law:**

The body of unwritten law developed in England from judicial decisions based on custom and earlier judicial decisions

also adopted and adapted many English practices in governing the English. These monarchs recognized that it would help to keep peace in the kingdom if they did not upset people by violating too many local customs.

Originally, English monarchs, either personally or through representatives, made laws, supervised law enforcement, heard cases—thus the term “royal courts”—and defended the kingdom. Frequently monarchs called on advisors to help them, especially when they needed to know local legal traditions and customs, and when they needed money. By the early thirteenth century groups of advisors and assistants were developing into separate institutions. They evolved into Parliament and the royal court.



Why did William the Conqueror allow the English to maintain many of their practices and customs?

Figure 5.4.1

### How Did Parliamentary Government in England Begin?

Even before the Norman Conquest, the English monarchs had brought together groups of advisors into councils of leading subjects, whom they relied on to advise them on various matters of state. These councils are the groups that came to be called parliaments, from the French word *parler*, which means “to speak.”

In 1295, King Edward I (1239–1307) summoned what came to be called the Model Parliament. The Model Parliament consisted of two representative parts, or houses. The House of Lords represented the feudal nobility and major church officials. The House of Commons was composed of two knights from each shire, or county; two citizens from each city; and two citizens from each borough, or town. Although called the House of Commons, this body was composed of people who had wealth and status in the kingdom. They were not the common people, as we understand that term today.

Parliament developed into a consistent body over time, in part because the English Crown, or monarchy, found it to be an effective way to raise money. Parliament represented the various interests in the kingdom, thereby providing monarchs with a convenient way of negotiating with all the interests at once. As Edward I said in his summons to the members of the Model Parliament, “What concerns all should be approved by all.” In turn, English subjects found Parliament to be an effective way to voice their grievances and to limit or check monarchical power.



## How Did English Common Law Develop?

When William the Conqueror became king of England, there were different systems of law in different parts of the country. This made hearing cases difficult for royal judges, who had to learn about each local system. William and his successors tried to provide a less confusing system of law that would be common to all parts of the kingdom—common law—and would be applied consistently by royal judges.

The system of law that William the Conqueror introduced required judges to publish their decisions so that judges in the future would know how earlier cases had been decided. Earlier rulings became **precedents**, or rules to guide future cases. The principle of following precedents is known by the Latin term **stare decisis**—“let the precedent (decision) stand.” This system gives predictability and stability to the law. Judges compare the facts of a case with cases decided earlier and attempt to rule in a way that is consistent with the earlier cases. Changes in judge-made law occur incrementally, as judges made minor changes in applying the law to the facts of each case.

## How Did the “Rights of Englishmen” Develop?

English law and the English constitution gave great importance to tradition, or custom. Once a rule was recognized as the law of the land, it was hard to change. Over the years, English monarchs and royal judges came to recognize that subjects had certain personal rights, often referred to as the **rights of Englishmen**. These common law rights were fundamental in the sense that neither the monarch nor Parliament would dare to change or violate them.

Centuries of respect gave these rights a special status. They included the following:

- The right to trial by a jury of one’s peers under the law of the land
- Security in one’s home from unlawful entry
- Limits on government’s power to tax



How might the right to trial by jury protect individuals from the abuse of power by government?

Figure 5.4.2

## Key words

### **precedent:**

Previous court decisions upon which legal issues are decided

### **stare decisis:**

The doctrine that a court should follow the previous decisions of other courts on cases in which the facts are substantially the same

### **rights of Englishmen:**

A term prevalent in seventeenth-century England and America referring to certain historically established rights, beginning with the rights of the Magna Carta, that all English subjects were understood to have

In 1100, an event occurred in England that was a precedent for a greater event a century later. In this year, King Henry I issued a Charter of Liberties, which bound him to obey certain laws regarding the treatment of nobles and church officials. Early in the next century, one of the great charters of liberty in human history, based partly on Henry's charter, was drawn up. This newer charter was written because the king, the pope, and the English barons (the king's feudal vassals) disagreed about the king's rights. This came about after a chain of events in the early 1200s, when King John I tried to take back some rights and powers that his barons had been enjoying. The result was a civil war between the barons and their king. The barons won.

## THE MAGNA CARTA

In June 1215, with the support of the Church and others, the barons forced King John to sign a new Charter of Liberties, which later became known as the Magna Carta, or "Great Charter." This charter addressed feudal relationships between the Crown and three classes of the population—barons, clergy, and merchants. In the charter, the king promised not to increase feudal dues and other money payments to the Crown without consent and to respect various property rights. The charter did not grant new rights. Rather, it confirmed certain traditional rights. The following three principles contained in the Magna Carta were important in the later development of constitutional government.



Figure 5.4.3

## Key words

### rule of law:

The principle that both those who govern and those who are governed must obey the law and are subject to the same laws

### Rule of Law

The Magna Carta was perhaps the most important early example of a written statement of law. It expressed the idea that the monarch must respect established rules of law. The term **rule of law** refers to the principle that every member of society, even rulers, must obey the law. Sometimes the phrase is rendered as “the supremacy of the law” because it means that rulers must base their decisions on known principles or rules instead of on their own discretion. The Magna Carta, for example, stated that no free man could be imprisoned or punished “except by the lawful judgment of his peers” and by the “law of the land.” This meant that the government could not take action against the governed unless it followed established rules and procedures. Arbitrary government was outlawed.

## Basic Rights

The barons made King John promise to respect the “ancient liberties and free customs” of the land. The barons did not believe that they were making any drastic change in the position or power of the king. Their goal was to establish a way to secure **redress of grievances**, or compensation for a loss or wrong done to them, should the Crown infringe on their common law rights.

## Government by Agreement or Contract

The agreement in the Magna Carta was between the king and a limited number of his subjects. It did not include the majority of the English people. However, it did express the feudal principle of drawing up an agreement between parties as a basis for legitimate government.

## Other Constitutional Principles

Later generations would discover in the Magna Carta the seeds of other important constitutional principles. For example, the American colonists found the principle of no taxation without representation and consent in King John’s promise not to levy certain feudal taxes without the consent of “our common counsel of the kingdom.” The Magna Carta also brought the law to bear against one law-breaking king. It gave King John’s barons the right to go to war with him again if he broke the agreement. Going to war, however, was not a satisfactory method of ensuring responsible government. A better way began to develop in the next century.

## Key words

### **redress of grievances:**

The correction of complaints



## Content Highlight: WHAT DO YOU THINK?

People have fought and died to establish rights such as those described in this lesson. However, it is difficult to understand the importance of these rights merely by reading about them. Examine the following two articles of the Magna Carta and then respond to the questions about them.

**Article 39:** No freeman shall be taken or imprisoned or disseised [dispossessed] or banished or in any way destroyed, nor will We [the King: this is the “royal We”] proceed against or prosecute him, except by the lawful judgment of his peers or by the law of the land.

**Article 40:** To no one will we sell, to no one will we refuse or delay, right or justice.

1. What rights, values, and interests are expressed in Articles 39 and 40?
2. In what ways do these rights limit the monarch? Why would the English nobles want to place such limits on the monarch?





- What similarity, if any, is there between the Magna Carta and the Mayflower Compact?
- What elements of the Magna Carta are found in the U.S. Constitution?

Figure 5.4.4

## What is the British Constitution?

The British constitution is not a single written document. It consists of common law, important acts of Parliament, and political customs and traditions. The central principle of the British constitution is respect for established rules and procedures—that is, for the rule of law. Many provisions of the British constitution grew out of a long series of political struggles between monarchs and Parliament.

Three great historical documents are important in the development of the British constitution and the rights of the British people. In addition to the Magna Carta in 1215, these include the Petition of Right in 1628 and the English Bill of Rights in 1689. All three documents were written at times when the struggle for power between monarchs and Parliament was especially intense.

By 1600, Parliament had become so important to English government that it could challenge the Crown's ability to act without its support. But monarchs did not easily give up authority. In the seventeenth century, the Crown and Parliament quarreled over a variety of issues, including money, religion, and foreign policy. At the heart of these struggles was the key constitutional issue: Did the Crown have to accept the supremacy of laws made by Parliament?

The first outcome of these struggles was a Constitutional document almost as important as the Magna Carta, called the Petition of Right of 1628. King Charles I needed money to fight wars against France and Spain. He sought to raise funds without the consent of Parliament. Parliament responded by forcing Charles to agree to the Petition of Right, which confirmed that taxes could be raised only with the consent of Parliament. The Petition of Right guaranteed English subjects other rights, such as a prohibition against requiring people to quarter soldiers in their homes and the right to habeas corpus, which will be explained later in this section. King Charles' acceptance of the Petition of Right strengthened the idea that English subjects enjoyed fundamental rights that no government could violate.



What limitations were placed upon the power of the Crown by the Petition of Right?

Figure 5.4.5

The Petition of Right, however, was not successful in quelling strife between the people and their king. Civil unrest ensued. The English monarchy fell in 1649 and Charles I was executed. Oliver Cromwell instituted the Commonwealth period, serving as Lord Protector until his death in 1658. He was briefly succeeded by his son Richard, until the monarchy was restored in 1660, and Charles II, the son of Charles I, came to the throne. Thus, it was during the reign of King Charles II that the right to habeas corpus gained new authority.

The Habeas Corpus Act of 1679 made consistent a number of previous habeas corpus acts and confirmed the right of British subjects to apply for a legal document called a **writ of habeas corpus**. A writ is a court order to a government official commanding that official to do something. A writ of habeas corpus orders an official to deliver—"habeas"—a person—"corpus," meaning "the body"—who is in custody to a court of law to explain why the person is being held. If the government cannot justify keeping the individual in custody, then the person must be set free. The writ of habeas corpus is one of the most important limitations on government power, because it means that no government official—not even the Crown—can hold someone in prison arbitrarily or indefinitely.

## Key words

### writ of habeas corpus:

A court order directing that a prisoner be brought to court before a judge to determine whether that prisoner's detention is lawful



How might a writ of habeas corpus protect individuals from the abuse of power by government?

Figure 5.4.6

Eventually, Parliament became the branch of government that represented the most powerful groups in the kingdom. By the end of the seventeenth century Parliament, not the Crown, was recognized as the highest legal authority in England. Parliament's struggle with the monarchy ended in a bloodless revolution known as the Glorious Revolution of 1688.

Under the Revolution Settlement, Prince William of Orange of the Netherlands and his wife Mary were invited to be joint monarchs and to preserve the power of Parliament. Among other things, Parliament required them

to agree to the English Bill of Rights, which in 1689 became a cornerstone of the British constitution.

The English Bill of Rights contained a number of provisions, ranging from limitations on the Crown's power to raise money to guarantees of free speech and debate in Parliament. The Bill of Rights also expressed two important principles that influenced constitutional development in America:

- **Rule of law.** The English Bill of Rights restated the idea in the Magna Carta that the rule of law is the foundation of legitimate government.
- **Representative government.** The English Bill of Rights established the idea that only representative government is legitimate. In England that meant the representation of social classes in Parliament, or a mixed constitution, composed of the monarchy (the rule of one), the aristocracy in the House of Lords (the rule of the few), and the House of Commons (the rule of the many).

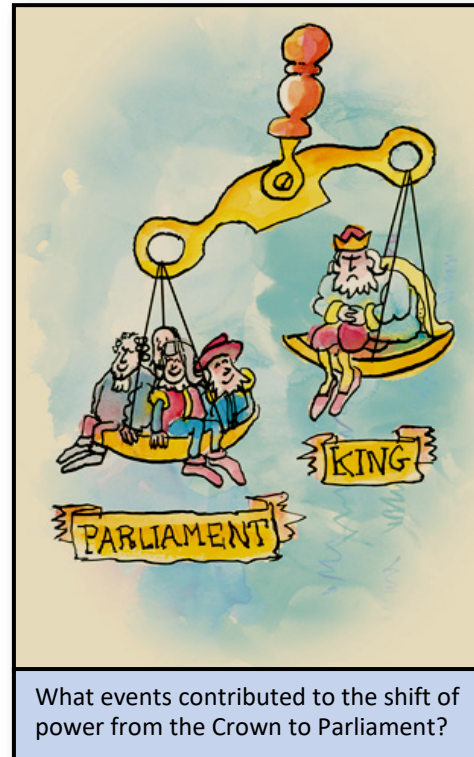


Figure 5.4.7

Debates about who should be represented in government would be taken up in America. In the end, the Americans would make a key decision by rejecting the feudal idea of representation by social classes, as the English Parliament did, in favor of the idea of social equality.



Figure 5.4.8





## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Evaluating the Importance of Habeas Corpus and Trial by Jury

Work in groups to examine the rights of habeas corpus and trial by jury. Each group should read **Selection 1** or **Selection 2 (on next page)**, and answer the questions that accompany it. Discuss your responses with the entire class.

#### **Selection 1: Habeas Corpus**

The writ of habeas corpus has been called the “Great Writ of Liberty.” One constitutional scholar called it the “greatest guarantee of human freedom ever devised by man.”

Suppose you were arrested and imprisoned by the English monarch. Although you have the right to be tried by the law of the land, the monarch’s jailers keep you in prison. They refuse to bring you before a court and to inform you of the charges against you. How could the right to a writ of habeas corpus protect you from such treatment? How could the jailers be forced to bring you into a courtroom for a fair hearing?



Figure 5.4.9

Suppose you had a family member, a friend, or a lawyer who knew you had been arrested and were being kept in prison. That person could go to court and ask the judge to issue a writ of habeas corpus. This writ would be an order by the judge to your jailer to bring you to court and present evidence that you have broken the law. If there were evidence, you would be held for trial. If there were no evidence, you would be set free.

Examining the Rights:

1. What limits does the right to a writ of habeas corpus place on the monarch?
2. Why would the English Parliament want to place such limits on the monarch?
3. What arguments can you make for this right today?
4. What examples of situations in the United States or other nations can you identify that uphold or violate this right?
5. Under what conditions, if any, do you think this right should be limited?
6. Is this right included in the Constitution of the United States? If so, where can it be found?



## Content Enhancement:

### CRITICAL THINKING EXERCISE – CONTINUED

#### *Selection 2: Trial by Jury*

The right to a trial by jury of one's peers is one of the oldest and most important of the fundamental rights of Englishmen. It has become an essential right in a free society.



Figure 5.4.10

Suppose you were arrested and imprisoned by the English king. A judge, appointed and paid by the king, has examined the evidence against you and decided that you should be tried for breaking the law.

The English constitution guarantees you the right to be tried by a jury of your peers. This means that a group of people from your community will listen to the evidence that the king's prosecutor has against you. They also will hear your side of the story. The jury has the authority to decide if you are guilty or innocent of breaking the law. Its verdict must be unanimous to find you guilty. The jury also has the power to find you not guilty—even if you have broken the law—if the jurors believe that the law is unfair.

Examining the Rights:

1. What limits does the right to a trial by jury place on the monarch?
2. Why would the English Parliament want to place such limits on the monarch?
3. What arguments can you make for the right to a trial by jury today?
4. What examples of situations in the United States or other nations can you identify that uphold or violate this right?
5. Under what conditions, if any, do you think this right should be limited?
6. Is this right included in the Constitution of the United States? If so, where can it be found?

## Conclusion

In this lesson, you learned about the important ways British history influenced the American constitution. While American colonists rebelled against Britain and the monarchy, the founding generation sought to build on a government that was based on rules and laws. Many of these basic ideas can be found in our government today.

## Lesson Check-up



- What is the common law of England? Why is it sometimes called “judge-made law”? How did the common law develop?
- What is the Magna Carta? How was it created? How did it contribute to the development of constitutional government?
- What is meant by the phrase “rights of Englishmen”? How were these rights established?
- Among the key documents in the struggle for power between king and Parliament were the Petition of Right of 1628, the Habeas Corpus Act of 1679, and the English Bill of Rights of 1689. Explain how and why each of these documents contributed to the development of Constitutional government in England.
- How are the ideas in the Magna Carta, the Petition of Right, and the English Bill of Rights related to natural rights philosophy and classical republicanism?
- What rights and other principles of government in the U.S. Constitution or in your state’s constitution can you trace back to the Magna Carta?



# Colonial Ideas About Rights and Government



## What You Will Learn to Do

Explain how colonial Americans' ideas about rights and government influenced our society

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Take responsibility for your actions and choices
- Treat self and others with respect

## Learning Objectives

- **Describe** the early development of America's traditions of constitutional government
- **Explain** why the American colonists attached special importance to such constitutional principles as written guarantees of basic rights and representative government

## Key words

- charter
- constituent
- covenant
- Fundamental Orders of Connecticut
- indentured servant
- magistrate
- Mayflower Compact
- suffrage



## Essential Question

What basic ideas about rights and constitutional government did colonial Americans hold?

### Learning Objectives (cont'd)

- **Evaluate**, take, and defend positions on the differences between life in colonial America and in England during the same period, the relationship between natural rights theory and slavery in America, and how natural rights philosophy and history help to explain the colonists' views of the proper role of government
- **Define key words:** charter, constituent, covenant, Fundamental Orders of Connecticut, indentured servant, magistrate, Mayflower Compact, suffrage

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### Introduction

This lesson describes how basic ideas of constitutional government were developed and used in the American colonies before independence from Britain. It explains how social and economic conditions in America sometimes required old ideas about government to be adapted or discarded. Occasionally, the colonists needed to create entirely new institutions.

### How Did the Colonial Settlement of America Inspire New Experiments in Constitutional Government?

More than 150 years elapsed between the time colonists arrived in British North America and 1776, the year when the thirteen colonies gained their independence from Great Britain. This history had a great influence on the Founders.

By the early 1600s, England wanted to establish colonies on the North American continent, as Spain and the Netherlands already had done. England had many reasons for wanting colonies in North America. Foremost, among these reasons was England's desire to develop a profitable maritime empire. To entice settlers to go to America, the Crown offered various incentives. Two important incentive plans were royal proprietorships and joint-stock companies.

## Key words

### Mayflower Compact:

An agreement by the English adult male immigrants who arrived at Cape Cod in 1620 to form a political body and to submit to "just and equal Laws"

### covenant:

A binding agreement made by two or more persons or parties

## Royal Proprietorships

One way the Crown encouraged settlements was to create royal provinces in America, called proprietorships. Most proprietors were personal friends of the English king. Proprietors had to find ways to lure settlers to the provinces that the Crown had given them. Eleven of the original thirteen colonies were founded as proprietorships. Perhaps the best-known colonial proprietor was William Penn (1644–1718), the founder of Pennsylvania.



Why did the English king give people the right to establish colonies in America?

Figure 5.5.1

## Joint-stock Companies

The Crown also chartered business ventures called joint-stock companies, giving each company the right to settle certain areas along the East Coast. Each had to attract enough settlers to establish a colony. The Virginia Company of London settled the first successful colony at Jamestown in 1607.

Settlement did not always proceed smoothly. For example, in 1620 after a seven-week voyage from Plymouth, England, under a grant from the Virginia Company of London to settle and establish a government in Virginia, the ship Mayflower arrived instead at Cape Cod in what is today the state of Massachusetts, where it had no right to be. Nevertheless, the leaders of the expedition decided before they landed to create a government to serve their needs. The **Mayflower Compact** was an early example of social contract theory put into practice in America. The Compact also laid the foundation for the state of Massachusetts:



How did the Mayflower Compact embody the ideas of the social contract and consent?

Figure 5.5.2

*We...the loyal subjects of...King James...having undertaken a Voyage to plant the First Colony in the Northern Parts of Virginia, do by these presents solemnly and mutually in the presence of God and of one another, **Covenant** and Combine ourselves together into a Civil Body Politic, for our better ordering and preservation...and by virtue hereof, to enact, constitute, and frame such just and equal Laws, Ordinances, Acts, Constitutions, and Offices, from time to time, as shall be thought most meet and convenient for the general good of the Colony, unto which we promise all due submission and obedience.*



## What Was Unique About the American Experience?



How might the wide availability of land in the colonies have affected attitudes about social status and equality?

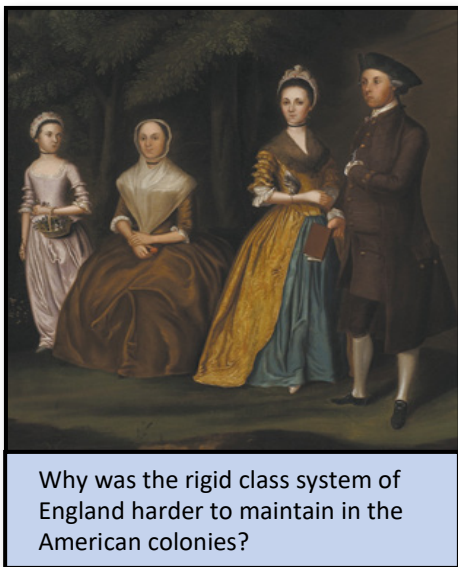
Figure 5.5.3

The special conditions of an undeveloped land profoundly affected economic, social, and political life in colonial America. Land was cheap and especially in New York, Pennsylvania, Virginia, and the Carolinas, readily available. Labor, by contrast, was scarce. Because of the labor shortage, **indentured servants** looked forward to earning their wages and buying land themselves after their period of servitude. An indentured servant was a person who sold his or her labor, usually in exchange for the cost of the trip from Europe to the colonies.

Nonindentured and free laborers generally earned higher wages in America than they could earn in Europe. Some of the Southern colonies gave newcomers fifty acres of land if they were able to arrange for their own transportation to the colony.

Cheap land and the high demand for workers meant that American colonists usually had greater opportunities to achieve prosperity than most people in Europe. While some became wealthy, others of course failed, creating a class of American poor. However, over time the great majority of free inhabitants achieved at least moderate prosperity.

Some English practices that protected the landed aristocracy in Great Britain did not survive in the colonies. For example, the English law of entail prohibited the sale or distribution of property beyond male family members. The law of primogeniture required that land be handed down



Why was the rigid class system of England harder to maintain in the American colonies?

Figure 5.5.4

to eldest sons. The colonists paid little attention to these laws, thereby increasing the wide distribution of land in the colonies.

England's rigid class system also was harder to maintain in America. Wealth and family name did not mean automatic success in a land where everyone had to work to survive. Those who came to America without great personal wealth rarely were held back if they were ambitious and hardworking. Carpenters and brick masons, for example, enjoyed only

## Key words

### indentured servant:

A person who voluntarily sold their labor for a set period of time in return for the cost of passage to the American colonies

## Key words

### **charter:**

A written document from a government or ruler that grants certain rights to an individual, group, organization, or to people in general

### **magistrate:**

A lower-level judicial officer, usually elected in urban areas, who handles traffic violations, minor criminal offenses, and civil suits involving small amounts of money

### **suffrage:**

The right to vote

modest social status in England. But the constant demand for new buildings in America allowed such craftsmen to earn a living equal to many of their social superiors. “Well-born” Europeans who considered hard work or manual labor beneath them sometimes had difficulty surviving in the colonies.

The chance to improve one’s lot in life became a fundamental ideal of the American experience. Examples abound in colonial America. For instance, one of a candle maker’s seventeen children, Benjamin Franklin (1706–1790), became a great inventor, statesman, and diplomat. An English corset-maker’s son, Thomas Paine (1737–1809), arrived in Pennsylvania from England in 1774 and became a famous writer on behalf of the American Revolution. A son of a poor, unwed mother, Alexander Hamilton (1755–1804), became the first Secretary of the Treasury of the newly formed United States.

## What Rights Became Part of Colonial Charters?

King James I gave the Virginia Company a royal **charter**, which granted the company permission to settle Jamestown. A charter is a written document from a government or a ruler that grants certain rights. The royal charter granted to the Virginia Company promised that:

*The Persons...which shall dwell...within every or any of the said several Colonies and Plantations, and every of their children...shall HAVE and enjoy all Liberties, Franchises, and Immunities...as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.*

Similar guarantees appeared in the royal charters establishing Massachusetts, Maryland, and other colonies. Such guarantees echoed the ideals of the Magna Carta—that all Englishmen, wherever they went, enjoyed certain basic rights.

This tradition of expressing rights in writing became an essential part of American constitutions. The Massachusetts Body of Liberties of 1641, for example, provided for the rule of law and protection of basic rights of persons living in that colony against any abuse of power by a **magistrate** or judge of the colony. In addition to echoing the Magna Carta in some respects, this document was America’s first bill of rights. It provided among other things that:

*No man shall be arrested, restrayned, banished nor anywayes punished...unless by vertue of some express laws of the country warranting the same.*

The Body of Liberties also guaranteed trial by jury, free elections, and the right of free men to own property. It prohibited government from taking private property without just compensation, from forcing witnesses to testify against themselves (self-incrimination), and from imposing cruel and unusual punishments. Although the Body of Liberties limited **suffrage**, or the right to vote, in Massachusetts, it granted certain political rights to those who did not enjoy the voting franchise, including the right to petition the government for the redress of grievances.

Guarantees of basic rights later appeared in other colonies. Pennsylvania, for example, guaranteed such rights as freedom from arrest except for “probable cause” and trial by a jury of one’s peers and the right against taxation without representation, as did other colonies. But Pennsylvania was the first colony to guarantee freedom of conscience—“the rights of conscience.”



### Content Highlight: WHAT DO YOU THINK?

1. If you had been offered the opportunity to come to America as an indentured servant, do you think you would have done so? Why or why not?
2. What do you think were the most important differences between life in England and life in the American colonies? How did those differences shape early American governments?
3. Were the differences between theories of representation in colonial America and England significant? Why or why not?
4. Social classes developed quickly in the American colonies but were based on wealth rather than birth. Does the distinction matter? Why or why not?

### Who Did Not Benefit From the Rights Expressed in Colonial Documents?

Not all Americans enjoyed the rights secured in colonial charters and other documents. For example, in some colonies the right to vote or hold office was restricted to Protestant white men. In others such rights were restricted to those who belonged to the colony’s official state or established church.

As in England and elsewhere, women were not granted political rights. Colonial laws limited their right to own property and to manage their own legal and personal affairs. Laws varied among the colonies, but married women usually had the legal status of underage children. They lost most of their legal identity to their husbands under a legal doctrine called coverture. According to English law,

*Husband and wife are one person...the very being or legal existence of the woman is suspended during the marriage.*

Between one-half and two-thirds of all immigrants to the colonies came as indentured servants. Most were bound to masters for periods ranging from a few years to decades. The status of many indentured servants was not much better than that of slaves until their period of indenture ended.

Native Americans also did not enjoy the rights expressed in colonial documents. Like the Spanish and French before them, British settlers treated Indian tribes as foreign entities. They were removed from their lands when necessary for colonial expansion and dealt with through treaties at other times.

The most glaring example of the failure to extend the rights and privileges to all was the institution of racial slavery. African slavery was well established in the American colonies by the eighteenth century. Slaves, who made up twenty percent of the population in 1760, were treated as property and thus were denied basic human rights.





## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Using Natural Rights Philosophy to Address the Problem of Slavery

Consider this situation. Some 325,000 of the 1.6 million people living in the colonies in 1760 were enslaved Africans. Slavery flourished in the plantation economy of the Southern colonies, as it did in the British and French West Indies and in South America. Slavery was legally recognized in all thirteen British North American colonies. New York City had a significant slave population, as did New England.

There was some active opposition to slavery among the population of free citizens as well as among the slaves themselves. Some opponents sought its peaceful abolition, while others were willing to use violent or illegal means.

As explained in an earlier lesson, natural rights philosophy emphasizes both human equality and the protection of private property. Both slave owners and abolitionists in the colonies and in Great Britain could point to natural rights philosophy for support. Which side has the stronger argument? Why?



What protections from abuse did slaves have, if any?

Figure 5.5.5

## What Basic Ideas of Constitutional Government Did the Colonial Government Use?

As previously explained, the English colonies originated with charters issued by the Crown. In general, the structure of colonial governments consisted of:

- A governor, who was the proprietor, or someone else appointed by the Crown
- A council of between three and thirty landholders that advised the governor and in some circumstances served as the highest court of the colony
- An assembly elected by the people that had a say in matters of taxation

Beyond these rudimentary structures, Crown charters usually offered few details about how local governments should function. As a result, America became a fertile ground for constitution-making and governmental innovation.

In 1636, colonists in several Massachusetts towns received permission to move west into the Connecticut Valley. Three years later those settlers adopted the **Fundamental Orders of Connecticut**. The Fundamental Orders of Connecticut derived authority from all free men living in these



Figure 5.5.6

towns. This colonial constitution helped to establish the American preference for written constitutions. The Fundamental Orders of Connecticut established a central legislative assembly, a governor, and courts. As was the custom, voting was limited to white male property owners. Other colonies also experimented with writing constitutions in the years that followed. Some of the early written constitutions were successful. Others failed or had to be revised. The forms of colonial government varied from colony to colony. However, all constitutions shared certain basic principles, including the following.

### **FUNDAMENTAL RIGHTS**

The colonists were concerned foremost with protecting the common law rights that they brought with them from England. At first colonists understood these rights as the ancient and fundamental rights of Englishmen. As the Revolution neared, the colonists increasingly understood their rights to life, liberty, and property in terms of natural rights philosophy.

### **RULE OF LAW**

To protect their fundamental rights, the colonists insisted on the creation of a government of laws under which those responsible for making and enforcing the laws had to obey the laws and could not exercise power arbitrarily.



Figure 5.5.7

## **Key words**

### **Fundamental Orders of Connecticut:**

Adopted in 1639, this series of laws is the first written constitution in North America

### **REPRESENTATIVE GOVERNMENT AND THE RIGHT TO VOTE**

One of the most important constitutional developments was the growth of representative government. The first representative assembly in the colonies met in Virginia in 1619. The right of colonists to elect representatives to colonial legislatures was one device for enticing settlers to come to America. Representative assemblies reduced the possibility that royal governors would violate the people's rights. The

legislatures would respond to the needs and interests of the people. The creation of representative assemblies also established the principle of no taxation without representation.



How do representative assemblies check the power of the executive branch?

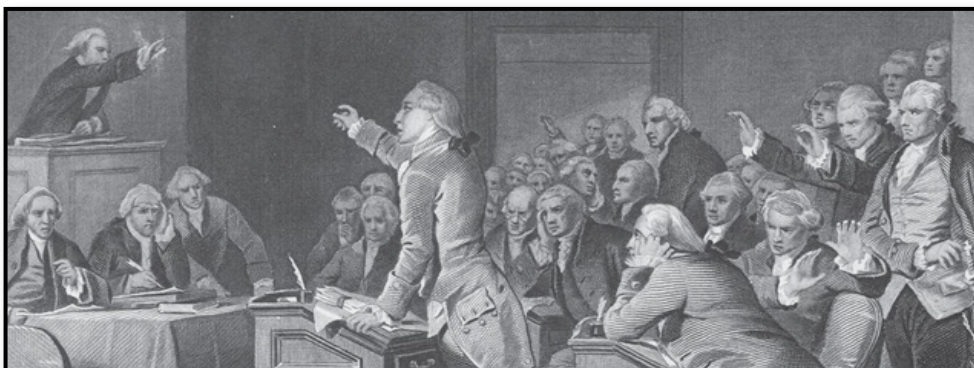
Figure 5.5.8

### SEPARATION OF POWERS

Colonial governments typically provided for the exercise of three kinds of governmental power. Separation of powers was evident in the following ways.

#### **Legislatures**

All the colonies had legislatures or assemblies that over time assumed greater responsibility for making laws. All but Pennsylvania adopted the structure of Parliament, with “lower” and “upper” houses. Pennsylvania adopted a unicameral, or one-house, legislature. Members of the upper house were either appointed by the governor or elected by the wealthiest property owners of the colony. All the men in the colony who owned a certain amount of property elected members of the lower house. The colonial legislatures eventually became the strongest of the three branches of government.



What might be the advantages and disadvantages of having a legislature be the strongest branch of government?

Figure 5.5.9

## Governors

Governors were responsible for carrying out and enforcing laws. They also were concerned with ensuring that the colonies were governed in a manner consistent with English law and tradition. The British monarch chose the governors, or the governors were the proprietors. Only in Connecticut and Rhode Island were the governors elected.

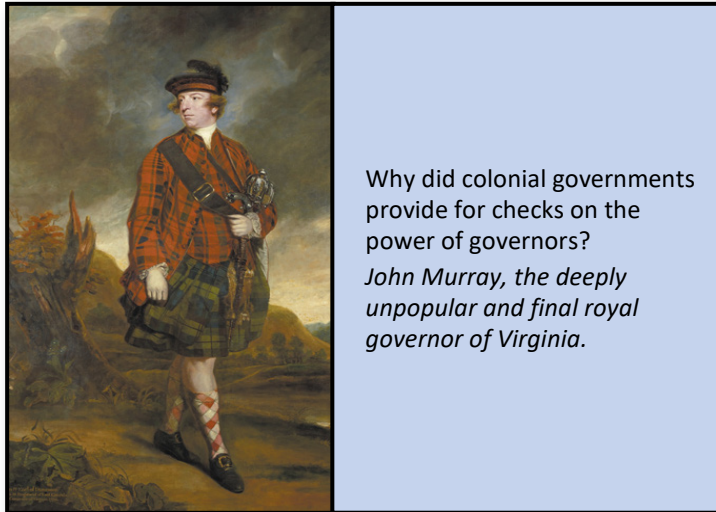


Figure 5.5.10

## Courts

Courts were created to administer local justice and to preside over the trials of those accused of breaking local laws. Judges were required to follow strict rules of procedure. Some colonies created a two-tiered system of trial and appeals courts.

### How Did Colonial Governments Become More Representative Than the Government in Britain?

American colonists believed that the security of life and liberty depended on the security of property, which explains in part the property requirement for full political rights, such as voting. If one of the purposes of government was to protect property, it seemed reasonable to many Americans to limit suffrage to those who possessed at least some land.

Owning fifty acres of land was a typical property requirement for voting in the colonies. Land was relatively easy to obtain, and so the body of eligible voters in America was proportionally larger than in England. Colonial legislatures accordingly were more broadly representative.

Unlike in England, colonial elections usually offered the voters a choice of competing candidates for office. Colonial legislators usually served shorter terms than members of Parliament, who faced election only once in seven years.

Colonial legislators also were required to live in the districts they represented. They were considered to be the voices, or agents, of the people, or their **constituents**. A constituent is a person represented by an elected official. And so, colonial legislators were responsible for

## Key words

### constituent:

A person represented by an elected official



ensuring that the legislature knew about the needs and interests of their constituents. By contrast, in 1776 members of the British Parliament did not have to live in the districts they represented and often had little understanding of the needs of their constituents. Instead, they were charged to represent the interests of the nation as a whole.



What relationship might there be, if any, between the ownership of property and individual liberty?

Figure 5.5.11

### Content Highlight:

#### WHAT DO YOU THINK?

1. What do you think is the best way to explain the American colonists' views of government? Is social contract theory or historical circumstance more important? Why?
2. What conflicts, if any, do you see between social contract theory and the status of women, indentured servants, and slaves in eighteenth-century America? What might explain those conflicts?
3. Does American colonial history help to provide context for understanding any contemporary issues in American politics and government? If so, which ones? If not, why not?
4. Do you think the same degree of social and economic opportunity exists for immigrants to America today as existed for the colonists? What has remained the same? What has changed?

## Conclusion

This lesson explored colonists' ideas about constitutional government. The colonists placed importance on written guarantees of basic rights and representative government. Colonists had a unique perspective on many aspects of government because of the economic and social conditions in America. And so, while they borrowed ideas from British government, the colonists also created a system that was truly American.

## Lesson Check-up



- What was the Mayflower Compact? Why was it drafted? How could it be said to reflect the idea that government should be based on consent of the governed?
- Why were colonial governments more representative than the British government?
- In what ways were eighteenth-century American and British societies similar and different in terms of the rights of individual liberty, equality of opportunity, suffrage, and property?
- How would you describe the economic, social, and political conditions of life in colonial America? How did these conditions affect the development of American ideas about government?
- How did the simple governing structures in colonial charters evolve into more comprehensive systems of local government before the Revolution?
- Why were written guarantees of rights in colonial documents important to the development of Americans' ideas about government?
- Are written guarantees of rights as important today as they were in colonial times? Why or why not?

# Colonial Rebellion and the Declaration of Independence



## Key words

- compact
- law of nature
- sovereignty
- writ of assistance

## What You Will Learn to Do

Explain the circumstances that produced the Declaration of Independence

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Take responsibility for your actions and choices
- Treat self and others with respect

## Learning Objectives

- **Describe** the British policies that some American colonists believed violated basic principles of constitutional government and their rights as Englishmen

## Essential Question

Why did the American colonists want to be independent from Great Britain?

### Learning Objectives (cont'd)

- **Explain** why Americans resisted those policies and how that resistance led to the Declaration of Independence
- **Evaluate** the arguments that the colonists made to justify separation from Great Britain
- **Evaluate**, take, and defend positions on violations of colonists' rights before the Revolution and important questions about the meaning and implications of the Declaration of Independence
- **Define** key words: compact, law of nature, sovereignty, writ of assistance

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### Introduction

The growth of the American colonies raised issues with the parent country, Great Britain, that were difficult to resolve peacefully. This lesson describes the circumstances that produced the Declaration of Independence and the major ideas about government and natural rights included in that document.

### How Did Great Britain's Policy Toward the Colonies Change?



Figure 5.6.1

Generations of colonists had grown used to little interference from the British government in their affairs. After 1763, however, several factors caused the British to exert more control over the American colonies than they had done in the previous 150 years. Great Britain had incurred large debts to gain its



victory over the French in the Seven Years' War of 1756–1763. The British government was under heavy pressure to reduce taxes at home. To the British ministers this meant that the American colonists should pay a fair share of the war debt, especially because much of that debt had been incurred in protecting the colonists.

Between 1763 and 1776, Great Britain tried to increase its control of the colonies. For example, the Proclamation Act (1763) forbade colonial authorities to allow settlement on Indian lands west of the Appalachian Mountains. The act aimed at reducing the costs of protecting colonists from wars that the colonists provoked with Native Americans. To raise revenue, the British government also increased its control of trade. The Stamp Act (1765) introduced a new tax on the colonists by imposing duties on stamps needed for official documents. At the same time Parliament passed the first Quartering Act (1765), which in 1774 was changed to require colonists to shelter troops in their homes.



Figure 5.6.2

### Why Did the Colonists Resist British Control?

Although some colonists accepted the new taxes and other controls, many resisted. New trade restrictions and taxes meant that some colonists would lose money. Perhaps more important, the new regulations challenged the colonists' understanding of representative government. In the previous century John Locke had written that:

*The supreme power cannot take from any man part of his property without his own consent... that is, the consent of the majority, giving it either by themselves or their representatives chosen by them.*

— (Second Treatise, 1689)

The colonists agreed with Locke. They thought that tax laws should be passed only in their own colonial legislatures, in which they were represented. No taxation without representation had become an established belief of settlers in the American colonies.

Small groups in each colony became convinced that only large crowds prepared to act forcefully could successfully resist the Stamp Act. Leaders in Connecticut dubbed their followers the Sons of Liberty. The name spread rapidly, coming to stand for everyone who participated in the popular resistance. Although the Sons of Liberty rarely sought violence, they engaged in political agitation that tended to precipitate crowd action.

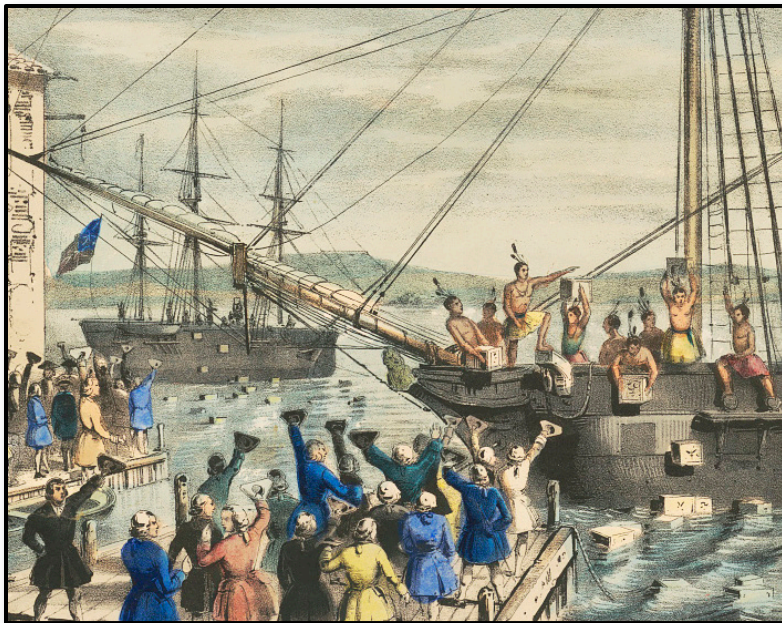
In October 1765, representatives from the colonies met in the Stamp Act Congress to organize resistance—the first such intercolonial gathering in American history. In March 1766, Parliament repealed the Stamp Act but passed the Declaratory Act, asserting Great Britain’s full power and authority over the colonies. A little more than a year later, in June 1767, Parliament passed the Townshend Revenue Acts, which levied new taxes on items such as tea, paper, and glass. In response, a group of American women calling themselves the Daughters of Liberty led boycotts of English goods and committed themselves to producing cloth and other staples that would help the colonies become economically independent from England. Parliament also gave new powers to revenue officials. **Writs of assistance**, or general warrants, gave these officials broad authority to search and seize colonial property. Colonists charged with various crimes were transported to Nova Scotia or England for trials that were frequently delayed.

The British sent troops to the colonies to maintain order and facilitate tax collection. In 1770, a conflict broke out between British troops and colonists in Boston, resulting in the so-called Boston Massacre. Five colonists were killed. This incident helped to convince many Americans that the British government was prepared to use military force to coerce the colonists into obedience. Although the Townshend Acts were repealed in 1770, the Tea Act in 1773 reasserted Parliament’s right to tax the colonists and led to the Boston Tea Party. This name was given to the event in 1773 when colonists, dressed as Mohawk Indians, boarded three British ships and dumped forty-five tons of tea into Boston Harbor. The British government responded with what colonists called the Intolerable Acts, a series of Punitive Acts (as the British called them) that, among other things, closed Boston Harbor to all trade. These measures attacked representative government by altering the Massachusetts charter to give more power to the new royal governor, limit town meetings, weaken the court system, and authorize British troops to occupy the colony.

## Key words

### writ of assistance:

A document giving a governmental authority the power to search and seize property without restrictions



*Boston Tea Party*

*Figure 5.6.3*



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Identifying Violations of Rights

Put yourself in the colonists' shoes. Each of the following situations is based on the experiences of colonists in America. Each has at least one British violation of a right that Americans thought they should have. Suppose you were an American colonist at the time. List the rights you would claim on the basis of such experiences.

1. There was some active opposition to slavery among the population of free citizens as well as among the slaves themselves. Some opponents sought its peaceful abolition, while others were willing to use violent or illegal means.
2. Your name is Elsbeth Merrill. While you were baking bread this afternoon and awaiting the return of your husband, an agent of the king arrived to inform you that you must shelter four British soldiers in your home.
3. Your name is Lemuel Adams. You have a warehouse full of goods near Boston Harbor. The king's magistrate gives British officials a writ of assistance that permits them to search homes, stores, and warehouses near the harbor to look for evidence of smuggling.
4. Your name is James Otis. You represent colonists who have been imprisoned and are being denied their right to a trial by a jury from their own communities. You argue that denying their traditional rights as Englishmen is illegal because it violates the principles of the British Constitution. The royal magistrate denies your request and sends the prisoners to England for trial.
5. Your name is William Bradford. You have been arrested and your printing press in Philadelphia has been destroyed because you printed an article criticizing the deputy governor. In the article you said the governor was like "a large cocker spaniel about five foot five."

#### How Did the Colonists Organize to Resist British Control?

Colonists formed "committees of correspondence" to publicize colonial opposition and coordinate resistance. In the fall of 1774, each colony except Georgia sent representatives to a meeting in Philadelphia to decide the best response to the actions of the British government. The meeting was the First Continental Congress. Benjamin Franklin drafted a resolution for the Congress, which stated that "there is a manifest defect in the Constitution of the British Empire in respect to the government of the colonies upon those principles of liberty which form an essential part of that Constitution." The delegates to the First Continental Congress voted to impose a ban on colonial trade with Great Britain. Their goal was to force Great Britain to change its policies, but British officials considered the trade ban an irresponsible defiance of authority and ordered the arrest of some of the leading colonists in Massachusetts.

By this time many of the more radical colonists, especially in New England, were beginning to prepare for war against Great Britain. They believed that it was the right of the people to overthrow the central government because it no longer protected the colonists' rights.



These colonists formed a civilian militia, which was called the Minutemen because this force was to be ready at a minute's notice to respond to the British attack that everyone expected.

On April 19, 1775, some seven hundred British troops tried to march to Concord, Massachusetts, where they had heard that the Minutemen had hidden arms and ammunition. Among other things they planned to arrest Samuel Adams and John Hancock, two colonial patriot leaders. Paul Revere (1735–1818) and William Dawes (1745–1799) alerted the colonists by riding through the countryside, warning people that the British were about to attack. Adams and Hancock escaped. On that day at the towns of Lexington and Concord, war broke out between seventy-five Minutemen and the British troops. The “shot heard round the world” had been fired.



What restrictions, if any, should be placed on the right to protest against a policy one opposes?

Figure 5.6.4



What were the purposes of the First Continental Congress?

Figure 5.6.5

## What Was the Purpose of the Declaration of Independence?

The Battles of Lexington and Concord began the war between America and Great Britain. In August 1775, Great Britain declared the colonies to be in a state of rebellion. In November 1775, the king formally withdrew his protection. That winter Thomas Paine's (1737–1809) pamphlet, *Common Sense*, turned colonial opinion toward the idea of independence. And by the spring of 1776 it appeared to many, that independence was the only solution to the colonists' problems. On June 7, 1776, Richard Henry Lee (1732–1794) of Virginia introduced a resolution in the Continental Congress asserting “that these United Colonies are, and of right ought to be, free and independent states, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved.” The Congress appointed a committee of five to prepare the Declaration of Independence.



## Key words

### sovereignty:

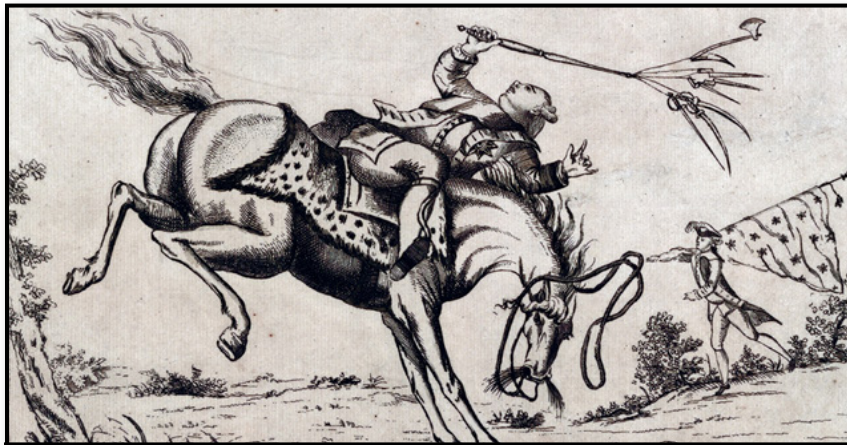
The ultimate, supreme power in a state

### law of nature:

In natural rights philosophy, moral rules found out by correctly applied reason or right reason, telling persons what they may and may not do in various circumstances

Thomas Jefferson (1743–1826) wrote the first draft of the Declaration of Independence. It announced the final, momentous step in the colonists' resistance to the British government by rejecting the **sovereignty**, or authority, of the Crown. Rebelling against the sovereignty of the government to which the colonists and generations of their forebears had sworn allegiance and from which they had sought protection for many years was a serious matter. Members of the Continental Congress believed that it was important to justify this action to other nations and to identify the basic principles of legitimate government to win sympathy and active support. Thus, a formal declaration was seen as essential.

### What Were the Main Ideas and Arguments of the Declaration of Independence?



What relevance might this political cartoon have to the American Revolution?

*"The Horse America, Throwing His Master" was printed in England in 1779. King George III is the rider of the horse.*

Figure 5.6.6

The Declaration of Independence is a prime example of the colonists' ideas about government and their complaints about British rule. It does not make an appeal on behalf of the king's loyal subjects to the fundamental rights of Englishmen. Instead, the Declaration of Independence renounces the monarchy itself and appeals to those natural rights common to people everywhere. It asserts that sovereignty—the ultimate governing authority—resides with the people, with those who are members of a politically organized community. The following are its most important ideas and arguments.

### NATURAL RIGHTS

The rights of the people are based on a higher law than laws made by humans. The existence of these rights is "self-evident." They are given by "the Laws of Nature and of Nature's God" and are "unalienable." In natural rights philosophy the **law of nature** contains universally obligatory standards of justice and would prevail in the absence of man-made law. Neither constitutions nor governments can violate this higher law. If a

government deprives the people of their natural rights, then the people have the right to change or abolish that government and to form a new government.

### HUMAN EQUALITY

Humans are equal in the sense that neither God nor nature has appointed someone at birth to rule over others. Thus, humans are politically equal. To be legitimate, the right to rule must be based on agreement, or a **compact**, among equal civic members.

### GOVERNMENT BY CONSENT

Such a compact once existed between the colonists and Great Britain. By the terms of this compact the colonists consented to be governed by British law as long as the central authority protected their rights to “Life, Liberty, and the Pursuit of Happiness.”

### “A LONG TRAIN OF ABUSES”

King George III violated the compact by repeatedly acting with Parliament to deprive the colonists of those rights that he was supposed to protect. These violations and other abuses of power showed a design to reduce government of the colonies to “absolute Tyranny.” Specifically, the Declaration of Independence charged that the king was:

- Seeking to destroy the authority of the colonial legislatures by dissolving some and refusing to approve the laws passed by others
- Obstructing the administration of justice by refusing to approve laws for support of the colonial judiciary and making judges dependent on his will alone
- Keeping standing armies among the people in time of peace without the approval of the colonial legislatures
- Quartering soldiers among the civilian population
- Imposing taxes without consent of those taxed
- Depriving colonists of the right to trial by a jury of their peers
- Altering colonial charters, abolishing laws, and fundamentally changing the constitutions of colonial governments

### RIGHT OF REVOLUTION

“Whenever any Form of Government becomes destructive of these Ends” for which government is created, it is the right of the people to “alter or to abolish it” and to create a new government that will serve those ends. The colonists had the right to withdraw their consent to be governed by Great Britain and to establish their own government as “Free and Independent States... absolved from all Allegiance to the British Crown.”

## Key words

### **compact:**

A formal contract or agreement between or among two or more parties or states

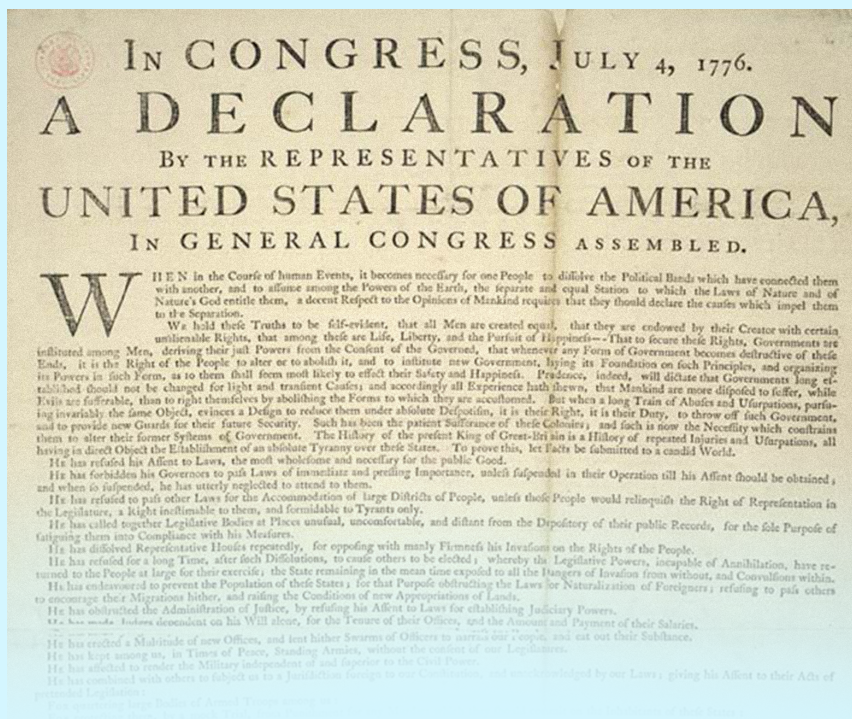


When is it justifiable to alter or abolish a government?

Figure 5.6.7

## Content Highlight:

### WHAT DO YOU THINK?



1. The Declaration of Independence states that people have a right to abolish their government. When is revolution necessary? Are a "Long Train of Abuses and Usurpations" required for revolution to be legitimate? Why or why not?
2. In what ways does the Declaration of Independence reflect John Locke's social contract theory? In what ways does it reflect principles of classical republicanism?
3. To whom is the Declaration of Independence addressed? Why do you think the drafters of the document would be attentive to "the Opinions of Mankind?"
4. Despite the fact that Jefferson owned slaves, he denounced slavery and the slave trade in his draft of the Declaration of Independence. After Southerners objected, the Congress deleted the passage. Search for the rough draft of the Declaration of Independence on the Internet. What do you think are the most significant differences between the rough draft and the final Declaration of Independence, and why do you think changes were made?

Figure 5.6.8

## Conclusion

In this lesson, you learned about how Great Britain's role toward the colonies changed after the Seven Years' War. After protecting colonists in America, Great Britain wanted the colonists to help pay for the war debt. Colonists resisted efforts of more control by Great Britain. They believed they were unfairly taxed, because they had no representation in the British Parliament, which made these laws. In less than 15 years, the colonists would rebel and declare their independence from Great Britain. The Declaration of Independence attempted to justify the colonist actions to the rest of the world, and gain support from other nations. The Declaration of Independence remains an example of how colonies and citizens can rise up against governments that do not represent them.

## Lesson Check-up



- How would you describe British policies toward the colonies before the 1750s?
- What were the colonists' major objections to British policies in the 1760s? What rights did the colonists claim that those policies violated?
- What is meant by the term sovereignty? How was sovereignty a disputed matter between Great Britain and the colonies?
- What problems identified in the Declaration of Independence would have to be corrected for governments created after American independence to be legitimate?



# Early State Constitutions



## Key words

- checks and balances
- legislative supremacy
- veto

## What You Will Learn to Do

Explain how early state governments promoted individual rights and limited government

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Take responsibility for your actions and choices
- Treat self and others with respect

## Learning Objectives

- **Explain** the basic ideas about government and rights that are included in state constitutions



## Essential Question

What basic ideas about government and rights did the state constitutions include?

### Learning Objectives (cont'd)

- **Explain** how the experiences of the states in developing their constitutions and bills of rights influenced the framing of the U.S. Constitution and Bill of Rights
- **Evaluate**, take, and defend positions on the theory of legislative supremacy, the importance of the Virginia Declaration of Rights, and the role of declarations of rights in early state constitutions
- **Define** key words: checks and balances, legislative supremacy, veto

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### Introduction

After declaring independence, the Founders designed new state governments to protect individual rights and to promote the common good. This lesson shows how the constitution of Massachusetts in particular was designed to achieve these ends. State constitutions also contained bills or declarations of rights. These guarantees of rights, for which Virginia's Declaration of Rights served as a model, had a great influence on the development of the U.S. Bill of Rights.

### What Was the Status of the Colonies After the Signing of the Declaration of Independence?

In 1776, the Declaration of Independence proclaimed the colonies to be "Free and Independent States." At the time most Americans would have used the phrase "my country" to refer to their state of residence. The states were united only by their common commitment to fight the war for independence from Great Britain.

In May 1776, shortly before the colonies formally declared their independence, the Second Continental Congress adopted a resolution calling on each state to draw up a new constitution. Between 1776 and 1780 all the states adopted new constitutions. Most kept the basic pattern of their old colonial charters, but they made important

modifications. Never before had so many new governments been created using the basic ideas of natural rights, rule of law, republicanism, and constitutional government.

### What Basic Ideas Did the State Constitutions Include?

The states experimented with various models in writing their new constitutions, but all contained the following basic principles.

#### HIGHER LAW AND NATURAL RIGHTS

Every state considered its constitution to be a fundamental, or “higher,” law that placed limits on governmental power. Unlike the British Parliament, the state legislature did not have the power to change the constitution. Each constitution reflected the idea that the purpose of government is to preserve and protect citizens’ natural rights to life, liberty, and property.

#### SOCIAL CONTRACT

Each state constitution made clear that the state government was formed as a result of a social contract, that is, an agreement among the people to create a government to protect their natural rights as expressed in the constitution’s preamble or bill of rights.



Are Americans today bound by a social contract that was created more than two hundred years ago? Why or why not?

Figure 5.7.1

#### POPULAR SOVEREIGNTY

All the new state constitutions stated that sovereignty, or ultimate governing authority, rests with the people. The people delegate authority to the government to govern in accordance with constitutional requirements.

#### REPRESENTATION AND THE RIGHT TO VOTE

All the state constitutions created legislatures composed of representatives elected by “qualified” voters, usually white men who owned some amount of property. Because property was relatively easy to acquire in America, about seventy percent of white men could vote. Unlike in Great Britain, representation was not based on fixed social classes. Most state Constitutions provided for annual legislative elections. In seven states free African Americans and Native Americans could vote if they met the property requirements.

## LEGISLATIVE SUPREMACY

A government in which the legislature has the most power exhibits **legislative supremacy**. Most state constitutions provided for strong legislatures and relied on the principle of majority rule to protect the rights of citizens. This reliance continued a development that had begun during the colonial period, when the legislatures first became strong. It also reflected the former colonists' distrust of executive power, which they believed had been abused under British rule.

The belief in legislative supremacy was based on the following assumptions:

- The legislative branch is most capable of reflecting the will of the people. Voters determine who their representatives will be and can remove them if they believe someone else would better represent them.
- The executive branch is less accountable to the people and should not be trusted with much power. The colonists' greatest problems with the British government had been with its executive branch, that is, with the king's ministers and the royal governors in the colonies.
- Judges also should not be trusted with too much power. Before the Revolution, judges had been Crown magistrates who tried the colonists for breaking British laws. Early state constitutions limited judicial power in various ways, including making judges stand for election at regular intervals and giving legislatures the power to reduce judges' salaries. In several states the upper house of the legislature continued to exercise some judicial functions, such as deciding cases involving probate or admiralty matters.

The following examples of a preference for legislative supremacy can be found in state constitutions drafted shortly after the Revolution:

- Executive branches were relatively weak and dependent on legislatures. For example, Pennsylvania's constitution provided for a twelve-member council rather than a governor. Other state constitutions gave legislatures the power to select the governor or to control the governor's salary.
- Governors had short terms of office, usually only one year, to ensure that they would not have time to amass too much power.
- Appointments made by the governor had to be approved by the legislature.
- Governors played virtually no role in lawmaking and had only a qualified, or limited, power to nullify, or **veto**, laws that the legislature had enacted. Some states gave their governors a veto power, but the legislatures in those states could override a veto by re-passing the proposed law.
- Most state Constitutions placed **checks and balances** on legislative powers, usually within legislatures. For example, every state constitution except those in Pennsylvania and Georgia provided for a check, or limit, on legislative powers by dividing the legislature into two houses. Most important decisions required

## Key words

### **legislative supremacy:**

A system of government in which the legislative branch has ultimate power

### **veto:**

A rejection of a proposed law that has been passed by a branch of government in an effort to delay or prevent its enactment

### **checks and balances:**

Distributing and balancing the powers of government among different branches of government so no one branch is able to dominate the others



debate, deliberation, and action by both houses—thus a degree of balance. Each house could check the power of the other by defeating a proposal with which it did not agree. Voters also could check legislators' power by electing new representatives.



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Evaluating Legislative Supremacy

John Locke and some other natural rights philosophers believed that in a representative government the legislative branch should be supreme because it is the branch closest to the people and reflects the wishes of the people. Accordingly, the legislative branch is the least likely to violate the people's rights. Most of the early state constitutions reflected Locke's view and weighted the balance of governmental power in favor of their legislatures. Include your opinions on the following questions in the spaces provided:

1. Do you agree with Locke's argument for the supremacy of legislative power? Why or why not?
2. Does the legislative branch necessarily reflect the people's will? Explain your response.
3. What might a government be like in which the executive or judicial branch was supreme rather than the legislature?

## How Did the Massachusetts Constitution Differ from Other State Constitutions?



What checks did the Massachusetts constitution place on the power of the governor?

*John Hancock was the first governor of the Commonwealth of Massachusetts.*

Written principally by John Adams (1735–1826), who would later become America's second president, the Massachusetts constitution of 1780 differed from those of the other states. In addition to relying on popular representation in the legislature, it created a strong system of separation of powers and checks and balances. It gave the governor effective checks on the powers of the legislature and provided for a judiciary with judges holding office according to their good behavior, not for limited terms.

The structure of the Massachusetts constitution is more like the U.S. Constitution than the other early state constitutions, and so it is worth examining in some detail. Following are two important characteristics of the Massachusetts constitution.

### **STRONG EXECUTIVE**

Qualified voters elected the governor, though for a short term—one year. The writers of this constitution believed that because the governor was popularly elected, it would be safe to trust him with greater power. To enable the governor to

Figure 5.7.2

be more independent of the legislature and to allow him to check the legislature's use of power, the Massachusetts constitution contained the following provisions:

- The governor's salary was fixed and could not be changed by the legislature.
- The governor had the power to revise laws enacted by the legislature, and his revision could be overridden only by a two-thirds vote of the legislature.
- The governor had the power to appoint officials to the executive branch and judges to the judicial branch.

### **REPRESENTATION OF VARIOUS ECONOMIC CLASSES**

The constitution provided for a complex system of representation to ensure that many groups and interests had a voice. Only electors who owned a large amount of property could vote for the governor. Electors who owned less property could vote for members of the upper house of the state legislature. Electors who owned only a small amount of property could vote for members of the lower house.

By providing for representation of these varied economic classes, the Massachusetts constitution was reminiscent of the classical republican idea of mixed constitution. More classes had a voice in the government, which ensured rich political dialogue and contributed to political stability.



#### **Content Highlight:** **WHAT DO YOU THINK?**

1. In what ways did Americans' colonial experience prepare them to write state constitutions after the Revolution?
2. How did early state constitutions reflect Americans' fear of centralized political authority?
3. Which branch of government do you think is most responsive to the will of the people? Should that branch have more power than the other branches? Why or why not?
4. What might be the strengths and weaknesses of the way the Massachusetts state constitution distributed the right to vote for the lower and upper houses of its legislature and the leader of its executive branch?

### **What Were the State Declarations of Rights?**

Most state constitutions began with a preamble and a declaration of rights. For example, the first sentence of the Pennsylvania preamble stated:

*Whereas all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals, who compose it, to enjoy their natural rights, and the other blessings which the Author of Existence has bestowed upon man; and, whenever these great ends of government are not obtained, the people have a right, by common consent, to change it, and take such measures as to them may appear necessary to promote their safety and happiness.*

Before allocating any governmental powers, the Pennsylvania constitution first listed the rights of the inhabitants of the state, beginning with the rights of “enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.” Writers of early state constitutions attached great importance to guarantees of basic rights. The lists of rights differed somewhat from state to state, but all were based on the idea that people have certain inherent rights that must be protected from governmental interference.

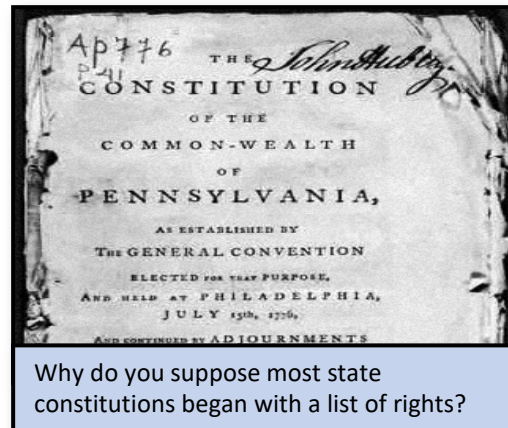


Figure 5.7.3



- What ideas about the purposes of government did George Mason include in the Virginia Declaration of Rights?
- What ideas from classical republicanism did George Mason include in the Virginia Declaration of Rights?

Figure 5.7.4

### What Important Ideas Are in the Virginia Declaration of Rights?

On June 12, 1776, Virginia became the first state to adopt a declaration of rights. The Virginia Declaration of Rights was also the first protection of individual rights to be adopted by the people acting through an elected convention. The Virginia Declaration of Rights expressed the people’s understanding of their fundamental, inalienable rights and the idea that people create government to protect those rights. It was also the first list of rights to appear in a state’s fundamental law, or constitution, thereby insulating those rights from governmental interference.

Both James Madison and George Mason (1725–1792) served on the committee appointed to write the Virginia Declaration of Rights. Mason wrote virtually the entire document, and his ideas would later strongly influence Madison’s drafting of the U.S. Bill of Rights. In writing the Virginia Declaration of Rights, Mason relied heavily on the writings of John Locke. He was also influenced by the ideas of classical republicanism and by the American colonial experience.

The Virginia Declaration of Rights listed specific rights, such as freedom of the press and the rights of criminal defendants. It also stated the following:

- All men are by nature equally free and independent, and enjoy the rights of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. No governmental compact can deprive them of their rights.

The Virginia Declaration of Rights (*cont'd*):

- All power is derived from and kept by the people.
- Government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community. If a government does not serve these purposes, the people have an inalienable right to alter or abolish it.
- All men are equally entitled to the free exercise of religion, according to the dictates of conscience.

The Virginia Declaration of Rights ended with a statement based on the ideas of classical republicanism about civic virtue and religious values:

*"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.... It is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other."*



What is the importance of a free press to a free society?

Figure 5.7.5



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Examining Historical Documents

Work with a study partner to complete the following activities.

1. Read the Virginia Declaration of Rights. How are the following concepts reflected in this document?
  - Social contract
  - Individual rights
  - Limited government
  - Civic virtue
  - Common welfare
2. Which historical experiences of the colonists seem to have exerted the greatest influence on the authors of state declarations of rights?
3. Is it significant that most state constitutions began with a list of rights, rather than those rights being included in the body of the constitution or appended as a list at the end of the document? Why or why not?

## What Rights Did Other States Protect?

Most states adopted declarations or bills of rights that resembled the Virginia Declaration of Rights. The few states that did not have such declarations, such as New York, included guarantees of certain rights in the main body of their constitutions. Like the Virginia



Declaration of Rights, the declarations in other constitutions began with statements about natural rights, popular sovereignty, and the purposes of government. Some declarations, such as Delaware's, provided that "all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole."

Other states' declarations varied in the rights they chose to include or leave out. However, most included political guarantees such as:

- The right to vote
- Free and frequent elections
- Freedom of speech and of the press
- The right to petition the government to redress grievances
- No taxation without representation



Figure 5.7.6

All state constitutions contained important procedural guarantees of due process such as:

- Rights to counsel and trial by a jury of one's peers
- Protection from illegal searches and seizures
- Protection from forced self-incrimination, excessive bail and fines, and cruel and unusual punishment

Most of the state declarations, including the Virginia Declaration of Rights, expressed a fear of military tyranny by condemning professional standing armies in time of peace and the quartering of troops in civilian homes. At the same time many declarations endorsed the idea of a "well-regulated" civilian militia and the right to bear arms.

These state declarations of rights would have a great influence on the later drafting and adoption of the U.S. Bill of Rights.

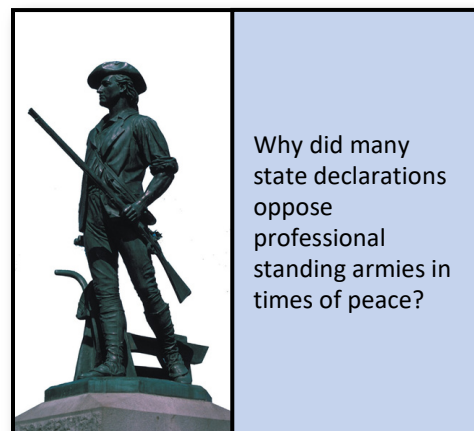


Figure 5.7.7



## Content Highlight:

### WHAT DO YOU THINK?

- Why did Americans think that it was important to have written declarations of rights in their state constitutions?
- Obtain a copy of the bill of rights in the constitution of your state. Are you surprised by any of the rights listed? Why or why not? Do you think all the rights listed in your state constitution also should appear in the Bill of Rights to the U.S. Constitution? Why or why not?
- In your opinion what is the greatest challenge to individual rights today and what should be done about it?

## Conclusion

In this lesson, you learned about early efforts at writing state constitutions. These constitutions were written before the United States Constitution. Each state wrote its own separate constitution. However, the ideas found in these constitutions shared many of the same principles about government found in natural law and classical republicanism. The Virginia Declaration of Rights, in particular, had a strong influence on the U.S. Constitution's Bill of Rights.

## Lesson Check-up



- What basic ideas about government were contained in the new state constitutions?
- Explain the meaning and significance of the following concepts: higher law; popular sovereignty; legislative supremacy; checks and balances.
- What important ideas did the Virginia Declaration of Rights contain? How was this document influential throughout the colonies?
- Examine the declaration of rights in your state constitution. How does the list of rights limit state government?

# The Articles of Confederation



## Key words

- Articles of Confederation
- confederation
- Shays' Rebellion

## What You Will Learn to Do

Analyze the Articles of Confederation and lack of sufficient authority to meet the nation's needs

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Take responsibility for your actions and choices
- Treat self and others with respect

## Learning Objectives

- **Describe** the United States' first national constitution, the Articles of Confederation
- **Explain** why some people thought the government under the Articles of Confederation was not strong enough



## Essential Question

What were the Articles of Confederation, and why did some Founders want to change them?

### Learning Objectives (cont'd)

- **Evaluate**, take, and defend positions on the strengths and weaknesses of the Articles of Confederation, the significance of the Northwest Ordinance, and Americans' mistrust of a strong national government
- **Define** key words: Articles of Confederation, confederation, Shays' Rebellion

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### Introduction

This lesson examines the government formed by the **Articles of Confederation**. It was the first of two blueprints for a United States government written between 1776 and 1787. The Articles of Confederation provided the framework of an alliance of states to fight the Revolutionary War. The provisions in this document reflected political realities and divisions among the states as well as the need for unity. Many Founders soon came to believe that this first government of the United States lacked sufficient authority to meet the nation's needs both during and after the war.

### Why and How Were the Articles of Confederation Created?

In addition to writing state constitutions between 1776 and 1780, Americans also considered how to manage economic and political relationships among the states, resolve disputes such as state borders, and conduct relations with the rest of the world. Some kind of union or **confederation** was necessary to achieve these goals. Therefore, the Founders set forth their ideas in a document known as the Articles of Confederation. A confederation is a form of political organization in which sovereign states delegate power to a central government for specified purposes.

### Key words

#### Articles of Confederation:

The first constitution of the United States, created to form a perpetual union and a firm league of friendship among the thirteen original states; it was adopted by the Second Continental Congress on November 15, 1777, and sent to the states for ratification

#### confederation:

A form of political organization in which the sovereign states combine for certain specified purposes, such as mutual defense; member states can leave a confederation at any time. The United States was a confederation from 1776 to 1789



Some leaders had seen the need for a united government for some time. America's elder statesman, Benjamin Franklin, had proposed a colonial government in 1754, and at different times groups of colonies (and then states) had imagined regional confederations to address particular issues. Franklin first submitted a draft for Articles of Confederation to the Second Continental Congress in July 1775. Several other proposals were made that summer and fall, but the question of independence from Great Britain was more important at that moment than forming a collective government.

On June 7, 1776, Virginian Richard Henry Lee (1732–1794) introduced a set of resolutions to the Second Continental Congress—one for independence, the other for a government. From these resolutions came the Declaration of Independence and the Articles of Confederation.

## What Problems Did the Articles of Confederation Address?

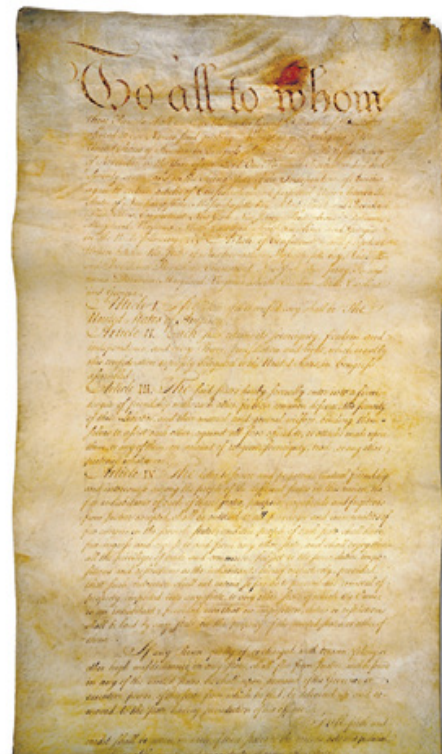
Two major concerns made it difficult for the Continental Congress and the states to devise a central government—fear of a strong national government and fear that some states would dominate others in the central government.

### FEAR OF A STRONG CENTRAL GOVERNMENT

When the war against Great Britain started, each state was like a separate nation with its own constitution and government. To the people, their state was their country, and all eligible voters could have a voice in government. They could elect members of their communities to represent their interests in their state legislatures. Especially in smaller states, the government was close enough to most citizens that they could participate in some of its activities.

Most members of the Continental Congress agreed that winning the war required a central government. However, they were wary of making one that was too strong. They, like many Americans, believed that the British government had deprived people of their rights, including their right to be represented in government. They thought that this was likely to happen with any central government that was both powerful and far away. They believed that government should be close to the people who could control it and make certain that it did not violate their rights. Their study of history and political philosophy led them to believe that republican government could succeed only in small communities where people shared common ideas and beliefs.

The solution to the problem was to create a “firm league of friendship,” not a strong central government. Thus, Article II in the Articles of Confederation stated, “Each state retains its sovereignty, freedoms, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”



What was the greatest weakness of the Articles of Confederation?

Figure 5.8.1

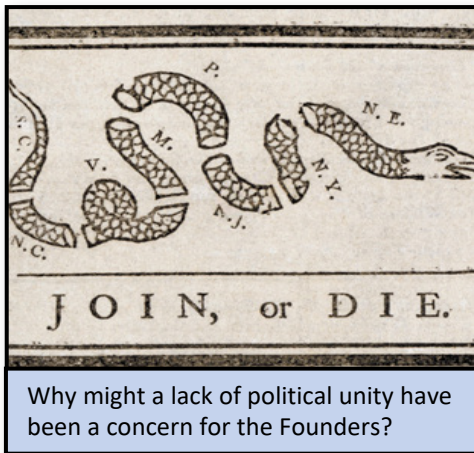


Figure 5.8.2

The government created by the Articles of Confederation strictly defined the authority of the central legislature, or Congress. Article VI listed things that states could not do—send or receive ambassadors to foreign nations, lay imposts or duties that conflicted with national treaties, maintain military forces beyond what Congress considered necessary for the state’s self-defense, or engage in war (except in case of invasion). Article IX granted Congress “the sole and exclusive right of determining on peace and war,” as well as directing military forces, conducting foreign policy, and determining the union’s expenses.

The Articles of Confederation left most of the powers of government with the states. For example:

- The Confederation Congress had no authority over any person in any state. Only the state governments had authority over their citizens.
- Congress had no power to collect taxes from the states or from the people directly. It could request money only from the state governments, which were supposed to raise the money from their citizens.
- Congress had no power to regulate trade among the various states.

### **FEAR THAT SOME STATES WOULD DOMINATE OTHERS IN THE CENTRAL GOVERNMENT**

The leaders in each state did not want the new national government to threaten their state’s interests. Three issues aligned groups of states against one another.

#### **Representation and voting in Congress**

Would each state have one vote, or would states with greater populations or wealth be given more votes than others? This question divided the more populous states (Massachusetts, New York, Pennsylvania, and Virginia) from the less populous (Connecticut, Delaware, Georgia, New Hampshire, and Rhode Island).

#### **Apportionment of war expenses among the states**

Would each state’s contribution to the war effort be based on total population (including slaves) or on free population only? This question divided the states with large enslaved populations (those from Maryland southward) from those with relatively small numbers of slaves (especially New England).

#### **Territorial claims in the West**

Five states (Delaware, Maryland, New Jersey, Pennsylvania, and Rhode Island) had fixed western boundaries

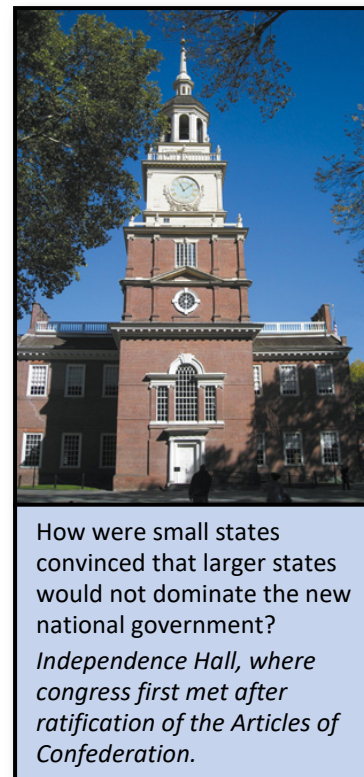


Figure 5.8.3

based on their original colonial charters, while others had “sea-to-sea” charters that allowed them to claim vast western territories. Would western lands be transferred to congressional control, creating a common “national domain” that could be sold later to pay off the national debt?

The following solutions to these problems emerged:

- Article V gave each state one vote regardless of its population. The Articles of Confederation also provided that on important matters (for example, whether to declare war or to admit new states) nine states would have to agree. This way the seven smaller states could not out vote the six larger.
- Article VIII created a formula for requesting funds that was not based on population, free or enslaved. However, this formula (based on the amount of settled, improved land in each state) was impractical because it was difficult to measure the amount of improved land across such a large nation.

In September 1780 Congress requested the “landed” states to grant part of their western lands to the United States. Once New York, Connecticut, and Virginia began the process of ceding those lands, Maryland became the last state to ratify the Articles of Confederation, on March 1, 1781.



Figure 5.8.4



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Examining the Advantages and Disadvantages of the Articles of Confederation

Work with a study partner or in small team to complete this exercise.

- Read the following excerpts from the Articles of Confederation.
- For each excerpt, create a list of advantages to the states or the national government resulting from the particular Article.
- Create a second list of the disadvantages to the states or the national government resulting from the particular Article.
- When you finish, compare your lists and be prepared to share your ideas with the class.

#### EXCERPTS FROM THE ARTICLES OF CONFEDERATION

**Article II.** Each state retains its sovereignty, freedom and independence, and every Power... which is not by this confederation expressly delegated to the United States, in Congress assembled.

**Article V.** No state shall be represented in Congress by less than two, nor more than seven Members.... In determining questions in the United States, in Congress assembled, each state shall have one vote.

**Article VIII.** All charges of war, and all other expences that shall be incurred for the common defence or general welfare...shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state.... The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states.

**Article IX.** The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences...between two or more states.

**Article X.** The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy [mixture of base metals] and value of coin struck by their own authority, or by that of the respective states.

**Article XIII.** Nor shall any alteration at any time hereafter be made in any of [these articles]; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every state.

#### What Were the Achievements of the National Government Under the Articles of Confederation?

The first national government accomplished a number of important things. The Revolutionary War was conducted under this government. Through the efforts of its diplomats, this government also secured recognition of American independence by European governments.



The Articles of Confederation did not create separate executive or judicial branches. However, Congress did create executive departments to administer finance, foreign relations, and military affairs. These were the beginnings of the later cabinet departments of treasury, state, and war. Although most disputes were to be handled in state courts, Congress could establish courts for certain limited purposes. Thus, Congress created admiralty courts to hear appeals from state courts. These courts were the first federal courts in the United States.



What were some of the achievements of the national government under the Articles of Confederation?

Figure 5.8.5

Perhaps the most lasting achievement of the Confederation was the Northwest Ordinance of 1787. It defined the Northwest Territory and created a plan for its government. The Northwest Territory encompassed the land north of the Ohio River and east of the Mississippi that would become the states of Ohio, Michigan, Indiana, Illinois, Wisconsin, and part of Minnesota. The ordinance also laid out the process by which a territory could move to statehood and guaranteed that new states would be on an equal footing with existing states. The Northwest Ordinance stated that slavery would be forever prohibited from the lands of the Northwest Territory. It required new states to provide for education by setting aside land that might be sold to fund schools. Congress under the Articles of Confederation could make these regulations for the Northwest Territory because it had complete control over it.

### What Were the Weaknesses of the Articles of Confederation?

The decision to create a national government with very limited power reflected Americans' fear of a strong national government. Americans believed that power that is not given is power that cannot be misused.

The limitations of the Articles of Confederation and the difficulties that arose under them led some Founders to desire a stronger national government. These limitations included the following:

- Congress had no power to tax. Congress could only request that state governments pay certain amounts to support the costs of the national government. This system did not work. Congress had borrowed most of the money it needed to pay for the Revolutionary War, but it had no way to pay its debts. The state

governments and many of the people living in the states also were deeply in debt after the war. When Congress requested ten million dollars from the states to pay for the costs of fighting the war, the states paid only \$1.5 million.

- Congress could make agreements with foreign nations, but it had no power to force state governments to honor these agreements. This raised another difficulty. Some citizens imported goods from other nations and then refused to pay for them. Not surprisingly people in foreign countries became reluctant to deal with people in the United States. In addition, when Great Britain recognized Congress' weakness in controlling foreign trade, it closed the West Indies to American commerce. As a result, many Americans, particularly millers and merchants of grain and other foodstuffs, were unable to sell their goods to people in other nations.
- Congress had no power to make laws directly regulating the behavior of citizens. Citizens could be governed only by their state governments. If members of a state government or citizens within a state disobeyed a resolution, recommendation, or request made by Congress, the national government had no way to make them obey.

The inability to make state governments and their citizens obey treaties led to a serious situation. The Treaty of Paris, which ended the Revolutionary War in 1783, included protections for the rights of loyalists (colonists who had remained loyal to Great Britain) and sought to ensure that they would be treated fairly. Some of these loyalists owned property in the states, and some had loaned money to other citizens. However, some state governments refused to respect this part of the Treaty of Paris. Some states had confiscated loyalists' property during the war. The national government was powerless to enforce its promise to the British government to protect the rights of these citizens.

Moreover, most state governments were controlled by the legislative branch, composed of representatives elected by a majority of people in small districts. In many states divisions emerged between what some historians call "localists" and "cosmopolitans."

Localists were people in relatively isolated rural areas, often in the western parts of states. They belonged to mostly self-sufficient, small communities. Many of these farmers had fallen into debt during and after the Revolutionary War. When representatives of localist districts held a majority in the state legislature, some states passed laws that canceled debts. They also created paper money, causing inflation that benefited debtors at the expense of their creditors.

Cosmopolitans, who lived primarily in seaports and larger towns, often were the creditors. They argued



What were the consequences of the weakness of the central government under the Articles of Confederation that are portrayed here?

Figure 5.8.6

that by canceling debts and issuing paper money, state governments were not protecting their property. They claimed that the state governments were being used by one class of people to deny the rights of others. Many cosmopolitans were involved in international trade as bankers, shipbuilders, and merchants. They also believed that the United States needed to honor its international treaties and foreign debts in order to maintain worldwide credit.

Some people argued that these problems were an example of too much democracy in state governments. They claimed that majority rule in the states did not adequately protect the natural rights of individual citizens or the common good, because majorities pursued their own interests at the expense of the rights of others. They thought this form of tyranny was every bit as dangerous as that of an uncontrolled monarch.



### *Content Highlight:* **WHAT DO YOU THINK?**

- The Articles of Confederation demonstrated a distrust of a strong national government. What were the historical and philosophical reasons for this distrust?
- What were the positive and consequences of a limited national government?
- The Northwest Ordinance is considered the most significant measure passed by the Confederation Congress. Why were the policies that it established important?
- Many people today continue to distrust the national government. In your opinion, is such distrust justified? Explain your position.

### **What Attempts Were Made to Solve the Problems of the Articles of Confederation?**

Recognizing the problems, some members of Congress and other Founders sought to amend the Articles of Confederation to give Congress greater powers of enforcement and taxation. One of these proposals would have changed the formula by which Congress requested money from states. Instead of counting a state's "improved lands," it would have assessed contributions based on each state's population, with five slaves counting the same as three free people. However, Article XIII prevented amendments unless ratified by all thirteen states. No amendment ever won approval from all the states.

By 1783, many of the original members had left Congress and were replaced by others who preferred the limited national government of the Articles of Confederation. Consequently, Federalist leaders such as Alexander Hamilton, James Madison, and others began to look for support outside of the existing Congress for solutions to the weaknesses in the Articles of Confederation.

A number of prominent leaders suggested holding a meeting of representatives of all the states. This idea of holding a special meeting, or convention, to discuss constitutional changes, instead of using the legislature, was an American invention. Most of the early state constitutions had been written by state legislatures. In 1780, Massachusetts had been the first state to hold a constitutional convention. By 1786, Madison and others

decided that if a convention could be used successfully within a state, then it was worth trying at the national level.

In 1786, five states sent representatives to a meeting in Annapolis, Maryland, to discuss commercial problems. Disappointed by the low turnout, Hamilton, Madison, and others wrote a report asking Congress to call a meeting in Philadelphia to suggest ways to change the Articles of Confederation to strengthen the national government. After a delay of several months Congress finally did so. Delegates to the Philadelphia Convention were authorized to propose amendments to the Articles of Confederation, not to develop an entirely new constitution.

### How Did Shays' Rebellion Result in Support for Change?

Many people realized that the Articles of Confederation were weak, but it took a dramatic event to convince them of the need for a stronger national government. This event, known as **Shays' Rebellion**, occurred in 1786, when a group of several hundred farmers in western Massachusetts gathered under the leadership of Daniel Shays (c. 1747–1825). Shays had been a captain in the Revolutionary War. His group called themselves the Regulators, because they sought to regulate the power of the state government.

Massachusetts farmers had serious economic problems. For example, many former soldiers in the Revolutionary War could not pay their debts because Congress had never paid them their wages. They lost their homes and farms. Some were sent to prison. Discontent arose among the people, and crowds gathered to prevent the courts from selling the property of those who could not pay their debts.

### Key words

**Shays' Rebellion:**  
An armed revolt by Massachusetts farmers seeking relief from debt and mortgage foreclosures; the rebellion fueled support for amending the Articles of Confederation

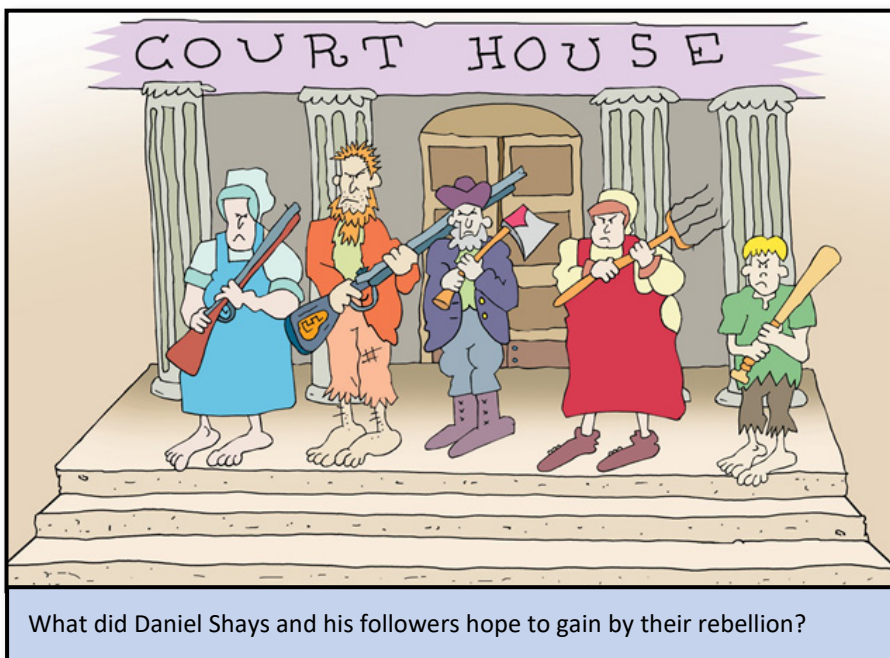


Figure 5.8.7



None of these tactics was new. Before the Revolutionary War, colonists in North Carolina and elsewhere had called themselves Regulators and had attempted to block the actions of British government officials. Crowd action was a longstanding response to perceived injustice. Those who opposed the crowds—including many people in the government—called them “mobs” and “rebels.”

Seeking weapons for their action, Shays and his men tried to capture the arsenal at Springfield, Massachusetts, where arms were kept for the state militia. They failed, and the governor called out the militia to put down the rebellion. The episode frightened many property owners, who feared that similar problems might arise in their states.



Figure 5.8.8

The fears generated by such conflicts, combined with the difficulties of raising revenues and regulating foreign trade, convinced a growing number of Americans to strengthen the national government. George Washington, who would not become America’s first president for another three years, had long desired such a change. After Shays’ Rebellion he wrote to James Madison on November 5, 1786,

*What stronger evidence can be given of the want of energy in our governments than these disorders? If there exists not a power to check them, what security has a man of life, liberty, or property?... Thirteen Sovereignties pulling against each other, and all tugging at the federal head, will soon bring ruin on the whole.*

## Conclusion

In this lesson, you learned about the United States' first national constitution, the Articles of Confederation. You also learned why some people thought the government under the Articles of Confederation was not strong enough. Finally, you explored the significance of the Northwest Ordinance, and Americans' mistrust of a strong national government.

## Lesson Check-up



- What were some of the achievements of the national government under the Articles of Confederation? What were some of the weaknesses of the Articles of Confederation?
- What was Shays' Rebellion? Why did it occur? What was its historical importance?
- Why did the Articles of Confederation create only a legislative branch of government? How did the Articles of Confederation deal with fears that some states would dominate others in the national government?
- What were positive and negative consequences of a limited national government? Which Americans were satisfied with government under the Articles of Confederation? Why?
- Compare the government under the Articles of Confederation with a contemporary confederation of nations, such as the United Nations, the European Union, the Organization of American States, or the Organization of African States. In what ways are they similar? In what ways are they different?

# The Philadelphia Convention



## Key words

- civil discourse
- constitutional convention
- federal system
- national government
- proportional representation
- Virginia Plan

## What You Will Learn to Do

Explain how the Philadelphia Convention was organized

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Take responsibility for your actions and choices
- Treat self and others with respect

## Learning Objectives

- **Describe** the organizing phase of the Philadelphia Convention
- **Explain** the significance of rules and agendas for effective civil discussion





## Essential Question

### How was the Philadelphia Convention organized?

## Learning Objectives (cont'd)

- **Evaluate**, take, and defend positions on determining what interests should be represented in a Constitutional Convention and the advantages and disadvantages of secrecy in governmental deliberations
- **Define** key words: civil discourse, Constitutional Convention, federal system, national government, proportional representation, Virginia Plan

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### Introduction

The Constitution of the United States of America was written at a convention held in Philadelphia in 1787. This lesson describes some of the important people who attended and the first steps they took in Philadelphia. The structure and rules they gave to their deliberations played a major role in the outcome by providing a framework for **civil discourse**, that is, the reasoned discussion of issues. The **Virginia Plan**, the first blueprint that the delegates considered, created the agenda for subsequent discussions.

### Who Attended the Philadelphia Convention?

Fifty-five delegates attended the meeting that later became known as the Philadelphia Convention or **Constitutional Convention**. This group of men is now often called the Framers of the Constitution.

Delegates were appointed by their state legislatures to represent their states at the convention. States sent as few as two delegates (New Hampshire) and as many as eight (Pennsylvania). However, each state had one vote, just as they did in Congress under the Articles of Confederation.

The delegates ranged in age from twenty-six to eighty-one; the average age was forty-two. About three-fourths of them had served in Congress.

## Key words

### **civil discourse:**

Reasoned discussion as opposed to emotional display

### **Virginia Plan:**

A plan, unsuccessfully proposed at the Constitutional Convention, providing for a legislature of two houses with proportional representation in each house and executive and judicial branches to be chosen by the legislature

### **Constitutional Convention:**

The gathering that drafted the Constitution of the United States in 1787



Most were prominent in their states, and some had played important roles in the Revolution. Some were wealthy, but most were not.

Contemporary observers were impressed by the quality of the delegates to the Philadelphia Convention. A French diplomat stationed in America observed that never before, “even in Europe,” had there been “an assembly more respectable for talents, knowledge, disinterestedness, and patriotism.” From Paris, Thomas Jefferson wrote to John Adams in London that the convention was “an assembly of demigods.”

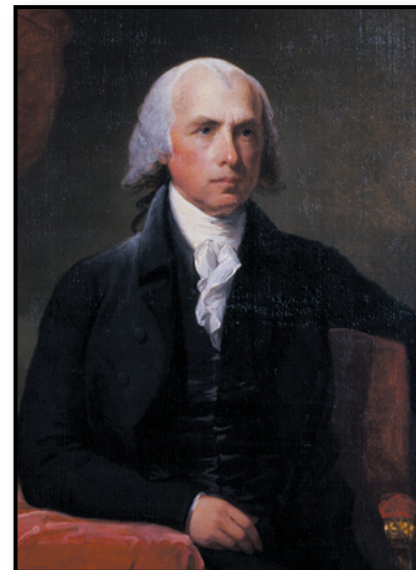
Perhaps the most balanced view of the men at Philadelphia came later, from early twentieth-century historian Max Farrand, who in 1913 wrote in *The Framing of the Constitution of the United States*,

*Great men there were, it is true, but the convention as a whole was composed of men such as would be appointed to a similar gathering at the present time: professional men, business men, and gentlemen of leisure; patriotic statesmen and clever, scheming politicians; some trained by experience and study for the task before them; and others utterly unfit. It was essentially a representative body.*

Most of the Framers’ stories are worth telling in detail. Eight played particularly significant roles.

George Washington (1732–1799) was the most respected and honored man in the country. During the Revolutionary War he had left Mount Vernon, his Virginia plantation, to lead the American army to victory over the British. The difficulties that Congress faced in supplying his army, as well as his experience leading an army composed of men from across the thirteen states, convinced him that the United States needed a strong **national government**. Washington initially refused the invitation to attend the convention because he wanted to remain in private life. He later agreed to be a delegate from Virginia, fearing that if he did not attend, then people might think that he had lost faith in republican government. Washington was unanimously elected president of the convention. He did not take an active role in the debates. But his presence and support of the Constitution, together with the widespread assumption that he would be the nation’s first president, were essential to the success of the Constitutional Convention and the Constitution’s ratification by the states.

James Madison probably had the greatest influence on the organization of the national government. Madison was among the youngest of the revolutionary leaders, but by 1787 his talents had long been



What was James Madison’s contribution to the Philadelphia Convention?

Figure 5.9.1

## Key words

### **national government:**

The organization having central political authority in a nation; the representative unit of political organization

recognized and admired. In 1776, at the age of twenty-five, he had been elected to the Virginia convention, where he was named to a committee to frame the state constitution. He first displayed his lifelong commitment to freedom of religion when he persuaded George Mason, author of the Virginia Declaration of Rights, to change the clause that guaranteed “toleration” of religion to one that secured its “free exercise.” Madison’s influence at the convention was great, in part because he spent the previous winter studying ancient and modern political theory in preparation for the deliberations.

Benjamin Franklin of Pennsylvania was eighty-one years old and in poor health. He was internationally respected, and his presence lent an aura of wisdom to the convention. Alexander Hamilton of New York, who had been Washington’s aide during the Revolution, was among the stalwart supporters of a strong national government. He was outvoted within his own state’s delegation and departed Philadelphia in frustration before the convention was half over. However, he returned for a few days and signed the completed document in September. James Wilson of Pennsylvania, although not as well-known as Madison or Hamilton, also was a major influence, particularly on how the delegates shaped the office of president.

Governor Morris of Pennsylvania was one of the delegates who spoke most often at the convention. He is credited with taking a principal role in drafting the Constitution. Edmund Randolph, Virginia’s governor, officially headed that state’s delegation and introduced the Virginia Plan to the convention. Randolph refused to sign the final document because he said it departed too much from the “Republican propositions” of the Virginia Plan; however, he ultimately supported ratification. Connecticut’s Roger Sherman was instrumental in forging the Connecticut Compromise on representation in Congress, which helped shape American federalism.

### What Important Founders Did Not Attend the Convention?

Several important political leaders did not attend the Constitutional Convention. Thomas Jefferson was in Paris as U.S. minister to France. John Adams (1735–1826), a principal architect of the Massachusetts Constitution of 1780 and the author of *Defense of the Constitutions of Government of the United States of America* was serving as U.S. ambassador to Great Britain. Patrick Henry (1736–1799), the Revolutionary leader, refused to attend the convention, supposedly saying “I smell a rat.” He opposed the development of a strong national government and was suspicious of what might happen at the convention. Other leaders who did not attend the Philadelphia Convention included John Hancock, Samuel Adams, and Richard Henry Lee.

Besides these prominent individuals, one state refused to send delegates. Rhode Island’s legislature did not want a stronger national government. The Articles of Confederation required the approval of all thirteen states to make amendments. The convention had been appointed to recommend amendments, not to scrap the Articles in favor of a new national constitution. Rhode Island believed that it could exercise veto power over whatever was proposed by simply refusing to participate.

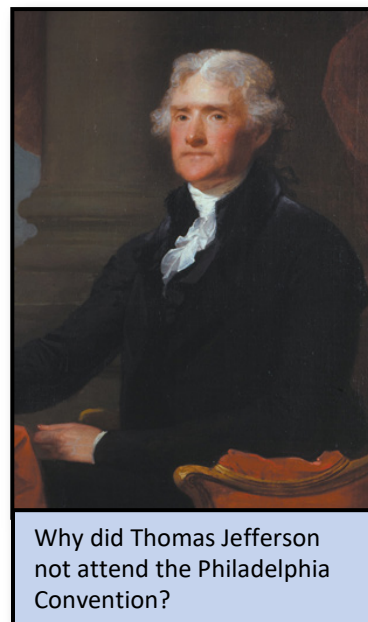


Figure 5.9.2



## Content Highlight: WHAT DO YOU THINK?

1. What criteria would you use to select a group of people to draft a constitution today?
2. What would be the advantages and disadvantages of selecting people to represent the interests of their states?
3. Would you select people to represent other interests? Are there any groups whose interests do not need to be represented? Explain your reasoning.

### What Rules Did the Delegates Adopt for the Convention?

On Friday, May 25, 1787, eleven days after the convention was scheduled to begin, delegations from a majority of the states were present in Philadelphia. After electing George Washington president of the convention, the delegates appointed a committee to draw up the rules for the meeting. The next Monday and Tuesday the delegates adopted the following key rules to govern their debates:

- Delegates from at least seven states had to be present for the convention to do business each day.
- If a delegate's absence would leave a state without representation, then he had to get permission to be absent.
- When rising to speak, a delegate had to address the president. While he was speaking, other members could not pass notes, hold conversations with one another, or read a book, pamphlet, or paper.
- A member was not allowed to speak more than twice on the same question. He could not speak the second time until every other member had a first opportunity to speak on the subject.
- Committees could be appointed as necessary.
- Any decision made by the convention was subject to reconsideration and change. No decision had to be final until the entire plan was completed.
- The convention's proceedings were to remain secret. No delegate could disclose the substance of the debates, although they were allowed to take notes. (Had it not been for Madison, who attended nearly every session and kept careful notes that would be published after his death, probably little would be known about what happened during the convention.)



Figure 5.9.3

The rules established the basis for civil discourse, a reasoned discussion in which every member has the opportunity to speak on any question, in which no individual's voice can drown out the ideas of others, and in which listening matters as much as speaking. In this discussion, ideas and proposals introduced later had the opportunity to alter decisions already made. This rule was essential, because each provision of a constitution is related to many others. Secrecy allowed for the free exchange of ideas. Many delegates feared that if

their debates were made public, then they would not feel free to express their real opinions or to change their minds in response to good arguments. They also thought the new constitution would have a greater chance of being accepted if people did not know about the arguments that occurred while it was being debated.

Over nearly four months these rules guided the convention's debate. At four critical points the delegates appointed committees to suggest solutions to difficult issues: (1) a committee to resolve the problem of representation in Congress; (2) a Committee of Detail to write a draft constitution, including provisions for the executive and judicial branches; (3) a Committee on Postponed Matters to deal with issues such as how to elect the national president; and (4) a Committee on Style to prepare the final language.



Figure 5.9.4



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Examining the Advantages and Disadvantages of Secrecy in Government Procedures

Opponents of the proposed Constitution criticized the convention's rule of secrecy. Some of them argued that secrecy alone was a reason to reject the Constitution. They contended that the public's business should be conducted publicly.

Today some governmental deliberations still are held in secret. For example, the Senate and House committees on military intelligence are closed to the public. The deliberations of juries, the Supreme Court, federal courts of appeal, and state appellate courts are not open to the press or the public.

Work in groups of two or three students to answer the following questions. Then be prepared to explain and defend your answers.

- What are the advantages and disadvantages of conducting some governmental matters in secret?
- In what ways can secret proceedings protect or threaten individual rights?
- In what ways can secret proceedings protect or threaten the common good?
- What proceedings, if any, do you believe should be conducted in secret?

## What Was the Virginia Plan?

Many delegates came to Philadelphia convinced that the Articles of Confederation should be scrapped, not amended. One of these was James Madison. Before the convention he already had drafted a plan for a new national government, which came to be called the Virginia Plan. The Virginia delegates agreed to put Madison's plan forward as a basis for the convention's discussions. Edmund Randolph, Madison's fellow Virginian who later would become the first U.S. attorney general, did so on May 29, 1787.



## Key words

### **federal system:**

A system of government in which entities, such as states or provinces, share power with a national government

### **proportional representation:**

In the context of American government, the electoral system in which the number of representatives for a state is based on the number of people living in the state; used to determine the number of each state's representatives in the U.S. House of Representatives

The most important thing to know about the Virginia Plan is that it proposed a strong national government. The Articles of Confederation authorized the national government to act only on the states, not on the people directly. Under the Virginia Plan the national government would have the power to make and enforce laws and to collect taxes, both actions that would directly affect individuals.

Each citizen would be governed under the authority of two governments, the national government and a state government. Both governments would get their authority from the people. The existence of two governments, national and state, each given a certain amount of authority, is known as a **federal system**. In addition, the Virginia Plan recommended the following:

- The national government would have three branches: legislative, executive, and judicial. The legislative branch would be more powerful than the other branches because, among other things, it would have the power to select people to serve in the executive and judicial branches.
- The national legislature, Congress, would have two houses. A House of Representatives would be elected directly by the people of each state. The House then would elect a Senate from lists of persons nominated by the state legislatures.
- The number of representatives from each state in both the House and the Senate would be based on the size of its population or on the amount of its contribution to the federal treasury. This system of **proportional representation** meant that states with larger populations would have more representatives in the legislature than would states with smaller populations.
- Congress would have power to make all laws that individual states were not able to make, such as laws regulating trade between two or more states.
- Congress would have power to strike down state laws that it considered to be in violation of the national constitution or the national interest.
- Congress would have power to call forth the armed forces of the nation against a state, if necessary, to enforce the laws passed by Congress.



## Content Highlight: WHAT DO YOU THINK?

- What are the advantages and disadvantages of having two houses of Congress? Why?
- Why did the Virginia Plan give Congress the power to strike down laws made by state legislatures? What arguments could you make for or against giving Congress this power?
- In what ways did the Virginia Plan correct what the Framers perceived to be weaknesses in the Articles of Confederation?

## Conclusion

In this lesson, you learned about the organizing phase of the Philadelphia Convention. You saw that the Convention followed specific rules and agendas for civil discussion. Finally, you learned that the Convention considered the Virginia Plan, which addressed the role of national government and state governments. The Virginia Plan supported a strong national government. Much of the plan determined the way our government functions today.

## Lesson Check-up



- How would you describe the delegates to the Philadelphia Convention? What prominent political leaders attended? Which leaders were absent and why?
- Why did Rhode Island refuse to participate in the Philadelphia Convention?
- In what ways were the Framers representative of the American people in 1787? In what ways were they not?
- How did the Virginia Plan propose to change the structure and powers of the national government under the Articles of Confederation?
- Conduct research to find out different states' roles in the Philadelphia Convention. How did each state's delegates respond to the Virginia Plan? Did the delegates from each state always vote the same way? Why or why not? As you study the next lessons, continue to examine each state's responses to proposals for representation, designs for the branches of government, and plans for the balance of power between national and state governments.

# The Debate Over Representation



## Key words

- Great Compromise
- New Jersey Plan
- Three-Fifths Compromise

## What You Will Learn to Do

Analyze the debate about representation at the Philadelphia Convention

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Take responsibility for your actions and choices
- Treat self and others with respect

## Learning Objectives

- **Explain** the differences between the Virginia Plan and the New Jersey Plan and the importance of the Great Compromise
- **Explain** how the Framers addressed regional issues with the Three-Fifths Compromise and the provision for a periodic census of the population



## Essential Question

Why was representation a major issue at the Philadelphia Convention?

### Learning Objectives (cont'd)

- **Evaluate**, take, and defend positions on why major issues debated at the Philadelphia Convention are still on the national agenda
- **Define key words:** Great Compromise, New Jersey Plan, Three-Fifths Compromise

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### Introduction

What or whom should the national government represent—the states, the people, or both? This lesson examines that debate at the Philadelphia Convention. It also examines the so-called **Great Compromise**, which dealt with the makeup of the House of Representatives and the Senate. In addition, it examines two issues that the Great Compromise did not resolve—how population would be counted for representation in the House and how new states might receive representation in Congress.

### What Were the Disagreements About Representation?

The Virginia Plan's proposal to create a two-house Congress was not controversial. Continuing British and colonial practices, all the states except Pennsylvania and Georgia had instituted bicameral legislatures. There also was a widespread belief that a bicameral legislature would be less likely to violate people's rights than a unicameral legislature. Each house could serve as a check on the other.

What was controversial in the Virginia Plan was the principle of proportional representation. James Madison, James Wilson, Rufus King, and others believed that the number of members in both houses should be based on the number of people they would represent. They argued that a government that both acted on and represented the people should give equal voting power to equal numbers of people. From Madison's perspective states should not be represented as states in the national

### Key words

#### **Great Compromise:**

A plan accepted at the Philadelphia Convention in 1787 that called for a Congress of two houses: in the upper house, or Senate, representation of the states would be equal, with each state having two senators; in the lower house, or House of Representatives, representation would be apportioned according to the population of each state, so that states with more people would have more representatives; also called the Connecticut Compromise



government. Rather, each representative should serve a district and connect the people of that district to the national government.

Other delegates argued for equal representation of the states, as under the Articles of Confederation. Many of these delegates believed that the United States was a confederation of separate states and that national government derived from and represented the states, not the people as a whole.

The positions of many delegates in this debate reflected the size of their states. Under the Virginia Plan, a state with a larger number of people would have more votes in both houses of Congress. Many delegates from smaller states wanted equal representation. They feared that unless they had an equal voice, the larger states would dominate them.

The delegates agreed on one thing: If the national legislature had two chambers—a House and a Senate—then at least one should be based on proportional representation. This would probably be the House. Thus, the debate dealt essentially with representation in the Senate.

By mid-June disagreement over representation created a crisis for the convention. Delegates from several small states, led by New Jersey statesman William Paterson (1745–1806), asked for time to come up with an alternative to the Virginia Plan.

### What Was the New Jersey Plan?

On June 15, 1787, William Paterson, who later would become the second governor of New Jersey, presented what has become known as the **New Jersey Plan**. This plan proposed keeping the framework of the Articles of Confederation, as the delegates had been asked to do. Following are some of the main parts of the New Jersey Plan:

- Congress would have only one house, as in the Confederation, and it would be given the following increased powers:
  - Power to levy import duties and a stamp tax to raise money for its operations, together with power to collect money from the states if they refused to pay
  - Power to regulate trade among the states and with other nations
  - Power to make laws and treaties the supreme law of the land so that no state could make laws that were contrary to them



What were some of the basic elements of the New Jersey Plan presented by William Paterson?

Figure 5.10.1

## Key words

### New Jersey Plan:

A plan, unsuccessfully proposed at the Constitutional Convention, providing for a single legislative house with equal representation for each state

- An executive branch would be made up of several persons appointed by Congress. They would have the power to administer national laws, appoint other executive officials, and direct military operations.
- A supreme court would be appointed by the officials of the executive branch. It would have the power to decide cases involving treaties, trade among the states or with other nations, and collection of taxes.

The New Jersey Plan continued the system of government existing under the Articles of Confederation by having the national government represent and act on the states, rather than representing or acting on the people. By the time the New Jersey Plan was presented, after two weeks of debate on the Virginia Plan, many delegates had become convinced that the national government needed new powers and a new organization for exercising those powers.

When the convention voted on the New Jersey Plan four days later, on June 19, it was supported only by the delegations from Connecticut, Delaware, and New Jersey, and a majority of the New York delegation—Alexander Hamilton was always outvoted by his two colleagues—with the Maryland delegation being divided. Defeat of the New Jersey Plan meant that the Virginia Plan continued to be the basis for the convention's discussion.

The failure of the New Jersey Plan ended the idea of keeping a unicameral national legislature. But it did not mean that all the delegates had abandoned their concerns about large states' power in a bicameral legislature. On July 2, the Framers voted on whether there should be equal representation in the upper house of Congress. The result was a tie, five states to five, with Georgia divided. Neither side in this debate seemed willing to compromise, and delegates began to fear that the convention would end in disagreement and failure.

In response to this impasse, a special committee composed of one delegate from each state was formed. This committee was responsible for developing a plan to save the convention. Some supporters of the Virginia Plan, including James Madison and James Wilson, opposed assigning this responsibility to a committee. However, most of the other delegates disagreed with them, and the committee went to work.

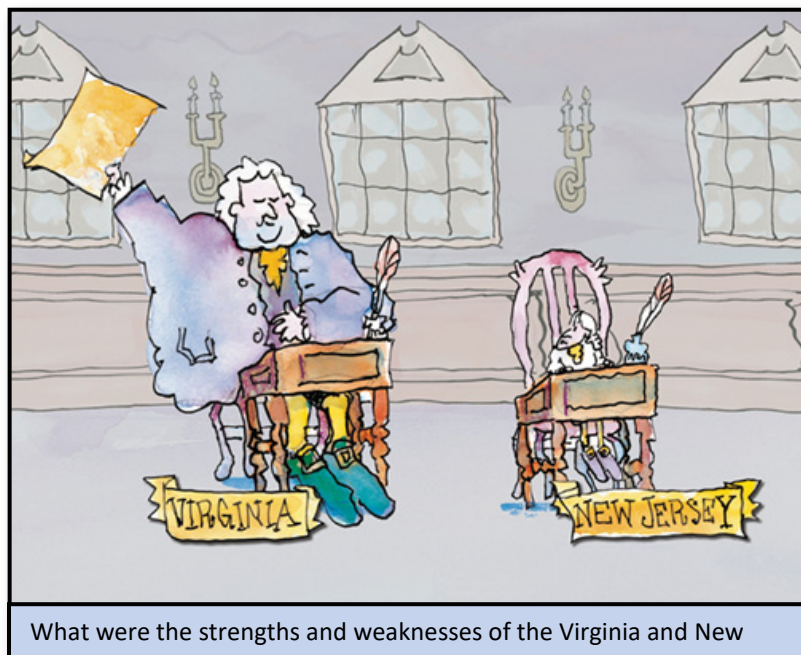


Figure 5.10.2



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Developing and Defending Plans for Representation

Work in committees of about five Cadets each. Each committee should have some Cadets who represent small states and some who represent large states. The task of each committee is as follows:

- The committee should develop a plan for how many representatives each state should be allowed to send to the Senate and the House of Representatives. Your committee may decide that there is no need for a two-house Congress and that a single house will represent the people more effectively.
- The group should select a spokesperson to present your committee's plan to the class with all members of the committee helping to defend their plan against criticisms by members of other committees.
- Following presentations of all the plans, each committee may revise its original plan if it wishes.
- The entire class should then examine the plans made by all the committees and try to reach an agreement on a single plan.

Later, individually compare the plans of the committees and the final class plan with the plan that the Framers arrived at, which is described in the next section of this lesson.

### What Was the Great Compromise?

The result of the special committee's work was the Connecticut Compromise. It is now called the Great Compromise. The committee adopted a proposal previously suggested by Connecticut delegates Roger Sherman (1721–1793) and Oliver Ellsworth (1745–1807). The Great Compromise contained the following ideas:

- The House of Representatives should be elected by the people on the basis of proportional representation (Article I, Section 2).
- There should be equal representation of each state in the Senate. Each state legislature should select two senators (Article I, Section 3).
- The House of Representatives should have the power to develop all bills for taxation and government spending (Article I, Section 7). The Senate should be limited to accepting or rejecting these bills. This provision later was changed to permit the Senate to amend tax bills developed in the House and to develop appropriations bills.

As in most compromises, each side gained a little and lost a little. The small states received the equal representation in the Senate that their delegates wanted in order to protect their interests. Those who believed that the national government derived from and represented the states saw that idea reflected in the Senate. The large states gave up control of the Senate but kept control of the House of Representatives with its important powers over taxation and government spending.

When the committee presented this compromise to the convention, Madison, Wilson, and several other delegates opposed it. They viewed the idea of state equality in the Senate as

a step away from a strong national government back toward the system under the Articles of Confederation. Some delegates from small states remained suspicious as well. Two delegates from New York, who had consistently voted with the smaller states, left the convention and did not return. But the crisis was over when the Great Compromise passed by a single vote.



### Content Highlight:

#### WHAT DO YOU THINK?

Madison argued that the Great Compromise was fundamentally unjust, as his notes of the convention show. Madison “conceived that the Convention was reduced to the alternative of either departing from justice, in order to conciliate the smaller states, and the minority of the people of the U.S. or of displeasing these by justly gratifying the larger states and the majority of the people.”

Do you agree with Madison that the Great Compromise was not a true compromise but a rejection of the principle of majority rule? Explain your position.

### What Was the Significance of the Three-Fifths Compromise?

Settling the question of representation in the Senate did not end the discussion of how representatives would be apportioned in the House of Representatives. What did proportional representation mean? Would each state receive representation based on the entire number of its people, free and enslaved? Would only free people (including indentured servants) be counted? If governments came into being for the purpose of protecting property, then should people or districts with more property receive greater representation than those with less? This debate would result in what is known as the **Three-Fifths Compromise**.

The greatest controversy centered on whether enslaved persons should be counted when apportioning representatives to the states. Delegates from the Southern states, which had the most slaves, argued that their slaves should be counted as full persons for purposes of representation. South Carolina delegate Pierce Butler (1744–1822) argued that slaves were the Southern equivalent of Northern free farmers and laborers. Echoing John Locke, Butler said that “an equal representation ought to be allowed for them in a government which was instituted principally for the protection of property, and was itself to be supported by property.” Not all Southerners agreed. Virginia’s George Mason concurred with Butler that slaves were economically valuable, but he “could not however regard them as equal to freemen.”

Delegates from the Northern states, where slavery had already been abolished or where it was declining, wondered why slaves should be counted for representation at all. Would not the elected representatives

### Key words

#### Three-Fifths Compromise:

Article I, Section 2, Clause 3 of the U.S. Constitution, later eliminated by the Fourteenth Amendment. The clause provided that each slave should be counted as three-fifths of a person in determining the number of representatives a state might send to the House of Representatives. It also determined the amount of direct taxes Congress might levy on a state.



simply serve the interests of the slaves' owners? Those interests were directly opposed to the interests of slaves themselves, who would choose freedom if they could. Should slave states receive extra votes in Congress because of their slaves, votes that they would then use to perpetuate the institution of slavery itself? Also, as Elbridge Gerry of Massachusetts asked on June 11, why should "the blacks, who were property in the South, be in the rule of representation more than the cattle and horses of the North?"

The delegates ultimately agreed on a compromise that first had been proposed during discussion of the Virginia Plan in June. According to this compromise, the entire population would be periodically counted (a census). For purposes of apportioning representatives, a states' population would be equal to its entire population of free persons (including indentured servants) plus three-fifths of "all other persons," meaning slaves—hence the name Three-Fifths Compromise (Article I, Section 2). Each slave also would be counted as three-fifths of a person when computing direct taxes (taxes owed by states to the national government). The three-fifths ratio was a convenient number, because it had first been proposed in the early 1780s when Congress discussed possible amendments to the Articles of Confederation to raise money from the states.

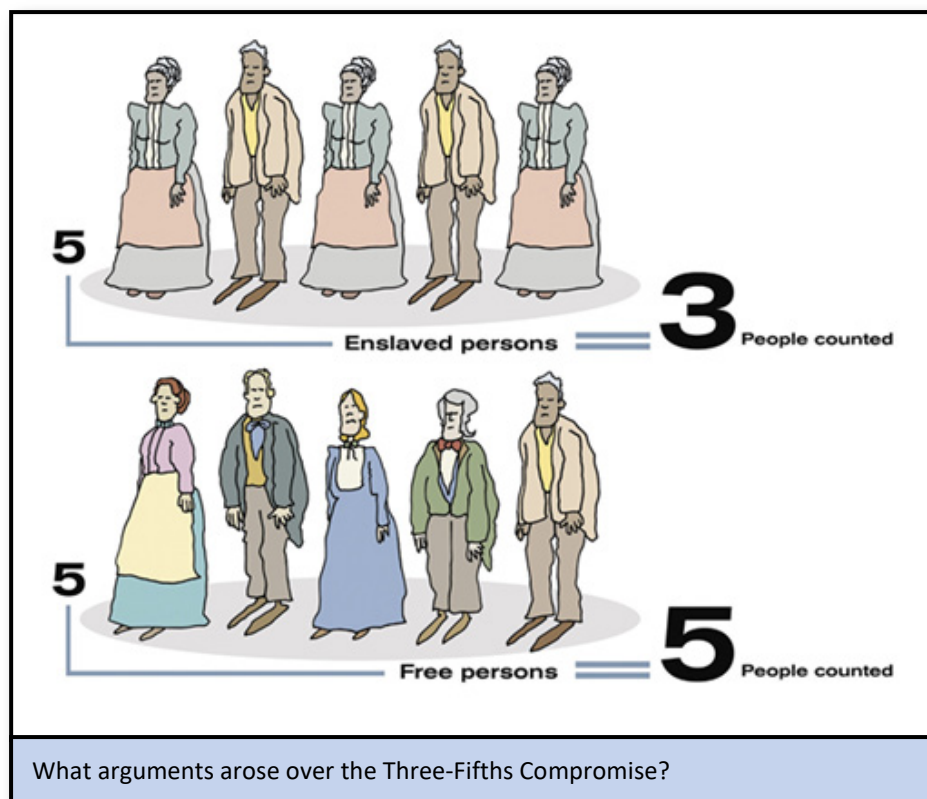


Figure 5.10.3

### How Did the Delegates Address the Representation of New States?

The Philadelphia Convention considered not only the balance between Southern (slaveholding) and Northern (non-slaveholding) states, but also the balance between existing (Eastern) and future (Western) states in the makeup of the new nation. The delegates recognized that new states might join the union when western lands owned by the national government attracted settlers. They even thought their neighbor to the north, Canada, might wish to join the United States. A few delegates worried that the population in new states soon would outnumber that of the existing Atlantic seaboard states.

Gouverneur Morris argued that the original states should be guaranteed a perpetual majority of the representation in Congress.

However, the Northwest Ordinance had mandated that new states should be admitted on the same terms as the original thirteen, with full representation in Congress. The periodic census, essential for counting free and enslaved persons for purposes of representation, also would allow new states to gain their proportional share of seats in the House of Representatives. The delegates decided to conduct such a census every ten years in order to reapportion, or reallocate, seats in the House based on shifts in America's population.

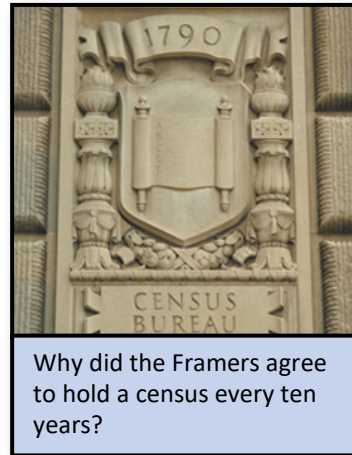


Figure 5.10.4

## Conclusion

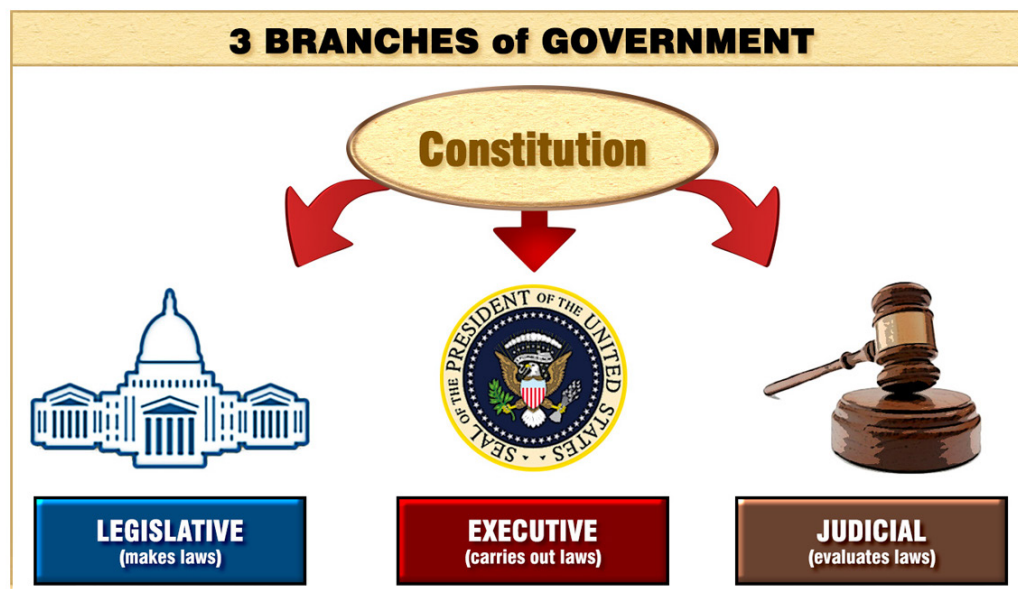
In this lesson, you learned about the differences between the Virginia Plan and the New Jersey Plan and the importance of the Great Compromise. You also studied how the Framers addressed regional issues with the Three-Fifths Compromise and the provision for a periodic census of the population. Finally, you saw that major issues debated at the Philadelphia Convention are still on the national agenda.

## Lesson Check-up



- What were the major arguments for and against proportional representation of states in the national government?
- What were the key elements of the Great Compromise? In what ways did it address the problem of representation, and in what ways did it not?
- How did the Three-Fifths Compromise and the census help delegates resolve issues of representation?
- How might the history of the United States have been different if the original thirteen states had been guaranteed a perpetual majority of the representation in Congress?
- How, if at all, has equal representation in the Senate affected the principle of majority rule?

# The Branches of National Government



## Key words

- deliberative body
- Electoral College
- necessary and proper clause
- separated powers
- shared powers

## What You Will Learn to Do

Analyze how the Framers envisioned the role of the three branches of national government

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Take responsibility for your actions and choices
- Treat self and others with respect

## Learning Objectives

- **Explain** the role of each of the three branches and describe how the Constitution organizes them
- **Explain** how and why the system of checks and balances contributes to limited government



## Essential Question

What questions did the Framers consider in designing the three branches of the national government?

### Learning Objectives (cont'd)

- **Evaluate**, take, and defend positions on how the president of the United States should be elected and issues relating to the appointment and service of justices of the Supreme Court
- **Define** key words: deliberative body, Electoral College, necessary and proper clause, separated powers, shared powers

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### Introduction

Political philosophers since ancient times have written that governments must do three things: make, execute, and judge laws. Unlike the British system, which concentrates power in Parliament, the U.S. Constitution assigns these competing and complementary functions to three separate branches of the national government. This lesson explains how the Framers envisioned the role of each branch.

### What Did Delegates Think About the Balance of Power Among Branches of Government?

Many Americans thought that an imbalance of power among different branches of government led to tyranny. They believed that the British monarch, through the use of bribes and special favors, had been able to control elections and exercise too much power over Parliament. The British government permitted members of Parliament to hold other offices at the same time, and in the eighteenth century the Crown used its exclusive power to appoint people to office as a reward for friendly members of Parliament.

The Framers believed that these actions upset the proper balance of power between the Crown and Parliament. It was the destruction of this balance to which Americans referred when they spoke of the “corruption” of Parliament by the Crown. They believed that royal governors had tried to corrupt colonial legislatures in the same way.

Given their experiences with the king and his royal governors, it is not surprising that Americans established weak executive branches in most state Constitutions. However,



## Key words

### **separated powers:**

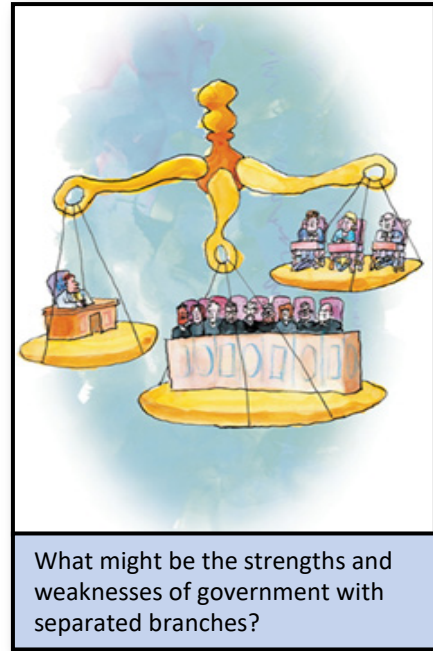
The division of government powers among the different branches. Separating powers is a primary strategy of promoting constitutional or limited government by ensuring that no one individual or branch has excessive power that can be abused

### **deliberative body:**

A legislative assembly that meets to debate issues

this strategy created other difficulties. Weak executives were unable to check the powers of the state legislatures. In many people's opinion, these legislatures passed laws that violated basic rights, such as the right to property.

Therefore, the challenge that faced the delegates at the Constitutional Convention was how to create a system of government with balanced powers. In order to achieve this balance, they created a government of **separated powers** or, as twentieth-century political historian Richard Neustadt called it, "a government of separated institutions sharing powers." This system is familiarly known as "checks and balances," as discussed in an earlier lesson.



What might be the strengths and weaknesses of government with separated branches?

Figure 5.11.1

## What Did Delegates Think About Legislative Power and What Questions Did Organizing the Legislative Branch Raise?



Figure 5.11.2

Many delegates had considered the organization and powers of Congress long before the convention because of their experiences under the Articles of Confederation and in their state governments. The delegates intended Congress to be a **deliberative body**. This meant that it should thoroughly debate issues and avoid making hasty decisions. The bicameral structure of Congress made it difficult to pass laws, especially at the whim of popular majorities. The

delegates agreed with Locke that the power to make laws is the greatest power a government possesses. They also sought to prevent the sort of "corruption" that Americans remembered from colonial times, when members of Parliament often received additional appointments from the King. Therefore, the delegates stipulated that members of Congress are not permitted to hold another national office while serving in the House or Senate.

The Virginia Plan would have given Congress plenary powers—plenary meaning “unlimited and undefined”—including a veto over state laws. In contrast, the New Jersey Plan would have more strictly defined legislative powers. With the adoption of the Great Compromise, Congress became a body with enumerated powers—that is, powers specifically listed, most of which are in Article I, Section 8, of the Constitution. The Framers also gave Congress the power to make all other laws that are “necessary and proper” for carrying out the enumerated powers. Article I, Section 8, Paragraph 18, is called the **necessary and proper clause** for this reason.

### What Did Delegates Think About Executive Power and What Questions Did Organizing the Executive Branch Raise?



Figure 5.11.3

The Articles of Confederation did not provide for an executive branch, but the Confederation Congress found it necessary to create executive officials for specific purposes, including coordination of foreign affairs and management of the treasury. The Framers wanted to give the executive branch of the new government enough power and independence to fulfill its responsibilities. In contrast to the deliberative nature of Congress, the executive needed “energy”—the

capacity to act quickly when necessary for the common defense, to preserve the public peace, and in international relations. However, the delegates did not want to give the executive any power or independence that could be abused.

The Philadelphia Convention did not discuss the executive branch until after it had resolved most issues concerning Congress. No delegate had come with a plan for organizing the executive. The Virginia Plan said only that the national executive should be elected by the national legislature, not what the executive branch should look like or what its powers should be.

### Content Highlight: WHAT DO YOU THINK?

Why do you suppose the White House is a relatively modest building compared with the palaces of heads of states in many other countries?

To achieve the balance between an energetic executive and limited government, the delegates had to resolve a number of questions. Each question concerned the best way to establish an executive strong enough

## Key words

### necessary and proper clause:

Article I, Section 8, Clause 18 of the Constitution that gives Congress the power to make all laws that are “necessary and proper” to carry out the powers specifically delegated to it by the Constitution. It is also known as the “elastic clause” because of the vagueness of the phrase “necessary and proper”

to check the power of the legislature but not so powerful that it would endanger republican government. Three key matters needed to be decided.

1.

**First - Should there be more than one chief executive?** Many Framers agreed that there should be a single executive to avoid conflict between two or more leaders of equal power. Some delegates also argued that it would be easier for Congress to keep a watchful eye on a single executive. Others argued for a plural executive, claiming that such an arrangement would be less likely to become tyrannical. The Framers agreed that there would be one president of the United States. They also assumed that there would be an executive branch composed of departments.

2.

**Second - How long should the chief executive remain in office?** The Committee on Detail recommended a seven-year term for the president, but many delegates thought seven years was too long. The Committee on Postponed Matters changed the term to four years, and the convention adopted that proposal.

3.

**Third - Should the executive be eligible for reelection?** Under the Committee on Detail's proposal for a seven-year term of office the president would not have been eligible for reelection. When the term was reduced to four years (Article II, Section 1), the Framers decided to allow the president to serve more than one term. The Constitution originally set no limit on the number of times a president could be reelected.

## How Should Presidents Be Selected?



What qualifications should one have to become president of the United States?

Figure 5.11.4

The delegates knew that the group with the power to select the president would have great power over the person who held the office. They were concerned that this power might be used to benefit some people at the expense of others. It also might make it difficult for the executive branch to function properly.

The delegates briefly discussed the idea of direct election by the people but rejected it because they believed that the citizens of such a large country would not know the best candidates. As George Mason put it, allowing the people to elect the president directly was like entrusting “a trial of colours to a blind man.” Many delegates from small states also feared that direct election would give the most populous states an advantage.

## Key words

The group of presidential electors who cast the official votes for president and vice president after a presidential election. Each state has a number of electors equal to the total of its members in the Senate and House of Representatives. The functioning of the Electoral College is provided for in Article II of the U.S. Constitution and amended by the Twelfth and Twenty-Third Amendments

If Congress were given the power to choose the president, then limiting the term of office to a single, long term—seven years in the initial plan—would be a way to protect separation of the executive and legislative branches. Congress would not be able to manipulate a president who in turn would not have to worry about being reelected. This is why the Framers also decided that Congress could neither increase nor decrease the president’s salary once the president was in office. If a president were not to be chosen by Congress, then providing for a shorter term of office would make the president more accountable to the people. But selection by state legislatures or governors might make the president too sensitive to local rather than national matters.

The main parts of the plan for the Electoral College were as follows:

- The Electoral College would be organized once every four years to select a president. After the election, the college would be dissolved.
- Each state would select members of the Electoral College, called electors, “in such manner as the legislature thereof may direct.” In other words, each state legislature maintained control over how and by whom that state’s electors would be chosen.



- Each state would have the same number of electors as it had senators and representatives in Congress. This proposal built both the Great Compromise and the Three-Fifths Compromise into the process of electing a president, as a state got additional electors simply for being a state (having two senators) and for its enslaved population, which increased its representation in the House of Representatives.
- Each elector would vote for two people, at least one of whom had to be a resident of a state other than the elector's state. This forced the elector to vote for at least one person who might not represent his particular state's interests.
- The person who received the highest number of votes, if it was a majority of the electors, would become president. The person who received the next largest number of votes would become vice president, which at the time was a vaguely defined office devised near the end of the convention.
- If the top two candidates received the same number of votes or if no one received a majority vote, then the House of Representatives would select the president by a majority vote, with each state having only one vote. In case of a vice-presidential tie, the Senate would select the vice president, with each senator casting one vote.

Although complicated and unusual, this compromise seemed to be the best solution. There was little doubt in the delegates' minds that George Washington would be elected the first president. However, there was great doubt that anyone after Washington would be enough of a "national character" to get a majority vote in the Electoral College. The delegates believed that in almost all future elections, the House of Representatives ultimately would select the president.

### Should the Electoral College Be Changed?

At the Philadelphia Convention, the Framers rejected proposals to have the president elected by Congress or state legislatures. Some delegates worried that direct election by the people would be unwise. The people might not be able to make informed judgments because it was unlikely they would know candidates from other states or regions, or they might simply splinter and support favorite candidates from their states or regions. They devised a plan called the Electoral College, although that name is not used in the Constitution. The plan is set forth in Article II, Section 1. It provides that each state gets the number of votes equal to the number of its representatives and senators. Because all but two states and the District of Columbia distribute all their votes to the statewide winner, the popular-vote victor can lose the Electoral College.

Since the nation's first presidential election in 1792 there have only been a few times when the winner of the popular vote has not won the election. The most recent example was the 2016 election. Donald Trump received less of the popular vote, 46.1 percent, than his opponent, Hillary Clinton, who received 48.2 percent. To win the electoral vote a candidate must win 270 of the 538 electoral votes.



Does the Electoral College make the outcomes of presidential elections more clear and less disputable? Why or why not?

Figure 5.11.6

Trump won with 304 votes to Clinton's 227. The 2000 election was closer, with George W. Bush winning 48.4 percent of the popular vote and Al Gore receiving 48.6 percent. Bush won 271 votes in the Electoral College, winning his first term in office.

In 1969, an attempt was made in Congress to amend the Constitution and replace the Electoral College with a system based on the national popular vote. Although the amendment was supported by a large majority in the House of Representatives, it failed to pass in the Senate due to a filibuster by senators from several small states who argued that eliminating the Electoral College would reduce the influence of small states. However, since the elections of 2000 and 2016 there have been a number of calls for change.

Critics of the Electoral College make the following claims:

- It is undemocratic and should be abolished in favor of direct popular vote for president and vice president.
- It unfairly gives disproportionate power to small states.
- The electoral votes of each state should be allotted to candidates in proportion to the popular votes they receive.

Defenders of the Electoral College make the following claims:

- Since presidential candidates cannot gain enough electoral votes in any one region of the United States to win, they must appeal to voters in most, if not all, of the regions of the country and represent their interests as well. The result is that winning candidates must be supported by voters from throughout the country, which contributes to the unity of the nation.
- The outcomes of elections are clearer and less disputable because the winner typically gets a larger proportion of the electoral votes than popular votes. This reduces the chances of a call for a recount of votes to decide an election when compared with popular-vote systems.
- The disproportionate power given to small states helps to protect their interests from possible abuses by larger, more populous states.



## **Content Enhancement:**

### **CRITICAL THINKING EXERCISE**

#### **Analyzing the Advantages and Disadvantages of the Electoral College**

Work with two or more other Cadets to answer the following questions. Be prepared to discuss your answers with your class.

1. What democratic principles, if any, are furthered or violated by the Electoral College?
2. What arguments can you give for and against the use of the Electoral College to select the president?
3. If you think the Electoral College should be reformed or replaced, what kind of changes for electing the president would you support? Why?

## What Did the Delegates Think About Judicial Power, and What Questions Did Organizing the Judicial Branch Raise?

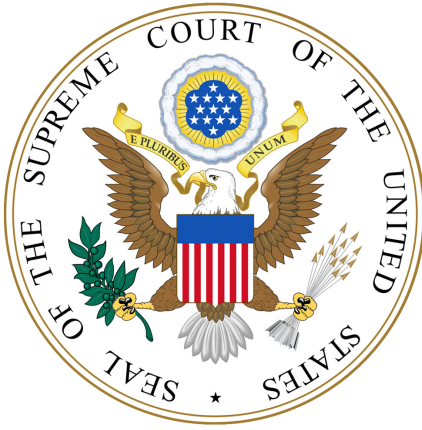


Figure 5.11.7

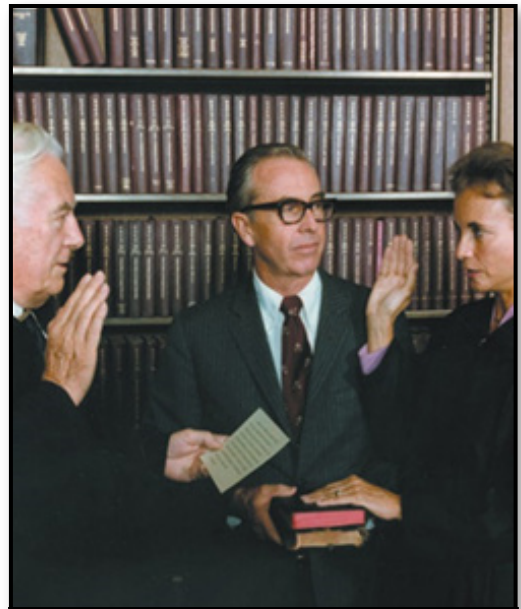
A national government needed a system for deciding cases involving its laws. This function could be left to state courts, but then the national laws might be enforced differently from state to state.

A judicial branch also would complete the system of separation of powers. The delegates had fewer problems agreeing on how to organize the judiciary than they had with the other two branches. They agreed that judges should be appointed by the president and confirmed by the Senate. They also agreed that all criminal trials should be trials by jury. This was a very important check, they believed, on the power of the government.

The delegates created only the Supreme Court as the head of the national judiciary and left to Congress the power to create lower federal courts (Article III, Section 1). They also reached other important agreements, among them the following:

- Judges should be independent of politics. They would use their best judgment to decide cases free from political pressures.
- Judges should hold office “during good behavior.” This meant that they would not be removed from office unless they were impeached (accused) and convicted of “treason, bribery, or other high crimes and misdemeanors.”

There also was considerable agreement about the kinds of powers that the judicial branch should have. The judiciary was given the power to decide conflicts between state governments and to decide conflicts that involved the national government.



What powers does congress have over judicial appointments?

Figure 5.11.8

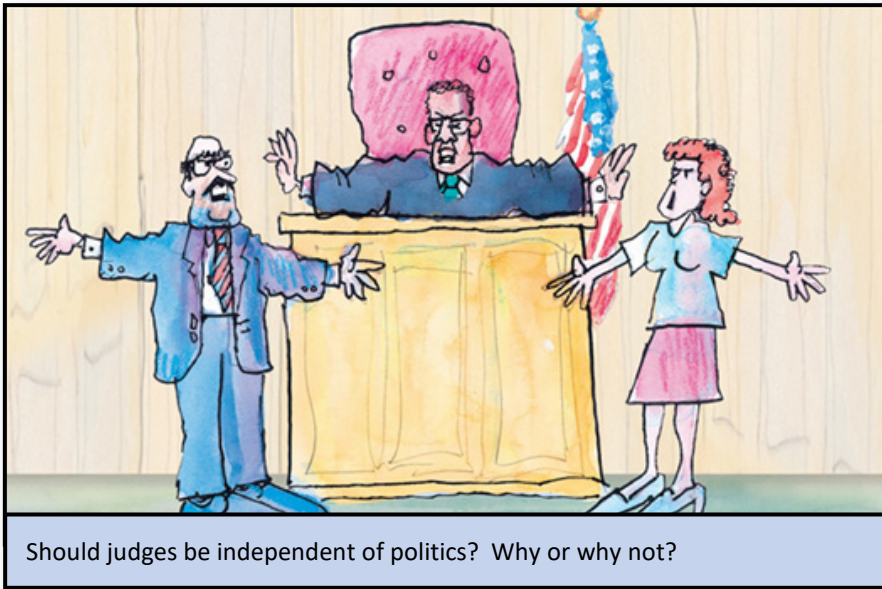


Figure 5.11.9

### Content Highlight: WHAT DO YOU THINK?

1. What are the advantages and disadvantages of having judges appointed, not elected, to serve “during good behavior”?
2. Should the composition of the Supreme Court be required to reflect the political, economic, racial, ethnic, geographical, and gender diversity of our country? Why or why not?
3. Should the Constitution be amended to require judges to retire at a specific age or after a certain number of years as a judge? Why or why not?
4. It has been argued that the judiciary is the least democratic branch of our national government. What arguments can you give for and against this position?

### How Are Powers Divided and Shared Among the Three Branches?

Implementing their belief in separated powers, the Framers limited the powers of each branch and provided that they had certain **shared powers**. Shared powers, such as the power to make treaties and appoint cabinet members and ambassadors, are powers that are not completely separated between branches of government but are shared among them. This system of separated and shared powers—checks and balances—was accomplished using several strategies, including the following:

### Key words

**shared powers:**  
Legislative powers not completely separated between the branches of government



- **Veto.** The president shares in the legislative power through the veto. Although the president can veto a bill passed by Congress, the bill can still become a law if two-thirds of both houses of Congress vote to override the veto. The veto power appears in Article I, Section 7, although the term veto is not used.
- **Appointments.** The power to appoint executive branch officials and federal judges is shared with Congress. The president has the power to nominate persons to fill those positions, but the Senate has the power to approve or disapprove the persons nominated (Article II, Section 2).
- **Treaties.** The president has the power to negotiate a treaty with another nation, but the treaty must be approved by a two-thirds vote of the Senate (Article II, Section 2).
- **War.** Although the president is commander in chief of the armed forces (Article II, Section 2), only Congress has the power to declare war (Article I, Section 8). Congress also controls the money necessary to wage a war. Therefore, the power to declare and wage war also is shared.
- **Impeachment.** Article I gives Congress the power to impeach the president, members of the executive branch, and federal judges and to remove them from office if they are found guilty of treason, bribery, or other high crimes and misdemeanors. Only the House of Representatives can bring the charges (impeachment). The Senate holds a trial to determine the official's guilt or innocence (conviction or acquittal). If convicted by two-thirds of the Senate, the official is removed from office.
- **Judicial review.** The Constitution does not specify that the Supreme Court can decide whether acts of Congress are constitutional. However, many of the Framers assumed that the judicial branch would have this power because the judiciary of many states already played this role.



### Content Highlight: WHAT DO YOU THINK?

How does each branch of government check and balance the power of the other branches?

## Conclusion

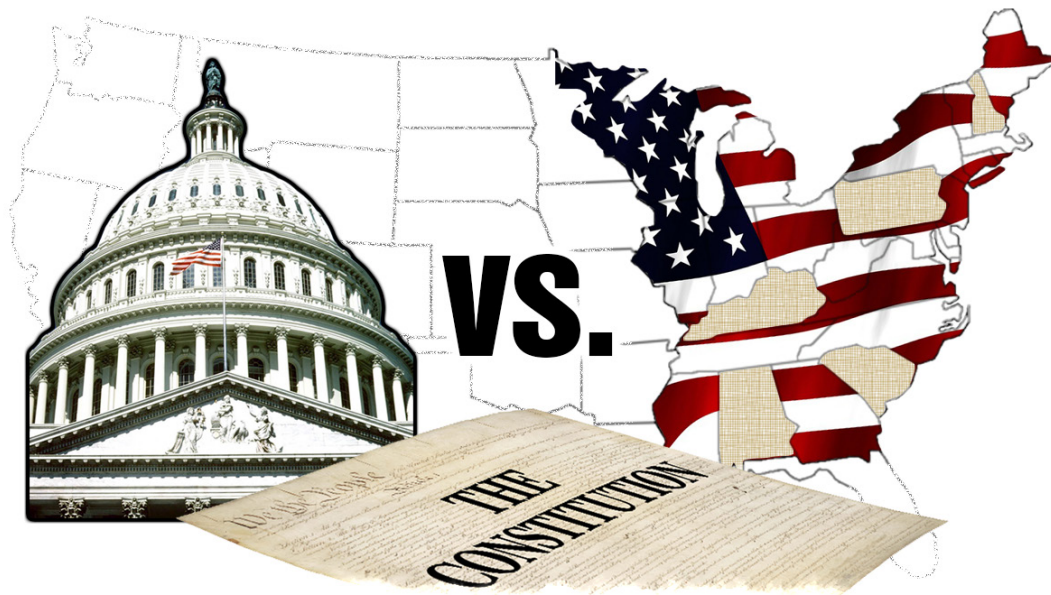
In this lesson, you learned about the role of each of the three branches and describe how the Constitution organizes them. You also saw why the system of checks and balances contributes to limited government. Finally, you learned that our government makes use of shared powers between the three branches of government.

## Lesson Check-up



- Why did the delegates enumerate the powers of Congress? Why do you think it did not enumerate the powers of the executive and judicial branches in the same detail?
- What is the Electoral College, and why did the delegates decide to create it?
- What issues did the delegates have to decide regarding the organization of the executive branch of government, and how did they resolve these issues?
- How did the delegates make sure the executive branch would have enough power to fulfill its responsibilities but not so much power that it could dominate the other branches of government?
- The Framers designed the national judiciary with the goal of making it independent of partisan politics. What constitutional provisions contribute to judicial independence? What constitutional provisions might threaten that independence?
- Has the checking and balancing relationship among the three branches intended by the Framers been maintained? Explain your response and support it with evidence.

# Balancing National and State Powers



## Key words

- ex post facto law
- bill of attainder
- secede
- supremacy clause
- tariff

## What You Will Learn to Do

Explain how the delegates distribute power between national and state government

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Take responsibility for your actions and choices
- Treat self and others with respect

## Learning Objectives

- **Describe** the major powers and limits on the national government, the powers that were specifically left to states, and the prohibitions the Constitution placed on state governments



## Essential Question

How did the delegates  
distribute powers between  
national and state  
governments?

### Learning Objectives (cont'd)

- **Explain** how the Constitution did and did not address the issue of slavery, as well as other questions left unresolved in Philadelphia
- **Evaluate**, take, and defend positions on how limited government in the United States protects individual rights and promotes the common good and on issues involving slavery at the Philadelphia Convention
- **Define** key words: ex post facto law, bill of attainder, secede, supremacy clause, tariff

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### Introduction

The relationship between national and state powers, more than any other issue, explains the need for the Constitutional Convention. This relationship was at the core of the first major debate, the one between supporters and opponents of the Virginia Plan. After forging the Great Compromise, the delegates worked out a series of other regulations and compromises that defined what the national and state governments could and could not do. Several of those compromises involved the question of slavery, the most potentially divisive issue among the states.

### What Powers Did the National Government Have Over State Governments and the People?

One reason the delegates agreed to meet in Philadelphia was their concern about some things that state governments were doing. They believed that some states were undermining Congress's efforts to conduct foreign relations, and they feared that state governments might threaten individual rights. They also knew that the national government under the Articles of Confederation had no power to enforce its decisions. The delegates all agreed that they had to create a national government with more power than Congress had under the Articles of Confederation. However, they did not agree



about how much power the new national government should have over citizens and the state governments.

The delegates included a number of phrases in the Constitution that set forth the powers of the national government over the states. These include the following:

- Article I, Section 4, grants state legislatures the power to decide the “times, places, and manner” of holding elections for senators and representatives but also grants Congress the power to make or change such regulations at any time.
- Article I, Section 8, gives Congress the power to set a procedure for calling the militia into national service “to execute the Laws of the Union, suppress Insurrections, and repel Invasions.”
- Article IV, Section 3, gives Congress the power to create new states.
- Article IV, Section 4, gives the national government the authority to guarantee to each state “a Republican Form of Government.” (Virginia delegate Edmund Randolph argued in the convention that no state should have the power to “change its government into a monarchy.”)
- Article IV, Section 4, also requires the national government to protect the states from invasion or domestic violence.
- Article VI, Section 2, also known as the **supremacy clause**, makes the Constitution and all laws and treaties approved by Congress in exercising its enumerated powers the Supreme Law of the Land. It also says that judges in state courts must follow the Constitution, or federal laws and treaties, if there is a conflict with state laws.

## Key words

### supremacy clause:

Article VI, Section 2 of the Constitution, which states that the U.S. Constitution, laws passed by Congress, and treaties of the United States “shall be the supreme Law of the Land” and binding on the states



What limitations does the Constitution place on the powers of the states?

Figure 5.12.1

## What Limits Did the Delegates Place on the National Government?

The Constitution also includes several limitations on the powers of the national government. Each of these provisions was designed to prevent a type of abuse that the delegates had seen in British history, in their own colonial and state governments, or in the national government under the Articles of Confederation.

Several provisions protect individual rights against violation by the national government:

- The national government may not suspend the writ of habeas corpus, “unless when in Cases of Rebellion or Invasion the public Safety may require it” (Article I, Section 9).
- The national government may not pass **ex post facto laws** and bills of attainder (Article I, Section 9). An **ex post facto law** changes the legality of an act after it has occurred. A **bill of attainder** is a punishment ordered by a legislature rather than by a court—that is, a law that declares a person guilty of a crime and decrees a punishment without a judicial trial.
- The national government may not suspend the right to trial by jury in criminal cases (Article III, Section 2).
- The Constitution also offers protection from the accusation of treason by defining this crime specifically and narrowly (Article III, Section 3). Congress cannot modify this definition. It can be changed only by a constitutional amendment.

Several other limitations protect the political independence and other rights of public officials:

- Members of Congress cannot be arrested “during Attendance at the Session of their respective Houses,” unless they commit “Treason, Felony, and Breach of the Peace.” Their speech or debate in the halls of Congress also is protected (Article I, Section 6).
- Congress cannot impose a religious test on people who hold national office (Article VI, Section 3). This means that people cannot be required to express certain religious beliefs as a qualification for holding office.
- If members of the executive or judicial branches are accused of misconduct in office, then the impeachment clauses (Article I, Section 3) protect their right to a fair trial.
- The national government cannot take money from the treasury without an appropriation law, nor can it grant titles of nobility (Article I, Section 9).

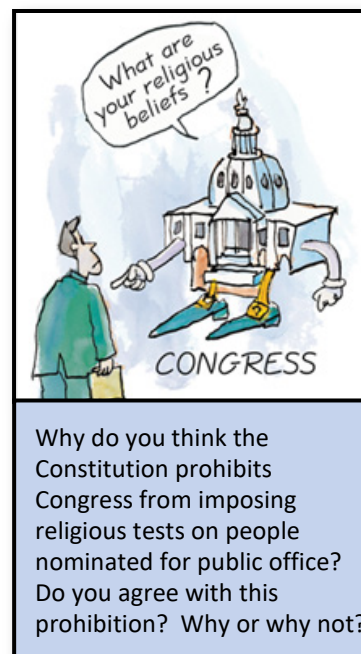


Figure 5.12.2

## Key words

### ex post facto law:

A law that criminalizes an act that was not a crime when committed, that increases the penalty for a crime after it was committed, or that changes the rules of evidence to make conviction easier. Ex post facto laws are forbidden by Article I of the Constitution

### bill of attainder:

An act of the legislature that inflicts punishment on an individual or group without a judicial trial

## What Limits Did the Delegates Place on State Governments?

The Constitution also limits the powers of state governments but not nearly as much as Madison had hoped for in the Virginia Plan. Many of the Constitution's limitations on state power are in Article I, Section 10, which prohibits states from:

- Coining their own money
- Passing laws that enable people to violate contracts, such as those between creditors and debtors
- Making ex post facto laws or bills of attainder
- Entering into treaties with foreign nations or declaring war
- Granting titles of nobility
- Laying duties (taxes) on imports or exports, except as necessary to pay for inspections
- Keeping troops or ships of war in times of peace

In addition, Article IV prohibits states from:

- Unfairly discriminating against citizens of other states
- Refusing to return fugitives from justice to the states from which they have fled

Many of these provisions, including the prohibitions on states making treaties, declaring war, or keeping armed forces in times of peace, were not new. They also had been part of the Articles of Confederation. Other limitations, such as the prohibition on "impairing the obligation of contracts," arose from the delegates' experiences in the 1780s, when some state legislatures attempted to pass laws releasing people from the responsibility to pay their debts.



### Content Highlight: WHAT DO YOU THINK?

- In what ways do the limitations on the national and state governments protect individual rights?
- In what ways do the limitations on the national and state governments promote the common good?

## How Did Slavery Affect the Distribution of National and State Powers?

Many delegates opposed slavery, and several Northern states had begun to take steps toward abolishing it. Virginian James Madison stated at the convention that he "thought it wrong to admit in the Constitution that there could be property in men." Therefore, the words slave and slavery never appear in the Constitution, even though several provisions clearly protected the institution.

Slaveholders considered their slaves to be personal property. Many delegates, not only Southerners, argued that slavery was fundamentally a state institution, like other matters related to property rights. Oliver Ellsworth of Connecticut stated, "The morality or wisdom

of slavery are considerations belonging to the states themselves.” If the Constitution interfered with slavery, North Carolina, South Carolina, and Georgia made it clear that they would not become part of the new nation and might instead form their own confederacy.

In addition to the Three-Fifths Compromise described earlier, other provisions in the Constitution reflected the differences between states that depended on slavery and those that did not.

The third paragraph of Article IV, Section 2, often called the “fugitive slave clause,” shows how the delegates sought to balance these views. This clause provides that if a person “held to service or labor” in one state escaped into another, they had to be delivered back to the person who claimed them. In an early draft, this clause began with the words “No person legally held to Service or Labour in one State.” On the next-to-last day of the convention, the delegates changed this to “No person held to Service or Labour in one State, under the Laws thereof.” This alteration was significant because it showed that the delegates did not intend to make slavery legal on a national level or in abstract terms. Instead, this clause reinforced the fact that slavery was a state institution, but it gave slaveholders the right to claim escaped slaves.

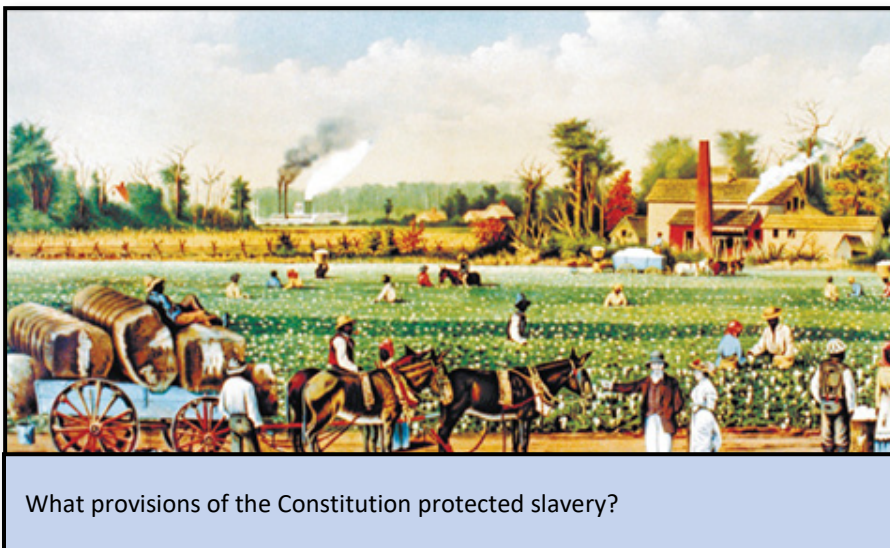


Figure 5.12.3

Another agreement between Northern and Southern delegates involved the issue of commerce. Congress gained the power to regulate commerce among the states, which the Northern states wanted. The delegates defeated a Southern attempt to require a two-thirds vote of both houses to pass laws regulating commerce. Many Southern delegates feared that Northern congressmen would seek **tariffs**, which are taxes on imports of manufactured goods. To satisfy the Southern states, the Constitution provided that the national government would not interfere with the importation of slaves to the United States earlier than 1808 (Article I, Section 9). This gave slave owners an additional twenty years to bring new slaves from Africa or the West Indies to the United States.

## Key words

### **tariff:**

A tax on imported or exported goods; also known as a duty





## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Understanding Positions on Slavery at the Philadelphia Convention

Although the delegates voted to give constitutional protection to slavery, many of them were not proud of having done so. They considered slavery to be a necessary evil at best, and many hoped it would go away by itself if left alone. As we now know, this protection of slavery almost destroyed the United States.

Work in small groups to develop positions for and against the following propositions:

1. John Locke argued that an essential purpose of government is to protect property. Therefore, the value of all property, including enslaved Africans, should be counted in allocating representatives to each state.
2. The Declaration of Independence asserts that all people are created equal and endowed with inalienable rights. Therefore, property in people should not be taken into account in allocating representatives to each state.
3. The settling of fundamental issues, such as whether or not to allow slavery, should be left up to each state.

#### What Issues Did the Philadelphia Convention Leave Unaddressed?

Slavery was not the only issue that the delegates did not directly address. The Constitution they drafted said nothing about national citizenship. Questions of citizenship were implicitly left to each state because the delegates could not agree on the answers. Some Northern states considered free African Americans to be citizens, while Southern delegates objected to that practice.

Similarly, the Constitution was mostly silent on the issue of voting rights. Each state had its own laws about who could vote. Usually those laws defined the amount of property a person had to own in order to qualify to vote as well as the amount of property required for a person to hold public office. No two states had the same qualifications, which is why the delegates left the “times, places, and manner” of electing members of Congress to the individual states. Only once does the Constitution prescribe voting rights. Article I, Section 2, states that anyone entitled to vote for “the most numerous Branch of the State Legislature” also is entitled to vote in elections for the House of Representatives.

- What was the largest group in the United States denied the right to vote and one of the last groups to attain that right?
- What arguments might states use to claim the right to secede from the Union?



This clause provoked debate among the delegates when Gouverneur Morris argued that suffrage for the House of Representatives should be restricted to landowners. Other delegates responded that the states would not be able to agree on such a qualification and that any nationwide qualification would disenfranchise people who already possessed the right to vote in some states. Besides, argued Benjamin Franklin, many of the sailors who had fought for America’s

independence were ordinary people who owned no land, and the adult sons of wealthy farmers often did not possess their own land until later in life. If the Constitution disenfranchised these people, Franklin said, it would deny their contributions to the United

States. On a practical level Americans were unlikely to ratify a Constitution that stripped them of voting rights.

In practice, the powers and limitations on national and state power have proved far more complicated than the provisions in the Constitution. Apart from the specific prohibitions in Article I and elsewhere, the Constitution barely suggests where national power ends and state power begins. In particular, the necessary and proper clause of Article I, Section 8, remains a source of controversy about the extent of national power.

In the seventy years after the Philadelphia Convention it became clear that another fundamental issue had not been resolved. Did states possess the right to **secede**, or withdraw, from the United States once they ratified the Constitution? Under the Articles of Confederation the states made up a “firm league of friendship,” a looser confederation than under the Constitution. At several points between the 1790s and 1861 states argued that they retained the right to secede if the national government enacted measures that they considered to be intolerable. A bloody civil war, not the civil discourse of the Philadelphia Convention, would ultimately resolve this question.

## Key words

### **secede:**

Formal withdrawal by a constituent member from an alliance, federation, or association

## Conclusion

In this lesson, you learned about the major powers and limits on the national government, the powers that were specifically left to states, and the prohibitions the Constitution placed on state governments. You also saw how the Constitution did and did not address the issue of slavery, as well as other questions left unresolved in Philadelphia.

## Lesson Check-up



- How does the Constitution balance state powers with powers granted to the national government? How does it limit each set of powers?
- How did the delegates at the Philadelphia Convention deal with the issue of slavery? Why did they choose to take the approach they did?
- What is the supremacy clause? Why is it important?
- Examine Article I, Section 8, of the Constitution. List any powers of Congress that are not included that you believe should be and be prepared to explain your choices.

# The Anti-Federalist Position



## Key words

- Anti-Federalist
- Bill of Rights
- ratification

## What You Will Learn to Do

Evaluate the Anti-Federalist position in the debate about ratification

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Treat self and others with respect

## Learning Objectives

- **Explain** why the Anti-Federalists opposed ratifying the Constitution
- **Explain** the role of the Anti-Federalists in proposing a bill of rights and to identify other contributions their views have made toward interpreting the Constitution
- **Evaluate**, take, and defend positions on the validity and relevance of Anti-Federalist arguments



## Essential Question

What was the Anti-Federalist position in the debate about ratification?

### Learning Objectives (con'td)

- Define key words: Anti-Federalist, Bill of Rights, ratification

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### Introduction

Most of the delegates at the Philadelphia Convention signed the Constitution on September 17, 1787. Their product would become the law of the land only if ratified by at least nine of the thirteen states. This lesson explains the process of **ratification** and the opposition that erupted immediately after the draft Constitution became public. Supporters of the proposed Constitution called themselves Federalists and labeled their opponents **Anti-Federalists**. The names stuck, even though the opponents argued that they—not the Constitution's supporters—were the real believers in a truly “federal” system, a confederation of equal states.

### Why Was a Ratification Process Required?

Amending the Articles of Confederation required approval by Congress and confirmation by the legislatures of all thirteen states. The Philadelphia Convention originally was conceived only to recommend amendments to the Articles of Confederation. The convention was expected to submit its work to Congress for approval or disapproval, followed by deliberations in the state legislatures.

Delegates knew that many members of Congress and the state governments would oppose the draft Constitution, largely because it reduced state powers. They also knew that it would be impossible to get all thirteen states to approve the Constitution, because Rhode Island had not sent delegates to Philadelphia.

### Key words

**ratification:**

Formal approval of some formal legal instrument such as a constitution or treaty

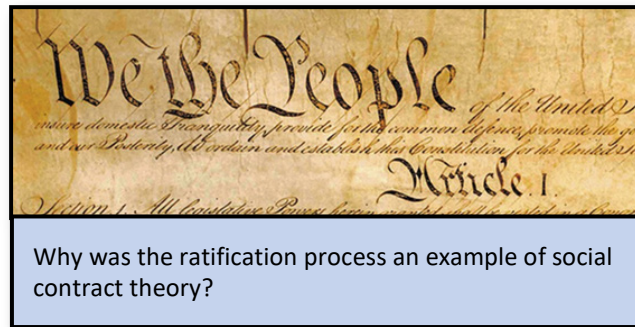
**Anti-Federalist:**

Opponents to ratification of the U.S. Constitution who believed that it gave excessive power to the federal government and failed to protect the rights and liberties of the people



James Madison developed the plan presented in Article VII of the Constitution: “The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states.” The plan was to go directly to the voters to get them to approve the Constitution. The Constitution would be presented to special ratifying conventions in each state, rather than to the existing state legislatures. Delegates to the conventions would be elected by popular vote for the sole purpose of debating and approving the Constitution. Madison’s plan was consistent with the idea in the Preamble to the Constitution, which says, “We the People...do ordain and establish this Constitution....” It also allowed the Constitution to go into effect without ratification in every one of the thirteen states.

The plan for ratification also was an example of social contract theory. The people who were to be governed by the new national government were asked to consent to its creation, consistent with John Locke’s natural rights philosophy and the Declaration of Independence—Just governments derive “their just Powers from the Consent of the Governed.”



Why was the ratification process an example of social contract theory?

Figure 5.13.1

The idea of ratifying conventions also reflected recent history in America. When the states wrote new state constitutions during and after the Revolutionary War, they were submitted to the people for ratification, rather than to the existing state legislatures.

### Where and How Did Americans Debate the Proposed Constitution?

The debate over adopting the Constitution began within the Philadelphia Convention itself. A week before the convention ended Virginia’s George Mason wrote a list of his objections on a draft copy of the Constitution and then departed without signing the finished document.

Ratification was not a foregone conclusion. As soon as the delegates released the proposed Constitution to the public, opposition emerged. In particular, heated debate erupted in the populous states of New York, Massachusetts, Pennsylvania, and Virginia. The United States would have little chance of surviving as a single nation if any of these large, commercially important states failed to ratify the Constitution.

Ratification debates took place largely in the pages of newspapers and pamphlets. The Anti-Federalists opened the discussion by stating their objections to the Constitution. Mason’s concerns were printed as a pamphlet. Many other distinguished Americans also wrote in opposition. Several, like Mason, had been delegates in Philadelphia, including Maryland’s Luther Martin, Massachusetts’s Elbridge Gerry, and New York’s Robert Yates. Yates wrote sixteen Anti-Federalist essays under the pseudonym Brutus, who helped assassinate Julius Caesar, supposedly in order to preserve the Roman Republic. Other important writers against the Constitution included Mercy Otis Warren, a Massachusetts playwright from a distinguished Revolutionary family, and Richard Henry Lee, a leading Virginia revolutionary and signer of the Declaration of Independence. Lee was once thought to have written Anti-Federalist essays under the pseudonym Federal Farmer. However, most historians now believe that Federal Farmer was Melancton Smith, an Anti-Federalist from New York. As opponents published their criticisms of the Constitution, supporters responded with defenses of the document.

On both sides writers believed in an essentially republican idea, namely, the use of reasoned discourse to educate the citizenry. They drew on political philosophy and ancient and recent history to make their arguments. Most of them employed pseudonyms so that their arguments would be read on their merits, rather than on the reputations of the authors. Ordinary Americans read and discussed the arguments in their homes, in coffeehouses and taverns, and in public meetings, thereby creating a truly nationwide debate.



### *Content Highlight:* **WHAT DO YOU THINK?**

1. Were the delegates justified in creating new rules for the ratification of the proposed Constitution? Why or why not?
2. If a convention were called today to consider major changes to the United States Constitution or to draft a new constitution, what rules would ensure an informed civic discussion of fundamental issues?
3. Today most newspapers refuse to publish letters to the editor or opinion statements without identifying the authors. By contrast, many people express opinions on the internet using pseudonyms. Does the use of pseudonyms today improve or diminish the quality of civil discourse? Explain your reasoning.

### **What Were the Key Elements of the Anti-Federalists' Opposition?**

Like many Federalists, Anti-Federalists believed in the basic ideas of republicanism. These ideas included the concept that the greatest governing power in a republic should be placed in a legislature composed of representatives elected by the people.

Anti-Federalists believed in another idea that dated back to classical republicanism that representative government could work only in a small community of citizens with similar interests and beliefs. Only in such a community can people agree on the common good or their common interest, and only in such a community will representatives truly reflect the beliefs and characteristics of their constituents. A large, diverse state or nation cannot sustain a republic, Anti-Federalists believed. In such a nation, a single national government will impose uniform rule over a heterogeneous population of diverse economic pursuits, varied religious and secular beliefs, and differing traditions and customs. In addition, in a large geographical territory many citizens live far away from the seat of government, making it difficult for them to watch over the activities of their representatives.

Once a government operates at a distance from most of its citizens, Robert Yates argued (as Brutus) in the first of his essays, it can no longer reflect those citizens' character or wishes. To maintain its authority, such a government will resort to force rather than popular consent. It will require a standing army, and it will tax the people in order to sustain that army. As a result, truly republican governments (those at the local or state level) will lose their power. The distant national government's taxation of citizens also will leave little money for local governments.

Anti-Federalists also believed that people living in small, agrarian communities are more likely to possess the civic virtue required of republican citizens. Living closely together,

they are more willing to set aside their own interests when necessary and to work for the common good. Moreover, the social and cultural institutions that best cultivate civic virtue—such as education and religion—work most effectively in small, homogeneous communities. Many Anti-Federalists argued that stronger institutions to foster civic virtue, not a stronger central government, would best overcome the problems that America faced in 1787 and in the future.

### How Did the Anti-Federalists' Philosophy Shape Their Objections to the Constitution?

Anti-Federalists believed that the Constitution would create a government that the people could not control. The size and diversity of the United States were exactly the opposite of a homogeneous small republic. A strong national government in a large nation, the Anti-Federalists argued, would be prone to the abuses that had destroyed republics since ancient times.

Anti-Federalists believed that each branch of the proposed national government had the potential for tyranny. Their specific arguments against the Constitution included the following:

- The Constitution gives Congress the power to make any laws that Congress believes “necessary and proper” to carry out its responsibilities. There is no adequate limitation on its powers. Congress could grant monopolies in trade and commerce, create new crimes, inflict severe or unusual punishments, and extend its power as far as it wants. As a result, the powers of the state legislatures and the liberties of the people could be taken from them.
- The president of the United States has the unlimited power to grant pardons for crimes, including treason. He could use this power to protect people whom he has secretly encouraged to commit crimes, keep them from being punished, and thereby prevent the discovery of his own crimes.
- The national courts have so much power that they can destroy the judicial branches of the state governments. If this were to happen and the only courts available were national (federal) courts, most people would not be able to afford to have their cases heard because they would need to travel a great distance. Rich people would have an advantage that would enable them to oppress and ruin the poor.
- Anti-Federalists also argued that the celebrated system of checks and balances among the branches could be turned against the people’s liberties. Following are two examples:
  - The Constitution says that treaties are the supreme law of the land. Treaties can be made by the president with the approval of the Senate, giving the Senate an exclusive legislative power in this area. This means that the Senate can act without the approval of the House of Representatives, the only branch of the legislature that is directly answerable to the people.
  - The powers of the executive and legislative branches are more mixed than separated.



Are people living in small and homogeneous communities more likely to be able to agree on their common good than people in large and diverse communities? Why or why not?

Figure 5.13.2

Rather than check each other, the president and Congress could collude to enact legislation, make war, or pass taxes that would undermine state and local governments.

Anti-Federalists also believed that the Constitution did not create a truly representative national government. The initial House of Representatives would have only sixty-five members from a population of more than three million, roughly one representative for every forty-six thousand citizens. Elected members of Congress would not be able to know, much less reflect the characteristics of, their constituents. An elite, privileged group soon would dominate the national government.



Has the Anti-Federalists' fear that an elite, privileged group would dominate the national government proven true?

Figure 5.13.3



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Analyzing the Positions of Some Anti-Federalists

Working in small groups, read the following statements by three Anti-Federalist writers. Summarize each writer's concern. What views of republican government are expressed in each statement? How, if at all, do the statements form a chain of reasoning for opposing the proposed constitution?

1. *If respect is to be paid to the opinion of the greatest and wisest men who have ever thought or wrote on the science of government, we shall be constrained to conclude, that a free republic cannot succeed over a country of such immense extent, containing such a number of inhabitants, and these encreasing in such rapid progression as that of the whole United States.... History furnishes no example of a free republic, anything like the extent of the United States.*  
--Brutus, probably Robert Yates of New York, No. 1
2. *Give me leave to demand, what right had they [the drafters of the Constitution] to say, We, the People. My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask who authorized them to speak the language of, We, the People, instead of We, the States? States are the characteristics, and the soul of a confederation. If the States be not the agents of this compact, it must be one great consolidated National Government of the people of all the States.*  
--Patrick Henry of Virginia
3. *There is no security in the proffered system, either for the rights of conscience or the liberty of the Press: Despotism usually while it is gaining ground, will suffer men to think, say, or write what they please; but when once established, if it is thought necessary to subserve the purposes, of arbitrary power, the most unjust restrictions may take place in the first instance, and an imprimatur on the Press in the next, may silence the complaints, and forbid the most decent remonstrances of an injured and oppressed people.*  
--"A Columbia Patriot," probably Mercy Otis Warren of Massachusetts



## Should There Be a Bill of Rights?

### Key words

#### Bill of Rights:

The first ten amendments to the U.S. Constitution

The lack of a **Bill of Rights** proved to be the Anti-Federalists' strongest and most powerful weapon. State constitutions listed the rights that state government could not infringe, and the Philadelphia Convention had considered but rejected including a bill of rights.

Not adding a bill of rights proved to be the delegates' greatest tactical error because the omission galvanized Anti-Federalists. The Anti-Federalists often disagreed with one another about specific objections to the Constitution, and they were not a well-organized group. But they soon realized that the best way to defeat the Constitution was to use the issue of a bill of rights.

The Anti-Federalists used the following arguments most often:

- The organization of the national government does not adequately protect rights. Only the House of Representatives is chosen directly by the people. The national government is too far removed from average citizens to understand or reflect their concerns. The national government's power could be used to violate citizens' rights.
- The national government's powers are so general and vague as to be almost unlimited. The necessary and proper and general welfare clauses seem particularly dangerous.
- There is nothing in the Constitution to keep the national government from violating all the rights that it does not explicitly protect. There is no mention, for example, of freedom of religion, speech, press, or assembly. These are omitted from the Constitution. Therefore, the Anti-Federalists reasoned, the national government is free to violate them.
- State constitutions contain bills of rights. If people need protection from their relatively weak state governments, then they certainly need protection from a vastly more powerful national government.
- A bill of rights is necessary to remind the people of the principles of our political system. As the Anti-Federalist writer, Federal Farmer put it in Federal Farmer 16, there is a necessity of "constantly keeping in view...the particular principles on which our freedom must always depend."

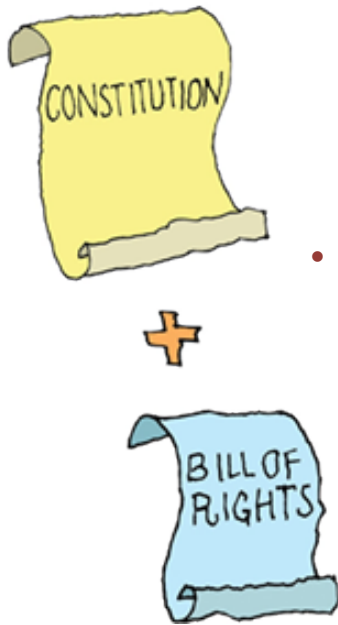


Figure 5.13.4

Many Anti-Federalist leaders hoped to defeat the Constitution so that a second constitutional convention would be held. There, the Anti-Federalists hoped, they would have more influence in creating a new government.

## Content Highlight:

### WHAT DO YOU THINK?

1. What criticism of the Constitution by Anti-Federalists seems to be the most valid? Why?
2. What criticism of the Constitution by Anti-Federalists seems to be the least valid? Why?
3. Which fears of Anti-Federalists do people express today? Are those fears justified? Why?



According to the Anti-Federalists, which branch of government should have the greatest governing power? Why?

Figure 5.13.5

## Conclusion

In this lesson, you learned about opposition to the proposed constitution of 1787. Much of the debate was about what makes up a “true” federal system. Both sides agreed on the basic ideas of republicanism. But the Anti-Federalists also relied on classical republicanism for their ideas about what was needed to sustain a representative government. In the next lesson, you’ll learn more about the position of the Federalists.

## Lesson Check-up



- What process did the Philadelphia Convention devise for ratifying the Constitution?
- What philosophical ideas guided the Anti-Federalists’ opposition to a stronger national government?
- What arguments did the Anti-Federalists make with regard to the need for a bill of rights?
- Do you agree with the Anti-Federalist position that people living in agrarian communities are more likely to possess republican civic virtue? Why or why not?

# The Federalist Position



## Key words

- faction
- The Federalist
- Federalists
- majority tyranny

## What You Will Learn to Do

Evaluate the arguments and strategies the Federalists used to win support for the Constitution

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Treat self and others with respect

## Learning Objectives

- **Explain** the key arguments of the Federalists and the process by which the Constitution was finally ratified
- **Evaluate**, take, and defend positions on the continuing relevance and validity of the Federalists' arguments
- **Define** key words: faction, The Federalist, Federalists, majority tyranny



## Essential Question

What was the Federalist position in the debate about ratification?

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### Introduction

The people who supported ratification of the Constitution, which created a stronger national government, called themselves **Federalists**. This lesson describes the arguments and the strategies that the Federalists used to win support for the Constitution.

### What Strategies Did Federalists Use in the Struggle for Ratification?

Once the Philadelphia delegates agreed on their strategy to use state ratifying conventions, supporters of the Constitution, known as Federalists, encouraged their associates in the states to organize as quickly as possible. They knew that the Anti-Federalists had not had enough time to organize their opposition. They believed that if the state conventions acted quickly, then the Anti-Federalists would have little time to oppose ratification.

In Pennsylvania, for example, Federalists knew that significant opposition in the western part of the state might defeat the Constitution. They scheduled the ratifying convention for early December 1787 in Philadelphia, too quickly for westerners to organize or to send many delegates. As a result, many Pennsylvania Anti-Federalists believed that their state had illegitimately ratified the Constitution. Anti-Federalists in New York, Virginia, and Massachusetts would not be defeated so easily.

The ratification debates in the states lasted ten months. It was an intense and sometimes bitter political struggle, especially in New York. To help the Federalist cause, three men—Alexander Hamilton, James Madison, and John Jay—published a series of essays in three New York newspapers under the pseudonym Publius (in honor of Brutus's friend, the Roman consul Publius Valerius Publicola, whose surname means "friend of the people"). These essays also were used in the contentious Virginia ratification debates and are an important source of information about the conflict over the Constitution. The essays were not intended to be objective. Their purpose was to rebut Anti-Federalist arguments and to convince people to support ratification. Historians and legal scholars consider these essays, now collectively called **The Federalist**, to be the most important work written to defend the new Constitution.

### Key words

#### Federalists:

Advocates for a strong central government who urged ratification of the U.S. Constitution in 1787-1788

#### The Federalist:

A collection of essays used in the debate over ratification of the U.S. Constitution



## Key words

### **faction:**

In this case, a number of citizens who are united by some common self-interest and uncommitted to the interests of the community

### **majority tyranny:**

A situation in which a majority uses the principle of majority rule but fails to respect the rights and interests of the minority

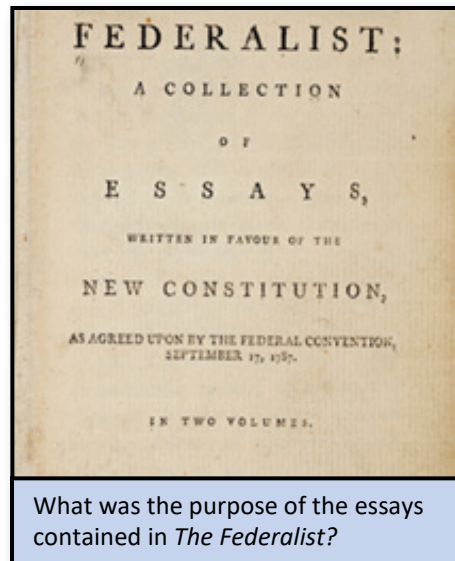


Figure 5.14.1

The writers of *The Federalist* were skilled at using basic ideas about government that most Americans understood and accepted. They presented the Constitution as a well-organized, agreed-on plan for national government. They did not stress the conflicts and compromises that had taken place during its development. Instead, they argued that the Constitution reflected a “new science of politics” that made the Anti-Federalist critique obsolete.

## How Did the Federalists Respond to the Anti-Federalists Fears About a Large Republic?

Most Americans probably agreed with the main Anti-Federalist argument that a republican government could not be sustained over a large and diverse nation. This argument had support in well-known political theory going back to Aristotle. History supported it as well. No republic had ever survived when the nation grew large. The transformation of ancient Rome from a republic into a monarchical empire seemed like a lesson in the way large republics collapse.

To solve the problem of republican government in a nation as geographically vast and culturally and economically heterogeneous as the United States, the Federalists needed a new political theory. James Madison expressed one most clearly in the tenth Federalist essay, which responded to Robert Yates’s first Brutus essay.

In Federalist 10, Madison turned classical republican arguments upside down. He began with a central premise that **faction** posed the greatest danger to governments of the people. By faction Madison meant any group, majority or minority, within a society that promoted its own self-interest at the expense of the common good. He did not define the common good or explain who decided what the common good was.

- If a faction consisted of a minority, a democracy worked well because the majority could outvote the faction.
- But if the faction consisted of a majority, then the risk of **majority tyranny** arose. Democracy would fail the common good. A republic, in which citizens elected representatives to tend to the people’s business, might work better.
- However, in a small, homogeneous republic—the type of society that classical republicanism prescribed—majority tyranny also could arise. Because people were relatively similar in occupations, habits, and manners, there would probably be no

more than two sets of ideas on any question. If those opposed to the common good commanded a majority, and the representatives simply reflected their constituents' views, then the outcome would still defeat the common good and the people's rights.

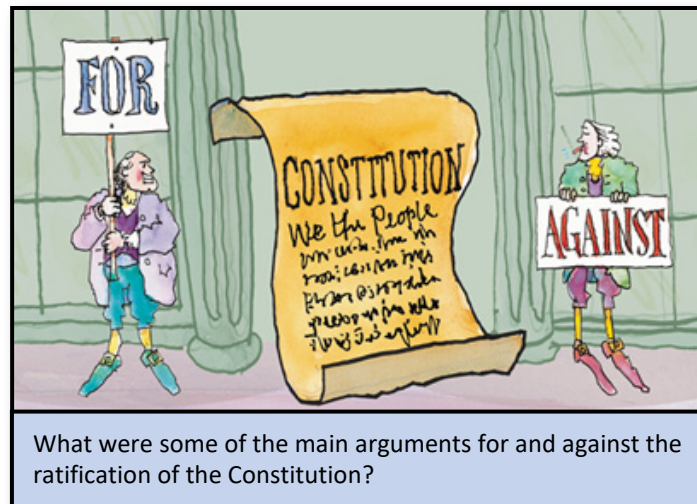


Figure 5.14.2

Madison next explained the benefits of a large, diverse republic. Such a nation was likely to have so many different factions that none would be able to command a majority. Moreover, in a large nation there were likely to be more “fit characters” for leadership—in other words, more eminent citizens able to see the common good. Unlike Anti-Federalists, who argued that good representatives reflected constituents’ views and characteristics, Madison and many other Federalists argued that good representatives “enlarged” or “refined” the public’s views by filtering out ideas that were based solely on self-interest. A large, diverse republic would therefore defeat the dangers of faction. No single faction would emerge supreme, and elected representatives would be most likely to see beyond the narrow views of ordinary citizens.



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Examining the Modern Relevance of Federalist 10

Madison wrote Federalist 10 at a time when people in geographically distant states, for example, Georgia and Massachusetts, were unlikely to know one another or one another’s “passions and interests.” Today modern technologies enable people in distant regions to know and communicate with one another. Working in small groups, respond to the following questions:

1. Do modern communications technologies promote the formation of “majority factions” in America today? Why or why not?
2. Have modern communications technologies contributed to a country that is at least as factional as Madison observed in 1787? Why or why not?
3. How relevant do you think Madison’s arguments in Federalist 10 remain today? To what extent, if any, does majority or minority factions appear to threaten the common good?

## What Were the Federalists' Central Arguments?

The following chain of arguments helped the Federalists convince a substantial number of people to support ratification:

1. Civic virtue can no longer be relied on as the sole support of a government that can protect people's rights and promote their welfare. Throughout history, the Federalists argued, the greatest dangers to the common good and the natural rights of citizens in republics had been from the pursuit of selfish interests by groups of citizens who ignored the common good. Consequently, for almost two thousand years political philosophers had insisted that republican government was safe only if citizens possessed civic virtue. By civic virtue they meant that citizens had to be willing to set aside their own interests in favor of the common good. Recent experiences with their state governments had led a number of people, including many delegates at the Philadelphia Convention, to doubt that they could rely on civic virtue to promote the common good and to protect the rights of individuals. Many of the state legislatures had passed laws that helped people in debt at the expense of those to whom they owed money. Creditors and others saw these laws as infringing on property rights, which were one of the basic natural rights for which the Revolution had been fought. The national government created by the Constitution does not rely solely on civic virtue to protect rights and promote the common welfare. Federalists argued that it is unrealistic to expect people in a large and diverse nation, living hundreds of miles apart, to sacrifice their own interests for the benefit of others. At the same time, the size and distance of the nation serve as a check on any single interest. So many interests and factions would be represented in the national government that it would be unlikely that any one of them would dominate.
2. The way the Constitution organizes the government, including the separation of powers and checks and balances, is the best way to promote the goals of republicanism. The Federalists argued that the rights and welfare of all are protected by the complicated system of representation, separation of powers, checks and balances, and federalism that the Constitution created. They also believed that the method of electing senators and presidents would increase the probability that these officials would possess the qualities required for good government. By filtering the people's votes through state legislatures (for senators) and the Electoral College (for the president) the Constitution would help to ensure that the most capable people were elected. The Federalists also argued that this complicated system would make it impossible for any individual or faction—even a majority faction—to take control of the government to serve its own interests at the expense of the common good or the rights of individuals. Madison rejected the argument that the system was so complicated that it would be difficult to get anything done. One of his criticisms of the state legislatures was



Figure 5.14.3

that they passed too many laws. Most of the Federalists believed that the best way to prevent a bad law from being passed was to prevent a law from being passed at all.

3. The representation of different interests in the government will protect basic rights. The branches of the national government, the power that the Constitution distributes to each, and the interests each is supposed to represent are as follows:
  - **Legislative Branch.** The House of Representatives protects the people's local interests because representatives are chosen from small congressional districts. The Senate protects the people's state interests because senators are elected by state legislatures.
  - **Executive Branch.** The president safe-guards the national interests because electors choose him from among leaders who have achieved national prominence.
  - **Judicial Branch.** The Supreme Court ensures good judgment in the national government because it is independent of political manipulation and therefore responsible only to the Constitution.

To counter Anti-Federalists' demand for a bill of rights, Federalists employed a number of arguments, described by Alexander Hamilton in Federalist 84. Among other things, Hamilton, who later would become the first U.S. Secretary of the Treasury, argued that the Constitution allowed the national government to exercise only enumerated powers. Nothing gave the national government authority over individuals. Adding a bill of rights would imply that the national government had powers that the Constitution did not give it. Hamilton also claimed that a bill of rights is unnecessary in a nation with popular sovereignty. Previous bills of rights, such as the English Bill of Rights, protected people from a monarch over whom they had no control. Under the U.S. Constitution, the people can remove elected officials who abuse their power.

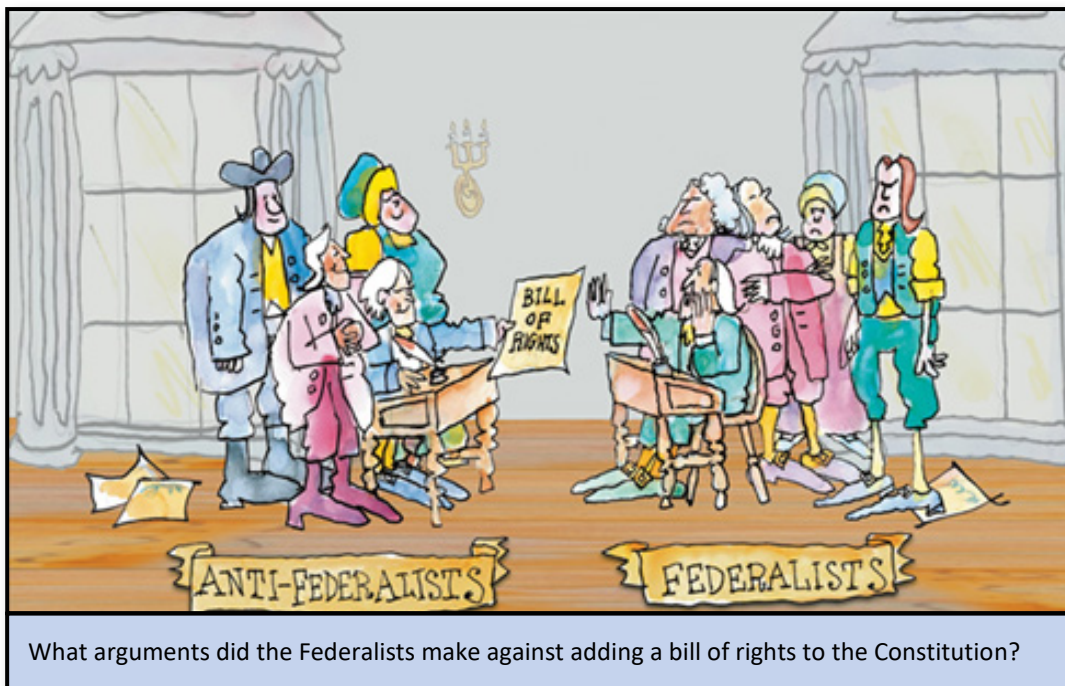


Figure 5.14.4



## Content Highlight:

### WHAT DO YOU THINK?

1. Why did the Federalists believe that they could not rely solely on civic virtue to make the new nation work properly? Do you agree? Why or why not?
2. How would Anti-Federalists (discussed in the previous lesson) respond to each aspect of the Federalists' philosophy and defense of the Constitution?
3. Is a good representative one who reflects and directly states their constituents' views and characteristics or one who enlarges those views in pursuit of a greater, common good? Explain your response.

### How Did Ratification Succeed?

The Federalists worked hard to overcome Anti-Federalist objections. By June 1788, nine states had voted to ratify the Constitution, enough for it to take effect. But neither New York nor Virginia had ratified. Without them the United States could not survive as a nation. New York and Virginia each had a large population, both were wealthy states, and each occupied a key geographical position. Without either state the nation would be split in two. Moreover, New York was America's primary commercial hub.

Finally, a compromise was reached. To get some Anti-Federalists to support the Constitution, or at least to abstain from voting in the state ratifying conventions, the Federalists struck a deal. When the first Congress was held, Federalists would support adding a bill of rights to the Constitution. This agreement reduced support for the Anti-Federalists and deprived them of their most powerful argument against the Constitution.

At that point, Anti-Federalist opposition seemed futile, and Virginia ratified the Constitution on June 26, 1788, by an 89 to 79 vote. New York's debate continued for another month, but ultimately enough Anti-Federalists abstained for the Constitution to be ratified by a vote of 30 to 27.

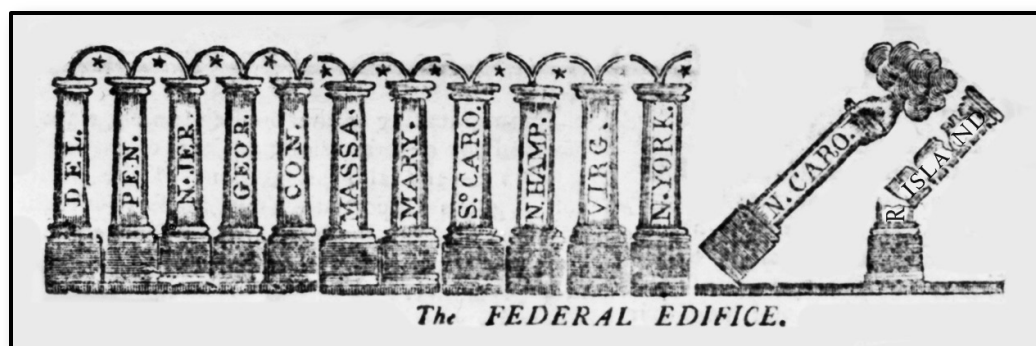


Figure 5.14.5

Ratification by eleven states still did not end the debate, because North Carolina and Rhode Island refused to approve the Constitution. North Carolina had called a ratifying convention that adjourned without voting. Rhode Island sent the Constitution to town meetings across the state, where it was overwhelmingly rejected. Once the first Congress proposed the ten amendments that became the Bill of Rights, North Carolina ratified the Constitution. Finally, on May 29, 1790, Rhode Island was forced to ratify when its largest city, Providence,

threatened to leave the state to join the Union and after the United States' first president, George Washington, inaugurated slightly more than a year earlier, had threatened Rhode Island with commercial restrictions as if the state were a foreign country.



### Content Highlight:

#### WHAT DO YOU THINK?

1. Explain the Federalists' argument that the Constitution did not need a bill of rights. Do you agree with their position? Why or why not?
2. Why do you think the delegates in Philadelphia protected some rights in the body of the Constitution but not other rights?
3. What do you think were the most important reasons put forth by the Federalists to support the Constitution? What do you think were the least important reasons?

### Conclusion

In this lesson, you examined the arguments for and against adoption of the Constitution. You also saw that while ratification succeeded, it was a close vote in some states. Today, the conversation continues over some of the same issues raised in the ratification debate. Issues about diversity, a strong national government, states' rights, and the power of factions remain part of our national political debate.

## Lesson Check-up



- What strategies did Federalists employ to win the struggle for ratification of the Constitution?
- What is *The Federalist*? How and why was it written?
- What arguments did Federalists make to support the ratification of the Constitution?
- What arguments did Federalists make to resist the demand for a bill of rights?

# Amendments and Judicial Review

## AMENDING THE CONSTITUTION

### PROPOSAL

- Vote of two-thirds of members of both the House and Senate

OR

### PROPOSAL

- By national convention called at the request of two-thirds of the 50 state legislatures

OR

### RATIFICATION

- Approved by three-fourths of 50 state legislatures

### RATIFICATION

- Approved by three-fourths of ratifying conventions held in 50 states

New Amendment to the Constitution



## Key words

- amendment
- judicial review

## What You Will Learn to Do

Describe how amendments and judicial review changed the Constitution

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Take responsibility for your actions and choices
- Treat self and others with respect

## Learning Objectives

- **Describe** the two ways in which the Constitution can be amended
- **Identify** major categories of constitutional amendments
- **Explain** why James Madison introduced the Bill of Rights



## Essential Question

How have amendments and judicial review changed the Constitution?

### Learning Objectives (cont'd)

- **Evaluate**, take, and defend positions on the amendment process and judicial review
- **Define** key words: amendment, judicial review

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### Introduction

This lesson describes the process that the Founders devised for amending the Constitution and the first application of that process—adoption of the Bill of Rights. It also explains the power of **judicial review**, a process not provided for in the Constitution, and the arguments for and against judicial review.

### How and Why did the Framers Devise an Amendment Process?

The Framers intended the Constitution to be, and to remain, a fundamental framework of law. They did not want the Constitution to become confused with ordinary laws and regulations, or to be changed in response to transient whims. However, they also recognized that American society and conditions would change over time in ways they could not predict in 1787. The Constitution that they proposed, George Mason argued, would “certainly be defective,” just as the Articles of Confederation had proved to be. Mason said, “**Amendments** therefore will be necessary, and it will be better to provide for them, in an easy, regular, and Constitutional way than to trust to chance and violence.”

The Framers made the Constitution difficult to amend, but not as difficult as it had been to amend the Articles of Confederation. Under Article V of the Constitution, amendments may be proposed by two-thirds of both houses of Congress, or by a petition of two-thirds of the states calling for

### Key words

**judicial review:**

The power of the courts to declare laws and actions of the local and state governments or the national government invalid if they are found to contradict the U.S. Constitution

**amendment:**

A change in or addition to a legal document



a special convention. Congress has the power to decide how a proposed amendment will be ratified, either by approval of three-fourths of state legislatures or by approval of three-fourths of special state conventions called to consider ratification. Congress also has the power to determine how much time states have to approve an amendment. If a proposal is not ratified within that time, then the amendment fails.

Americans have not been reluctant to suggest changes. Since 1789 more than ten thousand proposed amendments have been introduced in Congress. Only thirty-three amendments have gained enough votes to be submitted to the states for ratification. Of those thirty-three, twenty-seven have been ratified by the required three-fourths of the states. The other process for proposing amendments—by two-thirds of the state legislatures calling a convention—has never been used.



Why did the Framers make the Constitution so difficult to amend? Should the Constitution be easier to amend? Why or why not?

Figure 5.15.1

### Content Highlight: WHAT DO YOU THINK?

1. Read Article V of the Constitution. What are the advantages and disadvantages of each amendment process described in Article V?
2. The U.S. Constitution has only been amended seventeen times since 1791. Some scholars have claimed that it is more difficult to amend than any state constitution or the constitutions of other advanced democracies. What are the advantages and disadvantages of making it difficult to amend a constitution?
3. Find a copy of your state constitution. Identify the amendment process it contains and compare it with Article V of the U.S. Constitution. Which do you prefer? Why?
4. Some critics of the amending process argue that amendments, once proposed, should be put before a national popular referendum. They point out that forty-nine of the fifty states now submit state constitutional amendments to popular vote. Delaware is the only exception. Do you think the amendment process should be revised to bypass state legislatures and allow for a national popular referendum? Why or why not?

## What Types of Constitutional Amendments Have Been Adopted?

The Constitution has been amended twenty-seven times since 1789. These amendments can be grouped into six categories.

### BILL OF RIGHTS

**First Ten Amendments.** Adopted in 1791, the first ten amendments are referred to as the Bill of Rights. Many consider this collection of amendments to be part of the original Constitution. James Madison proposed the Bill of Rights in response to debates surrounding the ratification of the Constitution. Congress sent the states twelve amendments for consideration as the Bill of Rights. The states ratified only ten. However, in 1992 another of the original twelve was ratified as the Twenty-Seventh Amendment, limiting Congress' power to raise its own salaries. The twelfth proposed amendment, dealing with the number and apportionment of members of the House of Representatives, never became part of the Constitution.



Figure 5.15.2

## FUNDAMENTAL CHANGES

**13<sup>th</sup> and 14<sup>th</sup> Amendments.** As later lessons will explain, the Thirteenth and Fourteenth Amendments made changes that go to the core of the constitutional system. They outlaw slavery, define national citizenship, impose equal protection and due process requirements on the states, and give Congress expansive enforcement powers. Both amendments resulted from the Civil War and resolved issues not settled at the Constitutional Convention. Some scholars argue that the Thirteenth and Fourteenth Amendments are equivalent to a second American constitution because of their effect on the American governmental system.



Figure 5.15.3

## EXPANSION OF SUFFRAGE

**15<sup>th</sup>, 17<sup>th</sup>, 19<sup>th</sup>, 23<sup>rd</sup>, 24<sup>th</sup>, and 26<sup>th</sup> Amendments.** Later on, you'll learn more about six constitutional amendments that expand the right to vote, or increase the opportunity for direct political participation in elections. The Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments prohibit states from denying the franchise based on race, gender, age of persons eighteen or older, or failure to pay "any poll or other tax." The Seventeenth Amendment provides for the direct election of senators. The Twenty-third Amendment gives residents of the District of Columbia the right to vote in elections for president and vice president.

## OVERTURNING SUPREME COURT DECISIONS

**11<sup>th</sup> and 16<sup>th</sup> Amendments.** Two Supreme Court decisions proved so controversial that they led to successful efforts to amend the Constitution. The Eleventh Amendment overturned *Chisholm v. Georgia* (1793), which many interpreted as improperly expanding the jurisdiction of federal courts at the expense of state courts. The Sixteenth Amendment overturned *Pollock v. Farmers' Loan & Trust Co.* (1895), which barred Congress from levying an income tax.

## REFINEMENTS

**12<sup>th</sup>, 20<sup>th</sup>, 22<sup>nd</sup>, and 25<sup>th</sup>**

**Amendments.** Four amendments address matters affecting Congress and the president that delegates to the Constitutional Convention did not anticipate:

- The Twelfth Amendment changed Article II, Section 1, by requiring electors to make separate choices for president and vice president.
- The Twentieth Amendment shortened the time between an election and when the president, vice president, and members of Congress take office. The amendment reflected communications and travel changes that made it possible for officials and the public to know election results sooner and for newly elected officeholders to travel to the nation's capital more quickly.



Figure 5.15.4



- The Twenty-second Amendment limits presidents to two terms in office. The amendment gave the force of law to what had been an established custom until President Franklin D. Roosevelt stood for election an unprecedented four times.
- The Twenty-fifth Amendment addresses gaps in Article II about what should happen on the death, disability, removal, or resignation of the president.

## MORALITY

**18<sup>th</sup> and 21<sup>st</sup> Amendments.** In the 1880s, the Woman's Christian Temperance Union and the Prohibition Party argued that alcohol consumption had an unhealthy influence on American families and politics. Aided by organizations such as the Anti-Saloon League, these reformers persuaded Congress to propose the Eighteenth Amendment, outlawing the manufacture, sale, and transport of alcohol (private possession and consumption were not outlawed). The amendment was ratified in 1919. However, Americans soon concluded that the amendment was a mistake, and states ratified the Twenty-first Amendment, repealing the Eighteenth, in 1933. The Twenty-first Amendment is the only amendment that has been ratified using the state convention method.

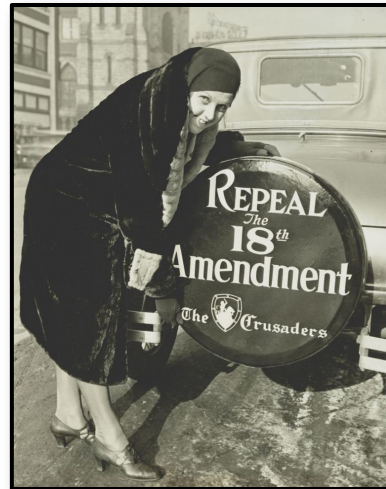


Figure 5.15.5

## Why Was a Bill of Rights Proposed for the United States Constitution?

Near the end of the Constitutional Convention, George Mason (author of the Virginia Declaration of Rights), Massachusetts delegate Elbridge Gerry, and young South Carolina delegate Charles Pinckney argued unsuccessfully for a bill of rights. Other delegates were not opposed to the idea, but they believed that the Constitution already contained many protections commonly found in a bill of rights, such as the right to jury trial in criminal cases, habeas corpus, prohibitions against bills of attainder, ex post facto laws, and religious tests for holding office.



Figure 5.15.6

During the ratification debates, some opponents argued that the lack of a bill of rights opened the door to tyranny in the national government. Several states directed their



delegates to “exert all their influence and use all reasonable and legal methods” to obtain amendments. Eight states wanted a statement that powers not delegated to the national government should be reserved to the states. Seven wanted a guarantee of jury trial in civil cases, while six urged protection for religious freedom.

Several prominent political figures also argued for a bill of rights. Thomas Jefferson, then U.S. minister to France, wrote to James Madison expressing his concern over the “omission of a bill of rights...providing clearly...for freedom of religion, freedom of the press, protection against standing armies, and restriction against monopolies.”

In his first inaugural address, President George Washington urged Congress to amend the Constitution to express the “reverence for the characteristic rights of freemen and a regard for public harmony.”

During his campaign for a seat in the House of Representatives in the first Congress under the new Constitution, Madison promised to propose a bill of rights. He made good on that promise by suggesting fourteen amendments to Articles I and III. He also proposed to add the following “prefix” to the Constitution:

*That all power is originally rested in, and consequently derived from, the people. That government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety. That the people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution.*

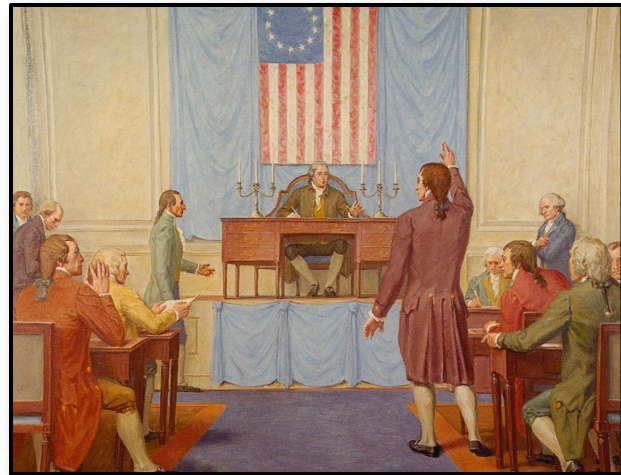


Figure 5.15.7

Madison also recommended other additions to the body of the Constitution in his June 8, 1789, speech to the First Federal Congress. He advocated inserting the following guarantee in Article I, Section 10:

*No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in all criminal cases.*

His proposal was not accepted, but a later lesson will discuss how that guarantee has been accomplished through the Supreme Court’s interpretation of the due process clause of the Fourteenth Amendment.

Roger Sherman of Connecticut argued against inserting statements of rights into the body of the Constitution. Sherman believed it was too early to begin rewriting the Constitution itself. He also feared that if amendments were added to the body of the Constitution, then the entire ratification process would have to start over again and might not succeed. Agreeing with Sherman, the House sent a list of seventeen amendments to the Senate to be added at the end of the Constitution as a bill of rights.

The Senate reduced these amendments to twelve. As discussed previously, the states ratified ten of the twelve amendments in 1791.



## Content Highlight:

### WHAT DO YOU THINK?

1. If you had been a member of the first Congress, would you have agreed with Madison that guarantees of rights should be inserted into the body of the Constitution or with Roger Sherman that they should be added as a group at the end? Explain your reasoning.
2. The Bill of Rights now is viewed as the cornerstone of American government. Do you think the Bill of Rights would be considered as important if the same provisions appeared in the Constitution itself rather than as a separate list? Why or why not?
3. Do you think the Bill of Rights should have been placed at the beginning of the Constitution, as many state constitutions do, rather than at the end? Why or why not?

## What is Judicial Review and Why is it Controversial?

Another way that the Constitution has developed and expanded is through judicial interpretation. In 1803, in the case of *Marbury v. Madison*, Chief Justice John Marshall (1755–1835) wrote for a unanimous Supreme Court that judges have the power to decide whether acts of Congress, the executive branch, state laws, and even state constitutions violate the United States Constitution. The justices of the Supreme Court have the final say about the meaning of the Constitution. The power to declare what the Constitution means and whether the actions of government officials violate the Constitution is known as the power of judicial review.

The Constitution does not mention the power of judicial review. However, both Federalists and Anti-Federalists assumed that the Supreme Court would exercise judicial review. The practice traces its roots to the seventeenth-century English system of law. It was well known and used by most state courts before adoption of the Constitution and even by the Supreme Court before being officially acknowledged in *Marbury*. Alexander Hamilton defended the power in *Federalist* 78:

*A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning.*

In *Marbury*, Marshall asserted that “it is emphatically the province and duty of the judicial department to say what the law is.” According to Marshall, judicial review rests on the following premises:

- The people exercised their sovereign power when they adopted the Constitution. The Constitution is a superior, paramount law that cannot be changed by ordinary means.
- Particular acts of Congress, the executive, and the states reflect temporary, fleeting views of what the law is.
- Acts of Congress, the executive, and the states that conflict with the fundamental law of the Constitution are not entitled to enforcement and must be disregarded.

- Judges are in the best position to declare what the Constitution means. By striking down laws and acts that conflict with the Constitution, they preserve the nation's fundamental law and the true will of the people.

Judicial review was neither immediately nor universally accepted. Anti-Federalists such as Brutus feared that the Supreme Court would use judicial review to eliminate the power of state courts. America's seventh president, Andrew Jackson (1767–1845), argued against it and threatened not to enforce Supreme Court decisions with which he disagreed. Not even all judges accepted the validity of judicial review. In *Eakin v. Raub* (1825) the Pennsylvania Supreme Court decided that the state Supreme Court had the power to review legislative acts and, if the acts were contrary to the state constitution, to declare such acts void. In that court decision, Justice John B. Gibson dissented and identified several arguments against such judicial review:

- Legislatures are the repository of the people's sovereignty, and the exercise of judicial review is an act of sovereignty, which should reside with the legislatures or the people.
- Judicial review could lead to political turmoil if the other branches of government, or the states, refuse to acquiesce to the Supreme Court's interpretation of the Constitution.
- Judicial review makes the judiciary equal or even superior to the legislature, even though judges are not elected.
- All officers of the government take an oath to support the Constitution and therefore all must consider the constitutionality of their actions.
- The judiciary is not infallible. Judges' errors in interpreting the Constitution cannot be corrected at the ballot box, only by Constitutional amendment.



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Evaluating, Taking, and Defending Positions on the Power of Judicial Review

Today judicial review is accepted almost universally in the United States and increasingly throughout the world. Controversy swirls around how the Supreme Court uses this power in particular cases:

1. Which, if any, of Gibson's arguments against judicial review remains relevant today?
2. Should the executive and legislative branches, as well as the judiciary, possess the power to declare what the Constitution means? Why or why not?
3. In what circumstances, if any, should the national judiciary have the power to declare state laws unconstitutional?
4. In what circumstances, if any, should the national judiciary have the power to declare laws made by Congress unconstitutional?

## Conclusion

In this lesson, you learned about the process the Founders devised for amending the Constitution and the first application of that process, which was the Bill of Rights. You also examined the major categories of constitutional amendments. Finally, you learned about the power of judicial review, and the arguments for and against it.

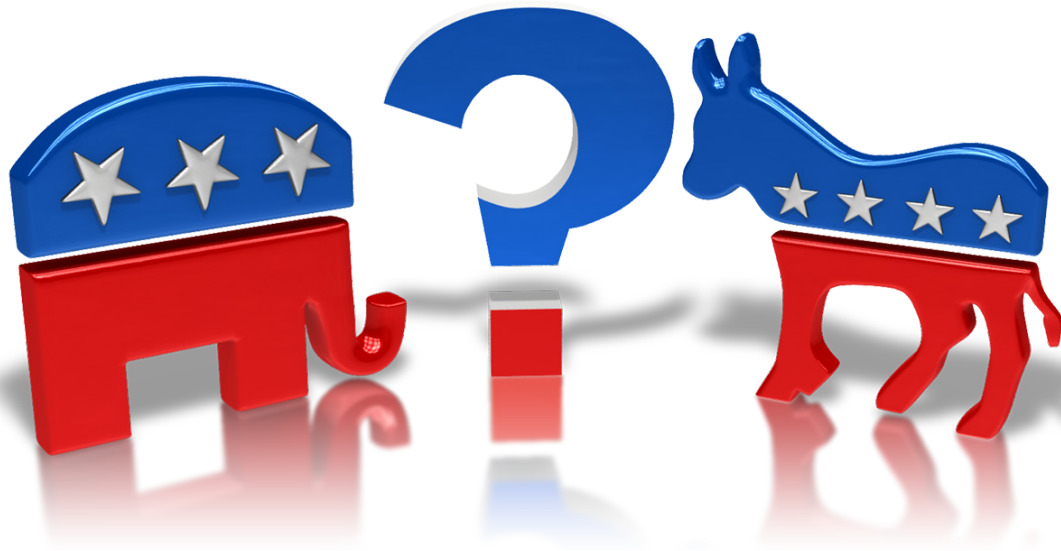
## Lesson Check-up



- What might have been the consequences if the Framers had not provided for an orderly opportunity to amend the Constitution?
- Which of all the amendments to the Constitution have made the country more democratic? In what ways?
- What were the arguments for and against including the Bill of Rights in the body of the Constitution as opposed to adding these rights at the end of the document?
- Describe the doctrine of judicial review. In what ways has judicial review proven to be controversial?
- Find a recent example of a Supreme Court decision that demonstrates the exercise of the power of judicial review. How does that decision affect individual rights, the common good, the balance of power between the branches of government, or the balance of power between the national government and the states?
- What justification, if any, might be made to support President Andrew Jackson's position that he would not enforce any Supreme Court decisions with which he disagreed?



# Political Parties and the Constitutional System



## Key words

- delegated powers
- party system
- patronage
- platform
- political party
- sedition
- ticket

## What You Will Learn to Do

Explain the role of political parties in the constitutional system

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Take responsibility for your actions and choices
- Treat self and others with respect

## Learning Objectives

- **Explain** why the Framers opposed the idea of political parties
- **Describe** the other ideas that helped political parties to gain acceptance



## Essential Question

What is the role of political parties in the constitutional system?

### Learning Objectives (cont'd)

- **Explain** the conflicting points of view that led to the development of parties and the roles that political parties have played in the American constitutional system
- **Evaluate**, take, and defend positions on the importance of political parties today
- **Define** key words: delegated powers, party system, patronage, platform, political party, sedition, ticket

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### Introduction

Soon after the federal government was established, there was an unforeseen development to which most of the Framers were opposed—the formation of political parties. This lesson describes the Framers' views on political parties and how the first parties came to be formed. It also explains how parties became an essential component of the American political system by helping to address challenges that the Constitution left unresolved.

### What Did the Framers Think About Political Parties?

James Madison's argument that the new Constitution would control the effects of factions was part of an ongoing debate within Anglo-American political thought about political parties. Some British writers, as well as Americans such as Alexander Hamilton, used the words faction and party as synonyms and viewed them as an evil to be eradicated in the society at large. Others, such as the Scottish political philosopher David Hume (1711–1776), had argued that parties were the inevitable result of diverse interests. In fact, James Madison followed this reasoning in Federalist 10 and believed that factions could be controlled. Ireland's Edmund Burke (1729–1797), another important political thinker, contended that open opposition expressed through political parties was a good thing. Without parties, Burke believed, opponents of the ruler would resort to conspiracy and

## Key words

### party system:

A concept in political science that political parties control government

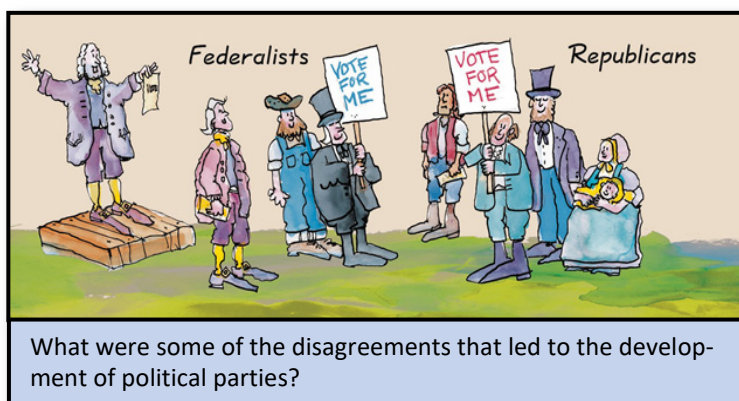
intrigue. Political parties motivated by self-defined guiding principles provided a crucial service to the body politic by fostering open debate.

No major eighteenth-century American leaders echoed Burke's arguments. However, Americans were accustomed to factional politics in their colonial and new state governments, often because of differing regional or economic concerns. Some of the Framers recognized the potential value of political parties. For example, Alexander Hamilton argued in Federalist 70 that parties within a legislature could "promote deliberation and circumspection, and serve to check excesses in the majority." But once a decision was made, Hamilton continued, opposition should cease.

Hamilton, Madison, and the other delegates to the Constitutional Convention had no experience with an ongoing **party system**, that is, a system of organized, relatively durable political parties that accept one another's right to exist and to compete in elections and within government.

## Content Highlight: WHAT DO YOU THINK?

1. If political parties had not arisen, how might the constitutional system have accommodated America's tradition of free and open political debate?
2. In Federalist 10, James Madison described factions. Review his definition of faction in Lesson 14. How do political parties differ from factions?



What were some of the disagreements that led to the development of political parties?

Figure 5.16.1

## What Ideas and Events Led to the Development of Political Parties in the 1790s?

Political parties developed within a decade of the ratification of the Constitution. Ironically Madison and Hamilton became leaders within those parties—on opposite sides. Several issues contributed to divisions

within the national government and the nation as a whole. Those divisions became the basis for the first parties. Following are four key issues.

### 1) THE POWER OF THE NATIONAL GOVERNMENT

Alexander Hamilton, who became secretary of the Treasury in George Washington's presidential administration, argued that the Constitution created a government designed to take on national problems. The national government could address any national issue, whether or not the issue was specifically mentioned in the Constitution. Because the Constitution stipulated certain **delegated powers** to the national government, those powers could be reduced or eliminated by amending the Constitution. Thomas Jefferson, Washington's first secretary of state, disagreed. He argued that the Constitution's description of national powers was so vague that the government would be able to do whatever it wanted. The "energetic" use of the national government's power was exactly what Jefferson feared.

### 2) ECONOMIC VISION

To demonstrate the power of the national government and to strengthen the new nation's commercial economy, Hamilton in his treasury role made a number of recommendations to Congress. One was that Congress pass a law establishing a national bank. Hamilton said that using a national bank was a "necessary and proper" method of carrying out the responsibilities given to Congress by the Constitution, such as collecting taxes and regulating trade. Jefferson, who believed in the virtue of an agrarian society of independent farmers, replied that the necessary and proper clause should be interpreted as if it read "absolutely and indispensably necessary."

### 3) FOREIGN POLICY

More than any domestic issue, the Napoleonic Wars between France and Great Britain mobilized American citizens on opposite sides. Jefferson and many of his supporters wanted the United States to help France, which had supported America during the war for independence. Hamilton and his supporters wanted the United States to ally with Great Britain because Americans had more trade and cultural connection with the British than with the French. Hoping to prevent people from dividing into opposing camps, President Washington declared American neutrality.

However, American supporters of a French alliance created Democratic-Republican Clubs, which held rallies and meetings to oppose the administration's policy. Jefferson, Madison, and other leaders subsidized newspapers that had editors who supported



Figure 5.16.2

## Key words

### **delegated powers:**

The powers people entrust to government for certain limited purposes. People can take these powers back if government fails to fulfill its purposes



## Key words

### sedition:

Incitement to rebellion

these views. Uniting under the name Republicans, these citizens and leaders forged America's first national political party. In response, Hamilton and his followers took the name Federalists.

Federalists and Republicans did not yet constitute a party system. Each party believed that the other was a threat to the new nation's very existence. Neither accepted the idea of a long-term, durable "loyal opposition." In the election of 1796, Federalist John Adams became president. But Republican Jefferson received the second-highest number of electoral votes and thus became vice president.

### 4) THE ALIEN AND SEDITION ACTS

Many in the early republic were concerned about foreigners, called aliens, and others who might incite **sedition**, or rebellion, against the authority of the national government. In 1798, President John Adams signed the Alien Act, which gave him the power to force foreigners to leave the country if he considered them dangerous, and the Sedition Act made it a crime for editors, writers, or speakers to attack the government. These laws outraged Republicans, especially after Federalist judges fined and jailed several Republican newspaper editors and a member of Congress under the Sedition Act. Madison and Jefferson wrote the Kentucky and Virginia resolutions, which claimed that the states had a right to decide if the national government had exceeded its powers. These resolutions claimed that the state legislatures had the power to declare acts of Congress null and void. Other states did not accept these resolutions. But the Alien and Sedition Acts helped mobilize Republicans for the presidential election of 1800.



*This cartoon from 1798, Congressional Pugilists, shows a brawl between two members of Congress.*

Why did disputes between the Federalists and Republicans arise over the Alien and Sedition Acts?

Figure 5.16.3

### What Was the "Revolution of 1800" and What Was Its Aftermath?

The presidential election of 1800 was the first to feature candidates for president and vice president who were openly supported by political parties. Federalists supported the reelection of John Adams. Republicans supported Thomas Jefferson. The candidates themselves did not campaign because it was considered undignified for presidential candidates to seek the office actively. But the election heightened the bitter party disagreements.

The election of 1800 was important to the new government. Federalists and Republicans accused each other of wishing to destroy the Constitution,

yet both parties accepted the results of the election. On March 4, 1801, the Federalists turned over control of the national government to the Republicans. For the first time in recent history control of a government was given to new leaders as the result of an electoral “revolution,” rather than by hereditary succession or violent overthrow.

However, the election of 1800 also exposed a problem in the Constitution. According to Article II, Section 1, each member of the Electoral College was supposed to vote for two candidates. The one receiving the highest number of votes became president, and the one with the second-highest total became vice president. In 1800, every Republican elector voted for Thomas Jefferson and Aaron Burr, resulting in a tie vote. The electors knew that Jefferson was supposed to be the president and Burr the vice president, but the Constitution did not allow electors to specify which candidate belonged in which office. Therefore, the tied election had to be decided by the House of Representatives.

By the next presidential election, the Twelfth Amendment to the Constitution had been ratified, stipulating that each elector cast one ballot for president and one for vice president. This amendment gave political parties an ongoing role in American politics.

Candidates for president and vice president would be a “**ticket**” in the modern sense and would run against the candidates of the opposing party. Nonetheless, Thomas Jefferson never believed that opposing political parties should be a permanent feature of the American system. In his inaugural address he noted, “We are all republicans—we are all federalists.”

Beneath this message of unity was another idea—that the Federalists as a **political party** should wither away because Jefferson’s Republicans represented the true common good. Over time, Jefferson hoped, there would be no clash of parties, but instead a national consensus around Republican principles would emerge.

## Key words

### **ticket:**

The choice of candidates of a political party for president and vice president

### **political party:**

An organization seeking to achieve political power by electing members to public office so that its political philosophy is reflected in public policy



What were the differences between the parties represented by John Adams and Thomas Jefferson?

Figure 5.16.4

## How Did Political Parties Grow and What Functions Did They Serve?

Only in the next generation did American political leaders promote a positive vision of political parties. As supporters of Andrew Jackson mobilized in the 1820s, New York politician Martin Van Buren (1782–1862), who would follow Jackson to become America’s eighth president, explained how a new party could serve the public good. Echoing Edmund Burke, Van Buren argued that a political party with clear principles offered voters a clear choice. Van Buren played an important role both in electing Jackson in 1828 and in creating the Democratic Party in the modern sense, which has existed since the 1830s.

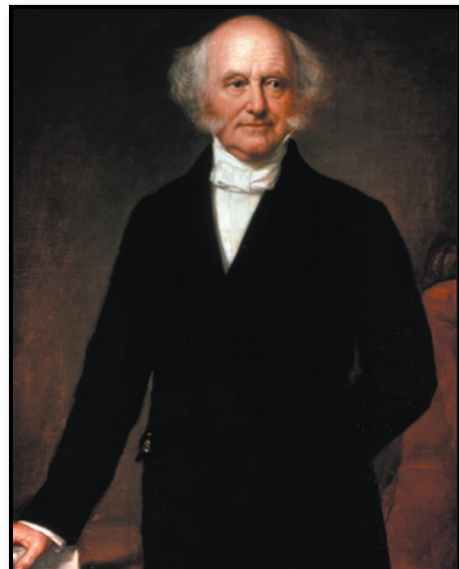
Van Buren believed that political parties could serve as a kind of glue within the American constitutional system. Although checks and balances and federalism could prevent tyrants from usurping power, these elements also discouraged the branches of government from working together. There was no mechanism for presidents to amass support for their goals in Congress.

In addition, there were great distances between national elected officials and ordinary citizens. Neither senators nor presidents were elected directly by the people, and the national government in Washington also was physically distant from most Americans’ lives.

Political parties helped bridge these distances. A president would have allies in Congress, the members of his own party who shared a political vision. Through the **patronage** system of appointing members of his own party to political offices, including local postmaster jobs, the president could build connections between national and local levels of government.

Local and state party committees staged elaborate entertainments, such as parades and rallies, to boost support for their candidates and to give citizens a sense of belonging to the party.

Just as revolutionary was Van Buren’s idea of a party system in which two parties regularly vied for citizens’ allegiance. Unlike Jefferson or Hamilton, who believed that opposition should evaporate once it recognized the true common good, Van Buren and others argued that there were valid, competing notions of the common good. Once a party was elected to power, it installed its supporters in public office and pursued its agenda.



Do political parties today serve the functions Martin Van Buren supported?

Figure 5.16.5

## Key words

### patronage:

When a president appoints members of their own party to positions in government

The opposing party continued to challenge those in power, holding them accountable. Political parties thus became an additional set of checks and balances alongside the ones that the Constitution had created.



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Examining the Relationship of Judicial Review and Political Parties to Constitutional Principles

The United States boasts of having a written constitution. However, two significant elements of American constitutionalism—judicial review and political parties—are not mentioned in that document. Work in small groups. Each group should choose one of the following constitutional principles to examine:

- Checks and balances
- Federalism
- Majority rule
- Individual rights
- Limited government
- Rule of law

Be prepared to explain to the other groups the ways that judicial review and political parties either do or do not support that principle.

### What Part Do Political Parties Play in Today's Political System?

Today political parties play an essential role in the American political system. Since the 1860s, the Democratic Party (founded in 1830) and the Republican Party (founded in 1854) have been the two major parties in the United States. However, their agendas and constituencies have changed dramatically over the years as new issues have created new coalitions and new divisions. Political parties serve several important purposes:

- They mobilize popular participation in the nomination and election of candidates for public office.
- They connect the executive and legislative branches of government. Presidents generally work most closely with members of their own party in Congress, and governors do the same with those in their state legislatures.
- Political parties connect the national government with state governments. However, each major party has enough internal variation to remain viable in states with very different political climates.
- By joining a political party people indicate their support for a particular **platform**, the label given to the priorities and policies of that party.

## Key words

### platform:

List of the policies and priorities of a political party; also known as a manifesto



- Political parties provide forums for deliberating about public policies. In a sense they work in a way that is opposite from what Madison suggested about factions. Rather than fracture the citizenry and promote passion and interest over reason and the common good, parties can help organize and channel passions and interests into the system. Each major party is like a large tent, under which a variety of interests and issues can coexist. Like the “large republic” that Madison envisioned, political parties actually can work against the most divisive tendencies of faction and passion.
- In times of rapid political change, political parties can provide a way of ensuring that people demand a change of government, not a change of constitution. Parties can be an agent of stability.

In recent years, many commentators also have observed less favorable aspects of the political party system:

- The longstanding dominance of the Democratic and Republican parties, entrenched through campaign finance laws and other structures, makes it difficult for parties espousing truly alternative views and agendas to gain lasting political support. In most other nations, especially those with parliamentary systems, there usually are many more parties, each representing a particular set of policies and values. Voters in such systems may feel as though they have a wider range of choices.
- American “third parties,” such as the Green, Libertarian, or Reform parties, tend to be expressions of discontent with the two major parties. They are generally small and oriented toward a narrow set of issues or are local or state based. They have little chance of becoming new major parties that are long-lasting and competitive nationally with the Republican and Democratic parties.
- If a single set of interests or a particularly passionate interest gains dominant power within a party, then the party is subject to the same threat of majority tyranny that Madison and other Framers feared in small republics and from political factions.

## Conclusion

In this lesson, you saw why the Framers opposed political parties. You learned about ideas that helped political parties gain acceptance and about conflicting points of view that led to the development of parties. You also studied the roles political parties have played in the American constitutional system.

## Lesson Check-up



- What ideas and issues led to the development of political parties in the United States?
- Assess the validity of the following claim: Political parties legitimize government policies by connecting citizens to government.
- How did the election of 1800 contribute to the formation of political parties? Was it a “revolution,” as some asserted?
- Are today’s political parties’ factions, collections of factions, or something else? Explain.
- In what ways does America’s two-party system promote or thwart America’s constitutional principles?
- What might be the advantages and disadvantages of the typical parliamentary systems’ inclusion of more than two parties in their legislatures?

# The Constitution and the Civil War



## Key words

- abolitionists
- literacy test
- poll tax
- secession

## What You Will Learn to Do

Analyze how the Civil War tested and transformed the American constitutional system

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Take responsibility for your actions and choices
- Treat self and others with respect

## Learning Objectives

- **Describe** several important constitutional issues raised by President Lincoln's actions, including the suspension of the writ of habeas corpus and the Emancipation Proclamation



## Essential Question

How did the Civil War test and transform the American constitutional system?

### Learning Objectives (cont'd)

- **Explain** the similarities and differences between the United States Constitution and the Constitution of the Confederate States of America
- **Explain** how the Civil War led to the creation of the Thirteenth, Fourteenth, and Fifteenth Amendments
- **Evaluate**, take, and defend positions on the conditions under which the writ of habeas corpus might be suspended and the constitutionality of secession
- **Define** key words: abolitionists, literacy test, poll tax, secession

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### Introduction

Between December 1860 and June 1861, eleven Southern states seceded from the United States and formed the Confederate States of America. The Civil War started in April 1861. The war raised several constitutional issues: the right of states to secede from the Union, the president's powers in wartime, the balance between individual rights and national security, and the constitutional status of slavery in the United States. Three constitutional amendments adopted after the war defined American citizenship and transformed the relationship between the national and state governments.

### How Did Constitutional Issues Lay Foundations for the Civil War?

The constitutionality of slavery, the issue of slavery in new territories, and the new Fugitive Slave Law of 1850 heightened the tensions between Northern and Southern states.

#### THE CONSTITUTION AND SLAVERY

At the Philadelphia Convention, the Framers attempted to avoid the issue of slavery. Previous lessons described several provisions of the Constitution reflecting compromise on that issue.



## Key words

### **abolitionists:**

Opponents of slavery who wished to put an end to the institution

The Three-Fifths Compromise (Article I, Section 2) gave slaveholding states additional representation in Congress based on their population of slaves. Article IV, Section 2, provided that enslaved people who fled from one state into another must be returned based on their owners' claims. And Article I, Section 9, prohibited Congress from banning the importation of slaves until 1808. When that ban expired, Congress passed—and President Thomas Jefferson signed—a law ending the importation of slaves into the United States.

Americans before 1860 debated whether the Constitution was a pro-slavery or an anti-slavery document. Did the Framers intend to allow slavery to continue forever, regulated entirely by states? Advocates of slavery, especially in the Southern states, said yes. The Constitution gave the national government no enumerated power over slavery within states. Many opponents of slavery, known as **abolitionists**, disagreed. They argued that the words “slave” and “slavery” appeared nowhere in the Constitution because the Framers knew that slavery was fundamentally at odds with America’s republican ideals. They also cited Article I, Section 9, as evidence that the Framers wanted the importation of enslaved Africans to end within two decades of ratification.

### **THE CONSTITUTION AND NEW TERRITORIES**

The Constitution did not give Congress power over slavery within the states, but it did give Congress power to make rules and regulations respecting territories and to approve the proposed constitutions of new states.

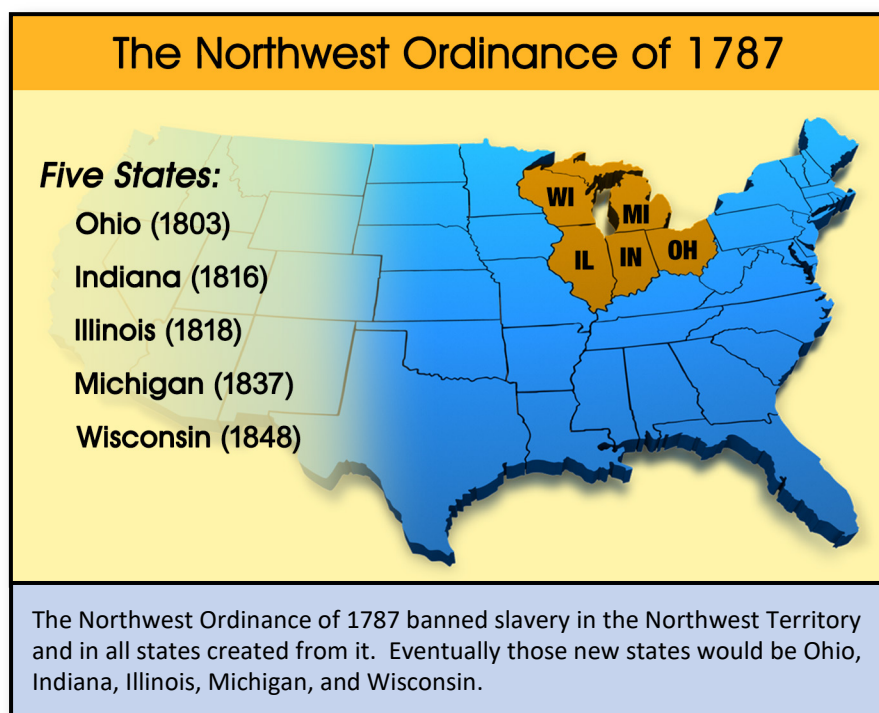


Figure 5.17.1

The question of slavery emerged anew whenever the United States added new territories and when territories applied for statehood. In 1820, Congress passed the Missouri Compromise to deal with the vast regions of the Louisiana Purchase of 1803. Under the compromise, Missouri

became a slave state, but other parts of the Louisiana Purchase would be open to slavery only if they lay south of Missouri's southern border. North of that line would be free (non-slave) territory. For the first sixty years under the U.S. Constitution, Congress admitted slave and free states in pairs, such as Missouri and Maine in 1820. This way the Senate would always have equal numbers of slave-state and free-state members, even though free-state representatives had a growing majority in the House of Representatives.

Following the U.S. annexation of Texas in 1845, the Mexican-American War of 1846–1848 disrupted that balance. The United States subsequently acquired nearly half of Mexico's territory, stretching all the way to California. Much of this land (including the future states of Utah, Nevada, and parts of Colorado and California) lay north of the Missouri Compromise line. Southerners worried that it would become impossible to maintain the equal number of slave and free states. On the other side, increasing numbers of Northerners believed that slavery should not be expanded into new territories. In 1850, Congress crafted another compromise. California, the first state created from the Mexican-American War territories, would be a free state with no slave state to balance it. But in return, the slave states would get a stronger Fugitive Slave Law, which provided mechanisms for the capture and return of alleged runaway slaves.

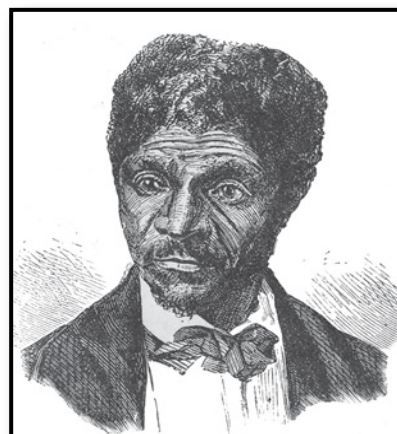
As settlers organized more of the new territories and envisioned future states, slavery remained a divisive issue. By the mid-1850s there were two major proposals. One, known as "free soil," argued that no new territories should be open to slavery. Another, which became law in 1854 as the Kansas-Nebraska Act, allowed the people of a territory to decide whether it should or should not allow slavery—even though that meant repealing the Missouri Compromise. Each of these concepts was based on ideals in the Declaration of Independence—human liberty in one case, majority rule in the other.

### The Fugitive Slave Law and *Dred Scott v. Sandford*

An earlier Fugitive Slave Act of 1793 had attempted to enforce a section of the U.S. Constitution that required the return of runaway slaves, but in practice it was rarely enforced. The new Fugitive Slave Law of 1850 was stronger and outraged many Northerners. Anyone—even an abolitionist—could now be forced to help capture African Americans who were claimed as runaway slaves.

Using the argument of states' rights, several Northern states passed "personal liberty laws" to circumvent enforcement of the Fugitive Slave Law.

One of the most important and controversial Supreme Court decisions in American history preceding the Civil War was *Dred Scott v. Sandford* (1857). Dred Scott (c. 1800–1858) was an enslaved African American whose master had taken him to the free state of Illinois and the free Wisconsin Territory and then back to Missouri. In 1846, Scott sued the man who held him in servitude on the grounds that Scott had achieved his freedom by residing in free territory. The Missouri Supreme Court ruled against him. Scott then sued in the federal Circuit Court in Missouri, and that court also ruled against him. Scott's attorney appealed the case to the U.S. Supreme Court.



What were the effects of the Supreme Court's decision in *Dred Scott v. Sandford* (1857)?

Figure 5.17.2

Chief Justice Roger Taney (1777–1864) wrote the Court’s majority opinion, which reached several explosive conclusions:

- African Americans, whether enslaved or free, could not be citizens of the United States. Individual states might grant them state citizenship, but these individuals could not enjoy the rights and protections of national citizenship under the Constitution, such as suing in federal courts. Taney reached this conclusion by reasoning that African Americans were not recognized as U.S. citizens when the Constitution was ratified. Taney’s opinion ignored the fact that the Constitution neither defines national or state citizenship nor specifies who does or does not qualify for citizenship.
- The national government did not have the right to exclude slavery from the territories. Enslaved African Americans were property.
- The due process clause of the Fifth Amendment protected property rights. Therefore, the Constitution protected the right to own slaves, and a slaveholder had the right to own slaves anywhere in the country or its territories.

Taney hoped that the Dred Scott decision would peacefully resolve the conflict over slavery and avoid a civil war. The ruling had the opposite effect. Now, it seemed to many people that the Supreme Court itself had taken the slaveholders’ side in the conflict.



### Content Highlight: WHAT DO YOU THINK?

1. How did slavery encourage different interpretations of the Constitution and the nature of the Union?
2. Examine the original Constitution. Do you think it is a pro-slavery document or an anti-slavery document? Cite evidence for your response.
3. What basic rights were in conflict in the Dred Scott case? What are some examples of similar conflicts today?

## Key words

### secession:

In U.S. history, the act of states leaving the Union in 1861 following the election of President Abraham Lincoln; precipitated the Civil War

### What Was Secession, and What Were the Arguments For and Against Its Constitutionality?

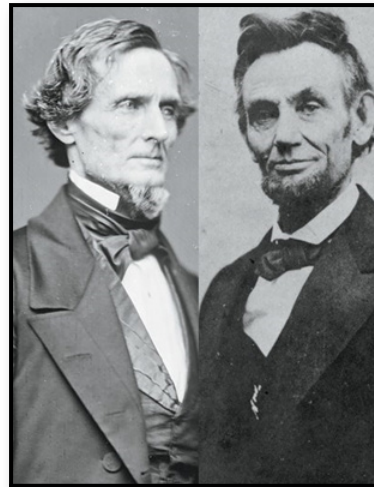
In 1860, Abraham Lincoln was elected president of the United States. Lincoln belonged to the new Republican Party, which was committed to “free soil” principles. Faced with the prospect of a national administration committed to restricting and eventually abolishing slavery, eleven Southern states responded with **secession**. One by one, they voted to leave—secede from—the Union. From December 20, 1860, to June 8, 1861, the eleven states seceded in this order: South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, Texas, Virginia, Arkansas, North Carolina, and Tennessee. They formed a new union

called the Confederate States of America and adopted a Constitution in March 1861 to govern its population of nine million, including 3.6 million slaves.

The states that seceded made two basic arguments for their constitutional right to do so. First, they argued that the Union was a compact of sovereign states. No state gave up its sovereignty when it ratified the Constitution. They wrote that concept into the beginning of their new Confederate Constitution: “We, the people of the Confederate States, each state acting in its sovereign and independent character.” Second, based on the ideals of the Declaration of Independence and the American Revolution, the leaders of the Confederacy believed that states and citizens possessed the right of revolution if their fundamental rights—in this case, the right to own slaves, who were regarded as property—were violated. They believed that leaving the Union was a second American Revolution.

President Lincoln and most Northerners denied the constitutional right of any state to secede from the Union. They believed that the Framers had created a perpetual union, a national bond expressing the sovereign authority of the American people as a whole. As Lincoln said in his inaugural address, “No government proper ever had a provision in its organic law for its own termination.” Southern states seceded, Lincoln argued, not because any constitutional rights had been violated, but because they feared they would lose the right to own slaves. Secession was therefore an act of rebellion.

The Constitution of the Confederate States of America drew most of its provisions and language from the U.S. Constitution. There were the three branches of government, including a bicameral legislature; the enumeration of congressional powers; and the provisions of the Bill of Rights. However, there were several important differences. The Confederate president would serve a single, six-year term. Congress was barred from making tariffs to benefit industry and from appropriating money for most internal improvements. Most important, the Confederate Constitution explicitly protected slavery, stating that no “law denying or impairing the right of property in negro slaves shall be passed.” Slaveholders were guaranteed the right to take their slaves anywhere in the Confederacy, including new territories; and the fugitive slave clause used the word slave.



How would you respond to the Confederates' claim that their separation from the Union was justified by the ideas contained in the Declaration of Independence?

*PHOTOS: Jefferson Davis (left) president of the Confederacy; and Abraham Lincoln, president of the United States*

Figure 5.17.3

### What Constitutional Issues Did the Civil War Provoke?

Slavery was the main reason that Southern states seceded from the Union. However, once the Civil War began, President Lincoln maintained that his paramount goal was to preserve the Union. Lincoln was opposed to slavery, but he believed his public duty as president was to defend the Constitution, even if that meant allowing slavery to continue. He refused to recognize the right of secession and always called the war a “domestic insurrection.” He hoped it would be concluded quickly, but the war became a bloody, four-year conflict that hardened views on both sides.





## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Understanding the Constitution of the Confederate States of America

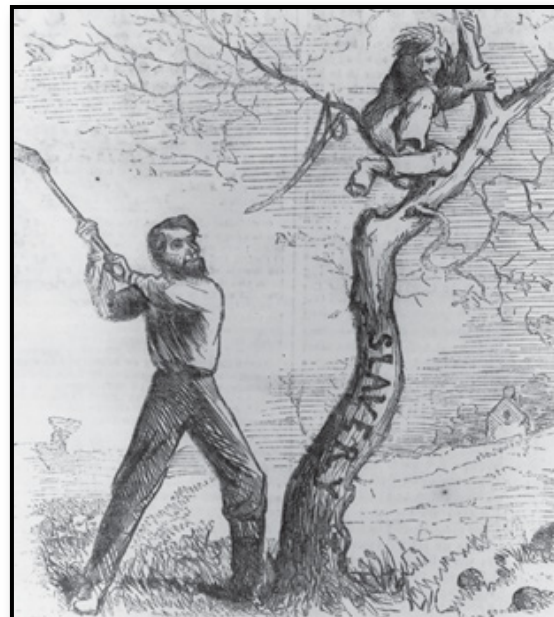
Obtain a copy of the Constitution of the Confederate States of America. Work in small groups. Each group should examine one article of that constitution. The groups should then come together to respond to the following questions:

1. In what ways did the Constitution of the Confederate States of America draw from the U.S. Constitution?
2. In what ways did the Constitution of the Confederate States of America adapt the U.S. Constitution to fit the circumstances of the Confederacy?

Lincoln asserted unprecedented presidential powers on behalf of the Union. The Constitution authorized some of his actions, such as calling up the militia. Other actions appeared to contradict congressional powers listed in Article I. For example, Lincoln expanded the regular United States Army when Congress was not in session, even though Article I gives Congress the power to “raise and support armies.” However, Congress quickly approved Lincoln’s action when it convened in the summer of 1861.

Lincoln also exercised extraordinary power in curtailing individuals’ rights in wartime. He suspended the writ of habeas corpus. Serving as a federal district judge when the Supreme Court was in recess, Chief Justice Taney held that only Congress had the power to suspend the writ. Lincoln defied that order. The result was that at least thirteen thousand civilians were held under military arrest and without judicial hearings during the war, mostly in the rebellious states and in the border states of Delaware, Kentucky, Maryland, and Missouri. These states bordered the Confederacy and permitted slavery but remained within the Union. Another border state, West Virginia, broke away from Virginia and became a new state in 1863. Lincoln also authorized military trials, not only for Confederates in rebel territory and war zones but also for some Union civilians in friendly territory. At various times during the war, people were arrested for “treasonable language” and publications that appeared to threaten the Union cause.

The Emancipation Proclamation illustrates the use of the president’s power as commander in chief of the armed forces. In the summer of 1862, Lincoln became convinced that abolishing slavery in the rebellious states was a military necessity. Doing so, he believed, would undercut the



LINCOLN'S LAST WARNING.  
“Now, if you don't come down, I'll cut the Tree from under you.”

Why did the Emancipation Proclamation free slaves in the rebellious states but not in the border states?

Figure 5.17.4

South's main labor source and consequently its ability to make war. That September, Lincoln announced that all persons held as slaves in states or parts of states still in rebellion on January 1, 1863, "shall be then, henceforward, and forever free." The president justified his action as a "fit and necessary war measure." Some critics denounced it as an empty gesture because it left slavery alone in areas under Union control.

For all its limitations, the Emancipation Proclamation had profound political and symbolic significance. The fight for the Union was now committed to America's founding principle of liberty. In his annual message to Congress, delivered a month before the Emancipation Proclamation took effect, Lincoln outlined a plan for the total abolition of slavery:

*Fellow-citizens, we cannot escape history.... The fiery trial through which we pass, will light us down, in honor or dishonor, to the latest generation....In giving freedom to the slave, we assure freedom to the free—honoring alike in what we give, and what we preserve. We shall nobly save, or meanly lose, the last best hope of earth.*



### Content Highlight: WHAT DO YOU THINK?

1. What provisions of the Constitution, if any, allow the president to take extraordinary action in wartime?
2. What do you think should be the limits on the president's authority in wartime? Did President Lincoln exceed those limits? Why or why not?

### How Did the Civil War Resolve Issues that the Framers Left Unanswered?

The Civil War resolved the great constitutional and human issue of slavery. Even before the war ended, Congress began considering a constitutional amendment to complete the Emancipation Proclamation. The Thirteenth Amendment, ratified in 1865, abolished slavery "within the United States, or in any place subject to their jurisdiction."

Northern victory also ended the idea of secession as a constitutional right and with it the vision of the Union as a mere federation of states. States continued to enjoy significant power and independence in the system of federalism, but the Civil War marked the beginning of a development that has continued to the present day, namely, the supremacy of the national government.

The Union victory also led for the first time to a definition of national citizenship. Soon after the war, as Union troops withdrew from the defeated states, white Southerners quickly began passing laws called Black Codes. These statutes, which appeared to protect the rights of African Americans, in fact prevented former slaves from developing the political power they might have gained with education and the right to vote. The Black Codes severely limited the rights of African Americans to own property, travel, and work for pay on acceptable terms.

It soon became clear to members of Congress that the Thirteenth Amendment was not enough to protect the rights of former slaves. In an attempt to provide help, Congress

passed the Civil Rights Act of 1866—over the veto of President Andrew Johnson, who had succeeded to the presidency on April 15, 1865, following Lincoln’s assassination. Despite this legislation, little changed.

As a result of continuing concerns, Congress drafted the Fourteenth and Fifteenth Amendments to the Constitution. The Fourteenth Amendment (1868) declared among other things that all persons born or naturalized within the United States are citizens. The amendment thereby nullified the Supreme Court’s decision in *Dred Scott*. The Fourteenth Amendment also prohibits states from making or enforcing any law that abridges the privileges or immunities of citizens or denies due process or equal protection of the law.

The Fifteenth Amendment (1870) prohibited both national and state governments from denying citizens the right to vote because of their race, color, or status as former slaves. From the late 1860s and into the 1890s large numbers of African Americans voted. They gained considerable political power and used it to protect their rights. All three amendments gave Congress power to enforce them by “appropriate legislation.” That power would transform the relationship between the national government and the states, as later lessons will explain.

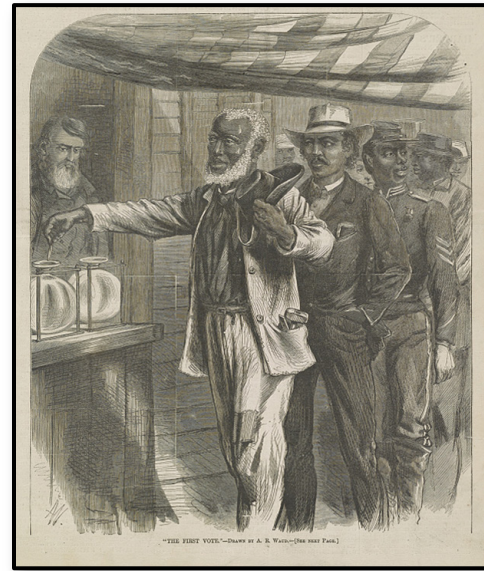


Figure 5.17.5

## Key words

### poll tax:

A tax that voters in many states were required to pay, in order to exercise their right to vote. These barriers were used until 1964 to prevent African Americans from voting

### literacy test:

A test to prove a person's ability to read and write. Until 1964, such tests were used in various states to prevent minorities from voting

Eventually public support for protecting the rights of the newly freed people weakened. In less than a decade since their ratification, the Fourteenth and Fifteenth Amendments had become ineffectual as tools for protecting these people’s rights. In the 1880s and 1890s, Southern states began passing laws to destroy the political power of African Americans. These laws included **poll taxes**, which required citizens to pay a tax, in order to vote; **literacy tests**, which required citizens to take tests proving they could read or write before they were permitted to vote; and grandfather clauses, which allowed people to vote only if their grandfathers had been eligible to vote.

When the U.S. government failed to enforce the Fourteenth and Fifteenth Amendments, African Americans learned to look to themselves and their own community institutions for help. Ministers, teachers, and community leaders became the backbone of a continuing struggle for the rights of African Americans for the next hundred years. By the 1910s and 1920s African Americans would begin to use the Civil War amendments as bases to challenge discrimination authorized by laws.

## Conclusion

In this lesson, you learned about issues that led to the Civil War creating several constitutional issues. These issues included the right of states to secede from the Union, the president's powers in wartime, the balance between individual rights and national security, and the constitutional status of slavery in the United States. You were also introduced to three constitutional amendments that were adopted that defined American citizenship and transformed the relationship between the national and state governments. You also compared the United States Constitution and the Constitution of the Confederate States of America.

## Lesson Check-up



- What was the Dred Scott case about? Why was the Supreme Court's decision in that case important?
- How did Southern states justify their decision to secede from the Union? How did President Lincoln and other Northerners justify treating secession as an act of rebellion?
- In what ways did President Lincoln assert presidential powers during the Civil War?
- On what constitutional grounds did President Lincoln issue the Emancipation Proclamation? Why did the Emancipation Proclamation not free all the slaves in the United States?
- What are the key provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments?



# Due Process



## Key words

- adversary system
- due process of law
- fundamental rights
- incorporation
- inquisitorial system
- procedural due process
- substantive due process

## What You Will Learn to Do

Analyze how the Due Process Clause of the Fourteenth Amendment changed the Constitution

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Take responsibility for your actions and choices
- Treat self and others with respect

## Learning Objectives

- **Explain** the historical origins of due process
- **Explain** the difference between procedural and substantive due process
- **Define** the concept of incorporation and describe its effect on powers of the states



## Essential Question

How has the Due Process Clause of the Fourteenth Amendment changed the Constitution?

### Learning Objectives (cont'd)

- **Evaluate**, take, and defend positions on historical and contemporary issues involving due process
- **Define** key words: adversary system, due process of law, fundamental rights, incorporation, inquisitorial system, procedural due process, substantive due process

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### Introduction

The Fifth Amendment limits only the national government, but the Fourteenth Amendment guarantees that states shall not deprive people of life, liberty, or property without “**due process of law**.” The Constitution does not define “due process of law.” However, the concept has deep roots in English history, and it has played a central role in Americans’ understanding of whether government actions affecting life, liberty, and property are valid. This lesson explains how the interpretation of due process has changed in American law since the adoption of the Fourteenth Amendment and how the requirement of due process has been used to protect the rights of individuals against actions by state governments.

### What Is Due Process of Law?

Due process of law is an ancient principle. Most scholars trace the idea of due process of law in the Anglo-American tradition to Chapter 39 of the Magna Carta of 1215. King John promised among other things not to imprison, exile, or destroy any free man or his property “except by the lawful judgment of his peers or by the law of the land.” The phrase “by the law of the land” meant that government, like the governed, must obey the law. The phrase “due process of law” first appeared in the

### Key words

#### **due process of law:**

A requirement stated in the Fifth and Fourteenth Amendments that treatment by state and federal governments in matters of life, liberty, or property of individuals be reasonable, fair, and follow known rules and procedures

subsequent 1354 version of the Magna Carta. Both phrases—“due process” and “law of the land”—mean that government must follow known and established procedures and may not act arbitrarily or unpredictably in negatively altering or destroying life, liberty, or property.

As discussed in Lesson 1, John Locke argued that the purpose of government is to protect life, liberty, and property. Beliefs about what are fair, just, and right when government seeks to affect life, liberty, or property change over time. Therefore, due process is both an ancient and an evolving concept.

The Fifth Amendment contains the Constitution’s first reference to due process of law. That amendment limits only the national government. Other constitutional provisions also address due process concerns. For example, Article I prohibits Congress and the states from passing ex post facto laws. But it is the Fourteenth Amendment that imposes the requirement of due process on the states and gives Congress the power to enforce the requirement through “appropriate legislation.” The courts determine whether legislation satisfies the requirements of due process in the Fifth and Fourteenth Amendments.

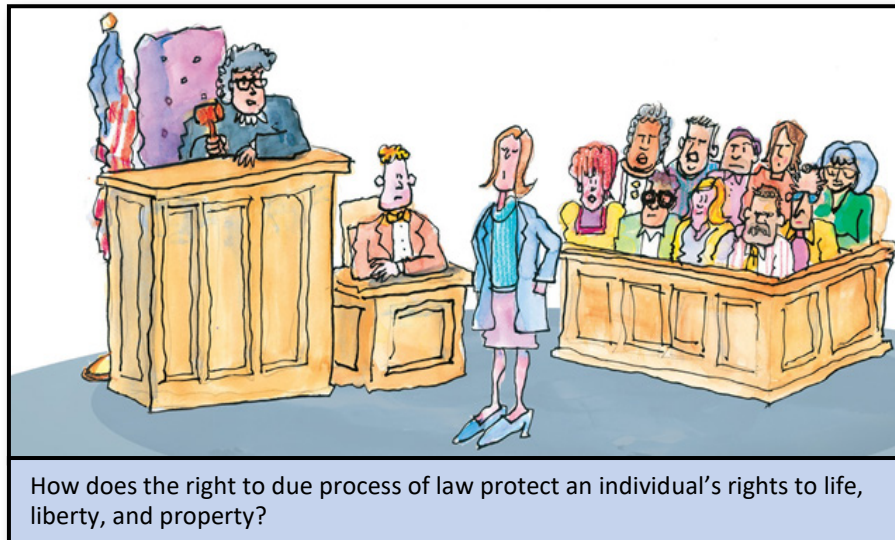


Figure 5.18.1

## Key words

### **procedural due process:**

The principle that government must respect all, not some, of a person's legal rights. Government must not subject individuals to unreasonable, unfair, or arbitrary treatment

## What Is Procedural Due Process?

Historically, due process of law meant that government officials must follow recognized procedures and not act arbitrarily when they make and enforce laws. This is called **procedural due process**, which requires government officials to act in certain ways before they regulate or take life, liberty, or property. In England, due process requirements initially focused on the rights of criminal defendants. For a criminal proceeding to be fair, for example, the laws must be clear. The defendant must know the charges that the government seeks to prove and be given a fair trial by a jury of his or her peers and the right to confront witnesses.

In the United States, due process guarantees apply to both criminal and noncriminal (civil) matters. For example, the Due Process Clause of the



Fourteenth Amendment addresses property, in addition to life and liberty. Property is a broad term. It refers to everything that a person can own, from tangible things such as land and buildings to intangible things such as copyrights and patents. People also have property interests in other intangibles, such as their jobs, welfare or unemployment benefits, and their reputations. In addition to constitutional guarantees, many laws enacted by state legislatures and Congress also contain provisions ensuring due process in matters such as public school discipline. Due process guarantees include the requirement of notice, the opportunity for a fair hearing, the opportunity to present evidence, and the opportunity to appeal an initial decision.

### Why Are Procedural Rights Important in an Adversary Legal System?

The legal systems in England and the United States are known as **adversary systems** of justice. This means that there are opposing, or adverse, parties in all cases. This type of system assumes that justice is most likely to result from the clash of positions between contesting parties. The opposing parties are responsible for gathering and presenting evidence and witnesses to support their side and for exposing weaknesses in the other side's case. Both parties seek to persuade a neutral, impartial decision maker—a judge or a jury—that they should prevail.

In a criminal case, where an individual's life, liberty, or property is at stake, the adversary system assumes that the defendant is innocent until proven guilty. Defendants are not required to prove their innocence. Instead, the prosecution must prove the defendant's guilt and, moreover, must do so "beyond a reasonable doubt," the most rigorous standard of proof in the law. "Reasonable doubt" has been described as a doubt that would cause a prudent person to hesitate before acting on important matters. In civil cases, the burden of proof is considerably lower. The side that presents the most credible and persuasive evidence wins. Lawyers, acting as advocates, play a central role in the adversary system. They represent clients in both civil and criminal cases.

The adversary system has been called a "fight theory of justice," because parties are pitted against one another in making their cases. Procedural guarantees ensure that the fight is fair. Both the Constitution and the Bill of Rights place great importance on procedural fairness. The Framers knew that just because a person is accused of a crime does not mean that the person is guilty. Lawyers represent criminal defendants whom they suspect, believe, or even know to be guilty to preserve the integrity of the adversary system.

By contrast, most European countries have an **inquisitorial system** of justice. The inquisitorial system uses specially trained judges to act as both investigators and decision-makers. Parties are expected to answer questions that the judge asks, and the questions usually are based on court-ordered investigations. There are fewer jury trials and fewer lawyers, and court proceedings usually are much shorter.

### Key words

**adversary system:**

A system of justice in which court trials are essentially contests between accuser and accused that take place before an impartial judge or jury

**inquisitorial system:**

A trial system in which a judicial official or set of officials acts as both prosecutor and judge, questioning witnesses, examining evidence, and reaching a verdict



Supporters of the inquisitorial system argue that the adversary system is based on unjustifiable assumptions—that there will be two adversaries of equal ability and resources and that the clash between these adversaries will yield the truth. Advocates of the inquisitorial system point out that often there is a great disparity in resources and ability between the two sides. They also argue that in the adversary system each side has an interest in presenting what is most likely to win for it; neither side is concerned with ensuring that the truth emerges. The inquisitorial system, by contrast, has courts with the responsibility for full investigation and presentation. Defenders of the inquisitorial system believe that this overcomes the effects of inequalities between litigants and maximizes the chance to discover the truth.

Critics of the inquisitorial system argue that it gives too much unrestrained power to judges and judicial institutions. Some claim that a trial by a jury of one's peers in an adversary system is likely to be far more impartial than a trial by members of a government.



### Content Highlight:

#### WHAT DO YOU THINK?

1. The adversary system of justice has been criticized for being inefficient. Should the United States adopt elements of the inquisitorial system in order to make judicial proceedings quicker and less expensive? Why or why not?
2. Which process, adversary or inquisitorial, is more likely to discover the truth of what happened in a criminal case? Why?
3. If you were a criminal defendant, would you rather be tried under the adversary system or the inquisitorial system of justice? Why?



What evidence is there about whether the adversarial or inquisitorial system increases the chances that the truth will be discovered and the rights of individuals protected?

Figure 5.18.2

## What Is Substantive Due Process?

In the United States, due process of law has two meanings. Procedural due process, described earlier, refers to the processes that governments must follow when they make and enforce laws. The second meaning of due process is known as **substantive due process**. It means that the Constitution usually prohibits some kinds of laws altogether, no matter how popular those laws may be with legislatures, executives, or even the people. Substantive due process is based on the idea that some rights are so fundamental that government must have a “compelling,” or exceedingly important, reason to regulate or interfere with them. It is the role of the courts, interpreting the Constitution, to determine whether a law is unconstitutional because it violates a fundamental right, and whether a governmental regulation of a fundamental right is justified by a compelling government interest.

The idea of **fundamental rights** traces to natural rights philosophy. Social contract theorists such as John Locke argued that people have natural rights that predate government. Some of those rights are so fundamental, or basic, that governments may not interfere with them or regulate them. One of the most difficult roles the Supreme Court plays is to identify which rights are fundamental and which are not. The justices’ views of fundamental rights have changed over time.

For many years, the Court held that the right to buy and sell a person’s labor is so fundamental that state and congressional laws establishing minimum wages and limiting the number of hours in a workday or workweek were unconstitutional. This was known as the era of economic substantive due process. In 1937 the Court abandoned the view that economic rights are fundamental rights.

However, the Court did not abandon its effort to identify other fundamental rights. It has continued to try to identify rights that are so basic that Congress or states must have a “compelling interest” in order to pass laws that interfere with or regulate such rights. The Court has identified the following rights as fundamental. Note that some but not all rights are listed in the Constitution or Bill of Rights:

- The right to marry and have children
- The right to purchase and use birth control
- The right to custody of one’s own children and to rear them as one sees fit
- The right of mentally competent adults to refuse medical treatment
- The right to free speech
- The right to interstate travel
- The right of legal voters to vote
- The right to associate
- The right to religious freedom

## Key words

**substantive due process:**  
Judicial interpretations of the Due Process Clauses of the U.S. Constitution requiring the content of law to be fair and reasonable

**fundamental rights:**  
Rights such as those to life, liberty, and property

Whether any or all of these rights are indeed fundamental, and thus prohibit most governmental regulations, is a topic of intense controversy in the United States.

### Content Highlight: WHAT DO YOU THINK?

1. How is due process related to the principle of limited government? How is it related to the principle of majority rule?
2. What kinds of controversies might arise in determining whether certain rights are fundamental rights?
3. Is one branch of government more capable of identifying fundamental rights than the other branches? Explain your reasoning.

### What Is the Doctrine of Incorporation?

For the first few decades after ratification of the Fourteenth Amendment, the Supreme Court continued to rely on the states to be the principal protectors of individual rights. All the state constitutions contained bills of rights. The Court was leery of interpreting the Fourteenth Amendment in a way that would upset the balance of power between the national government and the states.

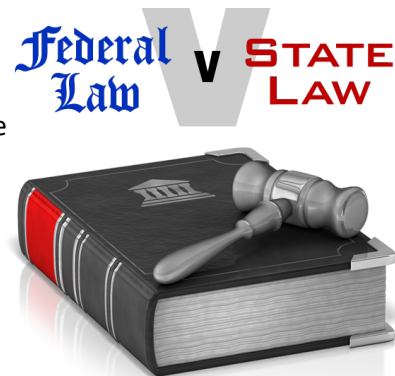


Figure 5.18.3

However, not all states interpreted their bills of rights to ensure due process and to protect the fundamental rights of everyone within their boundaries. In 1925, the Supreme Court began to examine the Due Process Clause of the Fourteenth Amendment with an eye to identifying the rights in the Bill of Rights that the states, like the national government, must protect. In *Gitlow v. New York* (1925), the Court recognized that the rights of free speech and free press are among the personal rights to liberty protected by the Due Process Clause. States could not infringe on these rights.

Interestingly, the Court upheld the New York Supreme Court's decision that Benjamin Gitlow, a Socialist, was guilty of criminal anarchy after publishing a "Left Wing Manifesto." The U.S. Supreme Court upheld his conviction on the basis that the government may suppress or punish speech when it directly advocates the unlawful overthrow of the government. The Court's ruling on the protected rights in the Fourteenth Amendment was incidental to the decision in this case, but it established a significant precedent.

Gitlow began a process known as **incorporation**—that is, using the Due Process Clause of the Fourteenth Amendment to decide whether various

### Key words

#### **incorporation:**

The process through which the U.S. Supreme Court has applied the Due Process Clause of the Fourteenth Amendment to extend the reach of the Bill of Rights to include protection from interference by states

guarantees in the Bill of Rights limit the states as well as the national government. In cases decided in the next two decades, the Court ruled that the Due Process Clause prohibits states from infringing on all the rights in the First Amendment. In determining which rights in the rest of the Bill of Rights limit the states through the Due Process Clause, the Court has followed a process called “selective incorporation.” This means that the Court has examined rights on a case-by-case basis, rather than holding that all the provisions of the Bill of Rights are limitations on the states. On some occasions, it has used a test offered by Justice Felix Frankfurter, who served on the Court from 1939 until 1962. Justice Frankfurter’s test involved asking whether it would “shock the conscience” if a particular right were not interpreted to limit the states.



What is the process of incorporation started by the Taft court in *Gitlow v. New York*? Can you think of any amendments to the Constitution that have been incorporated within the past ten years?

Figure 5.18.4

The Court was more reluctant to hold that the criminal procedural guarantees in the Fourth through Eighth Amendments limit the states. Their reasoning reflected a concern for federalism. State governments have a greater responsibility for prosecuting and punishing criminal behavior than does the national government, and procedural guarantees vary from state to state. Lesson 5 examines, among other things, the Court’s approach to identifying rights of the criminally accused that the Supreme Court has held are incorporated through the Due Process Clause of the Fourteenth Amendment to limit the states.

Today, despite the Court’s early reluctance regarding criminal procedure, most provisions of the Bill of Rights have been incorporated through the process of selective incorporation. The Court has refused to incorporate, or has not yet



Why do you think the Supreme Court incorporated the right to counsel in criminal trials in the Fourteenth Amendment?

Figure 5.18.5



considered whether to incorporate, the following rights in the Bill of Rights:

- The Fifth Amendment right to an indictment by a grand jury
- The Seventh Amendment right to a jury trial in civil lawsuits
- The implicit requirement in the Sixth Amendment that the jury in a criminal case must have twelve members and must reach a unanimous verdict



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Examining the Effects of Incorporation on Your State Supreme Court Decisions

Consider how Supreme Court decisions may have had economic impacts on both state and national governments.

Work in one of these three groups:

- **Group 1** - Examine the guarantees in the Fourth Amendment.
- **Group 2** - Examine the guarantees in the Sixth Amendment.
- **Group 3** - Examine the guarantees in the Eighth Amendment.

Each group should answer the following questions, and then explain its responses to the other two groups.



Figure 5.18.6

- What kinds of costs do states incur by having to protect the rights in this amendment?
- Should the national government assume responsibility for any increased costs to states associated with incorporation of the Bill of Rights? Why or why not?

## Conclusion

In this lesson, you learned about historical and contemporary issues involving due process. You studied the difference between procedural and substantive due process, and the major differences between the adversary and inquisitorial systems of justice. You also explored the concept of incorporation and understand its effect on powers that states have.

## Lesson Check-up



- Explain the difference between procedural and substantive due process. Is one more important than the other?
- What are the major differences between the adversary and inquisitorial systems of justice?
- What is the relationship between substantive due process and fundamental rights?
- What is the process of selective incorporation?
- Has incorporation of the Bill of Rights in the states validated the fears of the Anti-Federalists regarding the power of the national judiciary (see Lesson 13)? Explain your opinion.

# Equal Protection of the Laws



## Key words

- equality of condition
- equality of opportunity
- intermediate scrutiny
- rational basis
- separate but equal
- strict scrutiny

## What You Will Learn to Do

Analyze how the Equal Protection Clause of the Fourteenth Amendment prohibits state government from denying people "equal protection of the laws"

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Take responsibility for your actions and choices
- Treat self and others with respect

## Learning Objectives

- **Define** equal protection of the laws
- **Explain** why neither state governments nor the national government can deprive people of equal protection of the laws



## Essential Question

How has the Equal Protection Clause of the Fourteenth Amendment changed the Constitution?

### Learning Objectives (cont'd)

- **Explain** the “separate but equal” doctrine of racial segregation and why the Supreme Court abandoned it in *Brown v. Board of Education*
- **Describe** the categories that the Supreme Court now uses to decide cases challenging governmental actions that treat some people differently from others
- **Evaluate**, take, and defend a position on how conflicts between or among rights should be resolved
- **Define** key words: equality of condition, equality of opportunity, intermediate scrutiny, rational basis, separate but equal, strict scrutiny

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### Introduction

The previous lesson explained how the Fourteenth Amendment prohibits state governments from depriving a person of life, liberty, or property without due process of law. This lesson examines how the Equal Protection Clause prohibits state governments from denying people “equal protection of the laws.” Like the Due Process Clause, the Equal Protection Clause places limits on America’s governments, not private individuals.

### What Is Meant by “Equal Protection of the Laws?”

The Equal Protection Clause of the Fourteenth Amendment says that no state may “deny to any person within its jurisdiction the equal protection of the laws.” The amendment does not define “equal protection.” U.S. Senator Jacob Howard (1805–1871) of Michigan, one of the drafters, explained that “the phrase establishes equality before the law, and it gives, to the humblest, the poorest, the most despised...the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or those most haughty.”

Equal protection of the laws, like due process, is a constitutional guarantee of fair treatment for all persons, regardless of sex, race,



## Key words

### **equality of opportunity:**

A right guaranteed by both federal and many state laws against discrimination in employment, education, housing, or credit rights due to a person's race, color, sex and sometimes sexual orientation, religion, national origin, age, or handicap

### **equality of condition:**

Equality in all aspects of life, such as wealth, standards of living, medical care, and working conditions

national origin, religion, or political views. It is rooted in the truth expressed in the Declaration of Independence that “all Men are created equal.”

Equal protection of the laws forbids arbitrary or irrelevant barriers to the full enjoyment of rights by all persons. Two early cases are illustrative of equal protection of the laws in matters of race. *Strauder v. West Virginia* (1880) concerned an African American who had been convicted by an all white jury. West Virginia law expressly limited jury service to “all white male persons.” On appeal, the Supreme Court declared that law unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment.

Six years later the Court ruled in *Yick Wo v. Hopkins* (1886) that a San Francisco city ordinance that discriminated against Chinese laundry businesses violated the Equal Protection Clause. In a unanimous decision, the Court held that the ordinance was discriminatory and constituted class legislation prohibited by the Fourteenth Amendment. It also ruled that the Equal Protection Clause applies to all persons, citizens, and aliens alike.

Equal protection of the laws means that government must treat all persons as equals without favoritism to any individual or group. It also means that every person is entitled to **equality of opportunity** so that everyone can try to achieve the goals they seek, or as the Declaration of Independence puts it, “the Pursuit of Happiness.” Equality of opportunity means that laws must not unfairly disadvantage anyone in their opportunity to seek a variety of social goods, such as education, employment, housing, and political rights. It does not mean, however, **equality of condition** or that the results or outcomes of life will be the same for all. Equality of condition means equality in all aspects of life, such as personal possessions, living standards, medical care, and working conditions.



What rights are guaranteed by the equal protection clause of the Fourteenth Amendment?

Figure 5.19.1



## Content Highlight: WHAT DO YOU THINK?

1. What are the differences between equality of condition and equal protection of the laws?
2. Does inequality of condition undermine the ideal of equality of rights? Explain your response.

### What Was the “Separate But Equal” Doctrine, and What Was Its Effect?



What was the effect of the “separate but equal” doctrine?

Figure 5.19.2

After the end of Reconstruction, when U.S. troops were removed from former Confederate states and white people reasserted control of those states’ governments, most Southern states adopted so-called Jim Crow laws. These laws were designed to limit the rights and freedoms of African Americans. By the end of the nineteenth century Jim Crow laws had imposed a system of racial segregation throughout the South and in many other parts of the country.

In the landmark case of *Plessy v. Ferguson* (1896), the U.S. Supreme Court rejected the argument that a Louisiana law requiring blacks and whites to ride in different railroad cars violated the Equal Protection Clause.

The Court held that **separate but equal** facilities were constitutional. Justice Henry Billings Brown, writing for the majority in the 7-to-1 decision (one justice did not participate), wrote that if blacks interpreted the “separate but equal doctrine” as a “badge of inferiority,” it was “solely because the colored race chooses to put that construction upon it.”

Justice John Marshall Harlan, in a strong dissent, argued that allowing state-enforced segregation of the races violated the Equal Protection Clause:

*Our Constitution is color-blind.... In respect of civil rights, all citizens are equal before the law.... The judgment this day rendered will prove to be quite as pernicious as...the Dred Scott case.*

In fact, state-sponsored segregation under *Plessy* lasted almost sixty years. Laws requiring racial separation affected Asian Americans as well as African Americans.

## Key words

### **separate but equal:**

The argument, upheld by the U.S. Supreme Court in *Plessy v. Ferguson* (1896) but later reversed, that racially segregated public facilities are constitutional if those facilities are of equal quality

## Why Did the Supreme Court Abandon “Separate But Equal” in *Brown v. Board of Education*?

The National Association for the Advancement of Colored People (NAACP) was founded in 1909. For its first twenty-five years, it appealed to the conscience of all Americans to end racial mob violence and lynching, and it filed lawsuits seeking to end discrimination at the ballot box. The NAACP then turned to ending segregation in education. The association believed that improving educational opportunities and intermingling students of different races in schools would be the most effective way to end long-term patterns of racism in the United States. Under the direction of a legal team that included future Supreme Court Justice Thurgood Marshall, the NAACP argued and proved in case after case that medical, law, and other professional schools maintained for black students were not equal to those maintained for white students.

Those legal victories set the stage to challenge the separate but equal doctrine in segregated public elementary and secondary schools that were the legacy of Plessy. In 1952, the NAACP challenged state statutes that authorized “separate schools for the education of white and colored children.” The lead case was against the Board of Education of Topeka, Kansas. That school district maintained segregated schools, a situation that sometimes required students to be bused away from their neighborhoods to achieve segregation. Linda Brown, an African American third-grader, was one of the students who had to travel by bus to attend a segregated school. Her father, Oliver Brown, a railroad worker studying for the ministry, worked with the local Topeka NAACP to file a lawsuit seeking to remedy the situation. The trial court applied the separate but equal doctrine, and Brown lost.



Figure 5.19.3

On appeal to the U.S. Supreme Court the NAACP emphasized evidence demonstrating the severe and damaging effects of segregated schools on the psychological development of African American children. In *Brown v. Board of Education* (1954), the Supreme Court agreed with the NAACP and unanimously decided that separate education facilities are “inherently unequal.” In the field of public education, Chief Justice Earl Warren wrote, “the doctrine of ‘separate but equal’ has no place.” Justice Harlan’s dissent in Plessy was now the Court’s majority view. However, as will be discussed later, Brown was more difficult to enforce than the Supreme Court anticipated.

## How Has the Supreme Court’s Interpretation of the Equal Protection Clause Changed Since Brown?

Many laws create classifications, or categories, of people. For example, a state law requiring a person to be at least sixteen years of age to qualify for a driver’s license creates two classifications of people—those sixteen and older and those under sixteen. People in

one classification qualify to receive licenses or permits. People in the other classification do not. Therefore, the following is an important judicial question: Does a classification that results in different treatment violate the Equal Protection Clause?

The Supreme Court uses at least three levels of analysis to decide whether laws that create classifications violate the guarantee of equal protection of the laws.

### **LEVEL 1: STRICT SCRUTINY**

Laws that create classifications based on race, national origin, religion, or status as a legal alien are subject to the most rigorous judicial scrutiny, called **strict scrutiny**. Laws that deny or dilute the right to vote, impede interstate travel, or appear to restrict access to the courts also are subject to this level of analysis. Judges presume that such laws violate the Equal Protection Clause. The government that adopted the classification can overcome the presumption if it can persuade the Court that there is an extremely strong reason, known as a “compelling state interest,” for the law and that the government has imposed the fewest possible restrictions on the disfavored group.

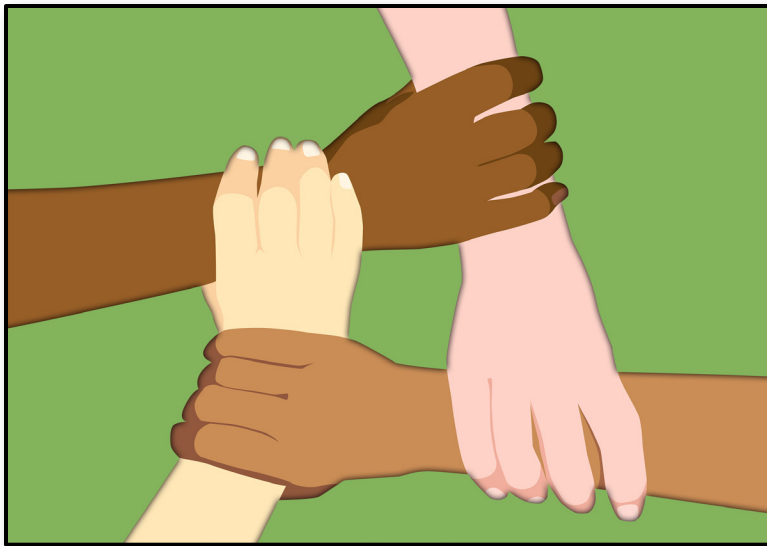


Figure 5.19.4

For example, during World War II the U.S. government persuaded the Supreme Court that there was a compelling state interest for racial classifications that resulted in the internment of Japanese Americans and others. All other laws classifying people on the basis of race have been struck down. For instance, in *Loving v. Virginia* (1967) the Court held that the state of Virginia had no compelling state interest for a law prohibiting interracial marriage.

### **LEVEL 2: INTERMEDIATE SCRUTINY**

Classifications based on gender and illegitimacy (birth to an unmarried mother) are subject to **intermediate scrutiny**. Governments that distinguish between groups because of gender or illegitimacy must prove that the laws are “substantially related to an important government purpose.”

## Key words

### **strict scrutiny:**

Under U.S. constitutional law, the second highest level of scrutiny used by courts reviewing federal law for constitutional legitimacy; “super strict scrutiny” is the highest level

### **intermediate scrutiny:**

In U.S. constitutional law, the middle level of scrutiny applied by courts deciding constitutional issues through judicial review



## Key words

### rational basis:

In U.S. constitutional law, the lowest level of scrutiny applied by courts deciding constitutional issues through judicial review

Using this standard, in *Craig v. Boren* (1976) the Court struck down an Oklahoma law that permitted women to buy 3.2-percent beer at age eighteen but required men to be age twenty-one. It held that the gender-based distinction was not substantially related to the state's interest in promoting traffic safety. In *Rostker v. Goldberg* (1981), the Court upheld a federal statute excluding women from the military draft on the ground that women were barred from combat. Today, however, most combat positions in the military are open to women.



Should the equal protection clause protect the right of women to take combat positions in the military? Why or why not?

Figure 5.19.5

### LEVEL 3: RATIONAL BASIS

All other laws that create classifications—including classifications based on wealth, disability, and age—are presumed to be constitutional. Courts presume that the deliberative process that legislatures use to enact laws ensures their “rationality”—that is, that such laws have a **rational basis**. The person or group challenging the law must show that the law is not rational, or reasonable.

Only rarely has the Court held that a law was not rational. In *Stanton v. Stanton* (1975), for example, the Supreme Court overturned a Utah statute that required divorced fathers to support their sons to age twenty-one but their daughters only to age eighteen. The state argued that it was rational for divorced fathers to support girls for a shorter time because girls tend to mature and to marry earlier than boys do. The Supreme Court disagreed.

The Fourteenth Amendment’s Equal Protection Clause applies only to the states. The Court has held—in *Hirabayashi v. United States* (1943)—that the Due Process Clause of the Fifth Amendment, which limits only the national government, contains an “equal protection component.” Both due process and equal protection standards require government to treat people fairly. Therefore, individuals or groups who believe the national government has deprived them of equal protection of the laws may challenge their treatment under the Fifth Amendment.



## Content Highlight:

### WHAT DO YOU THINK?

What level of judicial scrutiny do you think should apply in the following situations? Explain your reasoning in light of the criteria described regarding each level of scrutiny:

- Rejecting an eighty-five-pound woman from admission to the firefighter's academy
- Requiring drivers over age seventy-five or male drivers under age twenty-five to take an annual driver's exam
- Disqualifying a female student in a public high school from participating on the boy's wrestling team
- Refusing to put elevators in a county courthouse
- Incarcerating homeless persons with documented mental disabilities
- Barring the children of illegal aliens from attending public schools



Did the internment of Japanese Americans during World War II violate their right to equal protection of the laws? Why or why not?

Figure 5.19.6

## What Controversies Remain in the Area of Equal Protection of the Laws?

Claims of equal protection raise many difficult issues, including the following:

- Whether laws that give preferences to certain groups that historically have been denied equal opportunities (a practice known as affirmative action) are impermissible "reverse discrimination"
- Whether intermediate scrutiny is the appropriate level for analyzing classifications based on gender

Claims of equal protection raise many difficult issues (cont'd):

- Whether groups such as the mentally handicapped, children of undocumented immigrants, and gays and lesbians should be treated as “discrete and insular minorities” for purposes of equal protection analysis because of prejudice against them



Figure 5.19.7



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Weighing Equal Protection Against Other Constitutional Rights

This exercise calls for you to take positions on situations in which the right to equal protection conflicts with other important rights.

Consider the following real-life situation. James Dale was an assistant scoutmaster and an Eagle Scout in New Jersey. In 1990, Boy Scouts of America (BSA) revoked Dale's membership because BSA's standards “forbid membership to homosexuals.” Dale sued BSA, arguing among other things that revoking his membership violated his right to equal protection of the laws. BSA responded that the organization was merely exercising its right of association under the First Amendment. It pointed out that the Supreme Court has interpreted associational rights to include control over the political, religious, or cultural messages that an organization wishes to send.

Respond to the following questions:

1. Normally private organizations, such as the BSA, are not covered by the Equal Protection Clause. However, should they have to grant the right to equal protection and equal opportunity if they receive part of their support from the federal government as the BSA does?
2. Should private organizations be free to exclude people upon the basis of such factors as race, gender, ethnicity, or physical characteristics?
3. What level of judicial scrutiny should apply to claims of discrimination based on sexual orientation? Why? Compare your responses to the Supreme Court's analysis in *Boy Scouts of America v. Dale* (2000).
4. What standards should courts apply in resolving conflicts between First Amendment rights and equal protection guarantees?
5. Identify other situations that also may raise conflicts between equal protection guarantees and other constitutional rights.

## Conclusion

In this lesson, you learned about equal protection of the laws. You learned why neither state governments nor the national government can deprive people of equal protection of the laws. You also studied the "separate but equal" doctrine of racial segregation and why the Supreme Court abandoned it in *Brown v. Board of Education*. You explored the categories that the Supreme Court now uses to decide cases challenging governmental actions that treat some people differently from others.

## Lesson Check-up



- What was the "separate but equal" doctrine? How did the Supreme Court justify the doctrine in *Plessy v. Ferguson*?
- What arguments did the Court use in *Brown v. Board of Education* to abandon the "separate but equal" doctrine it had endorsed in *Plessy v. Ferguson*?



# Expanding the Right to Vote

13th Amendment

14th Amendment

15th Amendment

19th Amendment

23rd Amendment

24th Amendment

26th Amendment

**YOUR  
VOTE  
COUNTS**



## Key words

- enfranchisement
- franchise

## What You Will Learn to Do

Analyze how the right to vote has been expanded since the adoption of the Constitution

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Take responsibility for your actions and choices
- Treat self and others with respect

## Learning Objectives

- **Describe** the extension of the franchise as a result of changes in voting laws in Congress and various states, amendments to the Constitution, and decisions of the Supreme Court



## Essential Question

How has the right to vote been expanded since the adoption of the Constitution?

### Learning Objectives (cont'd)

- **Evaluate**, take, and defend positions on how extending the right to vote is related to fundamental ideas and principles of American constitutional government
- **Define** key words: enfranchisement, franchise

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### Introduction

During the colonial period and the early years of the nation, suffrage—the right to vote—was generally restricted to white men who owned property. The majority of adult white men met this requirement, especially in rural areas. Other people—women, Native Americans, African Americans, indentured servants, and members of certain religious groups—usually were denied the right to vote. This lesson examines how the right to vote has been extended since 1787. The expansion of the **franchise** to include almost all citizens eighteen years of age or older represents one of the great themes in American history, in some respects the most important theme.

### Why Is the Franchise Important in the American Constitutional System?

The term franchise refers to a right or privilege, in this context specifically the right to vote. Therefore, **enfranchisement** is the act of giving that right to vote to a person or a group of people. Representative government is based on the principle that the people have a say—either directly or indirectly—in determining who makes, executes, and judges the laws that govern them and in holding those authorities accountable. The most basic way of participating in representative government is to vote in elections.

### Key words

**franchise:**

A right or privilege; in the context of American politics, it means the right to vote

**enfranchisement:**

Giving the right to vote to a person or category of persons

One of the legacies of the Greek and Roman democracies is that citizens should have an economic “stake” in a community in order to exercise the franchise intelligently. Greeks and Romans believed that property owners were more inclined than others to participate in politics and to act in the public interest because they had a stake in living in a healthy community. The colonists shared that view. In most colonies voting was a privilege limited to Protestant men who owned property. Property qualifications usually were low, and land was cheap, which meant that thousands of colonists who would not have been able to vote in Europe were able to do so in America. For example, Virginia required only twenty-five acres of settled land or a hundred acres of unsettled land for enfranchisement. New York allowed otherwise qualified men to vote if they held lifetime leases but did not own the land outright. By European standards in the eighteenth century the franchise in America was generous and far exceeded the scope of the voting franchise in Great Britain. Yet whole classes of Americans—women, Native Americans, religious minorities, slaves, and indentured servants—were still excluded from voting.

### How Was Suffrage Determined When the Constitution Was Adopted?

The Constitutional Convention could not agree on uniform rules for suffrage. As a result, the Constitution stated only that members of the House of Representatives were to be elected by the people in each state who, under state law, were eligible to vote for the lower house of their state legislature.

In other words, the Constitution left it to each state to decide who could vote. Because state governments granted or denied the franchise, it follows that many of the early battles over voting rights took place in the states.

An early example occurred in New Jersey. That state’s constitution of 1776 granted the franchise to “all inhabitants” who met property and residency requirements. Therefore, for the next several years some African American men and women, and many widowed or unmarried women, voted in local elections. Married women could not meet the property requirement because their property automatically belonged to their husbands. In fact, a 1790 New Jersey election law expressly referred to voters as “he or she.” But in 1807 in the name of so-called election reform, women were disenfranchised. African American men were disenfranchised in 1844.



Why did the early battles over the right of women to vote focus upon state governments instead of the national government?

Figure 5.20.1

### Content Highlight: WHAT DO YOU THINK?

1. Why do you think the Philadelphia Convention declined to establish nationwide qualifications for suffrage?
2. How might the states’ diverse property requirements for suffrage influence citizens’ relationships to their governments?

## How Did Voting Rights Expand For White Men?

The revolutionary intellectual and pamphleteer Thomas Paine identified at least one of the problems with linking the right to vote to property ownership:

*You require that a man shall have sixty dollars' worth of property, or he shall not vote. Very well, take an illustration. Here is a man who today owns a jackass, and the jackass is worth sixty dollars. Today the man is a voter and goes to the polls and deposits his vote. Tomorrow the jackass dies. The next day the man comes to vote without his jackass and he cannot vote at all. Now tell me, which was the voter, the man or the jackass?*

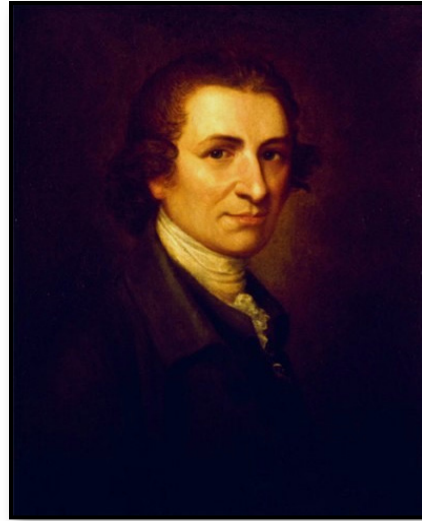


Figure 5.20.2

Early in the 1800s Americans became more democratic and less aristocratic in their thinking.

For example, American writer James Fenimore Cooper (1789–1851), author of *The Last of the Mohicans*, argued, “Every man who has wants, feelings, affections, and character has a stake in society.” It followed that lack of property should not be a barrier to voting.

Some states, such as Massachusetts, retained property requirements out of the fear expressed by former President John Adams that anarchy and mob rule would erupt if men with no property had the right to vote. Virginia did not abolish its property requirement until 1851. But in 1802 Ohio, then a frontier state, gave the vote to almost all white men in an effort to attract settlers. Other western states followed suit, as did the northern “frontier” state of Maine in 1820. Older states gradually amended their election laws to remove property requirements.

Most state voting reforms were accomplished peacefully. An exception was Rhode Island, one of the last states to remove the property requirement. In fact, it was the only state after 1840 not to have universal enfranchisement of white men. The leader for franchise reform there, a lawyer named Thomas Wilson Dorr (1805–1854), convened an extralegal “People’s Convention” that drafted a new state constitution enfranchising all white men. This act of rebellion led to a brief, small-scale civil war. But the so-called Dorr Rebellion of 1841–1842 was quickly put down, and Dorr fled the state only to be arrested and imprisoned on his return. Rhode Island subsequently did adopt a new constitution that enfranchised both white and African American men, but the state did not eliminate the property requirement until the 1880s.

Another arena of enfranchisement involved approximately 80,000 free Mexican men residing in the territory that the United States conquered in the Mexican–American War of 1846–1848. The Treaty of Guadalupe Hidalgo that ended the war also enfranchised these men. However, states affected by the treaty resisted recognizing these rights. Violence, fraud, and discrimination forced many Mexican Americans to abandon their lands and return to Mexico. When Texas was admitted into the Union as a slave state in 1845, Mexican Americans who tried to vote risked beating, burning, or lynching. After the Civil War the same tactics used to deny voting rights to African Americans—from physical violence to literacy tests—often were also applied to Mexican Americans.



## How Did African American Men Win, Then Lose, the Right to Vote?



Why did many people in Southern states reject the Republican Party after the Civil War?

Figure 5.20.3

The Fifteenth Amendment was added to the Constitution in 1870, five years after the Civil War. Although the Fifteenth Amendment granted the right to vote to African American men, most states in the South and several outside the South made it almost impossible for them to exercise the right. They were required to take literacy tests and to pay poll taxes. Some states enacted so-called grandfather clauses that permitted citizens to vote only if their grandfathers had been allowed to vote. Physical intimidation and threats of economic reprisals for voting were common. An economic reprisal is an action that limits or eliminates a source of income or makes goods and services more expensive to buy. By 1910, fewer than twenty percent of African American citizens voted across most of the South. In some Southern areas fewer than two percent voted.

The civil rights movement of the 1950s and 1960s galvanized the national government to exercise its power to protect African Americans against voting discrimination. Only then, almost a century later, was great progress made in ensuring the right to vote as guaranteed by the Fifteenth Amendment.

## How Was Suffrage Extended to Women?

During the middle years of the nineteenth century, the struggle for freedom and equality for African Americans was closely linked to the campaign for woman suffrage. Many abolitionists worked for woman suffrage, just as many women worked to end slavery. For example, abolitionist Frederick Douglass (1818–1895), who had been born into slavery, participated in the meeting at Seneca Falls, New York, in 1848 that produced the Seneca Falls Declaration of Sentiments. The declaration was crafted by Elizabeth Cady Stanton (1815–1902) and other suffrage leaders.

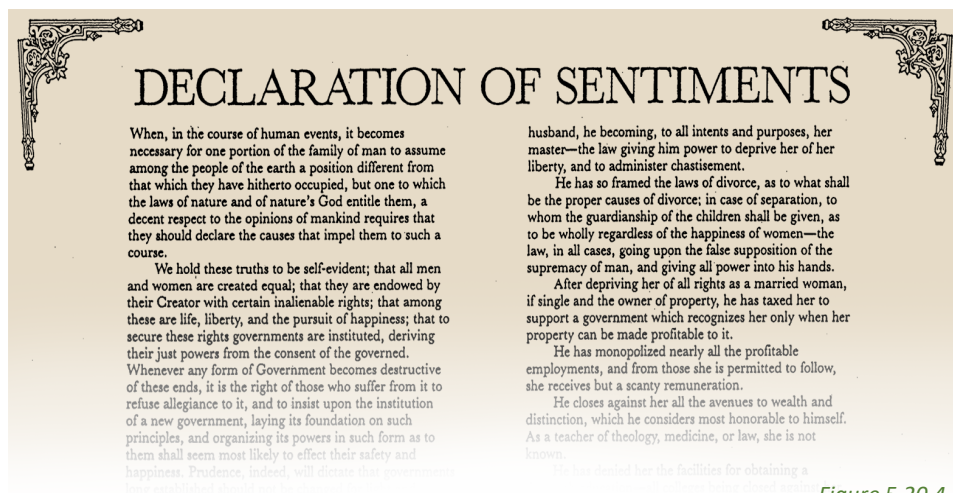


Figure 5.20.4



Figure 5.20.5

Echoing the Declaration of Independence, this declaration stated:

*We hold these truths to be self-evident: that all men and women are created equal.... Such has been the patient sufferance of the women under this government, and such is now the necessity which constrains them to demand the equal station to which they are entitled.*

Most people who advocated equal rights for women believed that gaining the right to vote was an essential step toward achieving other rights. When Congress was considering the Civil War amendments, leaders of the women's rights movement tried to get the right to vote extended to women as well as to all men.

These leaders, including the prominent suffragist Susan B. Anthony (1820–1906), whose likeness has since been featured on a one-dollar coin, hoped that their long support of the anti-slavery cause would be rewarded in the Fourteenth Amendment. But many male anti-slavery leaders refused to support suffrage for women, fearing that it would set back the cause of former slaves. Instead, they specifically included the term “male citizen” in reference to the right to vote in Section 2 of the Fourteenth Amendment.

In 1872, Anthony and other women went to the polls and insisted that they be allowed to vote. They pointed to Section 1 of the Fourteenth Amendment:

*All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.*

They argued that women, as citizens, could not be denied access to the ballot. However, they were denied, and so they took their cause to the courts. In *Minor v. Happersett* (1875), the Supreme Court ruled that being a citizen does not mean that a person has the right to vote and that states therefore could continue to deny the vote to women. The Court noted that citizenship and voting are not necessarily related, because aliens in the states of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, Missouri, and Texas who had announced their intention to become United States citizens—but were not yet citizens—enjoyed the franchise.

In 1869 Wyoming, while still a territory, gave women the right to vote. The story is told that subsequently, when considering Wyoming for statehood, certain members of Congress argued against this “petticoat provision.” The Wyoming legislature replied that it would rather stay out of the Union for a hundred years than join without allowing women to vote. Wyoming was admitted to the Union. During the next fifty years, several



Figure 5.20.6

other western states extended the vote to women. This was the result of persistent hard work by women in those states and national leaders such as Anthony and Stanton. Eventually some eastern states joined the movement, and by 1918 more than half the states had enfranchised women.

Pressure for a woman suffrage constitutional amendment mounted during World War I, when women entered the workforce in record numbers and the United States fought a war to protect democratic rights in Europe. The uncertainty and slowness of state-by-state victories convinced suffragists to renew the fight for a constitutional amendment. They vigorously lobbied Congress and President Woodrow Wilson until finally, in 1918, Wilson withdrew his opposition. In 1920 after a national campaign that included huge parades, demonstrations, picketing, and civil disobedience in Washington, D.C., Congress passed and sent to the states the Nineteenth Amendment. The amendment forbids states and the United States from denying or abridging the right of citizens to vote on the basis of sex. Within the year enough states ratified the amendment, and women finally gained the franchise.

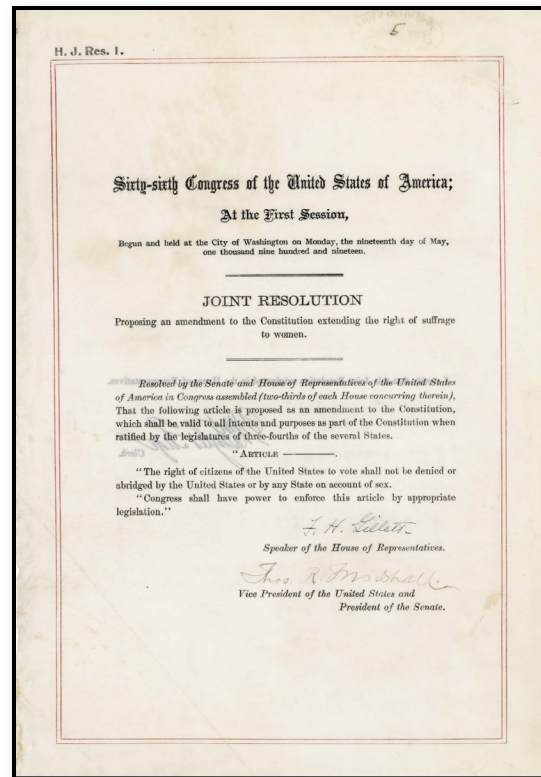


Figure 5.20.7

## How Was the Franchise Extended to Native Americans?

The original Constitution mentions Native Americans, as “Indians,” twice. Under Article I “Indians not taxed”—those who remained under tribal government—were excluded from state populations for purposes of apportioning taxes and determining representation in Congress. Article I also empowered Congress to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

These provisions reflected the position of the Framers, confirmed by opinions of the Supreme Court, that Native Americans were not citizens of the United States or the states in which they resided. Native American tribes were distinct political entities, separate from states or the federal government, with whom the United States would deal on a basis similar to that with which it dealt with foreign nations.

Native Americans’ early relationship with the federal government affected their rights in profound ways. They were “foreigners” and frequently were treated as enemies. The U.S. government often seemed to view them as problematic children. They were not citizens and had no right to vote. The Fourteenth Amendment did not change that status. Section 1 declares that citizenship is reserved for people subject to the jurisdiction of the United States.

In 1887 Congress enacted the Dawes Act, extending citizenship to Native Americans who were willing to give up their tribal affiliations. One effect of this act was to undermine tribal



culture. Three years later, the Indian Naturalization Act granted citizenship to Native Americans in an application process similar to immigrant naturalization. Then in 1924 Congress enacted the Indian Citizenship Act, extending the franchise to all “Indians born within the territorial limits of the United States.” This stream of legislation reflected a general expectation that tribal governments would wither and that Native Americans gradually would be assimilated into “mainstream” American society.

Many states were slow to comply with the Indian Citizenship Act of 1924. Native Americans encountered obstacles to voting, serving on juries, and giving testimony in courts. For example, New Mexico did not extend the franchise to Native Americans until 1962. Finally, Congress acted to address the problems that Native Americans and other minorities encountered in exercising the franchise by two means.

The first involved proposing the Twenty-Fourth Amendment (1964), which prohibited states from denying or abridging the right of any citizen to vote for failure to pay a poll tax or any other tax to vote in elections for national officials.

The second was enacting the Voting Rights Act of 1965, which outlawed discrimination against all minorities by banning voting requirements such as literacy tests, prohibiting the use of English fluency as a requirement for voting, and authorizing the national government to take control of voter registration in states where African Americans and other groups consistently had been denied voting rights.



What were some of the similarities in state action intended to deny the right to vote to African Americans, Mexican Americans, and Native Americans?

*President Calvin Coolidge (center) with Native Americans in front of the White House, 1925*

Figure 5.20.8

### How Did Eighteen-Year-Olds Win the Right to Vote?

Before 1971 only Alaska, Georgia, Hawaii, and Kentucky allowed persons younger than age twenty-one to vote. In 1970, facing widespread protests against the Vietnam War and resistance to the draft, Congress amended the Voting Rights Act to state that no one age eighteen or older could be denied the right to vote on the grounds of age.





## Content Highlight:

### WHAT DO YOU THINK?

1. What criteria should be used for determining whether changes in the franchise should be made constitutionally by statute? Why?
2. What principles of American constitutional government are served by expansion of the franchise?
3. What arguments can you make for removing or denying the franchise to particular groups or individuals? Explain your reasoning.
4. Should the voting age be lowered even further?

This move was not without controversy. In *Oregon v. Mitchell* (1970), in a deeply divided vote, the Supreme Court held that Congress could regulate the voting age in national elections but not in state elections.

In response to the Supreme Court's decision, Congress proposed and sent the Twenty-Sixth Amendment to the states. Ratified in 1971, this amendment prohibits both the United States and the states from denying or abridging the right to vote of citizens age eighteen or older.



Should all people serving in the armed forces have the right to vote regardless of their age? Why or why not?

Figure 5.20.9

## Conclusion

In this lesson, you learned how voting rights were expanded by changes in voting laws in Congress and various states, amendments to the Constitution, and decisions of the Supreme Court. You also saw that extending the right to vote is related to fundamental ideas and principles of American constitutional government.

## Lesson Check-up



- What processes did women use to obtain the right to vote? What factors explain why it took women more than three generations to secure the franchise?
- What reasoning supported tying the right to vote to property ownership? Is that reasoning still valid today? Why or why not?
- How have states differed in expanding the franchise?
- People between the ages of eighteen and twenty-five vote less often than any other age group. Why do you think this is so?
- What reasons can you give for providing the right to vote for citizens eighteen and older?

# The Role of Congress



## Key words

- delegate theory of representation
- enforcement powers
- enumerated powers
- federalism
- gerrymandering
- implied powers
- inherent powers
- trustee theory of representation

## What You Will Learn to Do

Determine the role of Congress in American constitutional democracy

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Treat self and others with respect

## Learning Objectives

- **Explain** basic differences between Congress and the British Parliament and how Congress reflects America's commitment to representative government and federalism
- **Identify** several constitutional sources of congressional power

## Essential Question

What is the role of Congress in American constitutional democracy?

### Learning Objectives (cont'd)

- **Identify** some of the challenges that members of Congress face in representing and serving their constituents
- **Evaluate**, take, and defend positions on contemporary issues about congressional representation and organization
- **Define** key words: delegate theory of representation, enforcement powers, enumerated powers, federalism, gerrymandering, implied powers, inherent powers, trustee theory of representation

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### Introduction

Congress often is called America's first branch of government because of its lawmaking powers and its control over the nation's purse. More than any other branch of the national government, it is the people's branch. Members of Congress are directly accountable to those who elect them. This lesson examines Congress' constitutional powers and how Congress represents both the people and the states.



How does the placement of Congress on Capitol Hill reflect its place in the Constitution?

*Figure 5.21.1*



## How Does Congress Differ From the British Parliament?

The Founders considered many models of governance—ancient and contemporary—when they designed America’s constitutional system. One of those models was the British parliamentary system. Although the Founders drew on one aspect of the parliamentary system by creating a two-house legislature, they proposed a U.S. Congress that would differ from Parliament in four essential ways:

### 1) REPRESENTATION

In the eighteenth century each chamber of the British Parliament represented a specific order in society. Members of the House of Lords inherited their seats from ancestors who had been given a peerage, a title of nobility, generations or even centuries earlier. In 1999, the Labor government abolished the hereditary right to a seat in the House of Lords. Today most members hold honorary life peerages. They are appointed because of distinguished service in law, the clergy, business, or the sciences. There are now about twelve hundred members in the House of Lords. It is the final court of appeal for civil cases throughout Great Britain and for criminal cases in England, Wales, and Northern Ireland.

The House of Commons is the preeminent body of Parliament. Its members are elected and hold office until Parliament is dissolved or for a maximum of five years. Each member represents a geographic division. Ministers are required to attend Parliament regularly to answer questions about their department, both to the full House and to its committees.

The Framers of the U.S. Constitution believed that Congress should represent all the people, not particular social classes. Therefore, they designed the House of Representatives to express the sentiments and viewpoints of diverse constituencies in electoral districts and to permit frequent turnover if voters choose to replace their representatives at elections that occur every two years. The Framers designed the Senate to be less influenced by popular passions and temporary impulses.

Accordingly, senators serve longer terms—six years—than members of the House, and they represent people in states as a whole rather than districts within states.

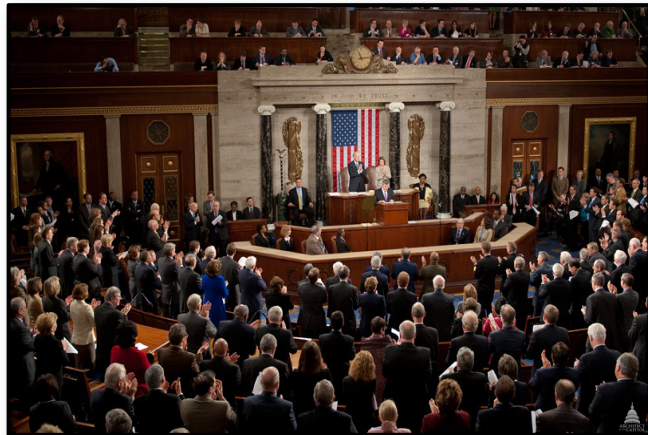


Figure 5.21.2

### 2) SEPARATION OF POWERS

In parliamentary government there is a close link between executive and legislative functions. When citizens vote in a national election for members of the House of Commons, they are endorsing the platform of a political party. The victorious party thus claims a mandate to govern. Its leader in Parliament becomes the prime minister, the nation’s chief executive as well as chief legislative officer. Members of Parliament also hold all other cabinet-level positions. This creates a unified government to legislate and to execute policy. Such a mingling of executive and legislative powers in the U.S. government is prohibited by Article I, Section 6, of the Constitution, which prohibits any member of Congress from occupying any other office in the federal government. This provision prevents the United States from establishing any form of parliamentary system.

In contrast to the British parliamentary system, Congress is one of three coequal branches of government. Congress makes laws, but it does not usually decide who will be president. It also plays an important but limited role in deciding who serves in the president's cabinet and in the federal courts.



Figure 5.21.3

For more than a century, the House of Commons has been the more powerful house in the British Parliament. The majority party in the House of Commons determines almost everything about the government. By contrast, the House of Representatives and the Senate are equally powerful and frequently check, or limit, one another.

### 3) LENGTH OF TERMS

Elections for the House of Commons do not occur on a fixed schedule. They must occur at least every five years, but they can occur sooner. The prime minister can call for earlier elections if they believe that the party can win an even larger popular mandate, that is, more seats in the House of Commons. If the party in power loses a vote in Parliament on an important national issue, this often is seen as a vote of “no confidence” in the prime minister, which also may trigger a new election.

Members of Congress face elections at times specified in the Constitution, no matter how popular or unpopular they may be. Representatives stand for election every two years, senators every six. The elections for the Senate are staggered, that is, the Senate is divided as equally as possible into thirds so that one-third of the Senate can be elected every two years, and reelection is possible.

### 4) FEDERALISM

In the constitutional arrangement known as **federalism**, power is divided and shared between a central government having nationwide responsibilities and constituent governments having state or local responsibilities. Although cities and towns in Great Britain have their own local governments, these government entities primarily are administrative units of the central government. Most of their powers are delegated to them by the national government. By contrast, Congress is not the only legislature in the United States. State legislatures also wield considerable legislative power, leading to a dynamic and unique system of federalism.

## Key words

### **federalism:**

A form of government in which power is divided and shared between a central government and state and local governments



What might be the advantages and disadvantages of the Parliament serving both the legislative and executive functions of government?

Figure 5.21.4

### Content Highlight: WHAT DO YOU THINK?

- What are the advantages and disadvantages of the lengths of terms of members of the House of Representatives and the British Parliament? Which do you prefer? Why?
- What are the advantages and disadvantages of the American system of separated powers compared with the British system? Which do you prefer? Why?
- What are the advantages and disadvantages of the American system of federalism and the British system, where the government agencies at all levels are primarily administrative units of the central government? Which do you prefer? Why?

### What are Congress' Constitutional Powers?

John Locke claimed that the legislature is the most powerful branch of government because it makes laws. Mistrusting any concentration of political power, the Framers carefully limited Congress' powers. The following are three examples.

#### ARTICLE I, SECTION 8

The Constitution limits Congress' lawmaking powers to those "herein granted." In addition to seventeen specific powers Congress has a generalized eighteenth power: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

#### ARTICLE I, SECTION 9

The Constitution identifies several matters on which Congress "shall not" legislate. For example, it cannot tax "Articles exported from any state." It cannot grant titles of nobility. It cannot draw any money from the Treasury "but in Consequence of Appropriations made by Law."

## BILL OF RIGHTS

Added to the Constitution in 1791, the Bill of Rights lists rights on which Congress “shall not” infringe. For example, the First Amendment states that “Congress shall make no law” establishing a national religion or abridging free speech or press. The Eighth Amendment prohibits Congress from levying “excessive fines” and imposing “cruel and unusual punishments” on convicted criminals. Even with these limitations, Congress today has far reaching powers. These powers can be clustered under four categories: enumerated, implied, enforcement, and inherent.

### Enumerated Powers

Powers listed in the Constitution are called **enumerated powers** or express powers. Article I, Section 8, for example, gives Congress power to “regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes.” Under the leadership of Chief Justice John Marshall, the U.S. Supreme Court defined Congress’ commerce power broadly. That broad interpretation has enabled Congress to regulate matters such as manufacturing, child labor, farm production, wages and work hours, labor unions, and civil rights. And Congress is given full power to regulate interstate and foreign commerce. Other parts of the Constitution also give Congress powers. For example,

- **Article II.** The Senate must advise and consent when the president makes treaties and appoints ambassadors, other public ministers, judges of the Supreme Court, and many other public officials.
- **Article III.** Congress has complete control over the appellate jurisdiction of the Supreme Court and authority to create lower federal courts.
- **Article IV.** Congress can admit new states and adopt all rules and regulations respecting U.S. territories and properties.
- **Article V.** Congress, like the states, can propose constitutional amendments. Congress has proposed all twenty-seven amendments to the Constitution and many that have not been ratified.

### Implied Powers

Some express grants of authority to Congress imply, or suggest, other powers. The “necessary and proper” clause in Article I gives Congress power to legislate on at least some subjects not expressly described in the Constitution. The idea of **implied powers** was tested when the first secretary of the Treasury, Alexander Hamilton, proposed the creation of a national bank. In *McCulloch v. Maryland (1819)*, the Supreme Court held that the necessary and proper clause and Congress’ power to coin and borrow money both implied the power to create a national bank. The Court also held that states could not tax the national bank, a significant blow to the exercise of state power.

Most laws that Congress enacts are written in general terms. They require administrative agencies to formulate rules that more specifically define the laws. The power to create administrative agencies to make rules and execute the laws is implied in Congress’ power to legislate. Congress has created hundreds of agencies, ranging from the Internal

## Key words

### enumerated powers:

Rights and responsibilities of the U.S. government specifically provided for and listed in the Constitution

### implied powers:

Powers authorized by a legal document that are not expressly stated but can be inferred from expressly stated powers



## Key words

### **enforcement powers:**

The power of Congress to enforce laws

### **inherent powers:**

Powers ingrained so deeply in an institution that they need not be stated

Revenue Service to the Social Security Administration, to implement its policy mandates.

Most of the agencies and departments that Congress creates are located in the executive branch. One of Congress' most important implied powers is congressional oversight, which includes monitoring and supervising the operations of the agencies it creates.

Committees of Congress frequently question agency heads and administrators about rules and regulations that the agencies have adopted. Congress also examines agency budgets and expenditures. Congress uses the information gained from such oversight to adjust authorizing legislation and the appropriation of funds to federal agencies.

### **Enforcement Powers**

The Thirteenth Amendment, outlawing slavery, was the first to give Congress the power to enforce it "by appropriate legislation." Since then the Fourteenth, Fifteenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments also have expanded the power of Congress to enforce the provisions of the amendments "by appropriate legislation."

During the 1960s and 1970s, Congress used its **enforcement powers** along with its power to regulate interstate commerce to enact sweeping civil rights, voting rights, and employment laws. For example, Congress used the commerce clause to enforce the Civil Rights Act of 1964 to prevent unfair discrimination against African Americans. The authority to do so was confirmed by the Supreme Court in *Heart of Atlanta Motel v. United States (1964)*. In this case the Court ruled that an Atlanta motel that discriminated against African Americans had to comply with the Civil Rights Act because it was in a business that served mostly interstate travelers. Congress' enforcement powers have significantly shifted political power away from the states and to the national government, as you learned in previous lessons.



Figure 5.21.5

### **Inherent Powers**

Some powers are so innate, or ingrained, in an institution that they do not have to be stated in words. These are termed **inherent powers**. Congress' power to investigate is such a power. The next lesson provides examples of Congress' use of this power.



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Evaluating the Powers of Congress

Article I, Section 8, Clause 18 of the Constitution states that Congress has the power “To make all Laws which shall be necessary and proper” to carry out the powers that the Constitution gives to the government of the United States. This has been called the “elastic clause” and has been used to establish the implied powers of Congress. Work in groups to evaluate the effects of this clause by addressing the following questions:

1. How would you define “necessary” and “proper”?
2. Does this clause contradict the principle of enumerated and limited powers? Why or why not?
3. What are the benefits of placing elastic (flexible) power in the hands of a representative body?
4. What are the problems or dangers of placing elastic power in the hands of a representative body?

#### How Does Congress Represent the People and the States?

Both the people and the states have voices in Congress. There are no constitutional limitations on how many terms a member of Congress may serve.

Article I, Section 2, provides that the number of representatives “shall not exceed one for every Thirty-Thousand” and that each state “shall have at Least one Representative.” Before 1842, some states elected their representatives “at large,” meaning that all qualified voters were eligible to vote for all candidates to fill that state’s allotment of representatives. Since 1842, members of the House have been elected from single-member legislative districts. That means that each state with a population large enough to entitle it to more than one representative in the House is divided into as many legislative districts as the state has representatives.

In some states, the state legislature draws district lines after each ten-year census. In other states, independent commissions draw district lines. Groups dissatisfied with the way district lines are drawn can challenge districting maps in court. In those situations judges also have a say in how congressional districts are drawn.



What criteria should be used to create congressional districts?  
*This is the 1812 political cartoon that led to the coining of the term gerrymander.*

Figure 5.21.6

## Why is Districting Controversial?

No matter where the lines are drawn, some groups and interests are benefited while others are harmed. For example, after World War I the population of the United States shifted dramatically from farms to cities. Nonetheless, many states continued to draw congressional district lines that favored rural over urban areas. In *Wesberry v. Sanders* (1964), the Supreme Court adopted the rule of “one person, one vote.”

Congressional district lines now must be drawn on the basis of population after each ten-year census. According to the Court, the population in each district must be mathematically equal to other districts in the state.

The “one person, one vote” requirement has not ended debates over where district lines should be drawn. **Gerrymandering**, or drawing district lines to achieve favorable political results for one political party, remains a fact of American political life.

Drawing district lines is not an issue in the Senate because Article I, Section 3, gives every state two senators no matter how large its population. California and Wyoming, for example, each has two U.S. senators. In 2010, California had a population of about thirty-seven million and Wyoming had a population of about one-half million.

The Constitution originally gave each state legislature authority to decide who would serve as that state’s senators. This method of selection ensured that state legislatures would have powerful, though indirect, voices in the Senate. In 1913, the Seventeenth Amendment provided for direct election of senators. Since then, senators have been chosen in statewide elections.

In 1913, Congress fixed the size of the House of Representatives at 435 members. When Hawaii joined the Union in 1959, the size of the Senate was fixed at one hundred senators. Congress therefore comprises 535 elected legislators. This large number has significant consequences for how Congress is organized and does its work. In 2004 the average House district approached seven hundred thousand in population. Among the world’s legislatures only India has larger constituencies. In addition to the 435 House members, there are five other elected representatives: a resident commissioner for Puerto Rico and four delegates—for the District of Columbia, American Samoa, Guam, and the Virgin Islands. Senators and representatives face formidable challenges simply trying to understand the diverse needs and interests of their many constituents. As explained in Lesson 5, a constituent is a citizen represented by an elected public official.

Other nations have representative bodies that are even larger than the U.S. Congress. In Germany, for example, there are 672 members of the Bundestag, which is the lower house of its parliament, and 69 members of the Bundesrat, the upper house. Mexico’s Chamber of Deputies has 500 members, while its Senate has 128 senators. The populations of those countries are considerably smaller than the population of the United States.

## Key words

### **gerrymandering:**

Drawing the boundaries of an electoral district to favor a political party



## Content Highlight:

### WHAT DO YOU THINK?

- In what ways, if any, does gerrymandering violate the principle of “one person, one vote”?
- What process and criteria should be used to draw congressional districts? Why?
- How might multi-member districts reduce problems caused by gerrymandering?

## What Theories of Representation Guide Members of Congress?

Since the debate over ratifying the Constitution, Americans have argued about the role of elected representatives. Should they, as Anti-Federalists believed, be “delegates” of their constituents and mirror their constituents’ views in Congress—reflecting the **delegate theory of representation**? Or should they, as Federalists argued, be “trustees” who gain the trust of their constituents and then exercise their own best judgment on matters of public policy—embodying the **trustee theory of representation**?

Most representatives say that they try to do both. America’s size and diversity make that effort ever more challenging.

In the 1830s, French observer and historian Alexis de Tocqueville (1805–1859) identified regional variations in climate, economics, culture, and religion that made it difficult to govern the United States as one nation. Tocqueville’s observations are even truer today. The United States has expanded across the continent and beyond, and its population of more than three hundred million reflects the diversity of the world. Members of Congress face an increasingly difficult task representing their constituents and finding common ground with legislators from other states and regions as they participate in their deliberations.

## Key words

### **delegate theory of representation:**

The idea that a legislative representative should exactly mirror their constituents’ views in deciding on public policy

### **trustee theory of representation:**

The idea that a legislative representative should use their best judgment in making decisions on public policy, regardless of constituent opinion



## Content Highlight:

### WHAT DO YOU THINK?

- What qualifications, other than those listed in Article I, do you think should be used when choosing a member of Congress? Explain your suggestions.
- How might members of Congress balance their roles as delegates of their constituents and trustees of the common good?





## Content Highlight:

### WHAT DO YOU THINK?

- Does representation by states in the Senate and state-based congressional districts in the House remain a logical basis for selecting congressional representatives today? What are some alternatives? Consider, for example, that southwestern Virginia has more in common with eastern Kentucky than with eastern Virginia.
- Some countries base representation on ethnicity, race, gender, or religious beliefs rather than geography. Would you support such a system of representation in the United States? Why or why not?
- Because members of Congress are elected from single-member districts, minorities of whatever kind within a district—racial, ethnic, ideological—might be left unrepresented. Many Western nations have multi-member districts in which different representatives are elected to serve the interests of different groups within the districts. This is called proportional representation. What might be the advantages and disadvantages of having such a system in the United States?

### How Do Members of Congress Serve Their Constituents?

Members of Congress rely on their constituents to elect and reelect them. It is not sufficient for representatives merely to be perceived as honest, public-spirited individuals committed to enacting good legislation and effectively checking the exercise of executive and judicial powers. Communication and action are essential. Members of Congress use three basic strategies for maintaining positive connections with their constituents.

#### COMMUNICATIONS

Members of Congress and their staffs actively communicate with constituents through letters, newsletters, media appearances, websites, blogs, town hall meetings, and other personal appearances in their districts.

#### CASEWORK

Every member of Congress employs staff members in Washington, D.C., and in local offices. These staffers' job, known as casework, is to help constituents solve problems that the constituents have encountered with the national government. They also respond to constituents who want personal favors. Constituents often seek help in dealing with agencies, such as the Internal Revenue Service or the Social Security Administration. Requested favors range from arranging tours of government offices to setting up meetings with government officials. At election time a constituent who has benefited from casework or a personal favor is likely to have a positive view of the representative even if they disagree with the representative's stand on particular issues.

#### SERVING CONSTITUENTS' INTERESTS AND CONCERNS

Members of Congress also create close ties to their constituents by introducing legislation and sponsoring amendments to legislation that serve constituents' interests and by working to have federal projects located in their district or state. Representatives who are

successful in sponsoring legislation that serves constituents' interests—including securing economic benefits for their states or districts in the form of highway projects, dams, military installations, research facilities, or other public projects—are more likely to be viewed favorably by their constituents than those who do not.

## Conclusion

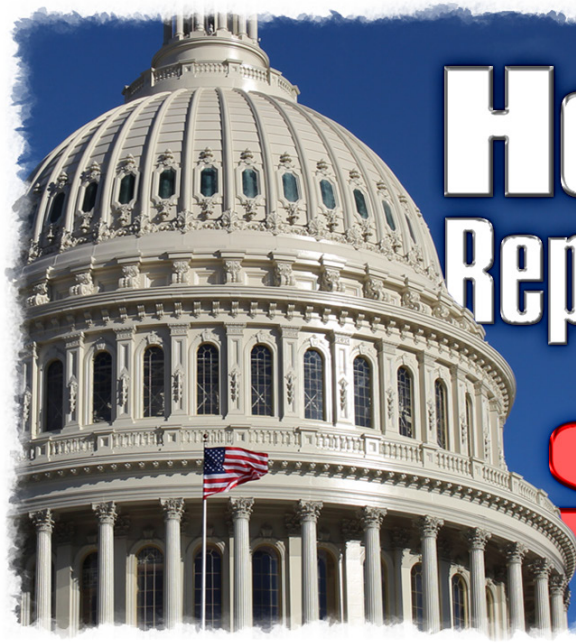
In this lesson, you learned about the historical foundations of Congress. Congress has powers to make laws and to control how federal money is spent. It is also the branch of government most directly accountable to citizens. In the next lesson, you'll learn more about how Congress performs its duties.

## Lesson Check-up



- In what ways does the U.S. Congress differ from the British Parliament?
- How would you explain the following terms? Enumerated powers; implied powers; enforcement powers; inherent powers.
- Why has the creation of congressional districts been controversial throughout American history? Why did the “one person, one vote” rule fail to end the controversy?
- Describe ways that members of Congress try to maintain positive connections with their constituents.
- Find and examine your representative’s and senators’ websites. What can you learn about your members of Congress from the information presented there? Is there an interactive feature on the website that enables you to convey your views to the legislator? What additional information would you like to have found on the site?

# Congressional Powers



## House of Representatives Senate



### Key words

- bill
- cloture
- filibuster
- impeachment
- lobbying
- pocket veto
- power to investigate
- seniority

### What You Will Learn to Do

Explain how Congress functions to make laws and conduct investigations

### Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Treat self and others with respect

### Learning Objectives

- **Describe** the role of rules, committees, and political parties in the organization and operation of Congress
- **Describe** the process through which proposed legislation becomes law



## Essential Question

How does Congress perform its functions in the American constitutional system?

### Learning Objectives (cont'd)

- **Identify** the primary sources on which members of Congress rely for information in the lawmaking process and to explain the importance of Congress' inherent power to investigate
- **Explain** why compromise is required in the deliberative process
- **Evaluate**, take, and defend positions on how Congress functions and whether it should streamline its procedures
- **Define** key words: bill, cloture, filibuster, impeachment, lobbying, pocket veto, power to investigate, seniority

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### Introduction

The United States Congress is one of the few national assemblies in the world with the power to initiate legislation rather than simply vote on **bills** proposed by the executive. Congress also conducts important investigations that can lead to changes in public policy and even the removal of federal judges and the president. From its earliest days Congress has relied on rules and leadership structures to facilitate its work. Today, with 535 members, Congress faces a variety of organizational challenges in its effort to represent growing and diverse constituencies.

### How Do Committees and Rules Help Congress Do Its Work?

The Constitution says little about how the House or the Senate should function. Article I, Section 5, states only that each chamber “may determine the Rules of its Proceedings.” The first Congress (1789–1791) set a precedent that is followed to this day by creating committees and adopting rules that govern how each house functions.

### Key words

**bill:**

Proposed law placed before a legislature for approval



## COMMITTEES

Both the House and the Senate have standing, or permanent, committees. Each committee, such as the House Agriculture Committee or the Senate Appropriations Committee, has jurisdiction over particular subjects and appoints subcommittees to examine proposals within specific areas. In committees and subcommittees, proposals can be examined carefully, and various perspectives heard. It is common for these committees and subcommittees to hold public hearings to receive testimony from individuals and groups on matters of interest to them. Oversight hearings also may be held during which members of administrative agencies may be called on to testify regarding how they carry out laws enacted by Congress. In these committees and subcommittees, the careful, deliberative work of Congress occurs. Committee assignments shape members' careers within Congress, enable them to serve their constituents' interests, and sometimes provide them national prominence.

Both chambers also use select committees and task forces, which usually have specific assignments and exist for a limited time. For example, a select committee was created to review James Madison's proposal for a Bill of Rights during the first session of Congress because members feared that using the regular committee process might take too long. Individual members of committees, such as the Senate Foreign Relations Committee, conduct personal investigations and make on-site visits related to their committee assignments.



Figure 5.22.1

## RULES

House rules, which are adopted by each Congress, specify the size of committees. House rules also specify the jurisdiction of committees. That is, they specify the kinds of draft proposals for legislation, known as bills, such as education, energy, or defense bills, that should be handled by each committee.

House rules also place limits on the number of members on committees and subcommittees, how many committees a member can serve on, and term limits for the chairpersons of the committees. House rules also govern the form and structure of debates on the floor of the House. For important bills the Rules Committee of the House, which is controlled by the majority party, creates "special rules." Committees also make rules that specify committee procedures, such as the order in which members ask witnesses questions at hearings, how

long each member may ask questions, how proposals are amended or “marked up” in committee, and the form in which bills are reported from committees.

The Senate also operates according to rules, but the rules are treated more informally in the Senate than in the House. Traditionally, members of the Senate have been more independent than members of the House, perhaps because senators originally were regarded as “ambassadors” from their states. A single senator can use the **filibuster**, a practice of refusing to surrender the floor during a debate, to prevent a vote. In 1917, the Senate adopted a rule to limit debate with the approval of two-thirds of its members, later changed to three-fifths, known as a **cloture** vote, and thus bring a proposal to a vote by the full Senate. Senators also have the opportunity to amend bills on the floor. In 2013, the Senate modified its procedures to allow for cloture for judicial nominees, other than Supreme Court nominees, by a simple majority vote.

Political parties also have organizations and leaders within Congress whose job is to encourage members to adhere to party policies and platforms. Party control traditionally has been stronger in the House than in the Senate. Under political party control, committee chairs are appointed not only according to **seniority**, or length of service, but also on the basis of party loyalty. At this time, chairs of committees are limited to three two-year terms.

## Key words

**filibuster:**

The practice of refusing to surrender the floor during a debate to prevent the Senate from voting on a proposal

**cloture:**

A rule of the U.S. Senate stipulating that debate on a legislative proposal be cut off and the proposal voted upon by the full Senate if sixty members agree

**seniority:**

Length of service



### Content Highlight: WHAT DO YOU THINK?

1. Throughout American history deliberative bodies have used committees to facilitate their work. How does the use of committees in Congress promote or undermine the principles of representation, majority rule, and limited government?
2. What principles and values do rules and strict adherence to them serve in a representative deliberative body such as the United States Congress?

### Who Leads the House and Senate?

The Constitution states that members of the House “shall choose their Speaker and other Officers.” The House selects one of its own members to be Speaker. Leadership in the House has taken essentially three forms: strong institutional speaker, committee chairs, and political party control.

#### STRONG INSTITUTIONAL SPEAKER

At many times in America’s history the Speaker of the House has been one of the most powerful political figures in the country and has wielded tight control over the organization and the legislative agenda of that chamber. Speakers typically control committee appointments and chair the powerful Rules Committee, called the “traffic cop” of the House

because it decides which bills will come to the floor and what the rules of debate will be. In the 1890s, Speaker Thomas B. Reed was so powerful that he was known as “Czar Reed.”

### **DECENTRALIZED COMMITTEE LEADERSHIP**

Sometimes leadership in the House has been decentralized. In the early twentieth century, for example, members of the House rebelled against the Speaker’s centralized leadership by placing power in the hands of committee chairs. During periods of decentralized leadership, committee chairs frequently are selected on the basis of seniority. Powerful committee chairs often compete with one another to control the legislative agenda.

### **POLITICAL PARTY CONTROL**

A third model of House leadership is a strong Speaker who represents the majority party more than the institution as a whole. For example, in the 1990s, Republican Speaker Newt Gingrich championed his party’s “Contract with America,” an agenda to reform many aspects of American national government. Committee chairs were appointed on the basis of party loyalty rather than seniority.

Leadership in the Senate always has differed from leadership in the House. The Constitution provides that the “Vice President of the United States shall be President of the Senate.” However, the vice president is not a member of the Senate and often is not a member of the majority party in the Senate. (Recall that since the adoption of the Twelfth Amendment in 1804 the vice president always has been a member of the same political party as the president.) As Senate president, the vice president’s only real power is to cast tie-breaking votes. In the absence of a constitutionally recognized leader, senators have elected majority and minority party leaders to guide their operations. However, leadership in the Senate never has been as formal as in the House, largely because of the tradition of individual independence in that chamber.



Figure 5.22.2

### **What Roles Do Majority Rule and Compromise Play in Congressional Deliberations?**

Enacting a law is one of the most complicated processes in American politics. Only about one in ten proposals survives and rarely without significant changes. The process begins when a member, either alone or with cosponsors, introduces a proposal for a law. Most proposals take the forms of bills, but they also can be resolutions. A simple resolution addresses procedural rules or expresses sentiments in each chamber. A joint resolution, introduced in both chambers at the same time, is a device for proposing constitutional amendments or other matters. If signed by the president or passed over the veto, a joint resolution has the force of law. A concurrent resolution usually expresses the “sentiment” of Congress but is not law. However, since the 1974 Congressional Budget Act, a concurrent resolution has bound Congress to budget limitations.

A bill can be introduced into either or both chambers. However, the Constitution requires revenue bills, which raise money, to originate in the House. When a bill or a joint resolution is introduced, it is assigned a number (with the prefix H in the House and S in the Senate). In general terms, the process then unfolds as follows.

## **COMMITTEE ASSIGNMENT**

All bills are assigned to at least one committee. The committee chair usually refers bills to subcommittees. Most bills are subjected to rigorous scrutiny, and their sponsors must agree to compromise in the form of amendments.

## **HEARINGS**

Once a bill has been assigned, the committee schedules a hearing, which usually is open to the public and often announced in the media and other forums. People such as representatives of interest groups and outside experts may present testimony. Testimony also may be presented by governmental organizations that support the legislative branch, such as the Congressional Budget Office, the Congressional Research Service, and the Government Accountability Office.

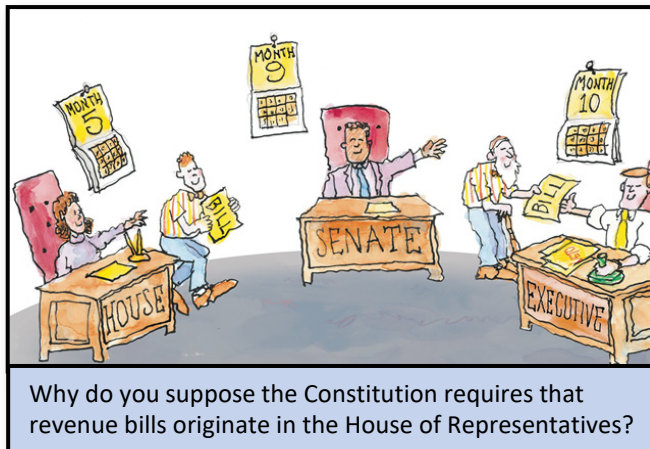


Figure 5.22.3

## **DELIBERATIONS**

If a committee wants to try to get a bill enacted into law, it will schedule what are called “mark-up” sessions in which committee members review the bill, modify it as they wish, approve of their final version, and then recommend the bill to the full House or Senate for approval. Bills developed by subcommittees are referred to full committees for approval before being submitted to the full House or Senate. Committee chairs determine whether the full committee will consider bills reported out of a subcommittee. During committee or subcommittee deliberations, amendments to bills can be offered and debated. If a bill is assigned to more than one committee and is defeated or significantly amended in at least one, then it is not likely to survive.

## **REPORT**

If the bill wins a favorable committee vote, then it is reported to the full chamber either in its original form or with recommended amendments. The written report that accompanies the bill explains why the committee acted as it did. Committee reports always are made available to the public.

## **FLOOR VOTE**

When a bill is reported out of committee, it is placed on a calendar for consideration and a vote by the full House or Senate.

## **REFERRAL TO THE OTHER CHAMBER**

Bills or resolutions passed by one chamber must be sent to the other chamber, and the process begins again. The other chamber may defeat proposals, amend them, or approve them without amendment.

## **CONFERENCE COMMITTEE**

Few bills that survive in one chamber emerge from the other chamber without being amended. When Senate and House versions of a bill differ, a conference committee,



## Key words

### **pocket veto:**

A presidential practice that allows a bill to die if not signed within ten days and Congress is adjourned

composed of members of both chambers, usually is appointed to try to reach a compromise. If the conference committee reaches agreement, then it issues a conference report that is submitted to both chambers for a vote. A conference report may not be amended, although it may be the subject of a filibuster in the Senate.

### **REFERRAL TO THE PRESIDENT**

Bills approved by both chambers are sent to the president. If the president signs a bill, then it becomes law. If the president vetoes the bill, it will become law only if it is passed again by a two-thirds majority of those present and voting of each chamber. If the president does not sign within ten days and Congress adjourns, the bill is dead. This last action is known as a **pocket veto**.

A bill must win majority support at every stage of the process. It is not enough to win a majority vote just once. The bill also must be acceptable to those who manage the process, including party leaders. Members of Congress who sponsor bills must be persistent and willing to compromise if they are to build winning coalitions at each stage.

By the time a proposal becomes a law, many groups and individuals with different interests and perspectives usually have scrutinized and debated it. The lawmaking process demonstrates America's system of representative government, limited government, and checks and balances at work.

### **What Role Has Congress Played in Promoting the Protection of Individual Rights?**

Attention to landmark cases in which Supreme Court decisions have resulted in the protection of the rights of minorities often has overshadowed the role of Congress and the active engagement of citizens in the political process. *Brown v. Board of Education* is an example of such a case.

Congress drafted the Bill of Rights and all the subsequent amendments that protect individual rights and extend rights to those deprived of them in the past. Congress also has passed landmark legislation that not only has given support to these amendments but also has established rights not explicitly contained in the amendments. The results have been significant changes in American life. Landmark legislation significantly changes public policy or the relationship between the national government and the states. Another example is the National Labor Relations Act of 1935 that protects the rights of workers to form and join labor unions. When the amendments to the Constitution have not been sufficient to protect individual rights, Congress has passed facilitating legislation. In the area of civil rights, for example, Congress passed the Civil Rights Acts of 1866, 1871, 1875, 1957, 1960, 1964, 1968, and 1991.

The passage of such legislation is a result of using democratic political processes made possible by our Constitution. Members of government have used these processes, as have private citizens, many affiliated with interest groups and movements. The abolition movement and the woman suffrage movement are examples.



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Examining the Role of Congress in Promoting the Protection of Individual Rights

Work in groups. Each group should select one piece of landmark legislation from the list below and research what rights the legislation was designed to protect and how Congress and interest groups used the political process to pass the legislation. Each group should then develop answers to the questions that follow and prepare a short presentation for the class.

- Civil Rights Act (1866)
  - National Labor Relations Act (1935)
  - Servicemen's Readjustment Act (G.I. Bill) (1944)
  - Civil Rights Act (1964)
  - Voting Rights Act (1965)
  - Freedom of Information Act (1966)
  - Indian Civil Rights Act (1968)
  - Pregnancy Disability Act (1978)
  - Americans with Disabilities Act (1990)
  - Homeland Security Act (2002)
1. What historical circumstances led to the legislation?
  2. What are the major provisions of the legislation?
  3. What rights does the legislation promote or protect?
  4. How does the legislation reflect a major shift in American public policy?
  5. How has the legislation changed the course of private and public action?
  6. How was the political process used to pass this legislation?
  7. Was this legislation initiated by one or more members of Congress? If so, who were they and why did they initiate the legislation?
  8. Was this legislation the result of members of Congress working cooperatively with interest groups? If so, what were the groups and how did they help get the legislation passed?
  9. Was this legislation the result of members of Congress being pressured by other members or by interest groups? If so, who applied the pressure and what methods did they use?
  10. Was this legislation the result of pressure put on Congress by an administration supported by coalitions of civil rights organizations and activists? What other factors contributed to the passage of the legislation?

#### Where Do Members of Congress Get Ideas for Legislation and Information in Deciding Which Bills to Support?

Members of Congress often initiate legislation based on campaign promises to constituents, responses to problems or crises, or their own analysis of what laws are needed. They also introduce legislation at the request of others and must decide whether to support bills that are submitted by others. The Library of Congress through its

Congressional Research Service frequently assists Congress by providing information and analyzing issues. The Congressional Budget Office will provide an analysis of the budget for a bill and its projected costs. In addition, information and requests for legislation often come from the executive branch, constituents, and interest groups.

### THE EXECUTIVE BRANCH

Article II, Section 3, instructs the president to give Congress information on the “State of the Union” and to “recommend to their Consideration such Measures as he shall judge necessary and expedient.” The president delivers an annual State of the Union address to Congress that outlines the president’s legislative agenda, among other things. This agenda can include creating, consolidating, or eliminating departments or agencies. Members of the president’s party in Congress usually sponsor the president’s legislative proposals.

Executive departments and agencies are another regular source of legislative proposals. Most proposals from the executive branch are aimed at improving the functions of the departments or agencies that Congress already has created. These proposals usually are carefully crafted and ready for a member of Congress to introduce.

### CONSTITUENTS

Many of those who live in a representative’s district or a senator’s state communicate with their elected officials, recommending the enactment of new laws or the repeal of existing laws. Constituents make telephone calls, respond to public opinion polls, send faxes and email, write personal letters, participate in letter-writing campaigns, and use blogs to inform their elected representatives and to persuade them about the need for particular legislation. Sometimes constituents ask their representative to introduce special legislation to address an individual problem or situation.

### INTEREST GROUPS

Thousands of individuals and groups seek to influence members of Congress and legislation through **lobbying**, the practice of trying to affect legislation on behalf of organizations, industries, or interest groups through contact with legislators. Groups that participate in lobbying include businesses, civic organizations, professional associations, and nongovernmental organizations. The Lobbying Disclosure Act of 1995 requires some lobbyists to disclose the interests they represent, the issues in which they are interested, and how much they spend annually. The act does not limit the amount of lobbying in which any individual or group may engage. The activity of lobbying reflects the First Amendment rights to speak, assemble, and petition. Certain personal traits and qualities set apart the most an effective lobbyist, whether individuals or groups.

### **Well Informed**

Members of Congress must be able to rely on the information they receive from lobbyists. Information must be able to withstand scrutiny, and it must be timely.

## Key words

### **lobbying:**

The practice of attempting to affect legislation by influencing legislators

## Knowledgeable

Lobbyists need to know not only their own issues but also the intricacies of the legislative process, key players, and which groups support and oppose particular proposals.

## Organized

Interest groups must convey a consistent message and must be persistent. They must be able to explain how an issue affects their members and clients. And they must use various forms of communication effectively, including personal contact with members of Congress.



How did disabled Americans use the political process to encourage the creation of the Americans with Disabilities Act of 1990?

Figure 5.22.4

## Cooperative

Successful interest groups, like members of Congress, must be able to build coalitions with other interest groups in the search for workable majorities.

## How Does Congress Use Its Power to Investigate?

Legislative bodies have claimed the **power to investigate** since at least the seventeenth century. Congress has conducted hundreds of investigations since 1792. The purposes of investigations include the following:

- Finding facts on which to base legislation
- Discovering or influencing public opinion
- Overseeing administrative agencies
- Probing into questionable activities of public officials
- Securing partisan political gain

Congress began making full use of its inherent power to investigate only in the twentieth century. For example, a congressional investigation into labor practices in the 1930s resulted in federal labor legislation. Standing congressional committees most often conduct investigations. Recently, however, Congress has made greater use of special investigative commissions, such as to examine the explosion of the Challenger space shuttle in 1986 and the terrorist attacks on the United States in 2001. Today, Congress' investigations rival its lawmaking powers and have helped Congress maintain its power in relation to the executive branch.

Congress uses its power to investigate as part of its power to impeach, or to put federal officials on trial. Any member of the House may initiate **impeachment** proceedings by introducing a resolution. The type of resolution determines which committee will investigate the charges.

## Key words

### **power to investigate:**

The power of Congress to undertake formal inquiries into matters of public business and public policy

### **impeachment:**

The constitutional process whereby the House of Representatives may 'impeach' (accuse of misconduct) high officers of the federal government for trial in the Senate



For example, a resolution calling for the impeachment of a federal judge will be referred to the Judiciary Committee. If the committee finds that there are grounds for impeachment, then it reports “articles of impeachment”—accusations of misconduct—to the full House for debate.

If a majority of those present and voting agree on impeachment, then the matter is sent to the Senate for a trial. Conviction requires a two-thirds majority vote. If the person convicted is an executive officer, then removal from office is automatic. The House does not often use its impeachment power. Only seventeen national officers have been impeached:

- Presidents Andrew Johnson (1868) and Bill Clinton (1998) (both acquitted)
- Secretary of War William Belknap (1876) (acquitted after resignation)
- Senator William Blount (1799) (charges dismissed after expelled from Senate)
- Thirteen federal judges (seven found guilty, four acquitted, two resigned), including Supreme Court Justice Samuel Chase (1805) (acquitted)

The threat of impeachment alone can be powerful. President Richard Nixon (in office, 1969–1974) and Supreme Court Justice Abe Fortas (in office, 1965–1969), as examples, each resigned when it appeared that they would be impeached.



## *Content Enhancement:*

### **CRITICAL THINKING EXERCISE**

#### **Restoring Congressional Power**

Congress is the lynchpin of the American constitutional system. However, several scholars and even former members of Congress believe that it is now a “broken branch.” Among other things, they criticize members of Congress for not effectively using the power to investigate, for ceding power to the executive, and for using the institution for personal advancement rather than promotion of the common good. Work in small groups to respond to the following questions. Then share your responses with other groups.

1. What organizational changes might make Congress work more effectively?
2. How might Congress’ procedures for reviewing, debating, and acting upon proposed legislation be made more efficient? What values would be served or not served by making Congressional procedures more efficient?
3. How could Congress make the most effective use of its power to investigate?

## Conclusion

Members of Congress have a crucial job in our government. They propose laws and conduct investigations. In this lesson, you learned that Congress has been the source of many landmark laws that have led to significant changes in American life. You also saw that Congress has taken actions to protect individual rights when the courts failed to do so. In recent years, Congress has been stymied by partisan-ship, low approval ratings from constituents, and expanding presidential powers. This has led to challenges in congressional effectiveness.

## Lesson Check-up



- How do committees, rules, and political parties help Congress organize to do its work?
- What values are served by using seniority to determine committee leadership positions in Congress? What values are served by using party loyalty to determine leadership positions? Is one method more consistent with constitutional ideals? Why?
- Describe the responsibilities of the House, the Senate, and the president in the law-making process.
- Explain the roles of interest groups in making laws.
- How, if at all, does the complex system of separated powers and checks and balances inhibit majority rule? Explain your position.
- How does landmark legislation differ from ordinary legislation?
- Congress uses its power to investigate to assess blame for government acts in the past and to acquire information to help it enact laws. Is one use of the power to investigate more justifiable than the other? Why or why not?
- Research the committees on which your congressional representatives serve. How do those committees address the interests and concerns of your district or state and the nation as a whole?

# Presidential Powers



## Key words

- commander in chief
- executive order
- executive power

## What You Will Learn to Do

Analyze traditional and modern presidential powers

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Treat self and others with respect

## Learning Objectives

- **Explain** the president's constitutional responsibilities and how the Executive Office of the President has evolved
- **Identify** various constitutional and political checks on the president's power
- **Explain** fundamental differences between the office of prime minister in a parliamentary system and the American presidency



## Essential Question

What is the role of the President in the American Constitutional system?

### Learning Objectives (cont'd)

- **Evaluate**, take, and defend positions on issues involving the exercise of Presidential power and the relationship between the President and the other branches of government
- **Define** key words: commander in chief, executive order, executive power

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### Introduction

The president of the United States is among the most powerful political figures in the world. In the international realm, the president speaks for the country and is the symbol of America. At home, the president suggests the policy agenda for Congress and is the leader of their political party. Americans look to the president for leadership, while at the same time fearing the concentration of political power in the executive branch. This lesson examines sources of presidential power and ways that checks and balances limit presidential power.

### What Are the President's Constitutional Responsibilities?

Article II of the Constitution places “the **executive power**,” the powers of the executive branch of government, on the president of the United States. Unlike Article I, which gives Congress those powers “herein granted,” Article II does not define executive power. The Constitution lists some of the president’s powers, but those listed have never been thought to be the president’s only powers. The listed powers include the following:

- Commanding the Army and Navy as **commander in chief**
- Heading the executive department (cabinet and executive departments)

### Key words

**executive power:**  
The authority to carry out and enforce the law

**commander in chief:**  
The highest ranked person of the military forces



*Presidential powers (cont'd):*

- Granting reprieves, or postponement of punishment, and pardons
- Making treaties, subject to the advice and consent of the Senate
- Nominating ambassadors, public ministers, consuls, and judges of the Supreme Court and other federal courts
- Recommending legislation to Congress
- Reviewing legislation passed by Congress and returning bills to which the president objects
- Receiving ambassadors and other public ministers (chief diplomat)

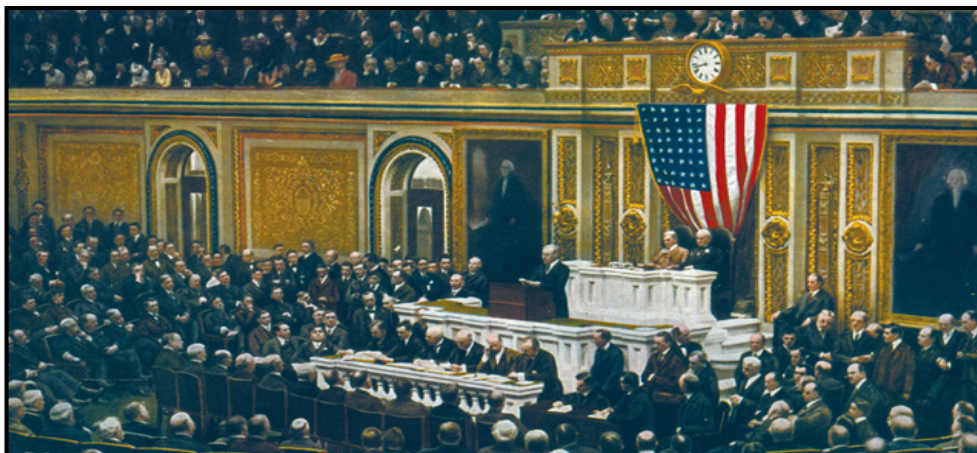
The Constitution further directs the president to “take care that the laws be faithfully executed.” It also requires the president to take an oath that includes a promise to “faithfully execute the Executive Office of the President” and “preserve, protect, and defend the Constitution of the United States.”

Presidents have asserted many reasons to justify a broad definition of executive powers, particularly in times of national emergency, such as the Great Depression, and war. The Constitution has proven flexible enough to adapt to changing understandings of presidential power.



### *Content Highlight:* **WHAT DO YOU THINK?**

1. Article II, Section 1, gives the president “executive power” but does not define what that power is. What other provisions of Article II give an indication of what the Framers meant by executive power?
2. What additional insights into the nature of executive power are provided in Article I?



What are the president’s most important responsibilities?

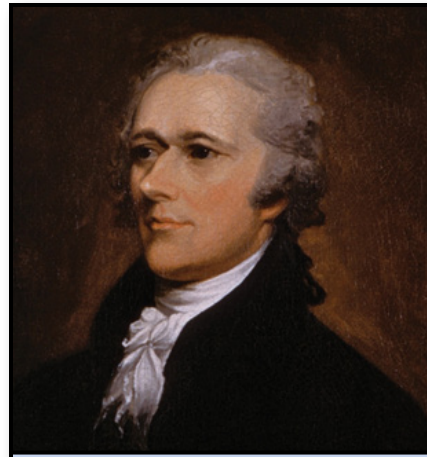
*President Woodrow Wilson had urged the United States to remain neutral during the First World War, which started in 1914. However, in 1917 German submarines attacked American merchant ships and Germany urged Mexico to join the war against the United States. President Wilson then asked Congress to declare war to “make the world safe for democracy.” Congress declared war four days after his speech.*

*Figure 5.23.1*

## How Did the Framers Envision the Presidency?

The Framers envisioned the president as an official above partisan politics, that is, a person not devoted to a particular political party. Publius explained in Federalist 68 that they wanted the president to be a person who had earned the esteem and confidence of the entire nation, with a character “preeminent for ability and virtue.” They designed the Electoral College to identify people of such character. There was no expectation that candidates would campaign for the office. The Framers thought that the president should remain above partisan politics. But their expectations were unmet even during President Washington’s administration, when factions arose that led to the development of political parties.

The Framers did not want the president to have the powers of a monarch. But they did want the president to be “energetic,” a quality they contrasted with legislative “deliberation.” “Energy” refers to the capacity of one person to act efficiently and vigorously on behalf of the nation. The Framers feared what they called a “feeble executive.” As Alexander Hamilton argued in Federalist 70, “A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.”



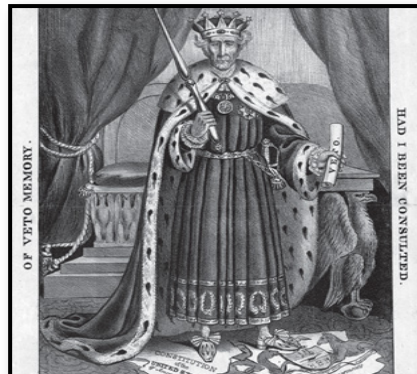
What did Alexander Hamilton and other Framers fear about a “feeble executive”?

Figure 5.23.2

## How Has the Presidency Evolved?

Occupants of the Executive Office of the President have varied in stature and achievements. Some have been undeniably great, others have been mediocre, and still others are regarded as failures. The precedents for the modern Presidency are the powerful figures who took a broad view of their authority under the Constitution.

Early examples of powerful presidents are our first and third presidents, George Washington and Thomas Jefferson. However, some scholars trace the rise of the powerful modern presidency to Andrew Jackson. Before Jackson, presidents used the veto power sparingly to aid Congress in the performance of its deliberative functions. They returned bills to Congress for “reconsideration,” or further reflection. Jackson used the power differently. He vetoed the recharter of the Second Bank of the United States. In the resulting battle between the president and Congress, Jackson appealed directly to the public to support his position on the bank. During his two terms in office, President Jackson used the veto twelve times, more than all his predecessors



What do you suppose President Andrew Jackson wanted the people to do when he appealed to them to support his position on the bank?

Andrew Jackson is shown in this 1833 political cartoon as a despotic king trampling on the Constitution. The artist is criticizing Jackson’s veto of a bill to recharter the Bank of the United States.

Figure 5.23.3

combined. He used it not only against bills that he considered unconstitutional but also against those he viewed as bad policy.

Abraham Lincoln contributed significantly to the growth of the office, even though he rarely used the veto power. Confronted with the Civil War, Lincoln asserted unprecedented, unilateral executive power. He justified actions such as imposing a blockade on Southern ports, suspending the writ of habeas corpus, nationalizing the militia, and expanding the size of the Army and the Navy as exercises of what he called an “inherent executive power” in times of emergency. Congress ultimately authorized most of Lincoln’s actions.

Theodore Roosevelt and Woodrow Wilson also helped transform the presidency into the powerful institution it is today. Roosevelt used the office as a “bully pulpit” to shape public opinion and frame debates on domestic legislation that he proposed to Congress. A bully pulpit is a position of visibility and influence, often a political office, from which to advocate a particular point of view. The word bully, in this case, means “very good” or “excellent.” Wilson similarly carried issues directly to the public, notably in his unsuccessful fight for America’s entry into the League of Nations after World War I.

The most influential president in the twentieth century was Franklin D. Roosevelt. Roosevelt was elected during the Great Depression and served until nearly the end of World War II. He used both crises to consolidate presidential power. At home, Roosevelt took direct control of the policy process, submitting a wide range of reforms to Congress as part of his New Deal. These included Social Security, employment programs, and extensive reforms of executive agencies. As commander in chief during World War II, Roosevelt helped to establish America’s preeminence in the international arena. He also was the first president to make extensive use of public opinion polls, which informed him about how Americans were responding to his proposals. He talked directly to the people through radio “fireside chats,” using a conversational, personal style to establish trust and confidence.

Roosevelt left a lasting impact on the presidency. Some presidents since Roosevelt have agreed with Roosevelt’s domestic policies. Others have sought to dismantle them. However, all effective presidents have relied on strategies that Roosevelt used to bolster presidential power. Ronald Reagan, for example, established himself as the Great Communicator, whereas John F. Kennedy and Bill Clinton used their personal charisma to win political allies and to persuade the American people to support their policies.



How did President Franklin D. Roosevelt use the radio to provide a civics lesson for all Americans?

Figure 5.23.4



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Examining Presidential Qualifications

The Constitution lists three formal requirements for the Executive Office of the President: natural born citizen, resident of the United States for fourteen years, and at least thirty-five years of age. Work in small groups to make a list of the informal qualifications that you think a president should possess. For example, should a president be well educated? Have previous government or military experience? Be charismatic, articulate, and personable? Why? Compare your list with the lists prepared by other groups. Are there informal qualifications that appear on everyone's list? How does your list compare with the qualifications the Founders believed were important?

### What is the President's Role in Foreign Policy?

Article II grants four powers that, taken together, establish the president as the nation's leader in foreign policy. Congress also has enormous powers over foreign policy because it establishes and collects taxes, declares war, pledges the credit of the United States, and regulates foreign commerce. Congress also funds the Armed Forces, makes rules governing them—the Uniform Code of Military Justice—and makes rules related to “Captures on Land and Water,” as contained in Article I, Section 8, of the Constitution. However, Congress' role is largely one of reacting to the president. The president's powers in foreign relations include the following.

#### COMMANDING THE ARMED FORCES

The nation's military power can be used both to protect the nation from hostile powers and as a threat to help persuade other countries to comply with America's policies. Congress has declared war only five times. However, every president after Roosevelt has used the commander in chief's power to send American troops to countries abroad—including Korea, Vietnam, Lebanon, Grenada, Kuwait, Somalia, Kosovo, Afghanistan, Iraq, Libya, Pakistan, and Syria—without declarations of war.

#### MAKING TREATIES

Treaties are agreements with other nations and international organizations. They can address matters ranging from economics to defense. The president has sole authority to negotiate and make treaties on behalf of the United States. However, the treaties must be approved by a two-thirds vote of the Senate. In 1949, for example, President Harry Truman made the United States one of the founding members of the North Atlantic Treaty Organization, a military alliance. The Senate approved. But other treaties, notably the Treaty of Versailles after World War I, have not been ratified.



What is the president's role in shaping foreign policy?

Figure 5.23.5



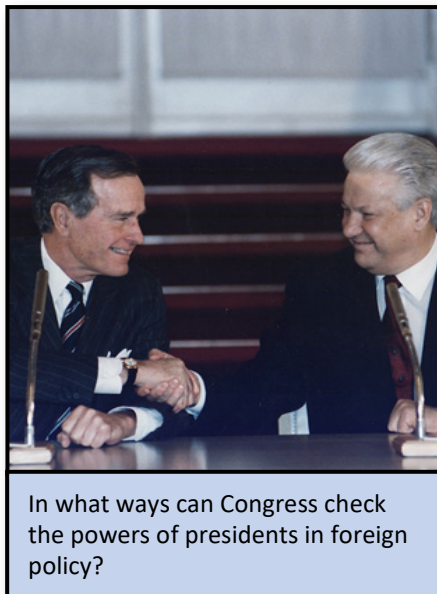
## **APPOINTING AMBASSADORS AND CONSULS**

The president decides who represents the United States within other countries. The president's appointees, who must be approved by a majority vote in the Senate, help to shape the image of the United States overseas and to advise on foreign policy, including monetary assistance to other countries, or foreign aid.

## **RECEIVING AMBASSADORS AND OTHER PUBLIC MINISTERS**

President Thomas Jefferson helped to establish the principle that this provision of the Constitution means that the president is "the only channel of communication between the United States and foreign nations." The right to receive ambassadors and other public ministers from abroad includes the right not to recognize them. Withholding recognition can be used as a policy tool. For example, in 1913 President Woodrow Wilson's refusal to recognize the provisional government of Mexico contributed to the downfall of that government.

### **How Do the President's Powers Expand in War and Emergency?**



*Figure 5.23.6*

During wars and emergencies, presidents commonly exercise powers not granted by the Constitution. President Grover Cleveland deployed federal troops without congressional authorization in 1894 to put down a strike among Pullman train car workers. President Franklin Roosevelt transferred destroyers to Great Britain in 1940, a year before the United States entered World War II. And President Truman ordered the secretary of commerce to operate the nation's steel mills during a strike to ensure an adequate supply of steel during the Korean War.

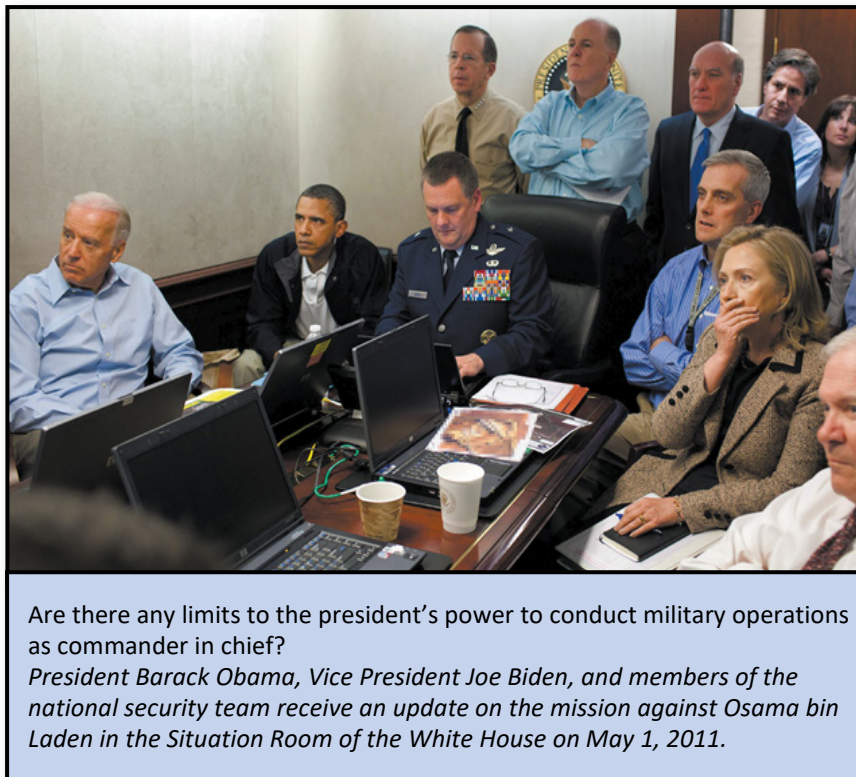
On occasion Congress and the Supreme Court have tried to rein in the president. In 1952, the Supreme Court held that President Truman had exceeded his authority in seizing the steel mills. In the 1970s, Congress also debated withdrawing funding for the Vietnam War as the war continued to lose public support. In 2006, the

Court held that President George W. Bush's creation of special military commissions to try alleged terrorists violated the Uniform Code of Military Justice passed by Congress in 1950 and the 1949 Geneva Convention, an international treaty that the United States had signed. These examples aside, during wars and national emergencies both Congress and the Court tend to defer to the president.

### **How and Why Has Presidential Power Expanded Historically?**

It sometimes is argued that the two-plus centuries of American experience have been characterized by a general drift of authority and responsibility toward the executive branch. In fact, the preponderance of power has flowed over time from one branch to another. During most of the nineteenth century Congress predominated. In the twentieth

century as the role of the United States in world affairs grew, so did the formal and informal powers of the president. The administrations of Franklin Roosevelt, Lyndon B. Johnson, Richard Nixon, and George W. Bush were marked by increased assertions of presidential authority.



Are there any limits to the president's power to conduct military operations as commander in chief?

*President Barack Obama, Vice President Joe Biden, and members of the national security team receive an update on the mission against Osama bin Laden in the Situation Room of the White House on May 1, 2011.*

Figure 5.23.7

There are several reasons for the increase in the powers of the presidency. One reason is that Americans have always expected their chief executives to act vigorously and to address the nation's problems. Alexander Hamilton in Federalist 70 claimed, "Energy in the executive is a leading character in the definition of good government." Thomas Jefferson contended that circumstances "sometimes occur" when the president must assume authorities beyond the law when necessity or self-preservation require. Interestingly, however, public opinion polls taken since the 1930s reflect two unchanging popular attitudes toward the presidency. The first is that people want strong, activist presidents. The second is that people fear and distrust activist presidents. Americans want and expect the other two branches of government to act as checks and balances on the executive.

A second reason for the enlargement of executive authority is that the constitutional powers of the president are stated in broad terms. It is possible to interpret them in ways that have permitted an expansion of presidential influence.

A third reason for the growth of executive power is the president's role in recommending legislation to Congress (Article II, Section 3). The executive branch proposes most of the bills that Congress considers. Enforcing decisions of the Supreme Court and carrying out and enforcing laws enacted by Congress also have led to a more central role for the executive. Moreover, the executive has played an increasingly active role in the development of federal regulations. Federal regulations are rules created by executive agencies to elaborate the often-general laws passed by Congress to make them operational. They are printed in the Federal Register, a daily government publication of notices, rules, and

## Key words

### **executive order:**

Directives issued by the president, including Presidential Directives, National Security Directives, and Homeland Security Presidential Directives

other information, and are open to public comment for thirty days before they are approved and become law. As such, they are an example of the shared power of lawmaking.

A fourth reason for the growth of executive authority is the use of **executive orders**. An executive order is a rule or regulation issued by the president. The use of executive orders by presidents has greatly increased in recent years as a result of the tendency of legislative bodies to leave the details of laws they pass to be filled in by the executive branch. All executive orders issued by the federal government must be published in the Federal Register. Some states have similar publications.

Finally, presidential and executive power has increased as the federal government has assumed responsibilities that formerly were seen as the responsibilities of individuals or of local and state governments. Examples of responsibilities shifted to the national government range from education to health care, transportation, and product safety.



What factors have contributed to the growth of executive power in relation to the powers of Congress?

Figure 5.23.8

## How Are Presidential Powers Limited?

Despite the president's immense powers, the system of checks and balances limits presidents in a number of ways. For example, the Twenty-Second Amendment limits the president to two elected terms in office. This amendment was adopted after Franklin Roosevelt abandoned the tradition begun by George Washington of stepping down after two terms. Even though Roosevelt had been immensely popular, Americans feared a president who remained in power too long.

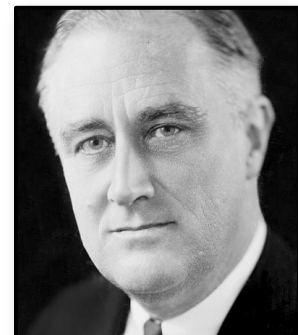


Figure 5.23.9

Congress can check the exercise of the president's power by doing the following:

- Rejecting the president's legislative agenda or modifying it in ways that make it unacceptable to the president. Examples include the rejection of Franklin Roosevelt's proposal to increase the number of justices on the Supreme Court and his plans to reorganize the executive branch.
- Asserting its constitutional authority. An example is the 1973 War Powers Resolution intended to reinforce the constitutional power of Congress to declare war. Among other things it requires the president to consult with Congress before initiating any foreign hostilities and regularly thereafter until American Armed Forces no longer are engaged in hostilities.
- Refusing to ratify treaties. For example, in 1996 Bill Clinton signed a comprehensive nuclear test ban treaty with 137 other nations. Ten years later the Senate had neither ratified nor held major hearings on it.
- Refusing to confirm presidential nominees to the judiciary or top administrative posts. Examples are the Senate's refusal to confirm Richard Nixon's nominations of G. Harrold Carswell and Clement Haynsworth to the Supreme Court and George H. W. Bush's nomination of John Tower to be secretary of the Department of Defense.
- Refusing to fund the president's programs. By cutting off or reducing funds, or by threatening to do so, Congress can abolish agencies, curtail programs, or obtain requested information. An example is the refusal of Congress to provide funding for emergency aid for Vietnam as requested by President Lyndon Johnson.
- Removing the president from office by impeaching, trying, and convicting him.

The Supreme Court also can check the exercise of presidential power. Examples include the following:

- ***Humphrey's Executor v. United States (1935)***. Congress must approve the president's decision to remove an official of an independent regulatory agency.
- ***United States v. Nixon (1974)***. The president is not entitled to automatic immunity from the legal process (reaffirmed in *Clinton v. Jones*, 1997).
- ***Train v. City of New York (1975)***. The president cannot refuse to spend money that Congress has appropriated unless Congress gives the president discretion to do so.

The executive branch itself can also limit the president, and will be discussed in the next lesson. Executive agencies and bureaus develop their own change resistant traditions and styles of performing their jobs. Career civil service employees—many of them experts in their fields—may resist the president's political priorities without fear of losing their jobs.

Finally, public opinion limits the exercise of presidential power. A president who lacks public support is handcuffed in his efforts to carry out his policy agendas at home and abroad. President Truman once lamented, "I sit here all day trying to persuade people to do the things they ought to have sense enough to do without my persuading them.... That's all the powers of the president amount to."

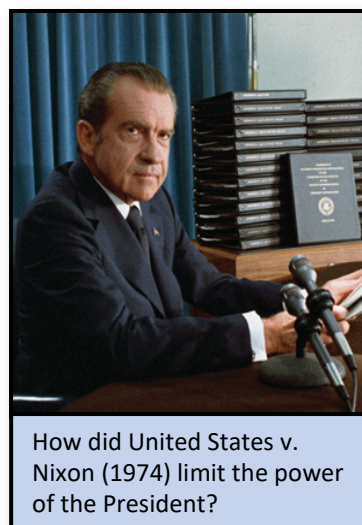


Figure 5.23.10



## What Role Has the Executive Branch Played in Promoting the Protection of Individual Rights?

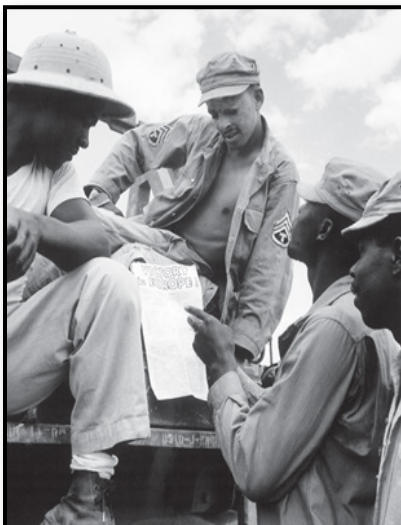
The actions of the executive branch in developing federal regulations and executive orders are subject to the same democratic political processes made possible by our Constitution. Private citizens and interest groups and movements have used these processes to influence executive branch decisions. The following exercise will give you an opportunity to examine a specific action of the executive branch that has played an important role in promoting the protection of individual rights.



What role did executive orders play in desegregating public school?



How did the Emancipation Proclamation affect the lives of slaves who lived in the South? What effect did it have on the Civil War?

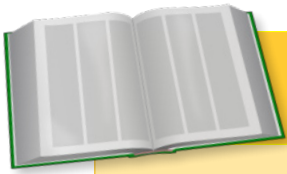


What effect did the executive order to desegregate the armed forces have on American society?



What role should government play, if any, in ensuring that disabled people have access to public facilities?

Figure 5.23.11



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Examining the Role of the Executive Branch in Promoting the Protection of Individual Rights

Listed below are some of the most important actions of the executive branch intended to protect individual rights. Work in groups of three to five Cadets. Each group should select one of the regulations or executive orders below and determine what rights it was designed to protect and how the political process was used to influence the actions of the government. Each group should answer the questions following the list and prepare a short presentation for the class.

- ***Emancipation Proclamation (1863)***. Freedom of slaves in territory of the Confederate States of America that did not return to Union control by January 1, 1863
- ***Executive Order 8802 (1941)***. Nondiscrimination in employment
- ***Executive Order 9981 (1948)***. Integration of the military
- ***Executive Order 10730 (1957)***. Integration of schools in Little Rock, Arkansas
- ***Executive Order 11246 (1965)***. Enforcement of affirmative action
- ***Philadelphia Plan (1969)***. Affirmative action in federal employment
- ***Code of Federal Regulations, Title 34 (C.F.R. 34) (2000)***. Implementation of parts of the Civil Rights Act of 1964 regarding nondiscrimination in education, as follows:
  - *Part 100*. Prohibits discrimination on the basis of race, color, or national origin
  - *Part 104*. Prohibits discrimination on the basis of disability
  - *Part 106*. Prohibits discrimination on the basis of sex
  - *Part 110*. Prohibits discrimination on the basis of age
- ***Code of Federal Regulations, Title 28, Part 35 (1991)***. Prohibits discrimination on the basis of disability

- 
1. What were the historical circumstances that led to the executive action?
  2. What are the major provisions of the executive order or federal regulation?
  3. What rights does the order or regulation promote or protect?
  4. How does the order or regulation reflect a major shift in American public policy?
  5. How has the order or regulation changed the course of private and public action?
  6. How was the democratic political process used to influence the executive branch to issue this order or regulation?
  7. Was this order or regulation a result of congressional action? If so, what were they and how did they help get the order or regulation enacted?
  8. Was this order or regulation the result of the influence of civil interest groups? If so, what were they and how did they help get the order or regulation enacted?
  9. What other factors contributed to the enactment of this order or regulation?

## How Does the American President Differ From a Prime Minister?

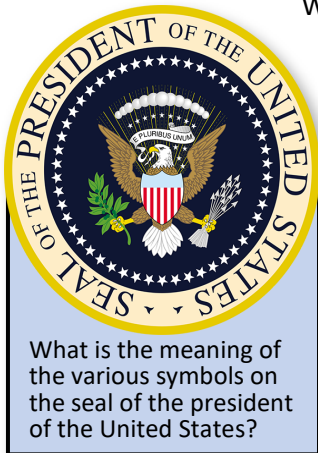


Figure 5.23.12

What role should government play, if any, in ensuring that disabled people have access to public facilities?

In a parliamentary system, the majority party or coalition in parliament appoints the prime minister, the highest-ranking member of the executive branch of a parliamentary government. Cabinet ministers usually are the leading parliamentary figures in the majority party. In Britain, the prime minister must have served in parliament so that they come to the office of prime minister with extensive government experience. Legislative and executive powers are integrated in parliamentary systems. That integration is believed to make the government more efficient and better able to reflect the popular will. A prime minister who submits a list of measures to parliament can be confident that parliament will enact the proposals. However, if the prime minister loses the confidence of parliament, they can be removed immediately.

In the United States the legislative, executive, and judicial branches are not integrated. The country as a whole chooses the president. Congress usually has no say in who is elected, and the Constitution does not require a president to have any prior experience in national government. Neither must the majority in either the House or the Senate be of the same political party as the president. The Constitution does not require Congress to adopt legislation that the president proposes, approve treaties that the president negotiates, confirm the president's judicial or other nominees, or fund wars. The president's actions also are subject to review by the judiciary branch and may be declared unconstitutional. Unlike a prime minister, the president serves a fixed four-year term and does not lose office merely because of low public opinion or failure to persuade Congress to enact proposed legislation.

If the president of the United States has become the preeminent figure in domestic and international politics, it is because presidents have used their constitutional and discretionary powers to their advantage. Presidential power depends on the ability to persuade, to navigate through the complexities of separation of powers, to garner trust, and to shape public opinion. History also shows that the president's roles in foreign affairs and as commander in chief are great sources of power. However, as Lyndon Johnson discovered during the Vietnam War, if public opinion turns against the president's foreign policies, that president's power is in jeopardy. Finally, since the United States has become a world power, the president's standing in the eyes of the public and, in the words of the Declaration of Independence, in the "Opinions of Mankind," may enhance or detract from the international reputation of the nation.



How did public opinion during the Vietnam War affect the presidency of Lyndon Johnson?  
*The Vietnam War was ended by Congress in June 1973 by the Case-Church Amendment, which prohibited further U.S. military activity in Vietnam, Laos, and Cambodia. To continue military activity in those countries the president would have had to ask Congress for approval in advance. At the time, Congress would not have granted such approval.*

Figure 5.23.13



## Content Highlight:

### WHAT DO YOU THINK?

1. Would you support a constitutional amendment to change the president's tenure in office from a fixed term to a vote-of-confidence system as in Great Britain? Why or why not?
2. Would you support a constitutional amendment to change the president's term of office to one six- or eight-year term? Why or why not?
3. What are the advantages and disadvantages of having the president chosen by the people rather than the legislature?
4. Should the president be required to appear before Congress from time to time to answer direct questions, as prime ministers are required to do in parliamentary systems? Why or why not?

## Conclusion

From presidents to prime ministers to dictators, the leaders of nations have a great deal of power. In this lesson, you saw how the power of American presidents has changed over time. The Framers wanted the person occupying the office to take initiative and provide strong leadership for the nation. But they also did not want the president to be too powerful. The courts and Congress are responsible for checking the president's powers. However, in times of crisis or war, presidents tend to expand their powers. Congress typically supports the president to end the crisis or defend our nation.

## Lesson Check-up



- What factors explain the growth of presidential power during our nation's history?
- Has Congress relinquished too much power to the president? Explain your view.
- How is the system of checks and balances designed to limit the exercise of presidential power?
- How well does the system of checks and balances work? Why?
- How would you define a "feeble" executive? In what ways might a feeble executive be as dangerous as an overly "energetic" executive?
- What are the differences between a president and a Prime Minister?



# Administering National Laws



## Key words

- bureaucracy
- cabinet
- civil service
- independent agencies
- quasi-judicial powers
- quasi-legislative powers

## What You Will Learn to Do

Determine how federal departments and agencies administer laws

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Treat self and others with respect

## Learning Objectives

- **Explain** why Congress creates administrative units, the circumstances that contribute to their creation, and the range of governmental functions that administrative units perform
- **Identify** some of the checks on the exercise of administrative power



## Essential Question

How are national laws administered in the American constitutional system?

### Learning Objectives (cont'd)

- **Evaluate**, take, and defend positions on public administration in the United States
- **Define** key words: bureaucracy, cabinet, civil service, independent agencies, quasi-judicial powers, quasi-legislative powers

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### Introduction

Departments, agencies, and bureaus that administer the laws, often referred to as the **bureaucracy**, touch every aspect of American life. For example, the Environmental Protection Agency sets standards for water and air quality. The Department of Transportation adopts rules for the development and operation of the interstate highway system. The Federal Aviation Administration oversees air traffic safety. The Food and Drug Administration approves medications. This lesson examines the role of administrative departments and agencies in America's national government.

### What Kinds of Administrative Units Exist in the American National Government?

The Founders understood that Congress would need to create organizations to execute the laws. Several of the Federalist essays discussed the importance of "good administration" as a condition of good government. The first Congress under the Constitution created the first administrative units: the Departments of State, War, and Treasury. It also created the Office of the Attorney General, which later merged into the Justice Department. Over the years Congress has created other administrative agencies. Today, there are basically three categories of administrative organizations, each with distinct responsibilities.

### Key words

**bureaucracy:**

Governmental departments and agencies and their staffs, principally civil service members and political appointees

## Key words

### **cabinet:**

The group of advisors to the president composed of the heads of the departments of the executive branch and certain other officials

### **independent agencies:**

Administrative organizations located outside the structure of executive departments

## EXECUTIVE DEPARTMENTS

At present there are fifteen primary administrative units, or departments, in the executive branch. Congress directs each department to administer particular laws. The president appoints the secretaries, or heads, of each department. The secretaries of the departments serve in the president's **cabinet**, which advises the president. The secretaries also are in the line of presidential succession if the vice president, Speaker of the House, and President pro tempore of the Senate are unable to serve. Some departments, such as the Departments of Defense and Justice, are the result of combining older departments or offices. Others, such as the Department of Health and Human Services and the Department of Education, are the result of dividing older departments. Every department contains various divisions and bureaus, each with a particular area of expertise.

## EXECUTIVE OFFICE OF THE PRESIDENT (EOP)

President Franklin Roosevelt complained that he lacked the necessary administrative “machinery” to execute the laws. In 1939, Congress created the Executive Office of the President to help with matters such as budgeting, personnel management, and natural resources planning. The EOP has grown into an umbrella organization with more than a dozen staff agencies. These agencies include the White House Office—including Homeland Security staff—the Office of Management and Budget, the Council of Economic Advisors, the National Security Council, and the Office of the United States Trade Representative. Some presidents rely on the EOP primarily for technical and managerial advice. Others use it to try to gain greater political control over the national bureaucracy.

## INDEPENDENT AGENCIES

Since 1887, Congress has created many **independent agencies** that are located outside the structure of executive departments. These agencies do more than merely implement congressional statutes. The first independent agency was the Interstate Commerce Commission. Congress directed the commission to decide whether the rates that state imposed on interstate commerce were “reasonable”—a partial, or “quasi,” legislative power—and to order the states to stop imposing “unreasonable” charges. Congress also empowered the commission to go to court to enforce its orders. In 1894, the Supreme Court held that the authority Congress had given to the commission was a “necessary and proper” exercise of its power to regulate commerce. Since then, Congress has created more than fifty other independent agencies. These agencies include the Social Security Administration, the Environmental Protection Agency, the Peace Corps, and the Federal Energy Regulatory Commission.

Not all administrative organizations fit into these three categories. For example, the Federal Emergency Management Agency (FEMA) was created as an independent agency. It is now officially located in the Department of Homeland Security, but it retains much of the autonomy that it established while it was an independent agency. The United States Postal Service is an example of a government corporation, created to

replace the Post Office Department. The Federal Communications Commission and the Occupational Safety and Health Review Commission are examples of organizations created to make and enforce regulations affecting regulated industries.



How do independent agencies help the president make and implement policy decisions? *Central Intelligence Agency Director George Bush (standing at left) discussing the evacuation of Americans from Beirut with President Gerald R. Ford (at right) during a meeting in the White House on June 17, 1976. Three days later Ford ordered hundreds of Americans and other foreign nationals to be evacuated from the Lebanese capital during the Lebanese Civil War.*

Figure 5.24.1



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### What is “Good Administration?”

Federalist 68 argued that the “true test of good government is its aptitude and tendency to produce good administration.” Work in small groups to respond to the following questions and then compare your responses with other groups.

1. What are the characteristics of “good administration”? Have the characteristics changed since the creation of the first administrative agency in 1789? If so, in what ways?
2. What powers do Congress, the president, and the courts have to ensure “good administration?”

## Why Does Congress Create Administrative Organizations and What Powers Do They Exercise?

Laws are often written in general terms. Congress cannot anticipate and does not have the expertise to resolve problems that arise when general laws are applied to specific circumstances. Almost from the beginning Congress has had to delegate some of its



## Key words

### **quasi-legislative powers:**

Having a partly legislative character by possession of the right to make rules and regulations having the force of law

### **quasi-judicial powers:**

Actions of an agency, board, or other government entity in which there are hearings, orders, judgments, or other activities similar to those of courts

lawmaking powers to those who administer the laws. Administrative units exercise **quasi-legislative powers** by adopting rules to implement broad congressional mandates. Rules are published in the Federal Register. Many administrative units also exercise **quasi-judicial powers** by holding hearings to resolve disputes that involve parties claiming to have been injured by administrative policies or procedures.

The Internal Revenue Service (IRS) provides an example. The Sixteenth Amendment gives Congress the power to “lay,” or establish, and collect taxes on income. Congress enacts general income tax laws. It has delegated to the IRS the responsibility to make and enforce rules about tax collection, including income tax forms, deadlines, and penalties for late filing. The IRS holds quasi-judicial proceedings, including hearings and opportunities to present evidence to a neutral hearings officer, for taxpayers who are accused of violating tax rules.

In 1946 Congress adopted the Administrative Procedure Act, which established guidelines for administrative units to follow when they make rules to implement laws. Among other things, the act requires public notice and an opportunity for the public to be heard before a rule goes into effect. The act also permits judicial review of the decisions of administrative units in federal court after someone has gone through, or exhausted, all quasi-judicial proceedings within the administrative unit.

## What Factors Have Contributed to the Number of Administrative Organizations?

The national bureaucracy has grown in response to demands placed on the national government. To establish greater control over the nation’s natural resources, Congress created the Departments of Agriculture and the Interior. In response to problems that arose during the Industrial Revolution, Congress created the Departments of Commerce and Labor, the Interstate Commerce Commission, and the Federal Trade Commission.

The Great Depression and President Franklin Roosevelt’s New Deal caused another significant growth of the national bureaucracy. The Tennessee Valley Authority, the Small Business Administration, the Federal Communications Commission, and the Social Security Administration trace their origins to the economic crisis of the 1930s and 1940s. Many programs also were added to existing agencies and departments during that time, such as a commodity support program in the Department of Agriculture.

The Cold War spawned the creation of the Department of Defense, the National Security Council, the Central Intelligence Agency, and the National Science Foundation. Programs such as the War on Poverty in the 1960s and energy crises in the 1970s led to the creation of more agencies, including the Department of Housing and Urban Development and the Department of Energy.

Beginning in the 1970s, presidents and many members of Congress sought to reduce the size of the national government. The Civil

Aeronautics Board, which regulated commercial aviation, was abolished in 1984. The Interstate Commerce Commission and the Resolution Trust Corporation, created to respond to bankruptcies of hundreds of savings and loan institutions, were abolished in 1995. The national bureaucracy also was scaled back when greater responsibility for welfare was returned to the states. The terrorist attacks on New York and Washington, D.C., in 2001, however, led President George W. Bush to agree to the creation of a Department of Homeland Security, which Congress created in 2002.



Figure 5.24.2

### How Are Administrative Agencies Staffed?

Today the vast majority of administrative civilian employees are selected through a **civil service** program or merit system. Congress created the system in 1883 following the assassination of President James Garfield by a disappointed office seeker. In passing the nation's first civil service law, Congress substituted merit for patronage, or the practice of rewarding supporters by giving them permanent jobs in the civil service.

By law Congress continues to exercise broad control over administrative employees. Congress can establish special requirements for holding office. It can set employee performance standards, wages, benefits, and cost of living adjustments. Congress also can provide protection for "whistle blowers," employees who expose waste or corruption.

When the civil service system was developed, it was intended to create a class of administrative employees who were insulated from politics. Thus, Congress passed the Hatch Act of 1939, which prohibited political parties from pressuring administrative employees to make financial contributions or to work for their candidates as a condition of job security or promotion. Some people complained that the Hatch Act deprived administrative employees of opportunities to participate in the political life that other Americans enjoyed. Finally, in 1993 President Clinton signed the Hatch Act Reform Amendments into law. These measures encourage civil servants to participate in political activity in accordance with regulations prescribed by the Office of Personnel Management.

Title 5 of the United States Code governs the merit principle in today's administrative agencies. However, a growing number of administrative jobs are being exempted from the provisions of Title 5. Individual agencies and departments have received authority to create their own personnel services outside standard civil service laws. The United States Postal Service, the Department of Defense, the Federal Aviation Administration, and the new Department of Homeland Security are examples.

### Key words

**civil service:**

Employment in federal, state or provincial, and local governmental agencies

Presidents also make appointments to federal agencies. These political appointees serve at the pleasure of the president, and their numbers have been growing. Through these appointments presidents have been able to place their own people in key leadership and support positions in all the federal agencies. Such appointments include the secretaries, or heads, of the departments that constitute the president's cabinet. By means of this network of political appointees the president can exercise considerable control over the federal bureaucracy to ensure that it furthers their policy priorities and agenda.

Whenever a new administration takes office, most political appointees lose their positions. There may be an almost complete change in the leadership of some of the administrative agencies. However, civil service employees retain their jobs and remain available to assist the new president and his or her cabinet in implementing the new administration's policies. By contrast, only a small number of senior civil service positions change hands in Great Britain when a new prime minister is chosen.



To what extent, if any, does political patronage still exist?  
*This 1881 political cartoon illustrating political patronage shows President Chester A. Arthur as a magician pulling cards labeled with the names of political offices out of a hat and tossing them into the audience.*

Figure 5.24.3

### Content Highlight: WHAT DO YOU THINK?

1. What are the advantages and disadvantages of patronage? Of civil service?
2. Should individual agencies or departments be able to create their own personnel service standards outside the civil service laws? Why or why not?

## How Do Checks and Balances Affect Administrative Agencies?

Administrative agencies are subject to many checks on the exercise of their powers. Those who exercise checks include the following.

### THE PRESIDENT

Presidents use their appointment power to reward political loyalists and advance their policy agendas. Presidential appointees usually are required to pursue the president's policies in administering government programs, thereby checking the power of civil service career employees.

Presidents also check the exercise of administrative power through the use of executive orders that direct agency heads and cabinet members to take particular actions. Executive orders have become more common in recent years as a means of forcing agencies to adjust administrative policies and procedures. For example, soon after he took office President George W. Bush issued executive orders creating Centers for Faith-Based and Community Initiatives offices in several departments and agencies to help ensure that faith-based groups would receive government contracts to provide social services.

### CONGRESS

Congress can control the bureaucracy in many ways. It is responsible for the creation, consolidation, and elimination of administrative agencies. The Senate must confirm high-level presidential appointees. Many statutes direct agencies to undertake certain actions and refrain from others. Congress also must appropriate the money required for agencies to operate. Congressional committees are responsible for overseeing the actions of administrative agencies. They review agency budgets, require administrators to justify expenditures, hold investigative hearings about agency activities, and require agencies to submit their proposed rules, which Congress has the power to veto.

Although the Supreme Court declared the congressional veto unconstitutional in 1983, Congress has continued to use it and has found other ways, including joint resolutions, to prohibit agencies from implementing rules with which Congress disagrees.

### COURTS

Courts decide whether agency operations follow the Fourteenth Amendment requirements of due process and equal protection. Courts also determine whether Congress has delegated too much legislative authority to administrative agencies. The Supreme Court has never questioned Congress' power to permit administrative agencies to "fill in the details" of statutes, but the Court has insisted that Congress clearly identify the standards that agencies must meet.

### FEDERALISM

If a state policy differs from a national policy—as has occurred in areas such as education, welfare, and environmental protection—then national bureaucrats can encounter resistance or refusal to comply with the national standards. Sometimes acting alone and almost always when acting with others, states can have a significant effect on the national bureaucracy.



## **CITIZENS, INTEREST GROUPS, AND THE MEDIA**

Those who are directly affected by administrative policies or who are interested in particular areas of public policy also check the exercise of administrative power. Many Social Security recipients, for example, monitor actions of the Social Security Administration and report complaints to the agency or to members of Congress. Environmental activists, welfare recipients, and many other individuals and groups keep close watch over various administrative agencies. Media investigations also can alert the public and elected officials to problems and miscarriages of justice in the bureaucracy.



### *Content Enhancement:*

#### **CRITICAL THINKING EXERCISE**

##### **Administrative Agencies and Limited Government**

James Madison argued in Federalist 47 that the “accumulation of all powers—legislative, executive, and judiciary in the same hands—may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with this accumulation (of power), or with a mixture of powers, having a dangerous tendency to such an accumulation of power, no further arguments would be necessary to inspire a universal reprobation of the system.”

Some administrative agencies exercise all three types of governmental powers to some degree. In addition to executing the laws, they exercise quasi-legislative powers by making rules and quasi-judicial powers by holding hearings on whether those rules have been violated. However, administrative agencies also are subject to checks and balances. Work in small groups to respond to the following questions and then compare your responses.

- In what ways is the exercise of all three kinds of powers by administrative agencies inconsistent with theories of separation of powers and limited government?
- What checks on the exercise of administrative authority are available to prevent agencies from coming within Madison’s definition of tyranny?
- What might be some alternatives to agencies exercising all three kinds of governmental powers? Are those alternatives realistic?

## Conclusion

Our nations' businesses, technology, medicine, education, and transportation systems have grown immensely since the 1800s. And so, in turn, has our national government. In many cases, new federal agencies and departments were created to address a problem such as: air traffic safety, fair wage rules, safety in medicines, prevention of monopolies, fairness in banking and financial practices, and so on. In this lesson, you saw that federal agencies wield power by adopting rules for laws that will be implemented.

## Lesson Check-up



- How would you define the term bureaucracy?
- How and why do Congress and the president rely on administrative agencies?
- Describe the sources of limits on the exercise of administrative power.
- Find an example of how the media or a citizens group in the United States or in your community has brought to light a problem in the bureaucracy.

# The Supreme Court



## Key words

- advisory opinion
- appeal
- appellate jurisdiction
- jurisdiction
- landmark decision
- litigant
- methods of constitutional interpretation
- original jurisdiction
- writ of certiorari

## What You Will Learn to Do

Determine the role of the Supreme Court in shaping our nations' laws

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Treat self and others with respect

## Learning Objectives

- **Explain** the difference between the Supreme Court's original and appellate jurisdictions
- **Explain** four methods of constitutional interpretation
- **Explain** how America's system of checks and balances limits the power of the Supreme Court

## Essential Question

What is the role of the Supreme Court in the American constitutional system?

### Learning Objectives (cont'd)

- **Evaluate**, take, and defend positions on issues relating to the role of the Supreme Court in the constitutional system
- **Define** key words: advisory opinion, appeal, appellate jurisdiction, jurisdiction, landmark decision, litigant, methods of constitutional interpretation, original jurisdiction, writ of certiorari

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### Introduction

The U.S. Constitution provides for an independent judiciary, a significant departure from the English tradition of formally placing judicial power in the legislative branch. Alexander Hamilton predicted that the Supreme Court would be the “least dangerous branch” because it depends on the other two branches to enforce its decisions. This lesson examines how the U.S. Supreme Court has become a coequal branch of the national government and describes some of the institutional checks on its power.



How, if at all, might the philosophical positions of a majority on the Supreme Court affect the daily lives of citizens?

*Figure 5.25.1*



## Key words

**jurisdiction:**

The power or authority to hear cases and make decisions

**original jurisdiction:**

In this instance, cases in which the Supreme Court has the right to consider the facts and the law in a case without it having first been passed on by a lower court

**appellate jurisdiction:**

The legal authority of a court to hear appeals from a lower court

**appeal:**

Bringing a court case from a lower court to a higher court in an attempt to have the lower court's decision reversed

**litigant:**

A party involved in a lawsuit

**writ of certiorari:**

A type of writ seeking judicial review of a legal decision

## What are the Constitutional Powers of the Supreme Court?

Article III of the Constitution created the Supreme Court and gives Congress power to create other courts that are inferior to, or below, the Supreme Court. The Constitution gives all judges whose authority comes from Article III, called federal judges, life tenure. It gives courts created under the authority of Article III, called federal courts, **jurisdiction**, or power to decide only certain cases. These are cases arising under national laws and involving citizens from more than one state. Finally, the article guarantees trial by jury in all criminal cases except impeachment. The Supreme Court also exercises the power of judicial review, deciding whether acts of Congress, the executive, state laws, and even state constitutions violate the U.S. Constitution.

The Constitution gives the Supreme Court jurisdiction to decide two categories of cases: original and appellate.

### ORIGINAL JURISDICTION

**Original jurisdiction** refers to the power of a court to pass judgment on both the facts of a case and the law. The Supreme Court has original jurisdiction in “Cases affecting Ambassadors, other public Ministers and Consuls,...[and]...Controversies to which the United States shall be a Party.” When the Supreme Court hears a case in its original jurisdiction, it is the only court to hear the case. The Court hears very few cases under its original jurisdiction. Those cases typically involve foreign diplomats or disputes between states over land, boundaries, or water and mineral rights. The U.S. Supreme Court has held that Congress cannot add to or subtract from the Court’s original jurisdiction.

### APPELLATE JURISDICTION

**Appellate jurisdiction** refers to the power of a superior, or higher, court to review and revise the decision of an inferior, or lower, court. To **appeal** means to ask for a new hearing from a higher court in the hope that it will overturn or modify a lower court’s decision. The Supreme Court has appellate jurisdiction in all cases not in its original jurisdiction “with such Exceptions, and under such Regulations as the Congress shall make.” Beginning with the Judiciary Act of 1789, Congress created a three-tiered system of national courts. Today, there are trial courts in each state, known as federal district courts, and thirteen courts of appeal, known as federal circuit courts. Congress frequently debates whether to limit the Supreme Court’s appellate jurisdiction in areas such as school prayer and the rights of criminal defendants. Historically, however, Congress has made relatively few exceptions to the Supreme Court’s appellate jurisdiction.

A **litigant**—a party involved in a lawsuit—who loses in a lower federal court or the highest court of a state can ask the Supreme Court to review the case. The party does so by filing a document called a petition, or request, for a **writ of certiorari**. The Court is not required to issue a writ. The Court’s rules currently state that the justices are more likely to allow review if there is disagreement among the federal courts of appeal on a

legal matter. If four Supreme Court justices vote to allow review of a case, then the Court issues the writ, which commands the lower court to send the record of the case to the Supreme Court. The Court traditionally does not explain its rationale for accepting or rejecting cases for review.

Each year the Supreme Court receives thousands of petitions asking it to issue a writ of certiorari. The justices accept only a small fraction. The number of cases that the Court decides has steadily decreased in recent years. For example, in 1980 the Court decided 232 cases. In 1995, the number was 95, and in 2006 it was 72. Most of the cases that the Court decides require it to interpret only the meaning of statutes or administrative rules, not their constitutionality.



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Examining Landmark Supreme Court Decisions

Some Supreme Court decisions have such profound effects on the meaning of separation of powers, checks and balances, individual rights, and federalism that they become known as **landmark decisions**. Like landmark legislation, described in Lesson 22, these decisions have far-reaching effects on how American constitutional government functions. Work in one to six groups, with each group taking a different case from the list below. Each group should study the case and then prepare a brief following the format for briefing Supreme Court decisions. Each group should then present to the other members of the class.

- *McCulloch v. Maryland* (1819)
- *Reynolds v. Sims* (1964)
- *Gibbons v. Ogden* (1824)
- *Nixon v. United States* (1974)
- *Gideon v. Wainwright* (1963)
- *United States v. Lopez* (1995)

1. What are the implications of the case for the way American constitutional government should function?
2. How did the Court's decision in this case clarify the meaning of the Constitution?
3. What additional constitutional challenges might arise in response to this decision?
4. Should the decision in this case be considered a landmark decision? Why or why not?

## Key words

**landmark decision:**  
A legal decision that constitutes a turning point or stage

## What Methods Are Used to Interpret the Constitution?

Since its inception, the Supreme Court has issued written opinions explaining its decisions. Initially each justice wrote an opinion in each case. Chief Justice John Marshall changed that practice, and since his era the Court has issued only majority, concurring, and dissenting opinions. Written opinions serve several functions. An important one is that they

hold the Court accountable to the people by making a public record of the decision and its rationale. Written opinions also establish a record that can serve as precedent for future cases.

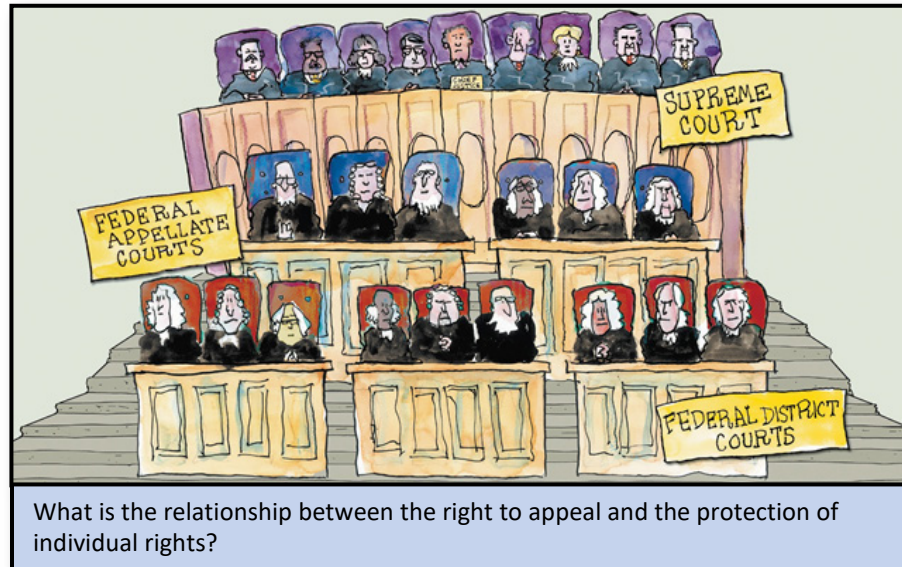


Figure 5.25.2

Some parts of the Constitution are very specific. For example, Article I states, “The Senate of the United States shall be composed of two Senators from each State.” Many provisions are not as clear as this one and so require interpretation. Examples include the following:

- “The Congress shall have Power...To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” (Article I, Section 8)
- “The United States shall guarantee to every State in this Union a Republican Form of Government.” (Article IV, Section 4)
- “No State shall...deprive any person of life, liberty, or property, without due process of law.” (Amendment XIV)

The following are four common **methods of constitutional interpretation**. All interpretation, regardless of method, begins with the words of the Constitution.

### **TEXTUALISM, LITERALISM, OR STRICT CONSTRUCTION**

This method involves looking at the meaning of words in the Constitution and giving each word, phrase, or clause its ordinary meaning. Advocates of this method argue that interpreting the Constitution according to its plain meaning keeps the Supreme Court neutral and helps justices avoid imposing their values on the Constitution. Relying on the plain meaning of words also makes the law certain and predictable.

### **ORIGINAL INTENT OR ORIGINAL HISTORY**

This method is related to the method described above, but it addresses the question of how to interpret words, phrases, or clauses that are not clear. Advocates of this method seek to understand what the Founders

## Key words

### **methods of constitutional interpretation:**

Ideas employed by U.S. Supreme Court justices when considering constitutional issues of some cases

meant when they wrote the words. They argue that the Founders debated and chose the words of the Constitution carefully, with the goal of producing an enduring constitutional framework. Seeking and applying the original intent of the Founders helps to maintain stability and neutrality in the law.

### **FUNDAMENTAL PRINCIPLES**

This method looks to principles—such as natural rights, republican government, or limited government—to interpret the meaning of words, phrases, and clauses that may not be clear. Advocates of this method argue that identifying the fundamental principles embodied in the Constitution is a useful way to determine the meaning of words, phrases, or clauses that may not be clear.



Figure 5.25.3

### **MODERNISM OR INSTRUMENTALISM**

This method starts from the premise that the Constitution should be interpreted, and interpretation should adapt to changing circumstances and contemporary needs. Otherwise, advocates of this method argue, the Constitution will have to be amended frequently or new constitutional conventions will need to be held. Advocates of this method further argue that justices should not hold back social progress by adhering to outmoded understandings of the Constitution.



### **Content Highlight:** **WHAT DO YOU THINK**

1. What are the advantages and the disadvantages of each method of interpreting the Constitution?
2. Which method or methods do you prefer? Why?

### **What Checks Exist on the Power of the Supreme Court?**

The Supreme Court exercises immense power when it interprets the Constitution. However, there are many checks on the exercise of judicial power, including limitations that the Supreme Court has imposed on itself. The following are checks on the Court's power.

### **SELF-IMPOSED LIMITS**

The Court avoids partisan politics by refusing to decide “political questions,” or questions that it believes should properly be decided by other branches or levels of government. The Court decides only cases in controversy. The Supreme Court does not issue an



## Key words

### **advisory opinion:**

In some judicial systems, a formal opinion on a point of law given by a judge or court when requested by a legislature or government official

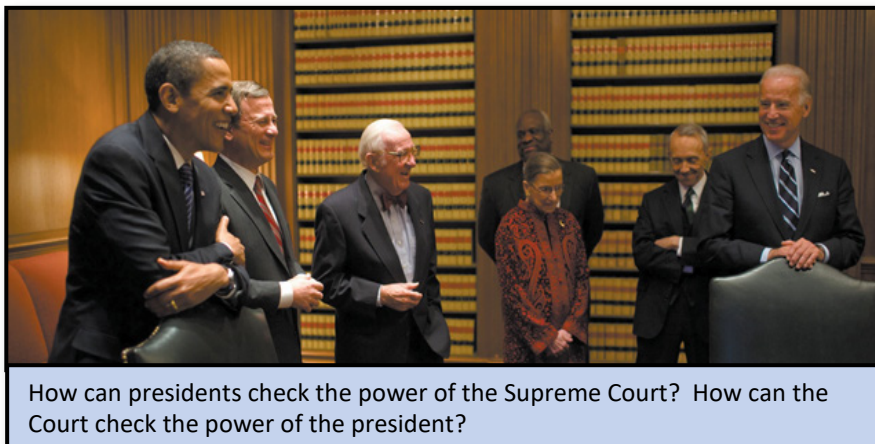
**advisory opinion.** That is, the Court will not offer an opinion about how a law should be interpreted unless there is a specific case before the Court in which the interpretation of that law is actually in dispute. The Court will decide cases by interpreting statutes if possible, thereby avoiding interpreting the Constitution. Written opinions also constrain future Courts.

### **PRESIDENTIAL APPOINTMENTS**

Presidents seek to influence future Supreme Court decisions with their nominees to the Court. By changing Court personnel, presidents seek to change approaches to constitutional interpretation and attitudes about the role of the Court in the constitutional system.

### **EXECUTIVE ENFORCEMENT**

Presidents and administrative agencies are responsible for enforcing the Court's decisions. Occasionally, presidents have threatened to refuse to enforce Supreme Court decisions or have enforced them only reluctantly. For example, in 1974 Americans anxiously waited to see if Richard Nixon would comply with the Supreme Court's order in *United States v. Nixon*. The Court had ordered the president to turn over White House tape recordings to prosecutors. Once revealed, the tapes implicated Nixon and his aides in the Watergate scandal.



How can presidents check the power of the Supreme Court? How can the Court check the power of the president?

Figure 5.25.4

### **CONGRESSIONAL POWERS**

Congress determines the Supreme Court's appellate jurisdiction and controls its budget. Congress has threatened to use those powers in response to Supreme Court decisions with which it disagrees. If the Supreme Court declares a congressional statute unconstitutional, Congress may pass the statute in another form to demonstrate its resolve on the issue. Congress also can alter the size of the Court, as it has done several times over the years. It can even determine when the Court meets or suspends a term of the Court, as it did in 1802. Finally, Congress can initiate constitutional amendments in response to unpopular Court decisions, such as a decision in 1895 that struck down an income tax statute. The Sixteenth Amendment, ratified in 1913, subsequently gave Congress the power to lay and collect taxes on income.

## **FEDERALISM**

States, like the executive branch, are responsible for implementing Supreme Court decisions. Sometimes state enforcement is lax. For example, more than sixty years after the Supreme Court ordered public school desegregation, several states still have found ways to evade that ruling.

- Should Supreme Court hearings be televised or streamed over the Internet? Why or why not?
- What characteristics should justices of the U.S. Supreme Court have? Why are these characteristics important?

## **Conclusion**

In this lesson, you learned about the Supreme Court, our nation's highest court. Supreme Court decisions have changed the way our nation has operated many times over the course of its history. However, the Court rules on a very small percent of court cases and its power can be limited in a variety of ways.

## *Lesson Check-up*



- Explain the difference between original and appellate jurisdiction. What is the role of Congress in determining the Supreme Court's appellate jurisdiction?
- Identify four approaches to interpreting the Constitution. Which approach do you think is best? Why?
- What criteria do you think should be used to determine whether a Supreme Court decision is a landmark decision?
- Would you support a constitutional amendment that placed term limits on Supreme Court justices? Why or why not?

# American Federalism

## LIMITED GOVERNMENT

### 9th Amendment

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

### 10th 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.*

## Key words

- initiative
- local government
- police powers
- recall
- referendum
- reserved powers

## What You Will Learn to Do

Describe the benefits and pitfalls of American federalism

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Treat self and others with respect

## Learning Objectives

- **Explain** how American federalism involves divided sovereignty and an ongoing effort to balance power between the national and state governments
- **Explain** the function of three basic kinds of local governmental units—counties, municipalities, and special districts
- **Identify** examples of governmental innovations at the state and local levels

# Essential Question

How does American federalism work?

## Learning Objectives (cont'd)

- **Evaluate**, take, and defend positions on continuing issues related to America's unique system of federalism
- **Define** key words: initiative, local governments, police powers, recall, referendum, reserved powers

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## Introduction

The American constitutional system is made up of two levels of government: national and state. The system is called federalism. The powers of and the boundaries between the national and state governments never have been clear. Sometimes the national and state governments seem to work in harmony. Sometimes they seem locked in a struggle for power. This lesson examines constitutional provisions affecting the states in their relationship to the national government. It explains how state governments are organized, including their creation of units of local government. Finally, it describes the role of states as “laboratories of democracy.”

## What Is the Constitutional Status of State Governments?

As explained in Lesson 7, states were the only units of government in the United States after the Revolution. They had complete governing authority over the people within their boundaries. Under the Articles of Confederation, states retained their “sovereignty, freedom, and independence” and all powers not “expressly delegated” to the United States.

The Constitution created a new national government, but it left, or “reserved,” many governmental powers to the states. The powers referred to in the Ninth and Tenth Amendments that are reserved to the states or to

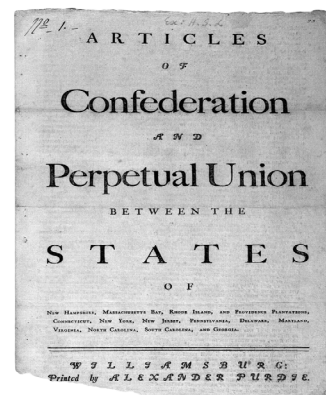


Figure 5.26.1



## Key words

### **reserved powers:**

The powers referred to in the Ninth and Tenth Amendments that are reserved to the states or to the people

### **police powers:**

The inherent authority of a government to impose restrictions on private rights for the sake of public welfare, order, and security within the boundaries of constitutional law

the people are called **reserved powers**. James Madison argued in Federalist 45 that the powers of the states would “extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”

States play an important role in the structure and operation of the national government. Article VII, for example, required the votes of “nine States” to ratify “this Constitution between the States.” Article I provides that the House of Representatives will be elected by voters who have the same qualifications as are required to vote for the “most numerous Branch of the State Legislature,” usually called a “house” or “assembly.” States are represented equally in the U.S. Senate. States also have a role in the Electoral College.

The Constitution suggests, but does not plainly identify, many governing powers left to the states. Article I, Section 10, lists powers that the states do not have. For example, no state can enter into treaties, alliances, or confederations, grant titles of nobility, or pass laws that impair the obligation of contracts. The list of what states cannot do implies that the states can do what is not prohibited. Article I describes the powers of Congress as those “herein granted,” again suggesting that governing powers not granted to Congress remain with the states. Moreover, the Tenth Amendment, added to the Constitution in 1791, states, “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.” The reserved powers referred to in the Tenth Amendment often are called **police powers**, a term that refers to the inherent power of a government to enact legislation protecting the health, safety, welfare, and morals of those within its jurisdiction. Examples of police powers are laws creating and operating public schools, making and executing criminal and civil laws, and making and enforcing land use regulations, or “zoning.”

Although the states retain considerable governing powers, the Constitution, the laws made under it, and treaties made under the authority of the United States are the “supreme Law of the Land.” Since the beginning there has been tension between the Constitution’s Supremacy Clause and the powers of the states. Some constitutional scholars believe that ambiguities about which level of government has the power over matters of domestic politics are part of the genius of the American constitutional system. These ambiguities mean that both levels of government always must strive to win the confidence and support of the American people.



### Content Highlight: WHAT DO YOU THINK?

- Read the Supremacy Clause in Article VI, Section 2, and the Tenth Amendment to the Constitution. How do these two provisions help to explain why the national and state governments seem to be locked in a perpetual struggle for powers?
- How would you explain American federalism to a non-American?

## How Are State Governments Organized?

All fifty states have constitutions. The following are some common features of the state constitutions.

### BILL OF RIGHTS

All the state constitutions have bills of rights, and in most states they appear at the beginning of the constitution. The preamble of most state constitutions declares that the purpose of government is to protect those rights. State bills of rights include many of the same rights as in the U.S. Constitution, such as rights to freedom of speech, press, and assembly and the right to a jury trial. Some state constitutions contain other rights, such as the right to work or the right to an education.

### THREE BRANCHES OF GOVERNMENT

All state constitutions create legislative, executive, and judicial branches.

#### **Legislative**

The lawmaking branch usually is called the legislature, but some states use the term assembly. Most legislatures meet annually; some meet only biennially—that is, every other year. Most legislatures are bicameral, or two-house, although Nebraska has a unicameral, or one-house, legislature. The Supreme Court has ruled that the legislative districts for both houses of state legislatures must be based on population. Unlike the U.S. Senate, therefore, the upper house of the state legislatures must reflect population, not geography. State legislatures enact laws on subjects ranging from speed limits and crimes to health care, education, land use, environmental protection, and licensing of professionals, including teachers, doctors, lawyers, beauticians, and morticians.

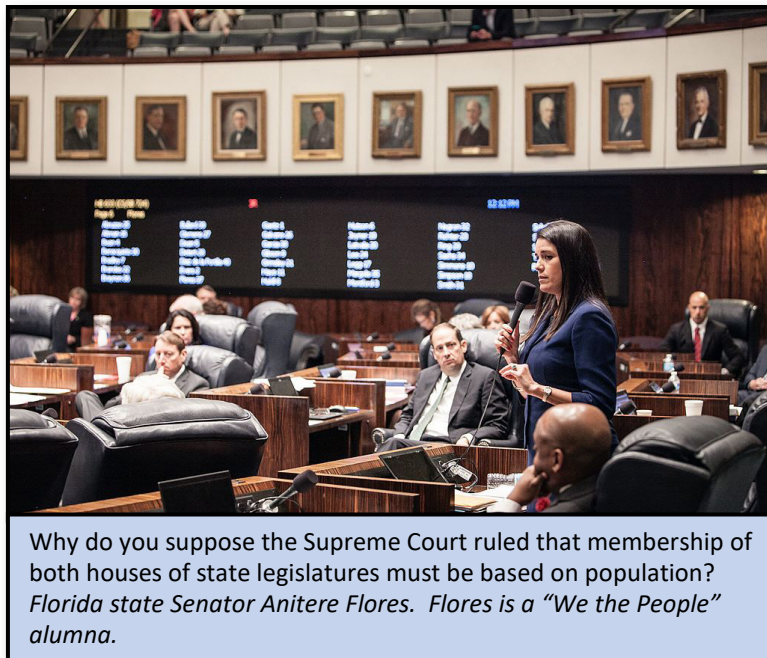


Figure 5.26.2

#### **Executive**

The chief executive officer of each state is the governor. Most governors serve two or four-year terms and may be reelected for at least one additional term. Most states also

## Key words

### **local government:**

Government of a specific local area, such as state subdivisions authorized by states or governments of cities, counties, and towns

have a lieutenant governor, whose role is much like the vice president of the United States. State administrative agencies collectively employ far more people than the national administrative bureaucracy. In 2013, for example, almost three million people worked for the U.S. government, while more than nineteen million people worked for state and **local governments** (see the explanation below).

### **Judicial**

The judicial systems of each state consist of trial and appellate courts. Many states elect judges, although some states use an appointment process. Some courts are local and specialized, such as justice-of-the-peace and municipal courts, with jurisdiction over matters such as traffic offenses. States also have a full range of trial and appellate courts. The state court of last resort, usually called the state supreme court or the court of appeal, has the final say about the meaning of the state constitution.

## **CREATION OF LOCAL GOVERNMENTS**

State constitutions give legislatures power to create local governments, which receive charters, or grants of authority, to carry out a wide range of governmental responsibilities. The laws that local governments enact usually are called ordinances. Most local government officials are elected. There are three broad categories of local governments, although there is considerable diversity among the states.

### **Counties**

Counties (called parishes in Louisiana and boroughs in Alaska) usually occupy large geographic areas within states. Their functions include record keeping, such as births, deaths, and land transfers; administration of elections, including voter registration; construction and maintenance of roads; collection of state and local taxes; and maintenance of courts, courthouses, and jails. There are more than 3,000 counties in the United States.

### **Municipalities**

Cities and townships usually serve urban areas, ranging from small towns of only a few hundred people to cities of many millions. They provide services such as police and fire protection, water and sewer systems, zoning and building-code enforcement, hospitals, libraries, streets, and parks. According to the 2012 Census of Governments, there were 35,879 municipalities and townships in the United States.



What is the role of the city council in local governments?

Figure 5.26.3

## Special Districts

Special districts operate independently of other local governments and usually are created to provide only one or a few services within a specific geographic area. Special districts usually operate schools or provide water and natural resource conservation; fire protection, usually in rural areas; libraries; transportation; cemeteries; and emergency services. Most special district officials are elected. In 2012 there were 12,880 independent school districts in the United States and 38,266 other special districts.



### Content Highlight: WHAT DO YOU THINK?

- Read the preamble to your state's constitution. How does it compare with the Preamble of the U.S. Constitution?
- Read the bill of rights in your state's constitution. How does it compare with the national Bill of Rights?
- How does the way in which your state's government is organized contribute to achieving the goals set forth in the preamble to your state's constitution?

## How Have State Constitutions Changed?

Since the first state constitutions were adopted in 1776, state constitutional conventions have resulted in new constitutions being adopted some 144 times. Louisiana, for example, has had eleven constitutions. Most other states have had two or three. Only eighteen of the fifty states still use their original constitutions.

State constitutions also have been amended thousands of times. Nearly every state election ballot contains proposals for constitutional amendments, either referred by the state legislature or placed on the ballot through the **initiative** process, which is explained later in this lesson. Some state legislatures, such as that of Massachusetts, regularly hold legislative sessions called constitutional conventions to consider whether to submit constitutional amendments to voters.

State constitutional amendments often reflect state responses to policy debates occurring throughout the United States. For example, beginning in the late twentieth century Americans have debated whether same-sex couples should be allowed to marry. Several states adopted constitutional amendments banning marriage between same-sex couples, whereas others adopted provisions or statutes granting same-sex couples a wide range of rights short of marriage. In 2015, this matter was taken out of the hands of the states in a ruling by the U.S. Supreme Court in the case of *Obergefell v. Hodges*. In a 5–4 decision, the Court ruled that same-sex marriage is a fundamental right guaranteed by the Equal Protection Clause of the Fourteenth Amendment. Other policy debates continue at the state level today. Recently proposed state constitutional

## Key words

### **initiative:**

A proposed law placed on the ballots of some states for voter decision



amendments include the use of public money for private education, authorization of casino gaming, and the use of marijuana for medical conditions.

Frequent amendments have made state constitutions much longer than the U.S. Constitution. The average length of a state constitution is 26,000 words, compared to about 8,700 words in the U.S. Constitution.



### *Content Highlight:* **WHAT DO YOU THINK?**

What are the advantages and disadvantages of a constitution being a concise document stating fundamental principles, such as the U.S. Constitution, compared to a document that spells out in greater detail the power and limits of government, such as many state constitutions?



### *Content Enhancement:* **CRITICAL THINKING EXERCISE**

#### **Examining Your State Constitution**

Find a copy of your state constitution. Examine your state constitution and answer the following questions about it.

- How does your state constitution reflect principles of classical republicanism and natural rights philosophy?
- How does the bill of rights in your state's constitution compare with the national Bill of Rights? Are there rights in your state constitution that do not appear in the Bill of Rights or vice versa? What are they?
- How is your state's constitution similar to and different from the U.S. Constitution with respect to separation of powers and checks and balances?

Research the history of your state constitution to find answers to the following questions.

- Has your state had more than one constitution? Why or why not?
- How many times has your state's constitution been amended? How have those amendments been made?
- Have any of those amendments made fundamental changes to your state's government? If so, in what ways?
- What are the differences, if any, between the amendment process in your state's constitution and the amendment process in Article V of the U.S. Constitution? Which do you prefer? Why?

## How Does American Federalism Work in Practice?

Since the adoption of the Constitution, Americans have debated whether the national government, state governments, or both have governing authority over certain matters. Regulation of commerce and grant-in-aid programs, demonstrate the kinds of issues that are common in America's system of shared governmental authority.

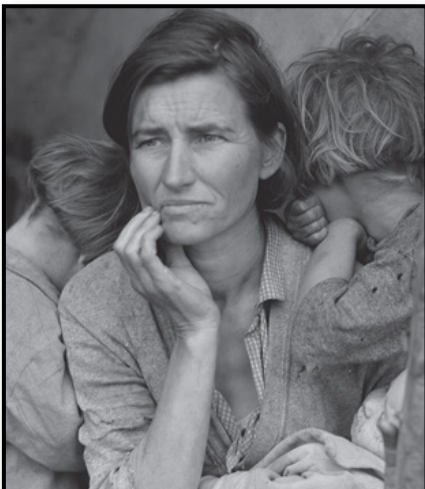
### REGULATION OF COMMERCE

The Constitution (Article I, Section 8) gives Congress the power to regulate interstate commerce. However, the states retain the power to regulate commerce within their own borders as part of their police powers. The two powers often come into conflict.

In an early example, the state of New York passed a law requiring ship captains to post bonds to pay for the care of impoverished passengers who came into the Port of New York. The purpose was to prevent an influx of foreigners who might become paupers, exhaust the state's resources, and cause crime and vagrancy. From one perspective the law was an exercise of New York's police power. From another perspective, it infringed on Congress' power to regulate interstate commerce.

Occasionally the Supreme Court has limited Congress' regulatory powers over commerce out of deference to the states. In contrast, in 2005 the Court reasserted Congress' power to regulate even purely local activities if those activities "have a substantial effect on interstate commerce."

U.S. drug policy is currently at a crossroads. Since Colorado became the first state to legalize marijuana for recreational use in 2014, an increasing number of states and some localities have followed suit. A number of states also have passed legislation to decrease the amount of time drug offenders are incarcerated and to increase substance-abuse treatment for offenders. Federal law, however, still prohibits marijuana for any use in all states and territories of the United States.



How did the Great Depression change American federalism?

Figure 5.26.4

### GRANT-IN-AID PROGRAMS

In the mid-1800s, the national government began giving money grants to states to help them with programs ranging from transportation to welfare. States had to submit plans for the use of the money and often had to match the monies with funds raised through state taxes. For many years, grant-in-aid programs permitted the states and the national government to work in relative harmony (known as "cooperative federalism"). The states performed their traditional functions with financial help from the national government.

The Great Depression of the 1930s and 1940s changed federalism profoundly, as people looked to the national government to solve problems such as unemployment and to help in areas such as job services and old-age assistance. Previously, people had looked to private charitable organizations or to their state governments. The Social Security Act of 1935, for example, established a number of grant-in-aid programs—but with

strings attached. In return for money from the national government, the states had to comply with congressional policies and rules adopted by the national bureaucracy.

Grants-in-aid have grown over the years and so have the conditions attached to them. They have become a device for the national government to influence state policymaking by giving or withholding money. For example, the national government lacks constitutional authority to set state speed limits. However, if a state wants grants for highway construction, then the Federal Highway Administration requires it to comply with a “national” speed limit. States such as Montana have debated whether it is worth losing the power to make decisions about speed limits to receive the grants.

Similar questions have swirled around education grants. The national government has no constitutional authority to set school policy. But for decades the national government has offered grant-in-aid programs designed to improve education from preschool through college. An example is the 2002 No Child Left Behind Act (NCLB). The Department of Education has issued rules about testing and state standards for measuring student proficiency. School districts that do not meet the proficiency targets set by the Department of Education risk losing federal funds, among other penalties. In 2005, the state of Utah risked losing its NCLB funding by subordinating NCLB requirements to state policies. Connecticut and other states filed lawsuits challenging the legality of some elements of NCLB.

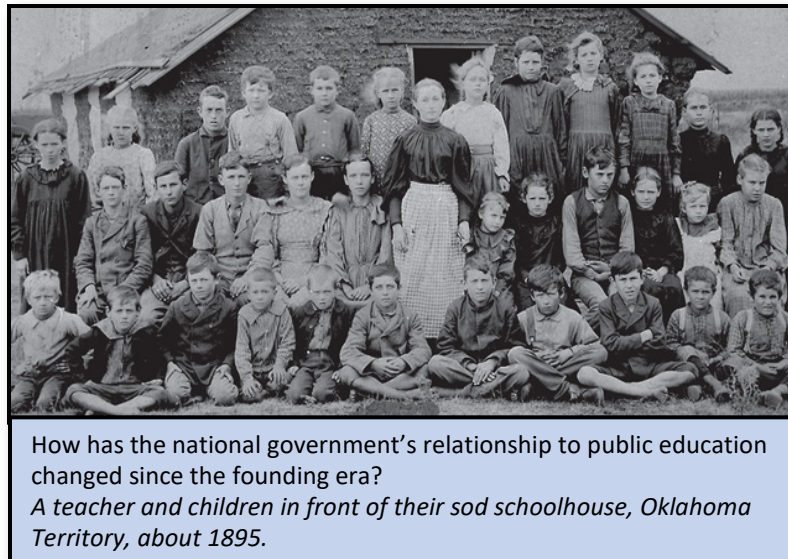


Figure 5.26.5

## How Are the States “Laboratories of Democracy?”

Supreme Court Justice Louis D. Brandeis observed that one of the principal values of American federalism is that a “single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” There are many examples of governance experiments in states and localities. Some innovations catch on in other states or in the nation as a whole. For instance, many states, starting with Wyoming, began permitting women to vote at least in local and state elections well before 1900.

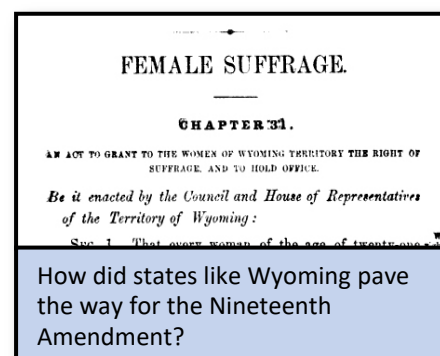


Figure 5.26.6

Those experiments set the stage for adoption of the Nineteenth Amendment in 1920, which guaranteed women the right to vote in all elections. The following are other examples of states as “laboratories of democracy”.

### **INITIATIVE, REFERENDUM, AND RECALL**

This trio of methods, begun during the Progressive era of the late nineteenth and early twentieth centuries, allows citizens to participate in direct democracy in their states. Initiative, **referendum**, and **recall** describe discrete actions, but they are related by their direct involvement of citizens. South Dakota was the first state to permit the initiative. There are two forms of initiative: direct and indirect. In a direct initiative, an individual or a group proposes and drafts a law or a state constitutional amendment. Then the initiator gathers a prescribed number of signatures to place the proposal on the ballot for approval or rejection by the voters. In the indirect process, proposals first go to the legislature. If legislators reject the proposal or take no action on it, then the proposal goes on the ballot. Twenty-four states today use the initiative.

The referendum involves placing a measure that has been approved by a legislature on the ballot for popular vote. Some state constitutions require the legislature to refer certain kinds of measures to the people. Others permit citizens to demand a vote on a law that has been passed by the legislature by gathering a prescribed number of signatures. Twenty-four states now use the referendum.

Recall is a process of removing elected officials from office. In the eighteen states that permit recall it is used most frequently at the local level. However, in 2003 enough California voters signed petitions to call an election to recall their governor and elect a new one.

### **ENVIRONMENTAL PROTECTION**

In response to congressional inaction on various environmental policy issues, a number of state legislatures have taken the initiative. One example is climate change. California took the lead in 2006 with the Global Warming Solutions Act. Since then other states have enacted similar measures, passing legislation to reduce greenhouse gas emissions, develop clean energy resources, and promote more energy-efficient vehicles, buildings, and appliances. Some states have joined together in regional compacts, such as the mid-Atlantic and northeastern states and the western and midwestern states. However, it seems that climate change is an issue that is prompting action at the national and international levels. Despite this fact, state governments and regional associations will continue to play an important role by testing new solutions and making successful programs available for widespread use.

### **HEALTH CARE**

By the mid-1990s soaring health-care costs and increasingly large numbers of people without health insurance had become a major issue of public concern. By the mid-2000s, nearly 50 million Americans did not have health insurance. Moreover, it was generally agreed that the United States had the highest health-care costs relative to the size of its economy of any country in the world. Proposed solutions to the problem, however,

## **Key words**

### **referendum:**

Placing a measure approved by a legislature on a ballot for popular approval

### **recall:**

A process of using special or general elections for removing elected officials from office



created significant political disagreement; Democrats generally sought to increase the federal government's and state governments' roles in providing affordable health care to Americans, whereas Republicans argued that the best solution was to keep America's health care system under the control of private enterprise. In 2009–2010, at President Obama's urging, Congress passed the Patient Protection and Affordable Care Act. This law mandates that people buy health insurance or face a tax penalty, subsidizes the cost of insurance for low-income citizens, provides financial incentives for certain small businesses to offer health insurance to their workers, prohibits insurance companies from denying coverage based on preexisting conditions or from capping annual benefits, expands Medicaid coverage, and creates health insurance exchanges to try to lower the costs of health insurance. In 2010, the Congressional Budget Office predicted that the law, which began to take effect in 2014, would reduce the federal deficit by \$143 billion over ten years.



### Content Highlight:

#### WHAT DO YOU THINK?

- If your state has adopted the initiative process, do you think it has been used to serve the common good or to advance special interests? Explain. If your state has not adopted the initiative process, what arguments can you make for and against doing so?
- What arguments might be made for or against adoption of initiative, referendum, and recall at the national level?



How has the national government attempted to address the issue of rising health care costs? Why have these efforts been controversial?

Figure 5.26.7

## Conclusion

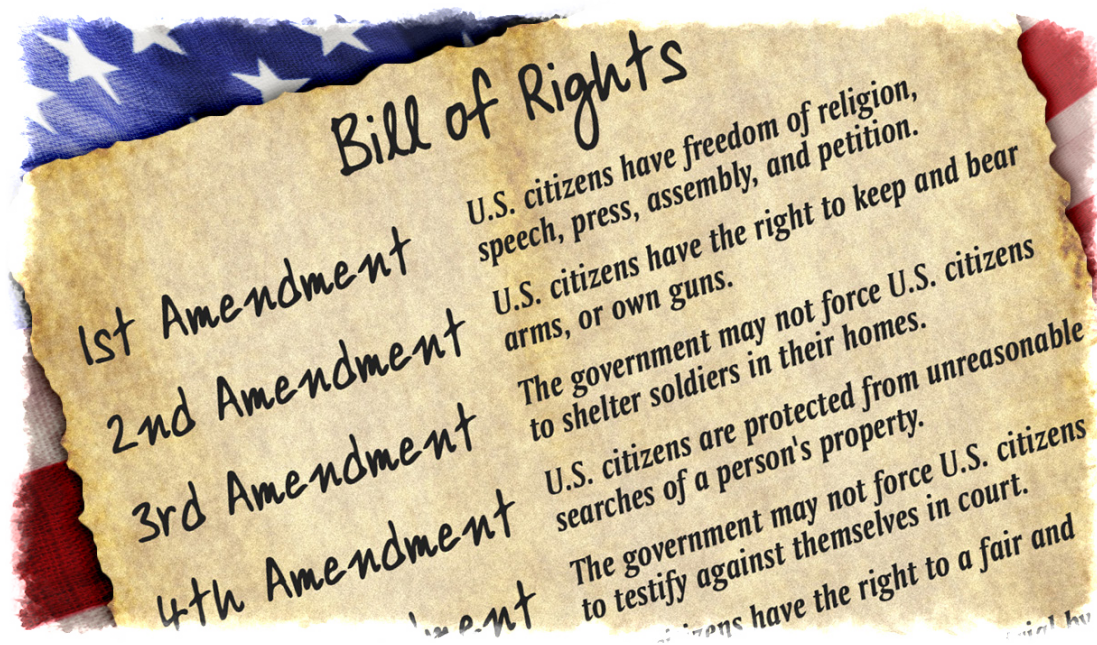
The Constitution was not clear about the boundaries of power between the national government and state governments. In this lesson, you learned that our system of federalism often works well, but sometimes results in direct conflict between national and state laws. You also saw that, most state constitutions share the same core values as the U.S. Constitution's Bill of Rights. And in the past, states have led the way for inclusive reforms, such as giving women the right to vote. States continue to play a role in both in expanding and restricting citizen rights.

## Lesson Check-up



- Why does each state have its own constitution?
- What are local governments? Why do state governments create them?
- Identify the local governments where you live and the functions they perform.
- What are initiative, referendum, and recall? How do they reflect principles of popular sovereignty? How do they undermine the concept of representative government?
- Has your state served as a “laboratory of democracy”? If so, how? Is it considering innovations that might serve as models of other states or the national government?

# The Bill of Rights



## Key words

- autonomy
- classes or categories of individuals
- economic rights
- negative rights
- personal rights
- political rights
- positive rights
- rights

## What You Will Learn to Do

Evaluate the U.S. Bill of Rights and its foundations

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Treat self and others with respect

## Learning Objectives

- **Explain** what bills of rights are and how they have evolved
- **Examine** the Constitution and its amendments and identify which of the rights they contain are (1) held by individuals, classes, or categories of individuals, or institutions, (2) personal, economic, or political rights, and (3) positive or negative rights



## Essential Question

What are bills of rights and what kinds of rights does the U.S. Bill of Rights protect?

### Learning Objectives (cont'd)

- **Identify** possible conflicts among these rights
- **Describe** various interpretations of the Second, Third, Ninth, and Tenth Amendments
- **Evaluate**, take, and defend positions about the kinds of rights protected by the U.S. Constitution and Bill of Rights
- **Define** key words: autonomy, classes or categories of individuals, economic rights, negative rights, personal rights, political rights, positive rights, rights

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### Introduction

This lesson provides a foundation for examining many of the **rights** contained in the U.S. Constitution, the Bill of Rights, and subsequent amendments to the Constitution that are discussed in earlier lessons. It also examines four provisions of the Bill of Rights that usually do not receive as much attention as others: the Second, Third, Ninth, and Tenth Amendments.

### What Are Bills of Rights and How Have They Evolved?

The struggle between the rights of people and groups and the power of government to interfere with or violate those rights is one of the great themes of human history. The Magna Carta, discussed in Lesson 4, is one example of efforts to protect rights against government abuse. It is sometimes referred to as the Great Charter of Freedoms, or the Magna Carta Liberatum.

The English Bill of Rights of 1689, also discussed in Lesson 4, is another example of listing the rights of individuals and groups in relationship to

### Key words

**rights:**

Moral or legal claims justified in ways that are generally accepted within a society or the international community



their government. Among other things, the English Bill of Rights guaranteed free speech and debate to Parliament, permitted English subjects to petition the Crown, prohibited the imposition of excessive bail and cruel and unusual punishments, and prohibited the Crown from keeping a standing army in peacetime. The English Bill of Rights also established that the rule of law is the foundation of legitimate government and that the People are entitled to be represented in legislative institutions.

The English Bill of Rights is important in understanding the evolution of bills of rights in the United States, but it is significant that the English Bill of Rights was enacted by Parliament. Therefore, Parliament can repeal it because it is merely an act of ordinary legislation that is subject to change at any time. By contrast, the drafters of America's first state constitutions included bills of rights that would bind all branches of government and could not be easily changed. The first state to do so was Virginia.

The Virginia Declaration of Rights of June 1776 states that its purpose is to form "the basis and foundation of government." The first three sections of the Virginia Declaration of Rights explain the relationship between rights and government authority:

- **Section 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."
- **Section 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."
- **Section 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 publick weal."

The next fourteen sections of the Virginia Declaration of Rights of 1776 explain how representative government should be organized. These sections also place limits on the government, such as prohibiting excessive bail and the suspension of laws without the consent of representatives of the people. The declaration also identifies rights that should be free from government interference, including freedom of the press, and a prohibition on general warrants (see Lesson 31). The last section of the Virginia Declaration of Rights includes principles of classical republicanism:

- **Section 15.** "That no free Government, or the blessing 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."

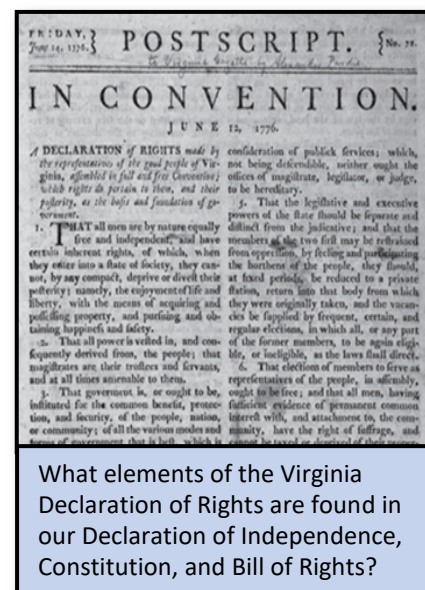


Figure 5.27.1

Each state adopted a constitution after the Declaration of Independence was issued. All states except New York, which embedded its bill of rights in the Constitution, began their constitutions with bills or declarations of rights. As discussed in Lesson 13, the Anti-Federalists used the lack of a bill of rights in the U.S. Constitution as a rallying cry against ratification. Lesson 15 explained how James Madison made good on the promise to introduce a bill of rights into the First Federal Congress. Today the constitutions of all fifty states, as well as the U.S. Constitution, contain bills or declarations of rights. As explained in Lesson 26, states typically place bills or declarations of rights at the beginning of the constitution.

### What Questions Are Useful in Examining and Understanding Bills of Rights?

When analyzing bills of rights, certain questions can help clarify an understanding of rights:

- Who holds the right? Is it held by individuals, **classes or categories of individuals**, or institutions?
- What kind of right is it—personal, economic, or political?
- Does the right require government to act, or does it require government to refrain from acting?

The following information should be useful in answering these questions.

### Who May Hold Rights?

Rights may be held by individuals, classes or categories of individuals, or institutions.

#### INDIVIDUALS

The idea that individuals can hold rights reflects the belief that humans should be considered autonomous and self-governing. This includes the belief that each individual should possess certain fundamental rights, such as those to freedom of thought and conscience, privacy, and movement. This emphasis on the rights of individuals is reflected in natural rights philosophy, exemplified in the Declaration of Independence by the statement that “all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.”

#### CLASSES OR CATEGORIES OF INDIVIDUALS

Under most legal systems members of certain classes or categories of individuals within a society are recognized in the law as holding certain rights. For example, laws may grant such rights to children, the

### Key words

#### **classes or categories of individuals:**

Groups of individuals within a society who can be recognized in the law as having certain rights



Should disabled veterans be considered a class or category of individuals with certain rights? Why or why not?

Figure 5.27.2

## Key words

### personal rights:

Those rights of individuals in their private capacity, such as the rights to life and liberty, as distinguished from the political rights of citizens, such as the rights to vote and to hold public office

### economic rights:

Those rights essential to citizens that allow them to earn a living, to acquire and transfer property, and to produce, buy, and sell goods and services in free markets

### political rights:

All rights of a citizen in a free society that are clearly expressed and guaranteed by the Constitution and implied by natural laws

### autonomy:

Independence, freedom, or the right to self-governance

mentally ill or disabled, veterans, and those who hold professional qualifications, such as teachers, doctors, attorneys, building contractors, and airplane pilots.

## INSTITUTIONS

Institutions such as schools; governmental institutions at local, state, and national levels; unions; universities; business partnerships; and corporations also hold certain rights.

## What Are Common Categories of Rights?

Three common categories are **personal rights**, **economic rights**, and **political rights**:

### PERSONAL RIGHTS

These rights provide for individual **autonomy**, including, among other rights, freedom of thought and conscience, privacy, and movement. The idea that humans are autonomous, self-governing individuals with fundamental rights is central to natural rights philosophy. The rights to life, liberty, property, and the pursuit of happiness often are said to be “God-given” or based on nature. Every person is believed to possess such rights at birth. The purpose of government is to protect those rights.



Figure 5.27.3

### ECONOMIC RIGHTS

These rights include choosing the work one wants to do, acquiring and disposing of property, entering into contracts, creating and protecting intellectual property such as copyrights or patents, and joining labor unions or professional associations. Like political rights, such rights can be created and protected by statutes, national or state constitutions, or both. Many people consider economic rights to be associated with ownership.

### POLITICAL RIGHTS

These are rights of individuals that address political participation and can be created and protected by statutes, national or state constitutions, or both. Examples are the rights to vote and to engage in political activities, such as supporting particular candidates for office or running for office.

## Do Rights Require Government to Act or Refrain From Acting?

Another common distinction made in discussions of rights is between **positive rights** and **negative rights**. In this context, the terms positive and negative do not refer to “desirable” and “undesirable.” Rather, they usually refer to the relationship of individuals and classes or categories of individuals to their government.

Positive rights require government to act in specified ways. They include, for example, the rights of individuals to receive certain services from government, such as protection of their persons and property from criminal acts, protection from aggression from other nations, public education, and in some cases food, housing, or medical care.

Some provisions of the Bill of Rights also require government action. The Sixth Amendment, for example, guarantees criminal defendants the right to speedy and public trials. That guarantee requires government to establish and fund systems of open courts and to prosecute crimes without delay. The Seventh Amendment guarantees individuals the right to a jury trial in most common law or civil cases and this requires government to ensure that judges and juries are available to hear cases.

Negative rights restrict government action. Many of the individual rights protected by the U.S. Constitution and the Bill of Rights are stated as negative rights. For example, the First Amendment states that “Congress shall make no law” that violates fundamental rights to freedom of religion, speech, press, assembly, and petition.

## What Kinds of Rights Does the Bill of Rights Protect?

The Bill of Rights appended to the U.S. Constitution is commonly understood to contain specific guarantees of individual rights. In fact, the situation is more complicated because the Bill of Rights involves the kinds of rights described above.

For example, the Second Amendment provides that “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.” The amendment requires the government to refrain from infringing upon the “right of the people to keep and bear Arms” and, as such, is a negative right. Some people argue that this amendment refers to the institutional rights of states to maintain militia units. Others contend that it refers to the individual right to keep and bear arms that is permitted by law in most states. The Supreme Court seemed to side with the institutional view in 1939 in *United States v. Miller*. In 2008, however, in the case of *District of Columbia v. Heller*, the Court made clear that the Second Amendment protected the individual’s right in federal territories to bear arms. In *McDonald v. Chicago* in 2010, the Court incorporated the Second Amendment and ruled that citizens have the right to bear arms.

Another example is the Third Amendment, which states, “No Soldier shall, in time of peace be quartered in any house, without the consent of the

## Key words

### **positive rights:**

Those rights that require overt government action, as opposed to negative rights that require government not to act in specified ways

### **negative rights:**

Those rights that prohibit government from acting in certain ways; rights that are not to be interfered with



Owner, nor in time of war, but in a manner to be prescribed by law.” This amendment, which embodies the centuries-old Anglo-Saxon legal principle that “a man’s home is his castle,” addresses the individual right not to be required to house soldiers. The amendment does acknowledge, however, the federal government’s institutional right, or power, in time of war to set aside this right on behalf of the right of the nation to security.



## **Content Enhancement:**

### **CRITICAL THINKING EXERCISE**

#### **Identifying Different Kinds of Rights in the Bill of Rights and Potential Conflicts Among Them**

Work in groups of three to five students to examine one of the following amendments: First, Fourth, Fifth, Sixth, Seventh, or Eighth. For each amendment, identify whether the rights protected are as follows:

- Held by individuals, classes or categories of individuals, or institutions
- Personal, economic, or political rights
- Positive or negative rights

Each group should report its conclusions to the class as a whole. Then the class should discuss how and in what ways the rights protected in the Bill of Rights might conflict with one another.

## **What Are the Meaning and Importance of the Ninth and Tenth Amendments?**

The first eight amendments to the U.S. Constitution contain specific guarantees of rights. By contrast, the Ninth and Tenth Amendments do not. There is ongoing debate about the meaning of these amendments.

The Ninth Amendment provides that “the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” Theories about the Ninth Amendment include the following:

- It is simply an admission that it would be impossible to list all the rights and liberties that should be protected from government interference.
- It confirms that the Bill of Rights does not increase the powers of the national government in areas not mentioned in the first eight amendments. It does not guarantee any rights or impose any limitations on the national government.
- It commands judges and Congress to affirm rights not mentioned in the Constitution.

The Tenth Amendment states, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States



How does the Tenth Amendment protect the powers of the states against the national government?

Figure 5.27.4

respectively, or to the people.” Of all the amendments, the Anti-Federalists demanded in state ratifying conventions, one designed to reserve powers to the states was the most common. Two views of the Tenth Amendment are the following:

- It states the nature of American federalism but adds nothing to the Constitution as originally ratified.
- It protects the powers of the states against the national government.



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### Assessing the Meaning and Importance of the Ninth and Tenth Amendments

Work in groups of three to five students and develop responses for the following questions regarding the Ninth and Tenth Amendments.

1. What do you think is the meaning of the Ninth Amendment? Of the Tenth Amendment?
2. What do you think is the importance of the Ninth Amendment to you personally and more generally to the preservation of individual rights and a democratic political system? Of the Tenth Amendment?

## What Rights Are Protected in the Body of the Constitution?

In addition to those rights protected in the first ten amendments—known as the Bill of Rights—the body of the U.S. Constitution and subsequent amendments also protect many rights. Alexander Hamilton argued in *Federalist* 84 that the Constitution itself is a bill of rights. Each provision is aimed at preventing the type of abuse that the Framers had seen in British history, their own colonial governments, their state governments, or the national government under the Articles of Confederation. Since the adoption of the Bill of Rights in 1791, seventeen other amendments have been added to the Constitution, one of which was repealed. Many of these also protect rights. However, the following exercise will focus on some of those rights protected in the body of the Constitution because the rights contained in the Eleventh through Seventeenth Amendments have been discussed in other lessons.



How does the Constitution protect against the type of abuse by government that the Framers had seen in colonial history?

Figure 5.27.5

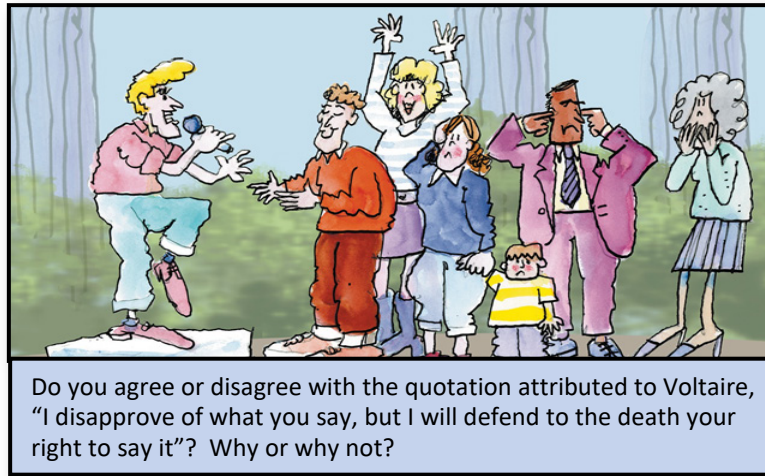


Figure 5.27.6



## Content Enhancement:

### CRITICAL THINKING EXERCISE

#### What Kinds of Rights Are Protected in the Body of the Constitution?

Work in small groups and examine Articles I, II, III, and IV of the U.S. Constitution. Then respond to the following questions:

1. How does Article I protect the political rights of those serving in Congress?
2. How does Article I protect individual rights from infringement by Congress? By the states?
3. How does Article I protect economic rights?
4. How does Article II protect the political rights of the president?
5. How does Article III protect the political rights of judges? Of individuals?
6. How does Article IV protect political rights of individuals? Of classes or categories of individuals?
7. Are the rights protected in Article I through IV of the Constitution positive rights, negative rights, or some of each? Explain.

Compare each group's response to these questions with the responses of other groups. Are there differences? If so, how do you explain the differences?

What do you think Alexander Hamilton meant when he claimed that the Constitution itself is a Bill of Rights?

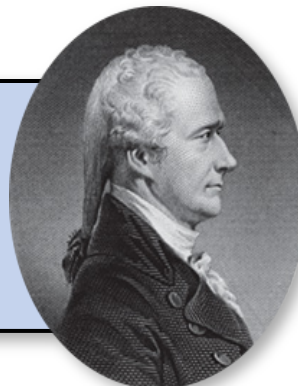


Figure 5.27.7

## How Have Attitudes About the Bill of Rights Changed Since 1791?

Many Federalists criticized James Madison for pushing the Bill of Rights through Congress. At best, they considered it of little importance. Madison himself, tired of the disagreement and dissent associated with the debates on the Bill of Rights, described the process as a “nauseous project.” Ironically, several Anti-Federalists who had based much of their opposition to the Constitution on the lack of a bill of rights also were unhappy. They had hoped to use the movement for a bill of rights as an opportunity to rewrite the Constitution.

Why did James Madison think it was important to add a bill of rights to the Constitution? Do you agree with him? Why or why not?

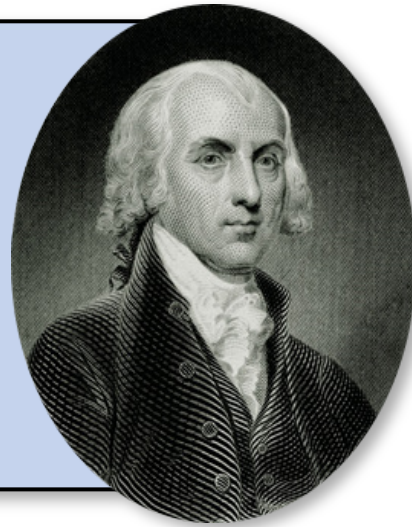


Figure 5.27.8

Some predicted that the Bill of Rights would do more harm than good by giving the national government power over the states in enforcing those rights.

The initial reaction of most Americans to the Bill of Rights was lukewarm. Its passage had little effect on the average person, who had closer ties to a particular state than to the national government. In *Barron v. Baltimore* (1833) the U.S. Supreme Court ruled that the Bill of Rights applied only to the national government. The Fourteenth Amendment and many Supreme Court decisions thereafter were required to incorporate most of the provisions of the Bill of Rights as limits on the states as well as on the national government.

In the twentieth century, the Bill of Rights achieved a significance never dreamt of in the eighteenth century. Today, the Bill of Rights is recognized throughout the world as one of the most important single documents that expresses and delineates fundamental individual rights.

Despite this fame, public opinion polls during the bicentennial of the Bill of Rights in 1991 revealed shortcomings in Americans’ knowledge of this important document. Polls did show that a high percentage of Americans knew that the first ten amendments to the Constitution are called the Bill of Rights. But most of those interviewed knew little or nothing about the meaning, history, and application of key concepts in the Bill of Rights. A recent poll showed that sixty-nine percent of respondents knew that the First Amendment protects freedom of speech, but only twenty-four percent knew that it also protects the free exercise of religion. Moreover, only eleven percent knew that in addition it protects freedom of the press; ten percent that it protects freedom of assembly; and just one percent that it protects the right to petition government for a redress of grievances. More than half believed that the First Amendment guarantees the right to trial by jury and the right to vote.





Why is freedom of speech an important right?

Figure 5.27.9



Should people be able to practice their religion completely free from government interference? Why or why not?

Figure 5.27.10

### Content Highlight: WHAT DO YOU THINK?

- In response to public opinion polls revealing Americans' ignorance of the Bill of Rights, one commentator argued that "the less Americans know about freedoms, the more they are likely to erode without our notice." Do you agree or disagree with this statement? Why?
- Reread the Bill of Rights. Do you think some rights are more important than others? If so, which one? Explain your reasoning.

## Conclusion

Citizen rights in relation to their governments have a long history. In this lesson, you examined the foundation of the U.S. Bill of Rights. The Bill of Rights is part of our nation's constitution. You learned that these constitutional rights are vital for a free society and protections against repressive government rule. The U.S. Bill of Rights is admired throughout the world. However, many Americans remain unclear about these important rights and what they mean.

## Lesson Check-up



- How do the rights found in the U.S. Constitution and the Bill of Rights reflect the influence of classical republicanism and natural rights philosophy?
- Are the early American bills of rights significantly different from the 1689 English Bill of Rights? Explain.
- How do the rights of institutions and classes of individuals, such as doctors or the disabled, differ from the rights possessed by all individuals under the U.S. Constitution? Under what circumstances, if any, should such rights be given preference over individual rights? Why?
- What are “positive rights” and “negative rights”? Provide examples of each.
- Why has it been difficult to resolve the meaning of the Second, Third, Ninth, and Tenth Amendments to the U.S. Constitution?

# Freedom of Religion



## Key words

- compelling state interest
- established church
- establishment clause
- free exercise clause
- separation of church and state

## What You Will Learn to Do

Explain how the First Amendment affects the establishment and free exercise of religion

## Linked Core Abilities

- Apply critical thinking techniques
- Build your capacity for life-long learning
- Communicate using verbal, non-verbal, visual, and written techniques
- Do your share as a good citizen in your school, community, country, and the world
- Treat self and others with respect

## Learning Objectives

- **Explain** the importance of religious freedom in the United States and to identify primary differences between the establishment and free exercise clauses
- **Describe** how the Supreme Court has interpreted the religion clauses, ongoing issues involving those clauses, and how conflicts can arise between the establishment and free exercise clauses



## Essential Question

How does the First Amendment affect the establishment and free exercise of religion?

### Learning Objectives (cont'd)

- **Evaluate**, take, and defend positions on issues arising from guarantees relating to the establishment and free exercise of religion clauses of the Constitution
- **Define** key words: compelling state interest, established church, establishment clause, free exercise clause, separation of church and state

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### Introduction

The first two clauses in the First Amendment prohibit Congress from making laws regarding the establishment of religion or prohibiting the free exercise of religion. The exact meaning of the establishment and **free exercise clauses** has been a topic of fierce debate. Did the Founders intend to build “a wall of separation between Church and State” as Thomas Jefferson asserted? Or did they merely intend to prevent religious persecution and the establishment of one national religion?

### What Is an Established Religion?

In the seventeenth century, when the first English colonies were being settled in America, Europe was in the throes of religious wars. This period was part of the era known as the Reformation, which began in the sixteenth century. The period led to more than a century of bloodshed as Catholics and Protestants struggled for political power. As various groups came to power, they often attempted to eliminate others by outlawing their religions or banishing, torturing, jailing, or killing adherents to religions other than their own.

Despite the turmoil caused by religious struggles, most Europeans continued to accept the legitimacy of an established, or official, religion. It was generally believed that religion and morality formed the necessary

### Key words

#### **free exercise clause:**

The part of the First Amendment stating that Congress shall make no laws that prevent people from holding whatever religious beliefs they choose or that unfairly or unreasonably limit the right to practice religious beliefs



## Key words

### **established church:**

An official, state-sponsored religion

### **separation of church and state:**

Basic principle of American government that no single religion should be favored by government over other religions, nor should government interfere with the right to practice or not practice religious belief

foundation of a successful government. Almost every nation in Europe had an **established church**. In France and Spain, it was Roman Catholicism. In some German states and in Sweden it was Lutheranism. In England, the Act of Supremacy of 1534 made the Church of England, or the Anglican Church, the established church.

People fleeing religious persecution settled many American colonies. However, most colonies followed the tradition of having established churches, and there was little patience with those who did not belong to the established church. Religious intolerance and persecution of those with nonconforming religious beliefs was common place in Anglican Virginia and Congregational, or Puritan, Massachusetts. People were taxed against their will to support state religions and punished for failing to attend public worship and sometimes for heretical or nonconformist opinions.

However, religious intolerance did not remain universal in the colonies for long. Intolerance of religious dissent and an unwillingness to separate church and state led to the exile of the dissenting theologian Roger Williams (c. 1603–1683) from Massachusetts Bay Colony. In 1636, together with a few friends, Williams secured land from the Indians in what is now Rhode Island. There he founded a new society based on freedom of conscience, religious toleration, and **separation of church and state**. This phrase refers to the lack of an established church or the state supporting one religion over others. Members of Williams's new colony had to promise to obey the majority, but "only in civil things." In 1663, the colony of Rhode Island and Providence Plantations was formally established.



What are some of the factors that led to increased religious tolerance during the colonial period?

Figure 5.28.1