THE HERITAGE GUIDE TO

the

Constitution

TEACHING COMPANION

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The Heritage Foundation is a research and educational institution—a think tank—whose mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.

Our vision is to build an America where freedom, opportunity, prosperity, and civil society flourish. As conservatives, we believe the values and ideas that motivated our Founding Fathers are worth conserving. As policy entrepreneurs, we believe the most effective solutions are consistent with those ideas and values.
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The Constitution is the guide which I will never abandon.
— George Washington

Eleven years after the Declaration of Independence, a small group of delegates convened in Philadelphia to create a new constitution for the new nation. Meeting in what is now Independence Hall from May 25 to September 17, 1787, they sought “to form a more perfect Union” and establish a government that would “secure the Blessings of Liberty to ourselves and our posterity.”

The challenge was to create the institutional arrangements for limiting power and securing the rights promised in the Declaration of Independence while preserving a republican form of government that reflected the consent of the governed. Their solution was to create a strong government of adequate but limited powers, all carefully enumerated in a written constitution. In addition to an energetic executive, a bicameral legislature, and an independent judiciary, its structural arrangements include a system of separated powers—giving each branch different functions and responsibilities so that none dominates—and federalism, which divides authority between the national and state governments. That the delegates could agree on such a system was, according to George Washington, “little short of a miracle.”

The Constitution is a well-crafted document, but not a simple document. Adding to the complexity of our Constitution is 200 years of legal interpretation and scholarship exploring its meaning. The Heritage Guide to the Constitution brings together more than 100 of the nation’s best legal experts to provide a line-by-line examination of the Constitution and its contemporary meaning. Each contributor was asked to write a brief essay on a particular clause, with two objectives:

- First, provide a description of the original understanding of the clause as far as it can be determined. If, within the standard of original understanding, there are credible and differing interpretations, they were to be noted and explained.

- Second, explain the current state of the law regarding the clause and, where appropriate, give brief explanations of the historical development of current doctrine.
Beginning with the Preamble, continuing through the seven Articles, and ending with the 27 amendments to the Constitution, The Heritage Guide to the Constitution proceeds sequentially to analyze every part of the Constitution.

A companion to The Heritage Guide to the Constitution, the Teaching Companion covers every clause in the Constitution and summarizes each essay in The Heritage Guide to the Constitution. The methodological difference is that the Teaching Companion focuses on major themes of the Constitution and how it operates. It also includes exercises and quizzes to facilitate understanding of the Constitution’s main concepts.

The Teaching Companion is appropriate for classroom settings, reading groups, or individual self-study. It is designed and organized to maximize flexibility: Students can learn about the Constitution by focusing on the branches of government, the seven Articles, or various topics such as voting, the House of Representatives, or federalism. As a result, the Teaching Companion can be the basis of a complete class on the Constitution, a supplement to a course, or an additional teaching or learning source for any course of study that deals with the Constitution.

The Teaching Companion consists of seven units, each of which includes between one and six lessons, and most lessons are further divided into thematic parts.

- **Unit 1** explains how to understand the Constitution not as a “living document” but as the complement to the Declaration of Independence that secures the ends of republican government. Students will learn about the history of the Constitution, explore the meaning of republican government, and understand that the Constitution is the supreme authority by which all policies and governmental actions in America are measured. This unit may be appropriate for younger students. Unit 1 has two lessons: Lesson 1 has one part, and Lesson 2 has two parts.

- **Unit 2** explains the structure and powers of the legislative branch. Divided into two houses, each with separate duties, terms of offices, and constituencies, Congress holds the legislative powers “herein granted,” including powers affecting the national economy, war and piracy, citizenship, and the territories, as well as powers necessary to carrying out the goals of the Constitution. This unit will also introduce students to the greatest challenge of limited government: the administrative state. Unit 2 contains six lessons: Lesson 3 has three parts, Lesson 4 has two parts, Lesson 5 has three parts, Lesson 6 has two parts, Lesson 7 has four parts, and Lesson 8 has one part.

- **Unit 3** focuses on the structure and powers of the executive branch. As the only wholly national figure, the executive carries out the laws of the land and is the principal agent for the nation’s foreign policy. Though the Founders gave the legislature several important checks on the executive’s power, they also gave the President certain powers over the legislature. Unit 3 contains two lessons: Lesson 9 has four parts, and Lesson 10 has four parts.
• **Unit 4** introduces students to the judicial branch: the types of federal courts, the kinds of cases these courts may decide, and when these courts may hear them. Students will also learn about the constitutional role of the jury, the administration of justice in the criminal process, and treason. Unit 4 contains three lessons: Lesson 11 has three parts, Lesson 12 has two parts, and Lesson 13 has one part.

• **Unit 5** discusses states and the federal system. The Constitution limits the actions of states and clarifies certain duties and obligations that states have toward one another and their citizens. This unit will also discuss the Fourteenth Amendment, which altered the relationship between the federal government and the states following the Civil War. Unit 5 contains one lesson: Lesson 14 has three parts.

• **Unit 6** reviews the Bill of Rights and the process by which the Constitution is amended. Although more than 5,000 bills proposing to amend the Constitution have been introduced in Congress since 1789, there have been only 27 amendments to the Constitution (including the Bill of Rights). Initially controversial, the Bill of Rights consists of 10 amendments: two substantive amendments, six procedural amendments, and two amendments that encapsulate the theory of constitutionalism. Unit 6 contains four lessons: Lesson 15 has one part, Lesson 16 has two parts, Lesson 17 has three parts, and Lesson 18 has three parts.

• **Unit 7** addresses slavery and voting in the Constitution. The greatest misunderstandings about the Constitution concern slavery and the slave trade. This unit explores the limitations on the slave trade, the compromises over representation and taxation, and the eventual abolition of slavery. While elections and voting are discussed, where applicable, in the units on the legislature, executive, and judiciary, Unit 7 explores the various amendments concerning the right to vote in federal elections generally. Unit 7 contains two lessons: Lesson 19 has one part, and Lesson 20 has one part.

**If You are Using the Guide in a Classroom...**

This book is designed for students at the high-school level and above. Some lessons may be accessible to younger students. It can be used, with *The Heritage Guide to the Constitution*, in large or small classroom settings as a full course or as a supplement. Reading assignments for each lesson range from 15 to 40 pages. If you choose to drop some of the parts of the lessons, then this curriculum can be used as an intensive one-semester course. If you choose to cover all of the readings, this curriculum would take at least 20 weeks to complete. This curriculum could fill a full school year, especially in conjunction with other materials, such as *We Still Hold These Truths: Rediscovering Our Principles, Reclaiming Our Future* (www.westillholdthesetruths.org). While only the teacher needs the *Teaching Companion*, the teacher and every student in the classroom needs a copy of *The Heritage Guide to the Constitution* (Bulk sales available from Regnery Publishing by calling 202-677-4455). Before each class period, be sure your class has read the necessary book passages and has received any appropriate lesson assignments indicated in the *Teaching Companion*. 
Overview of the Teaching Activities

Throughout this book, you will come across activities to help students further understand the subjects covered in each lesson. Here is an overview of each type of activity.

**Active Reading:**
Students are given passages, vocabulary words, or other information to better understand what they are reading.

**Before You Read:**
Students are given background information, important information, or an idea to think about while they complete their reading exercises.

**Brainstorm:**
The teacher will be given something to write on the board to encourage students to think about what comes to their mind.

If You are a Parent or Student...

For the student, *The Heritage Guide to the Constitution* and *Teaching Companion* can be used as a supplemental text and study companion for a class on American government, the Constitution, or constitutional law. It can also be used as a surrogate for material not covered and classes not offered. In this case, the book and study guide will aid students in their course of study, regardless of their school, professors, or other barriers to their education.

If You are Using the Edition for Self-Study...

The *Teaching Companion* and *The Heritage Guide to the Constitution* can augment a general education, refresh an education now forgotten, or facilitate a fresh study of the constitutional concepts long overlooked but once again at the heart of public debate. Self-study allows you to proceed at your own pace, to strengthen your constitutional reasoning skills, and to apply the constitutional principles to political issues of the day.
**Check Understanding:**
Through multiple choice, true/false, fill-in-the-blanks and short answer questions, students are able to review a lesson to ensure they understand the content of the lessons.

**Discussion Questions:**
This is a list of questions for each lesson to start the conversation with the students about a lesson or topic.

**Make a Real-Life Connection:**
Students will be challenged to apply the Constitution to something in their world today.

**Make an Inference:**
Students will be asked to make an inference about an idea based on what they have read.

**Research It:**
Students will be asked to research a specific topic.

**Work in Pairs:**
Students will be asked to work in pairs to further their understanding of a lesson or topic.

**Work in Groups:**
Students will be asked to work in groups to further their understanding of a lesson or topic.

**Write About It:**
Students will be asked to write about a person, event, or idea based on what they read.
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With special thanks to Kevin Burns, Anna Dunham, Michael Kelsey, Richard Odermatt, Joe Rusenko, and David Shaw.
UNDERSTANDING THE CONSTITUTION

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Lesson 1

HOW TO READ THE CONSTITUTION

Lesson Objectives:
When you complete Lesson 1, you will be able to:

• Explain the relationship between the Declaration of Independence and the Constitution.
• Understand that the Constitution has permanent meaning.
• Understand the three themes of the Constitution: consent of the governed, checks and balances, and federalism.
• Explain the difference between the Constitution and constitutional law.
• Describe the events leading to the creation of the Constitution.
• List the three rules of the Constitutional Convention.
• Explain how the Virginia Plan and the New Jersey Plan differed from the Great Compromise.
• Explain the auxiliary precautions of the extended Republic, the separation of powers, and federalism.
• Compare and contrast the originalist and non-originalist perspectives regarding the interpretation of the Constitution.
• List and explain six fundamental reasons why originalism is championed.
• Explain the process that originalists use when interpreting the meaning of the Constitution.

The Meaning of the Constitution

Essay by Edwin Meese III (pp. 1–6)

The Constitution of the United States has endured for more than 200 years and has remained an object of admiration throughout the United States and the world. The Constitution was born in crisis—it was initially designed as a response to the inadequacy of the government under the Articles of Confederation. Yet, as Edwin Meese III explains in “The Meaning of the Constitution,” the Constitution has endured because it builds upon the principles set forth in the Declaration of
Independence, which states that governments should operate through the consent of the governed to secure the people’s rights and liberties. The Constitution defines both the structure of the government and the rules for its operation to complement these principles.

The Constitution contains three important themes: consent, checks and balances, and federalism. First, the legitimate authority of the government depends on the consent of the people of the United States. According to the Declaration of Independence, because all men are created equal and have certain inalienable rights, no person can be ruled without his or her consent. The American people express their ongoing consent through elections.

Second, the checks and balances of the Constitution ensure that no one branch of the government (legislative, executive, or judicial) becomes too powerful, thereby encroaching upon the power of the other branches. This separation of powers limits the power of each branch but fosters cooperation in certain areas among the three branches. Thus, this mechanism protects against the twin dangers of republican government: democratic tyranny, which fails to protect individual rights of the minority, and democratic ineptitude, which fosters ineffective government.

Third, federalism prevents an unhealthy concentration of power in the government. The Framers’ experience under the Articles of Confederation highlighted the importance of federalism. The Articles of Confederation created a weak national government and strong state governments. These state governments, unrestrained by the powerless national government, fell victim to factions and failed to protect individual rights. The Founders realized that to prevent such abuses in the future, they would need to create a much stronger national government. But rather than creating a single, all-powerful national government, the Founders devised a federal system that divides sovereignty between two political entities—states and the nation—thereby recognizing a role for each. The Constitution divides power horizontally among three separate branches of the government at the national level and vertically between the national government and the state governments. This division ensures that the national government has enough power to perform its duties but not so much power as to harm the people’s liberty.

A former Attorney General of the United States and the chairman of the editorial advisory board of *The Heritage Guide to the Constitution*, Meese explains that the goals of the book are to present the Founders’ understanding of the Constitution and its provisions and to examine judicial interpretations of the Constitution and the political circumstances that comprise the history of constitutional law. Constitutional law is distinct from the Constitution: Constitutional law is the way in which the court interprets the Constitution, but the Constitution itself is “the supreme Law of the land.” The Constitution is the standard against which all laws, policies, and interpretations should be measured. Ultimately, the success of the American Republic depends on our fidelity to and the faithful interpretation of the Constitution.
Before You Read

Ask: What does the word “consent” mean? (to agree with or to approve of)
Now, what do you think “consent of the governed” means? (the approval of those being governed)

Active Reading

Have students read the last paragraph on page 2. To ensure understanding, ask: What is the difference between the “consent of the governed” and “the will of the majority”? (The “consent of the governed” means that people are self-governing in their local communities and that government may intervene only when the people give permission and the government acts through constitutional structures and the rule of law. “The will of the majority,” on the other hand, contends that all decisions of the majority directly determine the law.)

Active Reading

Read aloud the last paragraph on page 3. To ensure understanding, ask: How can a separation of powers lead to cooperation? (Nothing may be accomplished until some agreement is reached.)

Work in Pairs

Have students read about the Nationalists, those who favored limiting the power of the states, on page 4. Pair up students and have them write a few sentences summarizing why the Nationalists wanted to limit the states’ power. (Sample answer: The Nationalists saw the ill effects of unfettered state power under the Articles of Confederation. States not only interfered with the national government’s exercise of power, but also failed to secure the rights of their citizens.)

Active Reading

To ensure understanding, ask: What is constitutional law? (a body of law based on the decisions of the courts) How is constitutional law different from the Constitution? (Constitutional law concerns the interpretation of the law by the courts, whereas the Constitution is the law itself.)

Discussion Questions

1. On page 2, Meese quotes Thomas Jefferson as saying, “...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.” While the Constitution does not create rights, there are certain rights that the Constitution explicitly protects. What are some rights guaranteed to the citizens of the United States in the Constitution? (Some rights are mentioned in the Articles of the Constitution, such as the right of habeas corpus and the right to be free of bills of attainder and ex post facto laws. The Bill of Rights also contains explicit protections of rights, such as free speech and the right to bear arms.)

2. According to Meese, why has the Constitution remained strong for more than 200 years? (It complements the Declaration of Independence; it outlines both the structure of the government and rules for its operation that would secure the rights and liberties of citizens.)

The Formation of the Constitution

Essay by Matthew Spalding (pp. 7–12)

In “The Formation of the Constitution,” Matthew Spalding tells the story of the Constitutional Convention. In June 1776, Richard Henry Lee introduced a resolution in the Second Continental Congress to dissolve political connections with Great Britain, pursue foreign alliances, and draft a plan of confederation. The result was the Declaration of Independence (1776), the Franco–American Alliance (1778), and the Articles of Confederation (ratified in 1781).

The Articles of Confederation was the first attempt to organize a national government. The resulting government was rife with problems: States undermined the national government; Congress was unable to impose taxes to gain funds to pay for national expenses; there was no independent executive; foreign relations were weak. Apart from the institutional problems of the Articles of Confederation, majority tyranny remained a grave threat. In many states, majority factions had taken over state legislatures to deprive the minority of rights.

After several ad hoc meetings to discuss particular conflicts, the Constitutional Convention was convened in Philadelphia in 1787 to revise the Articles of Confederation and form a more perfect union. Each state but Rhode Island sent delegates to the Convention. This was an impressive group of delegates including George Washington, Benjamin Franklin, James Madison, and Alexander Hamilton. Thomas Jefferson (who did not attend) described the Convention as “an assembly of demi-gods.” The delegates unanimously chose George Washington as president of the Convention and agreed to abide by three basic rules: (1) voting was by state, and each state had one vote; (2) proper decorum was to be maintained at all times; and (3) the proceedings were to be kept secret.
As soon as delegates agreed to the rules, Edmund Randolph presented the Virginia Plan, which proposed to set aside the Articles of Confederation and create a new structure of government consisting of legislative, executive, and judicial branches. Under the Virginia Plan, population would determine a state’s representation in both the House and the Senate. This put less-populated states at a disadvantage, however. The New Jersey Plan to amend the Articles of Confederation featured a one-house Congress in which each state received equal representation. Roger Sherman proposed the Great Compromise in which population would determine representation in the House, but each state would have equal representation in the Senate.

A Committee of Detail reworked the various resolutions of the Virginia Plan and produced a draft of the Constitution in July 1787. From August to September, members of the Convention reworked this draft until they were satisfied with it. They then gave the draft to a Committee of Style to polish the language.

In addition to the provisions of the document, there are three unstated mechanisms in the Constitution: the extended Republic, the separation of powers, and federalism. Extending the Republic, meaning expanding the size of the nation, would increase the number of opinions, making it difficult for a majority to form on narrow interests against the common good. The separation of powers among three branches ensured that no branch of the government can usurp another branch’s power. The balance of power between the national government and the states further protected the people from the dangers of a centralized government. The national government would exercise a few delegated powers; the states would exercise all other powers.

On the morning of September 17, 1787, the Constitutional Convention gathered for a momentous occasion: The Constitution was read aloud one last time, and the delegates came forward one at a time to sign it. On September 28, Congress sent the Constitution to the states for ratification. Delaware was the first to ratify; New Hampshire was the ninth; Rhode Island, the last.

**Active Reading**

To ensure understanding, ask: One of the problems of the Articles of Confederation was that it required nine of 13 states to approve important legislation. Why was this problematic? (If the other four states banded together, they could quickly stop any important legislation.) Ask: As president of the Constitutional Convention, what role did Washington play? (He oversaw daily meetings of the Virginia delegation and considered strategy and reform proposals that became the plan for the Constitution. He contributed to formal debate only once but was involved throughout the proceedings.)
Active Reading

Ask: Why did less-populous states object to the Virginia Plan? (Under the Virginia Plan, representation in both the House and the Senate would be determined by population. The less-populous states would have less power than more-populous states in the legislature.) How would representation be determined under the New Jersey Plan? (Under the New Jersey Plan, each state would have an equal vote in a one-house Congress.)

Make an Inference

Ask: On page 10, Spalding says that Edmund Randolph refused to sign the Constitution in part because he was wary of having a single executive. Who was this executive? (the President) Why do you think having a single executive worried Randolph? (He may have thought this person would have too much power.)

Work in Pairs

Have younger students work in pairs to paraphrase Franklin’s quotation on page 12. Remind students that when you paraphrase, you put something into your own words. (Sample answer: George Washington had the sun painted on the back of his chair, and Franklin had looked at it many times, unsure whether it was a sunrise or a sunset. Once the Constitution was completed, Franklin was sure that it was a sunrise, meaning a new beginning.)

Discussion Questions

1. What were some problems with the Articles of Confederation? (Each state governed itself through elected representatives who in turn elected a weak national government. There was no independent executive, and Congress lacked the authority to impose the taxes it needed to pay national expenses. All 13 colonies had to ratify amendments. One state’s refusal prevented structural reform, nine out of 13 states had to approve important legislation, and all treaties had to be ratified by the states.)

2. One of the rules of the Constitutional Convention was that its proceedings were to be kept secret. Why do you think this was important? (Sample answer: Sharing the discussions at the Convention with the public would likely hinder the activity of the Convention. People might disagree, distract the delegates, and try to influence their opinions.)
3. In the section “Auxiliary Precautions,” Spalding says that three unstated mechanisms were at work in the Constitution. What were these auxiliary precautions, and why does he describe them as unstated? (The three unstated auxiliary precautions were the extended Republic, the separation of powers, and federalism. While these ideas were not explicitly stated in the Constitution, they are present throughout the document.)

The Originalist Perspective

Essay by David F. Forte (pp. 13–17)

In “The Originalist Perspective,” David F. Forte presents two contrasting interpretations of the Constitution. On one side are those who view the Constitution as a “living document” with no fixed meaning. According to this view, the meaning of the Constitution changes with the times. On the other side are the originalists, who argue that the Constitution has permanent meaning and should be interpreted as it was originally intended. Forte cautions that there is some overlap between the two camps.

Originalism is the dominant theory of interpretation. It has succeeded and even profited from the criticism of non-originalists. Originalism is championed for several reasons. First, originalism supports the nature of a Constitution, which limits any one generation from ruling according to passion. Second, it supports legitimate, popular government that protects human liberty. Third, originalism supports limited government, for it understands that government has no authority beyond the Constitution. Fourth, originalism limits the judiciary and prevents Supreme Court justices from asserting their will over the other branches’ ability to craft policy. Fifth, Originalism supports the intentions of the Constitution’s drafters. Sixth, Originalism is not result-oriented.

Determining the original meaning of the Constitution is not an easy task. It requires us to analyze the clauses, to examine the meaning of the words by taking into consideration their meaning at the time when they were written, and to compare them to the other sections of the Constitution. The originalist perspective does not remove controversy when interpreting the Constitution, but it does limit controversy within a constitutional tradition of the rule of law.

The Heritage Guide to the Constitution contains brief essays on each clause in the Constitution. These essays explain the meaning of each clause as far as it can be determined and note any credible and differing original interpretations.
Unit 1

Before You Read

Ask: Think about the meaning of the word “original.” What do you think it means to have an originalist perspective when interpreting the Constitution? (to view the Constitution in terms of its original, or first, meaning)

Active Reading

Point out that Forte uses the word “comport” on page 14 and again on page 15. Read aloud the sentences containing the word. Ask: What do you think the word “comport” means? (fits in with, goes along with)

Make a Real-Life Connection

Point out that on page 15, Forte states that “originalism, properly pursued, is not result-oriented, whereas much non-originalist writing is patently so.” Ask: What does he mean? (The task of originalism is not to implement a particular policy agenda regardless of the process. By contrast, non-originalists are concerned about the result—the particular policy produced—rather than the process used to achieve the result.) Ask: How should we analyze issues and policies using the original meaning of the Constitution? (The Constitution is based on particular permanent principles and creates a limited government. It does not settle specific policy disputes; it sets forth the process for creating policy through a careful, deliberative process. For instance, the Constitution does not determine how high taxes should be; it describes the process for imposing taxes and places limits on who can impose them.)

Active Reading

To ensure understanding, ask: When explaining the approach that originalists take when interpreting the Constitution, Forte says they look to “the elucidation of meaning by debate within the Constitutional Convention.” What does elucidation mean? (clarification) What does the entire phrase mean? (Originalists research what these words meant to the delegates of the Constitutional Convention when they were debating issues.)

Discussion Questions

1. Explain the difference between an originalist and a non-originalist interpretation of the Constitution. (Sample answer: An originalist perspective seeks to determine the original meaning of the Constitution, whereas a non-originalist perspective views the Constitution as a living document that changes with the times.)
2. Why do you think it is important to research the background of the Founders and the meaning of words when interpreting the Constitution? (Sample answer: The meaning of words changes over time. Some phrases are technical legal terms that may have changed or fallen out of use. Therefore, the meaning of the words at the time the Constitution was written must be determined.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 1. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. When interpreting the Constitution, originalists take into account all of the following except
   a. the meaning of words during the time the Constitution was written.
   b. the philosophies of the delegates at the Constitutional Convention.
   c. how the laws of the Constitution should be changed to reflect modern society.
   d. how the words were interpreted during the revolutionary struggle.

2. Which of the following was not a rule of the Constitutional Convention?
   a. The proceedings were to be kept secret.
   b. All delegates must be present at each session.
   c. Voting was by state, and each state had one vote.
   d. Proper decorum was to be maintained at all times.

3. The plan of government used before the Constitution went into effect was
   a. Articles of Confederation.
   b. Declaration of Independence.
   d. none of the above.

4. The president of the Constitutional Convention was
   b. Benjamin Franklin.
   c. Thomas Jefferson.
   d. Alexander Hamilton.

5. The plan of government that favored the large states was
   a. the New Jersey Plan.
   b. the Virginia Plan.
   c. the Northwest Ordinance.
   d. the Treaty of Paris.
6. The plan of government that favored the small states was
   a. the New Jersey Plan.
   b. the Virginia Plan.
   c. the Northwest Ordinance.
   d. the Treaty of Paris.

7. The decision to have two houses of Congress, with one house’s representation based on population and the other’s based on equal representation for each state, was called
   a. the Paterson Plan.
   b. the New Jersey Plan.
   c. the Virginia Plan.
   d. the Great Compromise.

8. The system of government in which power is divided between the central and state governments is called
   a. republican.
   b. federalism.
   c. monarchy.
   d. democratic.

9. The idea that the powers of government should be divided between and given to different branches is called
   a. checks and balances.
   b. separation of powers.
   c. federalism.
   d. implied powers.

10. When the power of one branch of government is blocked by the power of another branch of government, this is the concept of
    a. checks and balances.
    b. separation of powers.
    c. federalism.
    d. implied powers.

11. The dominant theory of Constitutional interpretation is that of
    a. originalists.
    b. the Supreme Court.
    c. non-originalists.
    d. contemporary court decisions.

**Fill in the blank: Write the correct word or words in each blank.**

1. The delegates signed the Constitution on _______. (September 17, 1787)

2. Using the original intention of the Framers as a guide for interpreting the Constitution is called an _______ perspective. (originalist)
3. Originalism is in opposition to the concept that the Constitution is a _______ document that lacks any fixed meaning. (living)

4. When determining the original meaning of the Constitution, originalists begin by examining _______. (the text of the clause)

5. The Constitution is strong in part because it complements the ________. (Declaration of Independence)

Short Answer: Write out your answer to each question.

1. What are the six reasons that David Forte gives to explain why originalism is championed?
   • It supports the nature of a Constitution.
   • It supports legitimate, popular government that protects human liberty.
   • It promotes limited government and the idea that government has no authority beyond the Constitution.
   • It limits the judiciary and prevents Supreme Court justices from asserting their will over the other branches’ ability to craft policy.
   • It comports with the intentions of the Constitution’s drafters.
   • It is not results-oriented.

2. What are the three auxiliary precautions that Matthew Spalding mentions are contained within the Constitution?
   • The extended republic
   • Separation of powers
   • Federalism

3. The United States government is divided into how many branches? (three branches)

True / False: Indicate whether each statement is true or false.

1. The Constitution means whatever the Supreme Court says it means. (False)

2. When originalists read the Constitution, they consider the historical context of when the text was created. (True)

3. The Constitution was written in 1787. (True)

4. The Articles of Confederation were problematic because the national government was too strong. (False. The national government was too weak.)

5. The Constitution was written at a convention held in Philadelphia. (True)
Lesson Objectives:
• Explain how the Preamble differs from the introduction of the Articles of Confederation.
• List and explain the six purposes of the Constitution as stated in the Preamble.
• Explain how the Emoluments Clause and the ban on State Title of Nobility support the republican form of government.
• Explain the purpose of the Guarantee Clause and the three criteria of a republican government.
• Discuss the ratification process for the Constitution and how it differed from that of the Articles of Confederation.
• Know how many states needed to ratify the Constitution for it to go into effect.
• Explain the purpose of the Attestation Clause and the significance of the way in which the Constitution is dated.
• Understand how the Supremacy Clause resolves conflicts between state and federal laws.
• Understand that the Constitution is supreme.
• Understand the purpose of the Oaths Clause and the Religious Test Clause and to which officials it applies.
• Understand the purpose of the Debt Assumption Clause.
**Unit 1**

**Part 1:**

**A New Constitution for a Young Republic**

**Preamble**

Essay by Forrest McDonald

**Emoluments Clause**

Article I, Section 9, Clause 8

**No State Title of Nobility**

Article I, Section 10, Clause 1

**Guarantee Clause**

Article IV, Section 4

**Ratification Clause**

Article VII, Clause 1

**Attestation Clause**

Article VII, Clause 2

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**Preamble**

*Essay by Forrest McDonald (pp. 43–46)*

The Preamble of the Constitution was an afterthought composed by Gouverneur Morris, a delegate from Pennsylvania and member of the Committee of Style. Though the Preamble does not have any substantive legal meaning, it is nevertheless a powerful statement of the purpose of the Constitution and a reminder of the principles of the Declaration of Independence that undergird the document.

As Forrest McDonald explains, the very first words of the Preamble—“We the People of the United States”—show a marked departure from the Articles of Confederation. The Constitution’s introductory words indicate that the people of the United States were members of one united country rather than representatives from different states forming a pact between states (as was the case under the Articles of Confederation). The use of “We the People” was also necessary considering the ratification procedure. The Preamble did not list the name of each state, because the Constitution would go into effect whenever the popularly elected ratifying conventions of nine states approved it. It was not obvious which nine would ratify first, and the Framers did not want to add names retroactively.

Some criticized the language for failing to list the states. Patrick Henry suggested that the absence of the list of states indicated that the Constitution created a national, consolidated government. Governor Edmund Randolph responded that “the government is for the people; and the misfortune was, that the people had no agency in the government before.”
The Preamble presents six purposes of the Constitution. Of these six, two are immediate requirements of safety and security common to every sovereign nation: “insure domestic tranquility” and “provide for the common defense.” Two look forward to building a particular society that upholds the rule of law and fosters prosperity and well-being for all of its citizens: “establish Justice” and “promote the General Welfare.” The other two objectives grandly express the Founders’ hopes for their nation’s and their people’s future: The Constitution is meant to “form a more perfect union” and “secure the blessings of liberty to ourselves and our posterity.”

“To form a more perfect Union” does not mean that the Founders thought that they could create a truly perfect government. Rather, the phrase meant a better and stronger union than the one that had existed under the Articles of Confederation. The second objective, “to establish justice,” implies that justice did not exist under the previous government. Gouverneur Morris chose the words carefully: While court systems existed prior to the Constitution, state governments violated individuals’ rights. The Constitution would guard against this behavior with an independent judiciary and separate prohibitions of certain state practices.

The third purpose, “to insure domestic Tranquility” was vital because, during this time, Americans were accustomed to rebelling against unpopular governments. The Constitution would prevent uprisings such as the Whiskey Rebellion (1794) and Fries’s Rebellion (1799). To insure tranquility, the new Constitution would give Congress authority over the state militias and guarantee to each state a republican form of government. The fourth objective, “to provide for the common defense,” was the reason the United States came into being. However, Americans were wary of strong standing armies, which could enslave the country as well as defend it. The Founders sought both to ensure a strong defense and to provide for these concerns about standing armies.

The fifth purpose, “to promote the general Welfare,” was not a broad grant of power to the federal government. “General” means applicable to the whole, not to any particular state or special interest. Thus, the Preamble limits government by ensuring that it always acts in the interests of the whole rather than for particular states or interests. The sixth and final purpose is to “secure the Blessings of Liberty to ourselves and our Posterity.” This broadly refers to the whole Constitution insofar as it establishes a limited government to protect individual liberties.

The Preamble, furthermore, points back to the principles and rights proclaimed in the Declaration of Independence. Far from negating the principles leading to the American Revolution, the Constitution fulfills them. The Preamble as a whole declares that the Constitution was designed to secure the rights of life, liberty, and the pursuit of happiness proclaimed in the Declaration.
Unit 1

Make a Real-Life Connection

Read the Preamble aloud. Ask students whether they have heard these words before and, if they have, where they have heard them. (in school, on television) Ask: Why do you think the Preamble is so well known? (Answers will vary. Students may say that the Preamble expresses the ideas behind the formation of the United States Constitution.)

Make a Real-Life Connection

Ask: In his discussion of the Preamble, Forrest McDonald explains what the phrase “general Welfare” meant to the Framers of the Constitution. What did they understand the phrase to mean? (It was a limitation on government’s power. Government could address certain general interests rather than regional or parochial ones.) How is the word “welfare” used today? (persons’ general well-being, social programs intended to promote well-being)

Active Reading

Read aloud the opening of the Preamble. Ask: What impression do these words make on you? If necessary, prompt students by asking: What do these words say about the people of the United States? (Students may say that the people of the United States are now one.) Read aloud the opening of the Articles of Confederation on pages 43 and 44. Ask: What impression do these words make on you? (Students may say that all people in one state are one and that each state is separate.)

Write About It

Point out that McDonald discusses the relationship between the Declaration of Independence and the Constitution. Have students read both documents and write a paragraph on how the purposes in the Preamble compare to the discussion of government in the second paragraph of the Declaration of Independence. (The Declaration sets forth the end of government; the Constitution creates the structures by which the Constitution will fulfill the promises of the Declaration.)

Discussion Questions

1. How does the Preamble show that the Constitution is different from the Articles of Confederation? (The Articles of Confederation tied the states together only loosely, but the Preamble represents the states as a united body through the phrase “We the People.” The Preamble also places the political strength of the government with the people, which differs from the Articles of Confederation.)
2. What does the goal to “secure the blessings of liberty to ourselves and to our posterity” reveal about how the Framers thought of the Constitution? (This statement reveals that one of the major goals of the Constitution was to secure liberty, or the personal rights of individuals, for all the generations to come.)

**Emoluments Clause** — Article I, Section 9, Clause 8

*Essay by Robert Delahunty (pp. 166–167)*

The Constitution creates a republican government. James Madison commented in *The Federalist* No. 39 that republican governments were rare: They existed in Holland, Poland, and Venice in attenuated forms. The existence of a genuinely republican government with republican institutions was unique to America. The Framers crafted institutions and drafted specific clauses, such as the Emoluments Clause and the State Title of Nobility Clause, to ensure that the American Republic would succeed.

The Emoluments Clause forbids both the United States from awarding titles of nobility and public officials from receiving either titles or similar advantages from a foreign power without the consent of Congress. Giving people lifelong titles of nobility is a characteristic of aristocracies, not republics. At the time, kings would customarily bestow expensive gifts on ministers of other countries who had visited them and signed treaties. The Emoluments Clause protected the republican character and American political institutions from such corrupting foreign influences. The Emoluments Clause has never been litigated, but it has been interpreted and enforced through court opinions.

**Before You Read**

Point out that one meaning of the word “emoluments” is “advantages.” Ask: *What are some advantages enjoyed by kings and queens?* (Answers will vary. Students may say that they are in a higher social class than everyone else and have greater privileges than everyone else. They are born into wealth, live extravagantly, and are entitled to servants.)

**Active Reading**

Explain that titles, such as those forbidden by the Constitution, indicate a rigid class structure entered into upon birth. For example, some individuals are born into the monarchy, while others might be born into the peasant class. Ask: *Why does the Constitution forbid titles?* (The American justice system is based on equality before the law. Formal recognition of distinctions based on class, race, or title would undermine republican government and the justice system.)
Active Reading

Ask: Why does the Constitution require Congress’s consent when an official receives a title or gift from a king or other world leader? (Requiring Congress to consent to the receipt of these gifts informs Congress about the gifts, prevents the likelihood that these gifts are mere bribes, and guards the republican character of America.)

Discussion Question

Point out that Delahunty quotes David Ramsey, an 18th century historian, as saying that equality is the “life and soul” of republicanism. Ask: What are some ways that the United States government tries to treat all people equally? (Answers will vary. Examples: the law protects everyone equally. All people have certain due processes. Citizens have the right to vote.)

State Title of Nobility — Article I, Section 10, Clause 1

Essay by Robert Delahunty (pp. 175–176)

While the Emoluments Clause forbids the federal government from granting titles of nobility, Article I, Section 10, Clause 1 forbids state governments from granting such titles. Together, these clauses help to maintain the republican character of the United States government.

The Articles of Confederation prohibited Congress and the states from awarding titles of nobility. Even before the Articles of Confederation, however, states had renounced the power to grant such titles. Thus, prohibiting state titles of nobility was not controversial.

Make a Real-Life Connection

Provide students with some examples of noble titles. These include prince, knight, king, queen, duke, duchess, count, and princess. Ask: Can you think of some examples of people who have a noble title in their names? (Answers will vary.) Where are these individuals from? (Answers will vary. Help students reach the conclusion that all people mentioned are from countries other than America.) What does this tell you about noble titles and America? (America is a republican government. It does not pick its officers according to a hereditary bloodline. It does not award titles, and her citizens do not receive titles.)
Active Reading

Ask: Where did the idea that states should not grant titles of nobility appear before it was made part of the Constitution? (The Articles of Confederation prohibited the states from granting titles of nobility.) How is the American republican form of government exceptional compared to other republics? (Republican governments were uncommon before the French Revolution. They were found in Holland, Poland, and Venice in attenuated and precarious forms. America created republican institutions based on republican principles.)

Guarantee Clause — Article IV, Section 4

_Essay by Robert G. Natelson (pp. 282–284)_

The Guarantee Clause makes certain guarantees to the states. It guarantees states a republican form of government and protection from foreign invasion. The Articles of Confederation did not guarantee a republican form of government. Delegates debated the meaning of republican government and agreed on three criteria, the absence of any one of which would render a government un-republican: popular rule, no monarch, and rule of law.

Popular rule means that political decisions are made by a majority of voting citizens. Citizens can act either directly or through representatives, but in either mode, the sovereign is accountable to the people. The Framers saw pure democracy as inconsistent with republican government. A pure democracy lacks magistrates; instead, the mob makes all decisions, including executive and judicial ones.

Monarchy is incompatible with republican government. Under the condition of no monarchy, for instance, the state executive cannot become tenured and serve for life.

The rule of law requires that the government and the governed alike be equally subject to the law and equally protected by the law. The rule of law means a formal, regular process of law enforcement and adjudication. The laws apply to the government and the governed alike. Moreover, the rule of law implies that there are certain standards to which specific laws and lawmaking must conform. For instance, bills of attainder and ex post facto laws are incompatible with the rule of law in a republican government.

If the citizens of a state think that their government is no longer republican, they must seek relief in Congress rather than the courts. The Supreme Court has noted that this clause does not present a justiciable question; that is, it is not a question that the courts may address or settle.
Before You Read

Ask: What is a guarantee? (a promise) What are some guarantees that a government would make to its people? (Responses may vary. Students may say that government protects its people from foreign invasion and treats people equally under the law.)

Active Reading

Help students understand how a republican government differs from a pure democracy and a monarchy. Point out that a pure democracy lacks magistrates. This means that the mob makes all decisions, including executive and judicial ones. Ask: Why is this dangerous? (The people who make up the majority would make all decisions. The majority could deny the rights of the minority.) Point out that the absence of a monarchy was a requirement of a republican government. Ask: What is the difference between a monarchy and a republic? (In a monarchy, the ruler holds power for life. A ruler who has lifetime tenure has little incentive to rule justly or in the people’s best interest, because the people would have no check on him. Elections are the chief mode to ensure accountability. In a republic, the people can remove their representatives if they fail to perform the duties of their offices properly.)

Write About It

Your book mentions that the rule of law prevents certain types of laws: ex post facto laws and bills of attainder. This will be discussed in greater detail in Lesson 8. Have students research the meaning of an ex post facto law and bills of attainder and provide a historical example of each. (Ex post facto laws are laws that make something illegal after the fact. Bills of attainder are laws directed at one person or at groups of persons. These laws do not accord with the rule of law, because the rule of law requires that laws be general rules of action, not retroactive punishments of past behavior or narrowly defined acts that do not apply to everyone. Examples will vary.)

Ratification Clause — Article VII, Clause 1

Essay by Charles Kesler (pp. 298–301)

The Ratification Clause formally accepted the Constitution as a replacement for the Articles of Confederation. This was a bold decision because the original purpose of the Constitutional Convention was to revise, not replace, the Articles of Confederation.

More significantly, the Framers required popular conventions of nine states to ratify the Constitution instead of relying on Congress, state legislatures, or the cumbersome procedures of the Articles of Confederation. The Constitution’s ratification
process was a more republican one. First, the Constitution would have obtained the consent of the people rather than that of the state legislators. Second, requiring unanimous consent would be unrepugnent; if 12 states approved but one rejected the constitution, the minority would effectively rule the majority.

The Anti-Federalists opposed the ratification process of the Constitution. They claimed that the Articles of Confederation did not need popular or majority ratification because the document was a treaty and not a constitution. James Madison explained that any breach in one article in a treaty frees the other parties from having to comply with the treaty. He implied that state governments’ actions had already violated the terms of the Articles of Confederation; therefore, there was no need to abide by the document’s ratification procedure. In a union of people under a constitution, actions that oppose the constitution are invalidated, and there is no similar ability to withdraw from the pact.

The Constitution applied to all states within the Union uniformly. Those states that ratified the Constitution would need to amend their state constitutions to comply with it, but the people of the United States could not demand change in states that chose not to ratify the Constitution. However, allowing the Constitution to go into effect with the ratification of nine states ultimately encouraged the rest of the states to ratify the Constitution.

**Before You Read**

Ask students to think about the word “ratification.” Explain that when something is ratified, it is formally accepted. Tell them that the purpose of the clause was to formally accept the Constitution and replace the Articles of Confederation. Read aloud Article VII. Ask: Do you think everyone agreed with this article? Why or why not? (Students should say that not everyone agreed. One state did not participate in the Constitutional Convention.)

**Write About It**

To ensure understanding, have students write a few sentences paraphrasing Madison’s argument in *Federalist* No. 40. Have them share their sentences with a partner. (Sample answer: In all important governmental changes, past procedures should not be the primary goal, because strictly adhering to past procedures may harm the larger purpose of securing the liberty and happiness of the people.)
Active Reading

Point to Madison’s distinction between a treaty and a constitution, discussed on pages 299–300. Ask: What makes a constitution different from a treaty? (In a treaty, there are no questions of constitutionality. If one party breaches an article of a treaty, then the other parties no longer have the obligation to comply with the treaty. In a constitution, actions that oppose the constitution are invalidated, and there is no similar ability to withdraw from the pact.)

Discussion Questions

1. Why is it important to have decisions made on the basis of majority approval instead of unanimous approval? (Unanimous approval might never be achieved; allowing majority approval prevents the tyranny of the minority, where one state in withholding its approval could prevent the greater security and happiness of the other 12 states.)

2. Kesler explains that one of the purposes of Article VII was to encourage the states that did not ratify the Constitution to come aboard. How do you think Article VII does this? (Students may say that the states that did not ratify the Constitution may have worried about their safety and prosperity without it. Not wanting to be isolated, they would therefore officially become part of the United States.)

Attestation Clause — Article VII, Clause 2

Essay by Matthew Spalding (pp. 301–302)

The Attestation Clause is the final clause of the Constitution of 1787. It was written immediately before the delegates signed their name to the document.

When the Convention reconvened on September 17, 1787, Benjamin Franklin delivered an address endorsing the Constitution even with its perceived imperfections. Delegates did not sign on behalf of their particular states; they simply signed their names, which was an expression of unanimity. William Jackson, although not a delegate, signed to attest to the delegates’ signatures.

As Matthew Spalding explains, the way in which the Constitution was dated—“the Seventeenth Day of September in the Year of our Lord” 1787, and “of the Independence of the United States of America the Twelfth”—uniquely situates the Constitution in Western civilization and American history. Along with the Constitution, only the Articles of Confederation and the Northwest Ordinance are dated according to the “Year of Our Lord” and the anniversary of the Declaration of Independence. By choosing to date the Constitution in this way, the Framers situated the document in context of the religious tradition of Western civilization and linked the Constitution to the principles articulated in the Declaration of Independence.
Check Understanding

To ensure students’ understanding, ask: How was the signing of the Constitution different from the signing of the Articles of Confederation? (The signatures of the delegates signing the Constitution were grouped by state, but they did not sign their names as representing their states as was done on the Articles of Confederation. This suggested unanimity.)

Active Reading

Help students understand the meaning of the words “of the Independence of the United States of America the Twelfth.” Explain that “the twelfth” refers to when the Declaration of Independence was signed: July 4, 1776, 12 years prior to the Constitution.

Discussion Questions

1. What is the relationship between the Constitution and the Declaration of Independence? (The Declaration of Independence establishes ends or purposes of government—the principles upon which governments are made. The Constitution creates the institutions or arrangements of government by which citizens expressed their consent, assured their safety, secured their rights, and otherwise governed themselves in light of the community’s highest purposes as described in the Declaration of Independence.)

2. Benjamin Franklin said he endorsed the Constitution despite its imperfections. Why do you think the Framers did not try to fix these imperfections? (Answers may vary. Students may say that the Constitution was as good as it could be at that time and that no document is perfect.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 2, Part 1. Review any material for questions they have missed. Short Answer: Write your answer to each question.

Multiple Choice: Circle the correct response.

1. According to the discussion of the Guarantee Clause, one of the key features of a republican government is that it does not have a
   a. Supreme Court.
   b. monarch.
   c. unicameral legislature.
   d. strong federal government.
Unit 1

2. To become the plan for government for the United States, the Constitution had to be ratified by
   a. all states
   b. nine states.
   c. 11 states.
   d. 12 states.

3. The only state that did not participate in the Constitutional Convention was
   b. Virginia.
   c. New Hampshire.
   d. Rhode Island.

Fill in the blank: Write the correct word or words in each blank.

1. In Article IV, Section 4, the Guarantee Clause assures the states protection from ___________________ and also guarantees ___________________________. (foreign invasion and domestic violence, “a Republican Form of Government”)

2. A pure democracy had no ________________. (magistrates)

3. Where the signers subscribed their names, the states are listed in ______________ order. (geographical)

4. Unlike the Articles of Confederation, the Constitution established a strong _______ government to protect the citizens. (federal)

5. The Preamble stresses that ultimate political authority lies with the people, not the states, by starting with the phrase ________________. (“We the People”)

6. ________________, the secretary of the Convention, signed to attest, or authenticate, the delegates’ signatures. (William Jackson)

Short Answer: Write out your answer to each question.

1. Why did Patrick Henry object to the Preamble? (Patrick Henry thought that since the Constitution failed to list states, its intention might be to form a consolidated government.)

2. Who signed the Constitution to attest to the delegates’ signatures? (William Jackson)

3. Who composed the Preamble? (Gouverneur Morris)
4. What are the six purposes of the Constitution, as stated in the Preamble?
   • to form a more perfect union
   • establish justice
   • insure domestic tranquility
   • provide for the common defense
   • promote the general welfare
   • secure the blessings of liberty to ourselves and our posterity

5. What was the purpose of the Emoluments Clause? (to shield the republican character of the United States against corrupting foreign influences)

6. During the debates over ratification of the Constitution, what were the three criteria of republicanism under the Guarantee Clause?
   • popular rule (majority of voting citizens)
   • that there be no monarch
   • rule of law

7. Which was the ninth state to ratify the Constitution? (New Hampshire)

**True / False: Indicate whether each statement is true or false.**

1. The prohibition on federal and state titles of nobility was designed to affirm and protect the republican character of the American government. (True)

2. The Preamble was placed in the Constitution as an afterthought. (True)

3. Article VII was the last and shortest of the Constitution’s articles. (True)

4. Article VII’s bold dismissal of the Articles of Confederation’s rule of unanimous approval emphasized the break from the Articles to a Constitution as supreme law of the land. (True)

5. The Emoluments Clause has been in court extensively. (False. To our knowledge, the Emoluments Clause has never been litigated.)

6. The Founders intended to create a pure democracy. (False)

7. All the Delegates signed the Constitution (False. Three Delegates did not sign.)
Debt Assumption Clause
Article VI, Clause 1

Supremacy Clause
Article VI, Clause 2

Oaths Clause
Article VI, Clause 3

No Religious Test
Article VI, Clause 3

**Debt Assumption** — Article VI, Clause 1

*Essay by Jeffrey Sikkenga (pp. 289–291)*

To finance the War of Independence, American states and the Continental Congress sold bonds to anyone who would buy them, leaving the new country in debt. During the Convention, delegates considered a proposal giving Congress the power to discharge the debts incurred by the states and the previous Congress. Since this debt was incurred before the signing of the Constitution, a question arose: Would the new government necessarily inherit the obligations of the previous government? There was also a related question: Should Congress assume this debt or the states retain it?

Under Article XII of the Articles of Confederation, Congress was liable for “monies borrowed and debts contract by” the old Continental Congress. Thus, the Articles provided precedent for the new government to inherit the debts incurred under the previous form of government. Elbridge Gerry objected that under the proposed wording, the new Congress would have the power but not the obligation to pay back the debt. Edmund Randolph agreed that without the explicit power enumerated in the Constitution, the new government did not have the authority to pay off the previous debts.

James Madison, however, disagreed. He argued that the new government had the obligation to pay the debts from the previous government and that this obligation existed whether or not the Constitution empowered the new government to pay. Furthermore, states did not have the power to engage in external affairs, which included the power to repay foreign bondholders. Thus, the new national government would inherit the power to repay foreign bondholders directly from the Articles and would not need an explicit grant of power from the new Constitution. In *The Federalist*, Madison maintained that the Debt Assumption Clause was not a legal or constitutional necessity; rather, it was included to satisfy foreign creditors of the United States. Ultimately, the new federal government fulfilled the obligations inherited from the Articles of Confederation without serious constitutional controversy.
Before You Read

Ask: What is debt? (money owed) How do people get into debt? (They borrow money that they cannot immediately pay back.)

Active Reading

Tell students that the War of Independence was the American Revolution, which lasted from 1775 to 1783. Explain that this war was between Great Britain and the 13 British colonies that had settled in North America. To understand why the colonies severed ties with Britain, have the students read the Declaration of Independence, focusing particularly on the list of grievances.

Supremacy Clause — Article VI, Clause 2

Essay by Gary Lawson (pp. 291–294)

The Supremacy Clause clarifies that above all else—above state law, federal laws, and the state constitutions—is the Constitution of the United States. The clause applies to all legal interpreters including Members of Congress, the President, federal officials, federal judges, state court judges, and other state officials. While both federal and state governments have power to enact laws, there must be a mechanism to determine which law applies in the event of a conflict. Under the Supremacy Clause, national laws made in pursuance of the Constitution take priority over any state acts that conflict with national law. This clause is not a grant of power; it specifies how to resolve conflicts.

At the Constitutional Convention, James Madison proposed congressional power to veto state laws. However, the Convention repeatedly rejected proposals for a federal veto power over state laws, seeking to reduce conflict between state and federal governments. The Convention accepted the Supremacy Clause in its final form (proposed by Anti-Federalist Luther Martin) without much dissent.

The Supremacy Clause’s historical context and text still leave several questions unanswered. For example, what is a conflict? When reformist legislation shifted from the states to the federal government during the New Deal, the Supreme Court began to fashion rules to try to determine when there is a genuine conflict. Generally, federal law “preempts” state law when Congress intends to do so or when Congress passes broad legislation that is intended to “occupy the field” on a certain issue. Additionally, a conflict can result when it is impossible to comply with both a state law and a federal law or when a state law obstructs compliance with federal law. However, to protect states’ police powers against federal encroachment, the Court has noted that federal law does not preempt state law unless Congress clearly intends that the federal law do so.
The Supremacy Clause is often seen as the source of the principle that states cannot regulate or control federal activities. In *McCulloch v. Maryland* (1819), Chief Justice John Marshall declared that supremacy allowed the federal government to “remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their influence.” While the federal government can prevent states from interfering with federal operations, this does not mean that the Supremacy Clause is the source of Congress’s power to protect federal operations. The basis of Congress’s powers is the constitutional enumeration of powers, not the Supremacy Clause.

Finally, the Supremacy Clause differentiates treaties from laws: that is, treaties made “under the Authority of the United States” and federal laws made “in pursuance” of the Constitution. This language ensured that treaties made by the United States prior to ratification of the Constitution take precedence over conflicting state laws. This does not, however, mean that treaties are “supreme” if they are not pursuant to the Constitution. Treaties that are properly executed are a part of the law of the United States and are on par with other federal laws.

**Before You Read**

Point out that each state has its own constitution and laws governing the state. It is possible that state law will differ from federal law. **Ask:** What happens when a state law is in conflict with a valid federal law? Which law applies? (The federal law will trump the state law.)

**Active Reading**

Read about the first strategy for resolving state and national conflict on page 291. It states that one way to avoid conflict is to give each government exclusive jurisdiction over a respective sphere. **Ask:** Do you think this would work? Why or why not? (Most students will say no, that it won’t work because some overlap between state law and federal law is inevitable.)

**Check Understanding**

Explain that the Supremacy Clause represents the Framers’ vision that the United States needed a strong but limited federal government. **Ask:** How does the Supremacy Clause both give the federal government power and limit how that power can be used? (Sample answer: The Supremacy Clause gives the Constitution supreme authority over state laws, but the Constitution allocates power to the executive, the legislature, and the courts in such a way that the document ultimately rests on the will of the people, who may in turn amend the document.)
Oaths Clause — Article VI, Clause 3

Essay by Matthew Spalding (pp. 294–296)

The primary significance of the Oaths Clause is that the oaths taken by those who hold office in the United States—the President, Members of Congress, federal judges—are oaths not to a king or ruler, or even to an executive or to Congress, but to the United States Constitution. The clause is a solemn reminder that the duty to uphold the Constitution is not the exclusive or final responsibility of the judiciary, but rather is shared by Congress and the President (per Article II, Section 1) as co-equal branches of the United States government.

While there was no oath required in the Articles of Confederation, Edmund Randolph proposed, as part of the Virginia Plan at the Constitutional Convention, that the legislative, executive, and judiciary powers be bound by oath to support the articles of the Union. Some delegates thought that it interfered with the power of states to police activity within their borders. However, the majority of delegates argued that the Oaths Clause was needed to ensure that political actors would uphold the Constitution at all times. The Oaths Clause in its final form applies to all members of the state and national governments.

The Clause’s declaration to “support the Constitution” is also significant. Members of Congress do not assume their office until they take the oath. John Marshall invoked the Oaths Clause as the basis of judicial review because it ensured that judges put the tenets of the Constitution first in their judgments. The Oaths Clause has also placed a personal responsibility on all members of the legislature to act in a way that is in accordance with the tenets of the Constitution.

The very first law passed by the House of Representatives concerned taking an oath to the Constitution, and under current federal law, officials in the federal government and state governments continue to swear to support the Constitution.

Before You Read

Ask: What is an oath? (a pledge or promise) What are some oaths that people take? (Answers will vary. People swear to tell the truth in court; physicians take an oath to do what is in their patients’ best interest.)

Active Reading

Ask: Spalding says that the Oaths Clause helps to fulfill the Framers’ plan to integrate the states into the functions of the federal government. How does state officials’ taking an oath to uphold the Constitution make them more involved in the federal government? (If they are bound to follow the Constitution, then they are bound to exercise their broad powers in accordance with the Constitution. For instance, state officials would not attempt to make a treaty with another country.)
Unit 1

Work in Pairs

Pair up students and have them research an instance where the federal government has required specific oaths (for example, during the Revolutionary War). Have them write a summary of the oath and explain the reasons why such an oath was necessary.

Discussion Questions

1. How does the Oaths Clause show the balance of power among the branches of government? (All branches of the government are considered equal insofar as they all have an obligation to follow, support, and defend the Constitution. The Constitution is not the province of only one branch.)

2. What does the Oaths Clause reveal about the Framers’ perception of individual responsibility? (The Oaths Clause places a personal burden on each individual in public office to act in an appropriate manner and to uphold the principles of the Constitution at all times.)

Religious Test — Article VI, Clause 3

Essay by Gerard V. Bradley (pp. 296–297)

The clause banning religious tests for federal office further attests that, regardless of one’s religious affiliation or lack thereof, the Constitution is the supreme law of the land. Political obligations and religious affiliation are important, but in the end, political actors within the constitutional order must give complete loyalty to and solemnly pledge to support the Constitution of the United States. Article VI of the Constitution ensures that America’s legal system—especially the federal and state courts—is defined by and focused on the Constitution.

The Article VI ban on religious tests is the one explicit reference to religion in the unamended Constitution. According to the ban, federal officers cannot be subjected to a formal religious test to hold office. The ban applied only to federal officers, but states could impose religious tests on their officials—and they did (the modern Supreme Court has ruled that religious tests on the state level are unconstitutional). Such a religious test often required a person seeking office to be Christian or even a Protestant.

The No Religious Test ban was hotly debated during the debates on ratification of the Constitution. Some focused on the clause to support the objection that the Constitution was too secular. Some supported religious tests to ensure good character in office. But defenders of the Constitution argued that the religious test ban was necessary to support religious liberty and to enable the best citizens to serve in the national government. Ultimately, the Framers supported the ban on such a test and instead required an oath to the Constitution.
Active Reading
To ensure understanding, ask: To whom did the Religious Test Clause ban apply? (to those seeking federal office)

Make an Inference
Ask: Why do you think the Framers of the Constitution did not extend the ban to state officials? (Answers will vary. Students may note that a ban on state religious tests for office would have faced stiffer opposition. Some states had established churches too. Ultimately, the Founders left the possibility of such bans at the state level to be a matter for states to decide.)

Discussion Questions
1. What does the Religious Test Clause tell you about the Framers of the Constitution? (The Religious Test Clause shows that the Framers of the Constitution were concerned about protecting the rights of individuals to the free exercise of their religious faith.)
2. Why does the Religious Test Clause rarely serve as a focal point for debate in the judicial system? (The Religious Test Clause rarely appears in courts today because courts settle controversies using the First Amendment.)

Check Understanding
Have students complete the following assessment to check their understanding of Lesson 2, Part 2. Review any material for questions they have missed.

Fill in the blank: Write the correct word or words in each blank.
1. During the American Revolution, General George Washington required all officers to subscribe to an oath renouncing any allegiance _______________ and pledging their fidelity to the _______________. (to King George III, United States)

Short Answer: Write out your answer to each question.
1. What strategy did the Supremacy Clause use to deal with potential conflicts between the national and local governments? (*It uses a conflict-of-laws rule that specifies that certain national acts take priority over any state acts that conflict with national law.*)

2. What was the very first law passed by the first session of the House of Representatives? (*"An Act to regulate the Time and Manner of administering certain Oaths"*)
3. The original, unamended Constitution contains how many explicit references to religion? *(one)*

4. Why were the states in debt before the signing of the Constitution? *(To pay for the War of Independence, the states and the Continental Congress sold millions of dollars in bonds.)*

5. What did Edmund Randolph think about the new Congress assuming past debt? *(He argued that the new government was bound only by the Constitution. Since this issue was not specifically addressed, the federal government was in the uncomfortable position of not having the authority to pay off the debt.)*

6. What is the main purpose of the Supremacy Clause? *(to resolve conflicts between national and state laws and maintain the primacy of the Constitution)*

7. What does it mean when a federal law trumps a state law? *(It means that federal law takes precedence over the state law.)*

8. What is the main purpose of the Oaths Clause? *(to ensure that officials are bound to the Constitution)*

9. Give an example of someone who must swear to uphold the Constitution. *(Answers will vary but may include any individual elected or appointed to public office, an office of honor or profit in the civil service, or uniformed services.)*

10. Why did the Framers of the Constitution support the ban on religious tests to hold office? *(They considered it an aspect of religious liberty.)*

11. How did the states and the Continental Congress finance the War of Independence? *(They sold millions of dollars in public bonds to soldiers, ordinary Americans, and investors in America and abroad.)*

**True / False: Indicate whether this statement is true or false.**

1. The Oaths Clause helps to fulfill the Framers’ plan to integrate the states into the electoral, policymaking, and executive functions of the federal union, subject to the limits of the Tenth Amendment. *(True)*
Lesson 3: The House of Representatives

Legislative Vesting Clause
Article I, Section 1

Part 1: The House of Representatives and Its Members

House of Representatives
Article I, Section 2, Clause 1
Elector Qualifications
Article I, Section 2, Clause 1
Qualifications of Representatives
Article I, Section 2, Clause 2
Enumeration Clause
Article I, Section 2, Clause 3
Allocation of Representatives
Article I, Section 2, Clause 3
Executive Writs of Election
Article I, Section 2, Clause 4
House Leadership: Speaker of the House
Article I, Section 2, Clause 5

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Lesson 3

THE HOUSE OF REPRESENTATIVES

Lesson Objectives:

When you complete Lesson 3, you will be able to:

• Explain how the House functions within the bicameral legislature.
• State the qualifications necessary to vote for a Representative and to become a Representative.
• Describe how the number of Representatives is determined and how these Representatives are allocated.
• Explain Congress's role in regulating elections, how Members may be expelled, and how vacant seats are filled.
• Explain the compensation requirement, the privilege from arrest, and freedom of speech for Members of Congress.
• Explain the restrictions in the Sinecure and Incompatibility Clauses.
• Understand the role of the Speaker of the House and the rules of adjournment and meetings of Congress.
• Understand the sole powers of the House of Representatives relating to lawmaking, impeachment, and the Electoral College.

Legislative Vesting Clause — Article I, Section 1

Essay by Douglas Ginsburg (pp. 46–48)

The Constitution creates a limited government of enumerated powers. The Framers separated the powers of government to avoid tyranny and ensure accountability. They divided the powers of government among three separate branches: Congress exercises the legislative power, the President exercises the executive power, and the judiciary exercises the judicial power. Neither the judicial nor the executive power includes a general lawmaking power, and Congress may not delegate its power.
The United States Congress is a bicameral legislature, meaning it consists of two houses: the House of Representatives and the Senate. Just as power is separated among the three branches of government (legislative, executive, and judicial), each house of Congress has its own constituencies, requirements for office, and responsibilities. A bicameral legislature promotes better deliberation and better lawmaking.

The Legislative Vesting Clause grants specific legislative powers to Congress including certain economic powers, war powers, and territorial powers. (These powers will be discussed in greater detail in lessons 5, 6, 7, and 8.) Congress may exercise those powers specifically granted to it by the Constitution and may not assume any general powers beyond those in that document.

The Framers carefully crafted the separation of powers, insofar as neither the judicial nor the executive power includes a general lawmaking power and Congress may not delegate its power. But it is sometimes difficult to distinguish laws that confer discretion upon the executive from those that call for the executive to exercise legislative power. The executive has discretion in executing law, but some decisions are fundamentally legislative ones.

The Supreme Court has addressed the question of delegated legislative powers several times. In 1825, the Court recognized that it is difficult to draw the line between the subjects that must be regulated by the legislature and those that are subject to another branch's discretion. In 1928, the Court upheld a statute that delegated to the President the power to raise tariffs. The Court set forth the following standard: A legislative action is not a delegation of legislative power if Congress creates an intelligible principle to which the person or body must conform. In 1935, the Court struck down two laws that delegated large amounts of legislative power.

*A.L.A. Schechter Poultry Corp. v. United States* (1935) was the last time the Court struck down a law for violating the Legislative Vesting Clause. Despite a few justices' doubts about delegation and the requirement that Congress have an intelligible principle to guide actors, the Court has maintained a hands-off approach to delegations of power. By failing to police the boundary between proper and improper delegations of power, the Court forgoes the opportunity to maintain the structure of government prescribed by the Constitution.

### Before You Read

Have students envision a household run by one person and a household run by two persons. Ask: How do you think decisions are made in a one-person household compared to decisions in a two-person household? (Since only one person makes the rules, whatever the person in charge says automatically becomes the rule. But in a household run by two people, the two people must agree on the decision.) Remind students that the United States Congress is bicameral and would be more similar to a two-person household.
Before You Read
Explain that to be “vested” means to be granted authority. Ask: What does it mean to say that Congress is vested? (It means that Congress has authority.)

Active Reading
Say: The Legislative Vesting Clause gives Congress legislative powers. What are legislative powers? (the power to make laws)

Discussion Question
Why do you think it is sometimes difficult for the three branches of government to maintain separate powers? (These powers might sometimes overlap; the Constitution cannot predict every situation that may arise.)
Part 1: The House of Representatives and Its Members

House of Representatives — Article I, Section 2, Clause 1

Elector Qualifications — Article I, Section 2, Clause 1

Qualifications of Representatives — Article I, Section 2, Clause 2

Enumeration — Article I, Section 2, Clause 3

Allocation of Representatives — Article I, Section 2, Clause 3

Executive Writs of Election (Filling Vacancies) — Article I, Section 2, Clause 4

Speaker of the House — Article I, Section 2, Clause 5

Essay by Bradley Smith (pp. 48–51)

At the Constitutional Convention, debate about the House of Representatives centered on three issues: length of term, equal versus proportional representation, and method of selection.

The two-year term of office was the result of a compromise between those who favored extremely short one-year terms and those who wanted three-year terms. The Convention determined that the Senate would represent states, and states would have equal representation in the Senate. The House would represent the people, and the question of proportional versus equal representation became conflated with the question of selecting Representatives. The Convention did not debate or define the scope of the phrase “by the People.” The phrase appears to mean direct popular election with a relatively broad right of suffrage as determined by the states’ own practices.

While the Convention favored apportioning representation according to population, the delegates did not intend to place any particular principle such as “one man, one vote” into the Constitution.

Moreover, the Constitution does not require Representatives to be elected by districts. In the beginning, many states elected their Representatives at large, meaning by the whole state. With this method, a state’s Representatives were more likely to speak with one voice, thereby increasing the state’s influence in the House. Congress
thus responded by requiring that the states elect their Representatives by district. Most states established congressional districts roughly according to population but gave great deference to geography, history, and local political boundaries.

Congressional districts could be problematic. For instance, “rotten boroughs” in Great Britain were districts with only a few inhabitants that nevertheless held seats in Parliament equal, in some cases, to large cities. To guard against this danger, the Framers gave each house the power to “alter” the “Times, Places, and Manner” of choosing Representatives (Article I, Section 4). In the early 20th century, however, some rural state legislators stopped redistricting in order to avoid losing their power to the growing urban areas in their states. At first, the Supreme Court held that redistricting questions were political questions. A few years later, it held that congressional districts should be as equal in population as possible. In Reynolds v. Sims (1964), the Court articulated the principle of “one man, one vote” to be the standard for evaluating redistricting.

**Before You Read**

Explain that the House of Representatives is the closest to the people and represents their interests to the national government. Ask: What does the word “represent” mean? (to stand in for another person or work for that person’s interests)

**Active Reading**

Read aloud the second full paragraph on page 49. To ensure understanding, ask: What was the Framers’ main goal in requiring elections? (They wanted to give the people the power to choose their own Representatives.)

**Elector Qualifications** — Article I, Section 2, Clause 1

*Essay by Roger Clegg (pp. 51–53)*

Concerning elector qualifications, the Convention delegates had two options: limit suffrage to all freeholders or incorporate state voting law and thereby allow the individual states to determine qualifications for electors.

After some debate, the Framers determined that it would be difficult to get all states to agree on one set of qualifications. Most delegates, including Alexander Hamilton and James Madison, supported allowing states to choose their own criteria for electors. The Convention at last approved the Elector Qualifications Clause, which states that individuals who are qualified to vote for candidates of the largest branch of a state’s legislature are automatically qualified to vote for Representatives. In other words, states have the power to set elector qualifications. Congress was given little say in voter qualification issues, although it does have the power to determine the
time, place, and manner of elections. Congress received additional authority to enforce certain amendments relating to suffrage (which will be discussed in lesson 20).

The Supreme Court has invalidated several state regulations that exclude classes of voters from the franchise. The Court has upheld congressional regulation of federal elections over conflicting state laws but has determined that the First Amendment restricts the application of the Elector Qualifications Clause to closed party primaries. (For further discussion of voter qualifications, turn to lesson 20 on Voting and the Constitution.)

Before You Read

Ask: What does the word “elector” mean? (It means a voter.)

Qualifications for Representatives — Article I, Section 2, Clause 2

Essay by David F. Forte and Stephen Safranek (pp. 53–54)

The Framers also considered the qualifications for Representatives. For republican reasons, the Framers rejected the British practice of numerous qualifications and limitations and established three simple criteria instead: Representatives must be at least 25 years old; they must have been citizens of the United States for at least seven years; and they must be inhabitants of the state (though not necessarily the district) from which they are elected.

This clause received little judicial attention until the late 20th century. In Powell v. McCormack (1969), the question was whether Congress could add qualifications for Representatives. The Supreme Court reasoned that it could not. In United States Term Limits v. Thornton (1995), the Court ruled that states did not have the power to add new qualifications for Representatives. Thus, the three constitutional requirements for Representatives could not be altered.

Active Reading

Have Students read the second paragraph on page 53 (the one beginning with “The Framers also considered...”) Ask: why did the Framers reject the idea of having many qualifications to hold office? (In contrast to the class and wealth qualifications of the British parliament, the Framers designed the American government to be a republic.)
Active Reading

Have students read about *United States Term Limits v. Thornton* (1995). Then ask them to explain the problem the Supreme Court confronted. (Sample answer: In *United States Term Limits v. Thornton*, justices considered whether states could make additional requirements for membership in the House or Senate. Specifically, Arkansas amended its state constitution to make ineligible for re-election any person who served three or more terms as a member of the United States House of Representatives from Arkansas or any person who served two or more terms as a member of the U.S. Senate from Arkansas. The Court ruled that states did not have the power to add new qualifications for Representatives.)

**Enumeration Clause** — Article I, Section 2, Clause 3

*Essay by Andrew Spiropoulos (pp. 56–57)*

The Enumeration Clause requires the federal government to make an “actual Enumeration” of the whole number of persons in the nation, as Congress shall direct, for the purpose of apportioning the seats in the House of Representatives.

The central question regarding the original meaning of this clause is as follows: Does the Constitution require an actual counting of individuals, or is estimation permissible? Those who argue that estimation is permissible contend that the phrase “actual Enumeration” likely means the most accurate calculation possible. Those who maintain that the phrase means actual counting of individuals as opposed to estimating contend that the words mean counting each separately.

This distinction between actual counting and estimating was well known and thoroughly discussed in controversies between the colonies and Britain. The participants in the debates frequently used the exact term “actual enumeration” and criticized the use of estimates in calculating population. Hamilton, Jefferson, and Washington emphasized accuracy in the census and frowned upon conjecture or estimation. Additionally, the first census, taken in 1790, required an exact and individual counting of every inhabitant of the United States.

These debates, discussions, and early American practice indicate that estimation was not permissible. In *Utah v. Evans* (2002), however, the Supreme Court ruled that census-takers may infer or guess the number of inhabitants of a household.
Another contentious issue during the Constitutional Convention concerned the number of Representatives in the House and how they would be allocated among the states. The delegates set the size of the House at 65 members. They wanted to allow Congress to grow in the future, but every state would have at least one Representative, and the number of Representatives would not exceed one for every 30,000 people.

Federalists and Anti-Federalists battled over the size of the House and the ratio of Representative to citizens. Anti-Federalists thought that such a small Congress would be poorly informed and would lack sympathy for the wide variety of their constituents. They argued that the country would become too large and would lose its republican character. Madison responded that the small initial number would be effective and could change as needed. Though the House would grow as the population did, the Senate would check the House.

Additionally, in *The Federalist* No. 55, Madison cautioned that “nothing can be more fallacious than to found our political calculations on arithmetical principles.” That is to say, there is a certain number of representatives that is necessary to foster deliberation and to carry out the constitutional duties of Congress, but when assemblies have too many representatives, reasoned arguments and civil debate are impossible.

As Madison predicted, the House expanded to meet the needs of the population. In 1920, Congress capped the number of Representatives at 435 after Members were unable to make a reapportionment. To determine the number of Representatives for each state, Congress has employed several apportioning methods and ultimately uses the Hill Method.

Make an Inference

Say: Forte writes on page 58 that the Members of Congress capped the number of Representatives at 435. Why did they do this? (They capped the number after they were unable to make a reapportionment.) How well do you think the House of Representatives would run today if the number was capped at only 65? What if the number was capped at 1,000? (Answers will vary. Students may say that a much smaller number of Representatives would not accurately reflect the country’s large population or that a very large number of Representatives would make deliberation and voting too difficult.)

Make a Real-Life Connection

Have students research information about their Representative and district. Assign them to find their congressional district, the name of their Representative, the population and geographic boundaries of their district, and where the district office is located. If possible, schedule a field trip to the district office.
Discussion Question

Why did Federalists and Anti-Federalists disagree about the number of Members of Congress? (Sample answer: Anti-Federalists thought that Congress should be large because a small Congress would not accurately reflect or represent the people. Federalists argued that a small Congress was acceptable, especially since it could expand as necessary. But Madison cautioned against attempts to base “political calculations on arithmetical principles.” When assemblies have too many representatives, reasoned arguments and civil debate are impossible.)

Executive Writs of Election – Article I, Section 2, Clause 4

Essay by Paul Taylor (p. 59)

To avoid vacant seats in the House of Representatives, the Framers agreed that such vacancies should be filled through a special election. Under Article I, Section 2, Clause 4, state governors are responsible for issuing writs of elections to fill vacancies. This arrangement would ensure representation for the people and bolster state authority over elections. The Supreme Court has held that governors have some discretion regarding the time of the election, but an election must occur.

Active Reading

To ensure understanding, ask: Why might the Framers have wanted to avoid vacant House seats? (Sample answer: The House is closest to the people and most directly represents their interests. In some cases, missing Representatives leave some states unrepresented in Congress.)

House Leadership: Speaker of the House –

Article I, Section 2, Clause 5

Essay by David F. Forte (pp. 59–60)

British and American legislative bodies have had leaders, or Speakers, for hundreds of years. In the British House of Commons and the early American colonial legislative bodies, the members selected the Speaker, but the Crown or royal governors greatly influenced the process. Under Article I of the Constitution, members of the House of Representatives would select their own Speaker and other officers.
At the beginning of the two-year term (or whenever a Speaker resigns or dies), Representatives select their Speaker. In early America, Representatives voted by ballot, but since 1839, they have done so by roll call. In most cases, party caucuses determine the candidates (and, barring any breakdown in party discipline, the Speaker) before the voting begins.

Although the Speaker is the primary legislative leader and promotes his party's agenda, he or she typically does not join in votes or debates. The Speaker's duties have changed dramatically over time. At first, Speakers possessed much power over committees and the writing and content of bills. Later, their power decreased, and their selection was based on seniority. In recent years, the position of Speaker has regained some of its early influence.

**Before You Read**

Ask: How are voting by ballot and voting by roll call different? Which kind of voting would you prefer? (Students may say that voting by ballot is more private and would therefore allow Representatives to feel less pressured to make a certain decision, or that roll calls are public and would force Representatives to be more transparent about whom they support.)

**Active Reading**

Point out that on page 59, Forte uses the term “Anglo–American.” Ask: What does this term mean? (It means “British and American.”) Why is it important in the study of American government? (Many American ideas about government stem from British ideas and practices.)

**Research It**

In the last paragraph of his article on page 60, Forte mentions several House of Representatives officer positions. Ask students to choose two of the listed positions and research them online. Then ask students to share a brief summary of what they learned. (Answers will vary.)

**Discussion Question**

David F. Forte writes that the role of the Speaker of the House has changed significantly throughout history. Briefly explain the changes that have taken place for Speakers since the Constitution was written. (Sample answer: At first, Speakers had a great deal of influence in the House of Representatives. As time went on, however, they began to take smaller roles in House activities. In recent times, Speakers have become more powerful again.)
Check Understanding

Have students complete the following assessment to check their understanding of Lesson 3, Part 1. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. The House of Representatives and Senate make up the ________ branch of government.
   a. executive
   b. federal
   c. legislative
   d. judicial

2. Members of the House of Representatives must be at least ________ years of age.
   a. 18
   b. 21
   c. 25
   d. 35

3. Which of the following has the most power in the election of Senators and Representatives?
   a. the Supreme Court
   b. the House of Representatives
   c. the Senate
   d. the states

4. The Presiding officer in the House of Representatives is the
   a. President of the United States.
   b. Vice President.
   c. President Pro Tempore.
   d. Speaker.

5. Unless otherwise specified in the Constitution, the officers in the Senate and House are
   a. appointed by the President.
   b. appointed by the Civil Service Commission.
   c. chosen by drawing lots.
   d. elected by the members of each house.

6. A United States Representative is elected for a term of
   a. two years.
   b. four years.
   c. six years.
   d. life.
Unit 2

Fill in the Blank: Write the correct word or words in each blank.

1. The Constitution specifically grants each state, no matter how small its population, at least ____________ in the House. (one Representative)

2. When considering qualifications for Representatives, the Framers considered and rejected ________, ________, and __________ qualifications. (property, wealth, and indebtedness)

Short Answer: Write out your answer to each question.

1. What are the three requirements to be a Representative? (A Representative must be 25 years of age or older, must have been a citizen of the United States for a minimum of seven years, and must be an inhabitant of the state in which he or she is chosen.)

2. What was the central question regarding the Enumeration Clause? (whether the Constitution requires that this census should consist of an actual counting of individuals or whether an estimate would suffice)

3. When does the House of Representatives elect its Speaker? (as the first order of business at the start of each two-year term and when a Speaker dies or resigns during the legislative term)

4. Does the Speaker of the House sit on any standing committees of the House? (Traditionally, the Speaker refrains from debating or voting in most circumstances and does not sit on any standing committees of the House.)

5. What three issues dominated the Constitutional Convention’s debate over the makeup of the House of Representatives? (length of terms, equal versus proportional representation of the states, and method of selection)

6. According to the Constitution, what qualifications are necessary for citizens to vote in elections for the House of Representatives? (Citizens can vote in elections for the House of Representatives if they are eligible to vote for the “most numerous branch of the state legislature.”)

True / False: Indicate whether each statement is true or false.

1. Article I of the Constitution grants all legislative powers to Congress. (False. Article I grants only certain limited legislative powers “herein granted” to Congress.)
2. The two-year term of office for the House was a compromise between those who preferred annual elections and those who wanted a longer, three-year-term. (True)

3. As a system of checks and balances, each House punishes members of the other House in instances of disorderly behavior. (False. Each House may punish its own members for disorderly behavior.)

4. The Anti-Federalists did not think that the country could grow and still remain republican. (True)

5. In 1929, Congress decided to cap the number of Representatives at 450. (False. The number was capped at 435.)

6. The House of Representatives has the freedom to choose its leadership without regard to the President or Senate. (True)

7. State governors are responsible for issuing writs of election to fill vacancies in the House of Representatives. (True)
Part 2:
Congressional Rules and Procedures for the House of Representatives and the Senate

Election Regulations
Article I, Section 4, Clause 1

Qualifications and Quorum
Article I, Section 5, Clause 1

Rules and Expulsion Clause
Article I, Section 5, Clause 2

Compensation Clause
Article I, Section 6, Clause 1

Congressional Compensation
Amendment XXVII

Privilege from Arrest
Article I, Section 6, Clause 1

Speech and Debate Clause
Article I, Section 6, Clause 1

Sinecure and Incompatibility Clauses
Article I, Section 6, Clause 2

Meetings of Congress Clause
Article I, Section 4, Clause 2

House Journal
Article I, Section 5, Clause 3

Adjournment
Article I, Section 5, Clause 4

Election Regulations — Article I, Section 4, Clause 1

Essay by Anthony Peacock (pp. 71–73)

Article I, Section 4, Clause 1 of the Constitution gives states the power to set the “Times, Places and Manner of holding Elections for Senators and Representatives” but adds that Congress may alter the states’ regulations. The purpose of this clause is twofold. First, states have the primary power over the time, place, and manner of elections, but Congress may alter the regulations; second, the legislative branches of the states and the federal government, not the executive or judicial branches, have the power to regulate elections.
This clause produced much disagreement. Anti-Federalists worried that Congress would use its power to extend Members’ terms in office indefinitely or to make holding new elections impossible. Supporters of the clause argued that the clause protects Congress from being overpowered or even destroyed by the states. Alexander Hamilton argued that Congress would alter the regulations only in extreme circumstances. Moreover, both houses must approve any changes in state regulations.

Several legal and constitutional developments have affected this clause. The Fifteenth Amendment granted Congress powers to enforce the amendment and prevent disenfranchisement based on race. Other constitutional amendments (to be discussed in Lesson 20) have altered various voting procedures.

Despite Hamilton’s comment, Congress has often intervened in regulating elections. Congress has required that Members of Congress be elected by district rather than by the state at large and that districts be compact and contiguous. The Voting Rights Act of 1965 contains some of the stricter requirements, including requiring federal approval for new voting practices.

The Supreme Court has also intervened in the electoral process. For instance, despite constitutional practices, the Court has advocated the principle of one person, one vote and has ruled on various redistricting plans.

Active Reading

To ensure understanding, ask: Who has the primary responsibility for regulating elections? (the state governments) What is the purpose of giving Congress any power over elections? (maintaining the balance of power and making sure the states do not become too powerful)

Qualifications and Quorum — Article I, Section 5, Clause 1

**Essay by David F. Forte (pp. 74–76)**

The Qualifications and Quorum Clause protects congressional independence and ensures that each house of Congress judges its own “Elections, Returns and Qualifications of its own Members.” The clause also allows Congress to investigate allegations of fraud among its members. The power to judge elections includes the power to investigate fraud, but not to expand the definition for qualifications for Members of Congress. The only objections to the clause were from those who wanted state legislatures to hold the power to judge elections.

The quorum requirement sets the minimum number of Representatives necessary for a House to conduct business and pass laws at a simple majority. This was a contentious section. All agreed that a two-thirds requirement would hinder the process, but requiring anything less than a majority might allow small factions to take over the
floor temporarily. The attempt to fix a specific number of votes necessary for a quorum failed, and the majority provision remained in the text. The Framers included a provision by which smaller numbers of Representatives could adjourn more easily.

In addition, the third section of the clause allows each house “to compel the attendance of absent members.” This part of the clause prevents minority factions from abusing the quorum provision.

**Before You Read**

Ask: What is a quorum? (a minimum number of participants needed to continue a group’s work) How might Members of Congress manipulate quorum rules to their own advantage? (A minority group in Congress might protest by refusing to attend meetings, which might make it impossible to meet a quorum or hold a vote.)

**Rules and Expulsion Clause** — Article I, Section 5, Clause 2

*Essay by David F. Forte (pp. 76–77)*

The Rules and Expulsion Clause of Article I gives each house of Congress the power to set its own rules and to punish its members for any “disorderly Behavior.” This clause strengthens the independence of the houses of Congress against the judiciary and the executive.

This Expulsion Clause is the only constitutional way to remove a Member of Congress without an election. Members may be expelled if two-thirds of their house supports this action. Some punishments levied under the Rules and Expulsion Clause include denunciation, censure, reprimand, loss of seniority, removal from committees, and fines. Since 1789, few members of either house have been removed. More frequently, each house will punish members through a majority vote.

**Active Reading**

Ask: What is impeachment? How is it different from expulsion? (Impeachment is a process of accusing an official of wrongdoing before a tribunal. Presidents may be impeached for committing crimes. Expulsion means being removed from office. Representatives may be expelled for inappropriate behavior.)

**Active Reading**

To ensure understanding, ask: What was the Confederacy? Why might Representatives be expelled for supporting it? (The Confederacy was a league of Southern states that rebelled against the Union and precipitated the Civil War. A federal politician who supported the Confederacy would likewise be in rebellion.)
Compensation Clause — Article I, Section 6, Clause 1

Essay by Adrian Vermeule (pp. 78–79)

In structuring the House and Senate, two questions arose regarding compensation: Should delegates be paid, and if so, by whom? Some Convention delegates were unsure whether federal legislators should be paid for their work. According to Adrian Vermeule, the delegates ultimately decided that pay would be essential to attract the best legislators: Unpaid legislators would be more susceptible to bribes to supplement their income, and unpaid positions might attract only the wealthy.

A second question about compensation concerned the source of the legislators’ wages. Under the Articles of Confederation, legislators were paid by their respective states and were therefore dependent on those states. But under the Constitution, Members would be paid according to federal law and with federal funds.

Modern questions on the clause focus on who should change compensation levels and how. In 1880, a federal court recognized Congress’s broad power to determine compensation schemes. The Twenty-seventh Amendment, though, prevents sitting Members of Congress from giving themselves a raise.

Congressional Compensation — Amendment XXVII

Essay by John C. Eastman (pp. 433–434)

In 1789, Congress approved an amendment concerning congressional compensation and sent it to the states for ratification along with the 10 amendments that would become known as the Bill of Rights. More than 200 years later, in 1992, the states finally ratified it.

The Constitutional Convention had determined that the federal government, not the states, would pay the Members of Congress. Anti-Federalists were still concerned that Members of Congress could set their own salaries. Madison responded to these concerns by proposing the Congressional Compensation Amendment. According to this amendment, congressional pay raises would apply to the next Congress, allowing the electorate to judge Congress for their actions before the pay increase took effect.

Six states initially ratified the amendment. Over the next 200 years, interest in the amendment varied. After a particularly notorious congressional pay raise in 1873, known as the “Salary Grab” Act, Ohio became the seventh state to ratify the amendment. A century later, a 1980s grassroots effort for ratification again brought public attention to the amendment. On May 7, 1992, three-fourths of the states finally ratified the amendment.

The odd history of the amendment led to some controversy. The Supreme Court ruled that disputes about ratification procedures were political questions. Because of issues of standing, judicial interpretation of the clause has been minimal.
Unit 2

Active Reading

Ask: Why were the Anti-Federalists concerned about Congress’s power to set its own pay? (Anti-Federalists were concerned that Members of Congress could set their own salaries and there would be no check on Congress’s ability to enrich themselves.) Did the Twenty-seventh Amendment adequately address these concerns? (When finally ratified, the Twenty-seventh Amendment checked Congress’s power to set their own salaries. According to the amendment, pay raises would apply to the next Congress, allowing the electorate to judge Congress for their actions before the pay increase took effect.)

Privilege from Arrest — Article I, Section 6, Clause 1

Essay by David F. Forte (p. 80)

The Privilege from Arrest Clause in the Constitution makes Senators and Representatives immune from civil arrest while Congress is in session. The clause does not provide immunity from criminal cases of “Treason, Felony, and Breach of the Peace,” nor does it exempt a Member from civil process. Civil arrest is very rare today, so this clause has little importance. The Supreme Court has interpreted it narrowly, leaving little actual protection for legislators.

Before You Read

Ask: What is a civil offense? (Civil offenses are violations of the law that are not criminal. They are subject to monetary penalties but not criminal penalties.)

Active Reading

To ensure understanding, ask: What are treason and felony? (Treason means betraying one’s country, and felony is a serious crime.)

Speech and Debate Clause — Article I, Section 6, Clause 1

Essay by James L. Buckley (pp. 80–82)

The right of members of the legislative branch to speak their minds with impunity while engaged in legislative work—a tradition which stretched back to the British Bill of Rights of 1689—was included in the Articles of Confederation and many state constitutions. The Framers included the clause in the Constitution to ensure that public representatives would be able to deliberate without fear of resentment or retaliation.
This clause specifically applies to the absolute freedom of speech only in Congress while performing legislative work. For example, a Congressman may not invoke this clause to protect himself from a libel suit if he committed libel outside of his official duties. The courts have repeatedly upheld this interpretation.

According to the Supreme Court, activities are within the sphere of official legislative duty if they are integral to the deliberative and communicative processes by which Members of Congress participate in committee and house proceedings with respect to their legislative work. For instance, the clause protects voting, speaking in committee hearings or on the floor of one of the houses, and even the reading of stolen classified materials into the record. On the other hand, negotiations with federal agencies, issuing a press release, or delivering a speech outside of Congress are not protected.

The text of the clause mentions Members of Congress, but the Supreme Court has declared that it applies also to congressional staffers conducting official congressional business. Curiously, the Court has held that if a Member’s actions fall within the “legislative process,” his immunity is absolute—even if the Member has acted contrary to law, he cannot be prosecuted if proof of the crime depends on his legislative acts. Although the clause protects Members of Congress from civil or criminal proceedings, Members remain subject to disciplinary measures from their own houses and by their constituents, on Election Day.

**Active Reading**

To ensure understanding, ask: What unusual situations may arise because of the limitations of the Speech and Debate Clause? (An example presented by James L. Buckley involves a legislator who is suspected of accepting a bribe to vote in a certain way. The legislator’s vote is protected by the clause because it is an official duty; however, the legislator could still be charged for having taken a bribe.)

**Active Reading**

Point out that Buckley uses the word “impunity” on page 80. Read aloud the first sentence of his article in which the word is used. Ask: What do you think the word “impunity” means? (It means being free and not being threatened with punishment.)

**Sinecure Clause** — Article I, Section 6, Clause 2

_Essay by David F. Forte (pp. 82–84)_

The Framers of the Constitution were well aware of the sources of corruption in the British government and wanted to avoid such influences in the new American system. The Framers designed the Sinecure and Incompatibility Clauses to guard against corruption and to protect the separation of powers.
The Founders included the Sinecure Clause in the Constitution to prevent the President from buying support from members of the legislative branch by creating offices and sinecures as rewards for them. The Sinecure Clause prevents a Member of Congress from being appointed to a federal office if the office has been created or the office’s salary has been increased during his time in Congress.

The Convention agreed that no Member of Congress should serve in an appointive position while a sitting Member of Congress. Some members of the Convention had proposed banning Members of Congress from being appointed to any office, state or federal, if that office had been created during his term of service or within one year afterwards. Other Founders, such as Hamilton and Wilson, wanted no bar at all after a person left Congress to allow the executive to induce the best Members of Congress into appointive offices. James Madison proposed “that no office ought to be open to a member, which may be created or augmented while he is in the legislature.” Eventually, the Convention adopted Madison's proposal, but they deleted the prohibition from holding state office and the one-year bar after leaving office. The clause reinforces the separation of powers and the federal structure of the Union.

The clause establishes a number of formal requirements: (1) It applies only to Members who have actually taken their seats, not to those who have been elected but not sworn in. (2) “Appointed” refers to the moment of nomination, not to the time of approval by the Senate. (3) The bar extends to the time for which a Member has been elected; it cannot be evaded by resignation from Congress. (4) “Civil office” refers to authoritative offices, not to temporary, honorific, or advisory appointments. (5) “Emoluments” refers to more than merely salary, although the exact definition has never been made clear.

Until 1973, Presidents had rigorously followed the demands of the clause. During President Nixon’s term, Congress reduced the salary of an office to its previous level to allow a sitting Senator to be appointed; this stratagem became known as the “Saxbe fix.” Gerald Ford, Jimmy Carter, and Bill Clinton also employed this strategy. However, under President Reagan, the Office of Legal Counsel issued an opinion stating that these end-runs around the formal language of the clause were inappropriate.

**Before You Read**

Ask: Think about the meaning of the words “sinecure” and “incompatibility.” Check a dictionary if you are uncertain of their meaning. What do these words mean? (A sinecure is an easy, high-paying job. Incompatibility means not working together well.)

**Discussion Question**

Explain how the “Saxbe fix” works and how it was first used. (Sample answer: The “Saxbe fix” was a strategy used by President Richard M. Nixon. It allowed Nixon to appoint Senator William Saxbe to the office of Attorney General despite a recent pay raise for the latter office. The “fix” involved reducing the compensation for the office back to the original amount.)
Incompatibility Clause — Article I, Section 6, Clause 2

*Essay by Joan L. Larson (pp. 84–85)*

The Constitution establishes several limitations on a person’s ability to serve in Congress including age, citizenship, and residency requirements. The Incompatibility Clause, though, prohibits Members of Congress from simultaneously serving as federal executive and judicial officers. It serves primarily as an anti-corruption device. Having seen the British Crown exert undue influence over Parliament by “purchasing” the loyalty of its members with offices, the Framers banned plural officeholding. By forbidding joint legislative and executive officeholding, the clause also preserves the separation of powers.

Interestingly, the clause does not specifically prohibit an individual from simultaneously serving in both the federal executive and judicial branches or in both a federal and state office. The latter issue is handled as a matter of state constitutional law, which generally forbids most forms of dual federal–state officeholding. On the former issue, simultaneous service in federal executive and judicial branches has been rare. There has been virtually no litigation involving the meaning of the clause, and the few judicial challenges concerning the clause have lacked standing.

Meetings of Congress Clause — Article I, Section 4, Clause 2

*Essay by David F. Forte (pp. 73–74)*

The Constitution requires that Congress assemble at least once a year, on the first Monday in December, unless the date is changed by law. The Meetings of Congress Clause ensures cooperation between the houses of Congress and rejects the traditional British method in which the executive branch summoned legislators to meet. The Framers did not want the executive to control the legislature. The President may still convene special sessions of Congress in “extraordinary Occasions,” but the date of Congress’s regular sessions is free from executive control.

During the Convention, there was disagreement over the exact times Congress should meet. Delegates discussed many practical and particular concerns ranging from the weather to European politics and the timing of state elections. In the final form, the Meetings of Congress Clause requires Congress to assemble at least once a year, on the first Monday in December, unless another date is assigned by law. Congress used its discretion under the clause to begin sessions in March rather than December until the Twentieth Amendment was ratified.
Active Reading

To ensure understanding, ask: What kind of problems were the Framers risking when they set the assembly date in December? (Political difficulties included not knowing recent developments in European political affairs; practical problems included bad weather, cold temperatures, and wintertime illnesses.)

House Journal — Article I, Section 5, Clause 3

Essay by David F. Forte (pp. 77–78)

The House Journal Clause requires each house to keep a journal of its proceedings. The requirement of a journal was not controversial; however, the provision allowing material to be kept secret caused concern. Many Convention delegates argued that secrecy would leave liberty insecure and destroy the ideal of an open and honest government.

Both houses have complete discretion over what proceedings will be secret. Moreover, Congress has used sparingly its privilege of keeping information secret. Early on, secret proceedings were common. Since the War of 1812, however, most Senate and House of Representatives proceedings have been public. The Senate still holds secret sessions on a few issues.

For all the concern about secrecy, though, the journal did not publish useful information generally, such as debates or congressional testimony. In 1873, Congress installed the *Congressional Record*, which includes debates and undelivered remarks and documents. In addition, journals, newspapers, radio, and television have made most of the actions of Congress open to all citizens.

Active Reading

Have students read the paragraph beginning with “Both history and judicial opinion” on page 77. Ask: In what circumstances would a house of Congress hold a secret session? What would be the reason for holding a secret session? (during impeachment, debates and discussions of classified information, and national defense) Why would a house of Congress hold a secret session? (Sample answer: Publicly revealing national defense strategies might give an enemy an advantage.)

Before You Read

Ask: What is a journal? What is it usually used for? (A journal is a book that records the actions and ideas of a person or group.) What sort of information would you put in a personal journal? What might you put in a professional or political journal? (Answers will vary.)
Adjournment — Article I, Section 5, Clause 4

**Essay by David F. Forte (p. 78)**

The Adjournment Clause prevents one house of Congress from obstructing the activity of Congress as a whole. According to the Adjournment Clause, neither the House nor the Senate may adjourn for more than three days or move to any other place unless both houses consent to it. This regulation was made to ensure cooperation between the houses and keep one house from adjourning or moving in order to hurt the efforts of the other house.

If the two houses cannot agree, then the President may intervene to adjourn Congress. So far, this measure has not been necessary. The President has never had to intervene. One house may adjourn for less than three days, but longer recesses require both houses to consent. This clause also permits Congress to move the capital temporarily in times of crisis. For example, during the War of 1812, the government fled Washington.

**Before You Read**

Ask: What does the word “adjourn” mean? (It means to suspend a meeting.)

Have you heard this word in any other context besides Congress? (in courtrooms)

**Research It**

Point out that Congress moved the capital during the War of 1812. Ask students to look up information about the War of 1812, why Washington, D.C., was abandoned, and where members of the federal government went. Then invite students to share their findings with the rest of the class and speculate about what might happen today if an emergency caused Congress to meet in a new location.

**Discussion Question**

Why must both houses agree to move to a new place? (If both houses did not have to agree, one house might move to hinder the actions of the other house.)

**Check Understanding**

Have students complete the following assessment to check their understanding of Lesson 3, Part 2. Review any material for questions they have missed.

**Multiple Choice: Circle the correct response.**

1. Since ________, most Senate and House of Representatives proceedings have been made public.
   a. World War II
   b. the Revolutionary War
   c. the Civil War
   d. the War of 1812
Unit 2

2. Members of the House of Representatives may be expelled from office as long as at least ________ of Representatives concur.
   a. a quorum
   b. one-third
   c. a majority
   d. two-thirds

3. The houses of Congress are allowed to adjourn for more than three days or to move their location only if
   a. both houses consent to it.
   b. the President requires it.
   c. the Speaker proposes it.
   d. there is an emergency.

Fill in the Blank: Write the correct word or words in each blank.

1. Privilege from Arrest does not cover criminal cases involving ________, felony, or breach of the peace. (treason)

2. The Twenty-seventh Amendment prevents a sitting Congress from giving itself a __________ to take effect during its term. (pay raise)

3. The Privilege from Arrest Clause prevents Members of Congress from being put under civil arrest, but this is valid only while Congress is ________.
   (in session)

4. Article I, Section 6 forbids federal ________ and ________ officers from simultaneously serving in Congress. (executive, judicial)

5. With respect to the conduct of the election of federal Senators and Representatives, the responsibility lay primarily with the ________ and secondarily with _________. (states, Congress)

6. Under the British model, the ________ called Parliament to meet.
   (executive)

True / False: Indicate whether each statement is true or false.

1. The Anti-Federalists strongly supported the election regulations that gave Congress the prerogative to make or alter election regulations. (False. The Anti-Federalists were concerned that Members of Congress would abuse the regulations and manipulate election laws so that they could stay in office indefinitely.)

2. The Framers of the Constitution understood the Incompatibility Clause primarily as an anti-corruption device. (True)
3. By confirming each house’s power to set its own procedures, the Framers strengthened the independence of each branch of Congress against the other as well as against the executive and the judiciary. (True)

4. At the Constitutional Convention, the Framers readily agreed that the new national government would compensate Senators and Representatives from a federal treasury. (False. The Framers heatedly debated the question of whether the new national government or the states should pay the representatives.)

5. It took nearly 200 years to ratify the Congressional Compensation Amendment. (True)

6. Civil arrest is rarely practiced anymore, so the Privilege from Arrest Clause is virtually obsolete today. (True)

7. The Rules and Expulsion Clause provides the only constitutional mechanism by which a sitting Member of Congress can be removed from office before the end of his term. (True)

Short Answer: Write out your answer to each question.

1. Why did the Framers of the Constitution include a Compensation Clause in the Constitution? (They feared that unpaid legislators might turn to corruption to supplement their incomes.)

2. Where does the money come from to pay Senators and Representatives? (The federal treasury)

3. Where was the right of legislators to speak their minds with impunity acknowledged before the Speech and Debate Clause of our Constitution?
   - The British Bill of Rights of 1689
   - The Articles of Confederation
   - State constitutions (after the Revolution)

4. If the two houses cannot agree on a time of adjournment, who is designated to settle the dispute? (The President of the United States)

5. Why did the Framers write the Adjournment Clause such that neither house can adjourn for more than three days without the consent of the other? (Otherwise, one house could prevent the entire Congress from fulfilling its responsibilities by adjourning.)
Part 3:
Sole Powers of the House of Representatives

Impeachment
Article I, Section 2, Clause 5

Origination Clause
Article I, Section 7, Clause 1

The Electoral College and the House of Representatives:
House as Tiebreaker
Article II, Section 1, Clauses 2 and 3, and Amendment XII

Impeachment — Article I, Section 2, Clause 5

*Essay by Stephen B. Presser (pp. 60–62)*

The Framers designed the Impeachment Clause to be a method for disciplining a President who abused his authority. It would strengthen the separation of powers. But the clause was not meant to be a mere tool by which Congress could prevent the President from carrying out his constitutional duties. Under the Standards for Impeachment Clause in Article II, Section 4, all civil officers of the United States (including members of the executive and judicial branches) are subject to impeachment.

The Constitution does not specify the method by which impeachment procedures are to be initiated, and practices have varied over the years. In recent years, the House Judiciary Committee has initiated the proceedings and has made recommendations to the whole House. For a period of time, legislation allowed the Attorney General to appoint a special prosecutor who had the power to recommend impeachment. Because of dissatisfaction with such extensive independent power, the statute authorizing such a counsel has expired.

Impeachment is a political decision. The House is constitutionally obligated to follow the standards of impeachment in Article II, Section 4. Because the House has the sole power to bring charges of impeachment and the Senate has the sole power to try impeachments, the courts may not review the decisions of either house concerning impeachment.

Though the Framers saw impeachment as essential to the separation of powers, it is unclear whether the House has an affirmative duty to monitor the conduct of impeachable officials and to initiate impeachment proceedings once evidence of impeachable activity emerges. On one hand, it would seem that the House should have the same discretion to initiate proceedings as prosecutors exercise. On the other hand, Alexander Hamilton argues in *The Federalist No. 77* that Presidents would be “at all times liable to impeachment,” thereby suggesting that the House is bound by their oaths of office to impeach the President if he has committed an impeachable offense.
Origination Clause — Article I, Section 7, Clause 1

Essay by Erik M. Jensen (pp. 85–86)

In crafting our government, the Framers not only distributed powers among the three branches of government (separation of powers), but also divided Congress into two houses, with different constituencies, term lengths, sizes, and functions for each house. In this spirit, the Origination Clause of the Constitution allocates the power to raise revenue—part of the power of the purse—to the House of Representatives, the legislative body closest to the people.

The Origination Clause was part of a compromise between large and small states, tempering large states’ dissatisfaction over the equal representation of states in the Senate regardless of size. Requiring the House of Representatives to initiate money bills gave more-populous states more influence than less-populous states, since the number of representatives in this legislative body depended on a state's population.

The first draft of the Origination Clause required all money bills to originate in the House and gave no authority to the Senate to amend these bills. Opponents of the clause argued that it did not matter which branch approved a bill first if both branches supported it. The final version of the Origination Clause, however, required that bills raising revenue, or taxes, must originate in the House of Representatives and gave the Senate the power to amend them.

Regrettably, this clause has had little effect in practice for two reasons. First, most revenue bills are created in the Treasury Department; second, the Senate has construed its power to amend so broadly as to replace the entire text of revenue bills that had originated in the House.

Before You Read

Ask: What does the word “originate” mean? (to start or begin)

Make a Real-Life Connection

Ask: In his discussion of the Origination Clause, Erik M. Jensen uses the phrase “power of the purse.” What does this phrase mean? (Whoever has control of money has the “power of the purse.”) Who holds the “power of the purse” in your household? (Answers will vary.)

Active Reading

To ensure understanding, ask: Elbridge Gerry of Massachusetts, who proposed the original version of the Origination Clause, did not want to give the Senate the power to amend “money bills” because he was afraid the Senate would become an aristocratic body. What is an aristocratic body? (a hereditary ruling class of nobility)
Discussion Question
How did the first version of the Origination Clause differ from the final version? (The first version of the clause applied to all money bills. The final version covered only bills for raising revenue and gave the Senate the power to amend these bills.)

The House as a Tiebreaker in Presidential Elections –
Article II, Section 1, Clauses 2 and 3, and Amendment XII

*Essays by Einer Elhauge (pp. 184–186), Tadahisa Kuroda (pp. 186–188), and Charles Fried (pp. 377–379)*

The Constitutional Convention designed a unique method to select the President called the Electoral College, consisting of electors from each state who would be responsible for choosing the chief executive. Each state would appoint its own electors, the number of which would be determined by the number of that state’s Senators plus the number of its Representatives in the House. For instance, if a state had one Representative in the House, adding the state’s two Senators would give it three electors.

These electors would each cast two ballots, but at least one had to be for a citizen from another state. The person who received the majority of votes would be President, and the runner-up would be Vice President. If two or three persons received a majority of electoral votes or an equal number of votes, the House of Representatives would choose a President. If no candidate received a majority, the House would choose from among the top five candidates.

The Twelfth Amendment altered the way in which the Electoral College elected the President and Vice President. Under the Twelfth Amendment, electors vote for President and Vice President separately. The House of Representatives has the power to choose a President if no candidate receives a majority of electoral votes; the Senate has the same power for the Vice President. (For more information on the Electoral College and the Twelfth Amendment, turn to Lessons 9 and 10.)

Research It

Have students find out how many times the House of Representatives has selected the President. Have students select an election and point out who were the candidates involved, how many ballots were cast, and who became President.
Check Understanding

Have students complete the following assessment to check their understanding of Lesson 3, Part 3. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. The responsibility for impeaching officials lies with
   a. the Senate.
   b. the Supreme Court.
   c. the House of Representatives.
   d. the President.

2. The responsibility for trying an impeached official lies with
   a. the Senate.
   b. the Supreme Court.
   c. the House of Representatives.
   d. the President.

Fill in the Blank: Write the correct word or words in each blank.

1. There is no doubt that the Framers saw __________ as a part of the system of checks and balances to maintain the separation of ________ and the republican form of government. (impeachment, powers)

2. Early on, the acquittal of Justice Samuel Chase set the standard that Supreme Court Justices should not be impeached on the ground of their __________ preferences. (political)

Short Answer: Write out your answer to each question.

1. What was the original arrangement for electing the President and Vice President? (Presidential electors voted for two candidates. The one with the most votes—as long as it was a majority of electors—would be President, and the individual with the next greatest number of votes would be Vice President.)

2. All bills for raising revenue must originate where? (in the House of Representatives)

3. How was the Origination Clause part of a critical compromise between the large and small states? (The large states were unhappy about equal representation in the Senate, but the Origination Clause compromised by giving large states more influence over tax bills since they had greater influence in the House of Representatives.)

4. Who votes to impeach an officer? (The House of Representatives)
Unit 2

True / False: Indicate whether each statement is true or false.

1. The Senate is not allowed to originate bills for raising revenue, but the Senate can propose or concur with amendments on these (and other) bills. (True)

2. The Framers placed specific grounds of impeachment in the Constitution because they wanted to prevent impeachment from becoming a politicized process as it had in England. (True)
Lesson 4

THE SENATE

Lesson Objectives:
When you complete Lesson 4, you will be able to:
• Describe how the Senate functions within the bicameral legislature.
• Describe the history and purpose of the Equal Suffrage Clause and how the Senate supports federalism.
• Explain the qualifications necessary to become a Senator.
• Describe the senatorial classes.
• Describe the process of electing Senators and filling Senate vacancies under Article I and under Amendment XVII.
• Understand Senate rules on adjournment, compensation, and sinecure and explain the role of the Vice President and the President Pro Tempore in the Senate.
• Understand the sole powers of the Senate concerning impeachment, appointment, the Electoral College, and treaties.

Part 1:
The Senate and Its Members

Senate
Article I, Section 3, Clause 1

Equal Suffrage in the Senate
Article V: Prohibition on Amendment

Qualifications for Senators
Article I, Section 3, Clause 3

Senatorial Classes and Vacancies
Article I, Section 3, Clause 2

Popular Election of Senators
Amendment XVII, Clause 1
The United States Constitution has a bicameral, or two-part, Congress: the House of Representatives (covered in Lesson 3) and the Senate. The Senate cooperates with the House of Representatives to pass legislation to be presented to the President for signing into law, but the Framers of the Constitution designed the Senate to be a deliberative body that would serve primarily to correct and refine the actions of the House and provide vital advice and consent to the executive for appointments and treaties. As result, there are several key differences in the structure, procedures, and duties of the Senate.

As agreed upon at the Constitutional Convention, the Senate is composed of two Senators from each state, with each Senator having one vote (rather than each state's two Senators voting as one). Unlike the House, where all Representatives stand for election every two years, leaving open the possibility of a 100-percent change in membership, Senators serve for staggered six-year terms. These devices would protect the interests of the states as states.

Originally, each state legislature selected its Senators to represent the state. This distinct feature of the Senate was an essential element of federalism in the American system. As Rossum notes, election by state legislatures encouraged Senators to preserve the original federal design and to protect not only the particular interests of their home state, but also the states as separate political and legal entities. The Senate was indeed accountable to the people of its state, but that accountability was channeled through state legislatures. In requiring direct election of Senators, the Seventeenth Amendment changed both the nature of the Senate and the relation of Congress to the states.
Before You Read

Ask: Why did the Framers of the Constitution create a bicameral legislature? (The two houses would check and balance one another. Because it was closest to the people, the House of Representatives would be most responsive to the opinions and passions of the people. The Senate would serve to refine and enlarge those opinions to produce good legislation that would become good laws.)

Active Reading

To ensure understanding, ask: How many Senators does each state have? (two) How many Representatives does each state have? (This depends upon population, but each state has at least one Representative.)

Work in Pairs

Remind students that federalism is a division of authority between the national government and regional, or state, governments. Pair up students and have them write a response to this question: “How does the Senate preserve federalism?” (The Senate preserves the federalism because it protects the interests of the states as states. Each state has two Senators. The Senators represent the interest of their states. A state’s population does not determine the number of Senators that represent it. Each Senator casts a vote, called per capita voting. Per capita voting better reflects a state’s interest because states’ opinions may be divided on an issue.)

Equal Suffrage in the Senate — Article V: Prohibition on Amendment

Essay by Ralph Rossum (pp. 288–289)

Rather than creating a single, all-powerful national government, the Founders devised a federal system that divides sovereignty between two political entities (states and the nation), thereby recognizing a role for each. The national government would exercise a few delegated powers; the states would exercise all other powers.

The Prohibition on Amendment: Equal Suffrage in the Senate Clause was designed to protect the original federal design of the Constitution. It prohibits any Amendment that would deny a state equal representation in the Senate. Some Convention delegates (including Roger Sherman, who devised the clause, and Gouverneur Morris, who proposed it) were concerned that certain states might form partnerships to abuse, disenfranchise, or even eradicate other states. This provision does more than merely protect smaller states from larger ones. It secures a role for states generally and ensures that the American republic operates on a system of mixed sovereignty, as Madison described in The Federalist No. 39.
Some critics of the provision argue that it gives too much power to the states; but as Ralph Rossum argues, the clause reflects the intentions of the Framers for the new government. It allows states to be an integral part of the separation and balance of power needed to maintain the country. Indeed, the clause is one of two clauses for which the Constitution expressly forbids any amendment. (The first concerns regulating and abolishing the slave trade and will be discussed in lesson 19.) Thus, Article V stands as a permanent protection against any amendments that would attempt to alter equal representation in the Senate and thereby undermine the federal system.

### Qualifications for Senators

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**Qualifications for Senators** – Article I, Section 3, Clause 3

_Essay by Ronald Pestrutto (pp. 64–65)_

Because the Senate was meant to check and restrain the passions of the House of Representatives, the requirements for membership in the Senate are stricter. Serving in the Senate requires a greater extent of information and stability of character. Therefore, Senators must be at least 30 years old and must have been citizens of the United States for at least nine years. Senators must also be inhabitants of the state from which they were elected.

The age requirement for Senators is five years older than the minimum requirement for Representatives, and the citizenship requirement is longer for Senators than for Representatives. These requirements ensure that Senators have had enough time to study and know the republican principles underlying our nation’s Constitution and way of life. Ronald Pestrutto writes that these qualifications were agreed upon with little debate and have faced few challenges since their approval.

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**Before You Read**

Ask: Based on the previous lesson, what do you remember about the qualifications for members of the House of Representatives? (Representatives must be at least 25, they must have been a citizen for at least seven years,
and must be inhabitants of the state from which they were elected.) Students may look back at their notes or texts for reminders. Ask: Do you think the qualifications will be stricter or more lenient for Senators? (Answers will vary. Students may say that they will be stricter.)

**Make a Real-Life Connection**

Read aloud the paragraph on page 65 starting with “In the aftermath of the Civil War” and ask students to imagine they are Senators during the Civil War era. Ask: Would you as a Senator be willing to deny other Senators their seats if you thought they were disloyal to the Union? (Answers will vary.)

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**Senatorial Classes and Vacancies Clause**

Article I, Section 3, Clause 2

*Essay by David F. Forte (pp. 63–64)*

There was much agreement about the design of the Senate at the Constitutional Convention. State legislatures would elect the Senators to represent the state. The Senate would be smaller than the House of Representatives, but Senators would have longer and staggered terms of office to create greater stability and permanence. While the House would initiate most of the legislation, the Senate would refine what the House produced. Though the term length was greatly debated, the Framers ultimately chose a system of six-year staggered terms.

Staggering the terms required a system of senatorial classes. Article I of the Constitution outlines three classes. Senators of the first class would leave office after the second year. Senators of the second class would leave office after the fourth year. Senators of the third class would leave office after the sixth year.

On May 13, 1789, the first assembly of Senators divided themselves into three geographically based groups. Then a member of each group selected a number (1, 2, or 3) at random from a box, and that number determined the classes of Senators. The Senators completed their terms in office according to the class they had drawn. New states’ Senators would be allocated among the classes.

Along with choosing term limits and senatorial classes, delegates of the Constitutional Convention also had to address the issue of vacated Senate seats. Vacancy in the Senate meant that a state would not have equal representation during that period. The delegates decided that state executives (governors) would make temporary appointments during legislative recesses. When the legislature reconvened, it would decide on a permanent replacement.
Only one member of the Convention objected to this arrangement. James Wilson expressed concern that giving power to governors to make emergency appointments would upset the separation of powers. Edmund Randolph responded and the Convention agreed that temporary executive appointments were the best option to prevent gaps in representation.

**Active Reading**

Read aloud the information about senatorial classes beginning on page 63. Then draw a simple outline showing how a staggered class system would work. You may use students’ names as the names of the Senators. To ensure understanding, ask: How are the classes determined? (They are geographically balanced with no state having both its Senators in the same class) Why did the Framers design this system? (It supports the stability of the Senate.)

**Make an Inference**

Ask: What was James Wilson’s objection about the gubernatorial appointments for senate vacancies? (He was concerned that allowing the executive to select a replacement Senator would violate the separation of powers by making the legislator too dependent upon the executive.)

**Popular Election of Senators** — Amendment XVII, Clause 1

*Essay by Ralph Rossum (pp. 413–414)*

The Seventeenth Amendment changed the process by which Senators were elected and Senate vacancies were filled. While these changes made the Senate more democratic, they altered the relationship of the states to the national government and weakened the protection of state interests.

As early as 1826, the House of Representatives introduced resolutions calling for the direct election of Senators. One-hundred-eighty-seven similar resolutions were introduced before Congress approved what the states would ratify as the Seventeenth Amendment. In the meantime, states had gradually turned to non-binding popular elections to choose Senators. Candidates for state legislatures would sign pledges to vote for the popularly selected candidates. The people would not elect a candidate for state legislature who refused to sign the pledge. By 1912, more than half of the states functionally had popularly elected Senators.

Four factors encouraged endorsement of the Seventeenth Amendment: deadlocks over senatorial elections, Senate scandals, the rising Populist movement and its suspicion of political influence, and the influence of the Progressive movement. The Progressive movement was a 20th century political and social movement that...
emphasized more democratic processes (e.g., the direct election of Senators) and advocated the expansion and centralization of government (e.g., the creation of regulatory agencies).

**Before You Read**

Ask: What form of election was originally intended for Senators? (States’ Legislatures would elect Senators.) What are some differences between popular elections and this form of selection? (Students may answer that popular elections allow the people to select their leaders directly. Legislative appointments are one step removed from the people, since the popularly elected state legislators select the Senators.)

**Make an Inference**

According to Ralph Rossum, under direct elections, Senators are more likely to have Ivy League educations and more extensive previous government service. In addition, the Senate’s partisan lines are typically similar to those of the House of Representatives. Ask: What do you think these facts say about American voters? (Answers will vary. Sample answer: The extensive service and higher educations may reflect the public’s ideals about dedicated and highly skilled officials. The partisan lines probably reflect the real partisan lines of the people, since they are also reflected in the House of Representatives, the members of which are also elected by popular vote.)

**Vacancies in the Senate** — Amendment XVII, Clauses 2–3

*Essay by Todd Zywicki (pp. 415–416)*

The Seventeenth Amendment also changed the method by which Senate vacancies are filled. Under Article I, state legislators chose Senators, and state governors would fill temporary vacancies until the state legislature could elect a new Senator. After the ratification of the Seventeenth Amendment, the expense and inconvenience of popular elections made it necessary to schedule elections for Senators at regular intervals. To prevent lengthy vacancies that would leave states underrepresented in the Senate, a state governor may appoint temporary replacements until a special election fills the seat.

The language of the clause indicates that the states have the power to balance conflicting goals of a speedy popular election versus the state’s interests in conducting elections on a regular basis to increase voter turnout and decrease expenses. Thus, states may choose to postpone elections to fill vacancies until the next regular election occurs. The language of the clause does not define when a vacancy exists. For example, it is an open question whether the voters can knowingly create a vacancy by electing a deceased candidate.
Vice President as Presiding Officer — Article I, Section 3, Clause 4

*Essay by Peter W. Schramm (pp. 65–66)*

The Vice President has two constitutional duties: to receive the electoral votes and to serve as the presiding officer over the Senate. Although presiding officer is an important role, it carries few real powers beyond presiding over the procedure and casting tiebreaking votes.

Because the Vice President would have some legislative responsibility, some delegates challenged the clause as a violation of the separation of powers. However, allowing the Vice President to preside over the Senate and to break tie votes solved two problems: It allowed the body always to reach a resolution, and it preserved the equality of states. If a Senator were to be the official presiding officer and therefore allowed to vote only in a tie, then one state would lose half of its representation during normal votes.

Early in the Republic, Vice Presidents took their role as presiding officers very seriously and often were very active in the Senate and called upon to cast many tiebreaking votes. As time passed, however, their visibility diminished. Modern Vice Presidents rarely sit in with the Senate, as they are typically too busy with executive duties to invest much energy in their Senate role.

**Active Reading**

*Ask: Who usually presides over the Senate today? (the President Pro Tempore of the Senate)*

President Pro Tempore — Article I, Section 3, Clause 5

*Essay by David F. Forte (pp. 66–67)*

In the absence of the Vice President, the Senate may elect a President Pro Tempore to serve as presiding officer of the Senate. Originally, the Senate elected a President Pro Tempore each time the Vice President absented himself for short or long periods of time. In 1890, the Senate adopted a new procedure by which members elect a President Pro Tempore who will serve until replaced. Typically, the Senator selected is the senior member of the majority party.

The President Pro Tempore is not a legislative leader. He supervises the Senate, makes procedural rules while in the chair, and appoints substitute members to sit in his chair when he steps down. By statute, he is third in the line of succession to the President after the Vice President and the Speaker of the House.
Before You Read

Ask: What do you think a “President Pro Tempore” is? (“Pro Tempore” means “for the time being.” Students may answer that the title sounds like “Temporary President.”)

Research It

Point out the list of other senatorial officers on page 67 in the last paragraph of Forte’s article. Assign students to use their texts, other books, or online resources to research the role of one of these officers. Then ask students to share their findings. Along with the class, summarize the findings and write one- or two-sentence descriptions of each post.

Procedures and Rules — Article I, Sections 4–6

Essays by Anthony Peacock, David F. Forte, Adrian Vermeule, James L. Buckley, and Joan L. Larsen (pp. 71–85)

The procedural rules discussed in Article I, Sections 4–6 apply to the Senate as well to the House. As with the House of Representatives, the Senate is not allowed to adjourn for more than three days or to move its meeting place unless both houses agree to the changes. The Senate is also subject to rules about its quorum. A majority of Senators is usually needed to make a vote, but a smaller number may convene to conduct day-to-day business. The Constitution discourages senatorial absenteeism and any problems that may stem from it by allowing Members of Congress “to compel the attendance of absent members.”

Like Representatives, Senators are given a salary through the federal treasury, as outlined in the Compensation Clause. All Members of Congress are subject to restrictions on their wages according to the Twenty-seventh Amendment.

Senators are subject to the Sinecure and Incompatibility Clauses, which prohibit members of the federal executive and judiciary branches from serving in Congress simultaneously or from taking new posts or posts with recently increased salaries. These clauses are meant to keep Senators focused on their duties in Congress and to avoid government in-dealing and other kinds of corruption.

The two houses of Congress are given several important self-regulatory powers. The Qualifications and Quorum Clause allows the Senate to regulate its own elections, returns, and member qualifications, as well as authorizing it to hold investigations of members suspected of wrongdoing. Senators who are found guilty of “disorderly Behavior” may be punished in various ways or even expelled from office under the Rules and Expulsion Clause. Some other punishments include denouncement, reprimand, fines, reduction of seniority, and removal from committees.
Before You Read

Ask: What are some things you remember about the rules and procedures discussed in Lesson 3 on the House of Representatives? (Answers will vary)
Do you think these rules and procedures will be mostly similar or mostly different? (They are mostly similar.)

Write About It

One unique procedure in the Senate is the use of the filibuster. Have students research what the filibuster is, how it is used, and how it reflects the unique nature of the Senate. Have them write 1–2 paragraphs to share with the class.

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 4, Part 1. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. A Senator’s total term of office is
   a. one year.
   b. two years.
   c. four years.
   d. six years.

2. The Sinecure and Incompatibility Clauses are designed to avoid
   a. amendments to certain rules.
   b. direct popular elections.
   c. impeachment trials in the Senate.
   d. corruption in Congress and impermissible blending of powers.

3. According to the Constitution, a Senator must be at least
   a. 25 years old and a citizen for seven years.
   b. 30 years old and a citizen for nine years.
   c. 35 years old and a natural born citizen.
   d. none of the above.

Fill in the Blank: Write the correct word or words in each blank.

1. Under Article I, Senators are chosen by _______. (state legislatures)

2. The _______ stands in as the Senate’s presiding officer if the Vice President is unavailable. (President Pro Tempore)

3. A Senator of the second class would expect to leave office after the _______ year. (fourth)
4. The Connecticut Compromise designated that there would be ________ Senators per state. (two)

5. Temporary Senate appointments to fill vacant seats are to be made by state ________. (governors or executives)

6. A Senator’s salary is paid out of the ________. (federal treasury)

7. The Constitution allows Congress “to compel the ________ of absent members.” (attendance)

8. The Senate of the United States is composed of _____ Senators from each state. (two)

9. Prior to the Seventeenth Amendment, if there was a sudden vacancy in the Senate, the ___________ had the power to make a temporary appointment. (governor)

10. The Vice President of the United States also functions as ________ of the Senate. (president)

11. Early in the Republic, the Vice President took seriously his constitutional duty of _________________. (presiding over the Senate)

Short Answer: Write out your answer to each question.

1. What is the term of office for a United States Senator? (Six years)

2. When our Founding Fathers wrote the Constitution (specifically, Article I, Section 3, Clause 1), who chose the Senators from each state? (The state legislatures)

3. What are the qualifications for a Senator? (A Senator must be at least 30 years old, must have been a citizen for at least nine years, and must be an inhabitant of the state from which he or she is elected.)

4. What does Amendment XVII discuss? (The popular election of Senators)

5. List a few of the qualities the Framers designed for the United States Senate.
   - State legislatures would choose members of the Senate from their respective states
   - It would have fewer members than the lower house
   - Members of the Senate would serve longer terms
   - It would represent the interests of states as state
True / False: Indicate whether each statement is true or false.

1. During the 2000 election, the people of Missouri knowingly voted for a deceased Senator. (True)

2. The Framers of the Constitution perceived the Senate to be a more deliberative body, while the House would initiate most legislation. (True)

3. Directly after the Civil War, both houses of Congress occasionally denied individuals their seats if such individuals could not swear that they had never been disloyal to the Union. (True)

4. The Vice President presides over the Senate and casts tiebreaking votes. (True)

5. There have only been a few occasions when the Vice President has had to cast a tiebreaking vote as president of the Senate. (False. There have been over 200 occasions when he has cast the tiebreaking vote.)

6. The Constitution prohibits any amendment that would deny a state equal representation in the Senate. (True)
Part 2: Sole Powers of the Senate

Trial of Impeachment
Article I, Section 3, Clause 6

Punishment for Impeachment
Article I, Section 3, Clause 7

The Electoral College and the Senate: Senate as Tiebreaker
Article II, Section 1, Clauses 2 and 3, and Amendment XII

Senate’s Advice and Consent in Treaties and Appointments
Article II, Section 2, Clause 2

Trial of Impeachment — Article I, Section 3, Clause 6

Essay by Michael J. Gerhardt (pp. 67–69)

Although the House of Representatives may impeach an officer, the Senate has the sole power to try impeachments. The Framers assigned this task to the Senate rather than the House or the judiciary because the Senate would be better educated, more virtuous, more deliberate than the House and more numerous and better suited to handle the procedural demands of an impeachment trial than a court.

The Constitution sets three major requirements for impeachment trials. First, because of the seriousness of the occasion, Senators must be under oath or affirmation. Second, the Chief Justice presides over the proceedings, both because of the solemnity of the occasion and to prevent the Vice President from presiding over the trial of the President. Third, requiring two-thirds of the Senators to vote for a conviction promotes serious deliberation and ensures a broad consensus that cuts across party or factional lines.

Three major questions remain about the Senate’s powers to try impeachments. First, must the Senate try an impeached official, or may it dismiss an impeachment without a full-scale trial? In 1797, the Senate voted to expel Senator William Blount after the House impeached him. When Blount noted that Senators are not subject to impeachment, the Senate dismissed the House’s impeachment resolution, thereby suggesting that the Senate may dismiss an impeachment resolution without a trial.

Second, how much power does the Chief Justice have when presiding over the Senate? In 1868, during the impeachment trial of President Andrew Johnson, the Senate repeatedly voted to overrule the Chief Justice’s procedural decisions. During President Clinton’s trial in 1999, however, the Senate did not challenge the Chief Justice’s rulings.
Finally, what procedures must the Senate employ in impeachment trials? Since the Senate has the constitutional power to determine its own rules of proceeding, the Senate has formulated its own special impeachment trial procedures with periodic revisions. In light of recent failed attempts to impeach popular Presidents for misconduct, some people question whether impeachment is indeed an appropriate remedy for judicial or executive misconduct.

**Research It**

According to Michael J. Gerhardt, the House of Representatives has impeached 16 people, including Presidents Andrew Johnson and William Jefferson Clinton, throughout history. Only seven of these people, however, have actually been convicted by the Senate. Ask students to choose one of the impeached officials and prepare a brief report on his or her alleged offenses and trial, as well as the results of the trial.

**Punishment for Impeachment** — Article I, Section 3, Clause 7

*Essay by Michael J. Gerhardt (pp. 69–71)*

The Constitutional Convention narrowly defined the scope and nature of the punishments that the Senate may impose in impeachment trials. The Convention limited the punishments in the federal Constitution to those typically found in state constitutions: removal and disqualification from office. It also rejected the British impeachment practice in which the House of Lords could impose any punishment, including death, on impeached officers.

Three major questions have arisen under the clause. First, may the Senate impose the sanctions of removal and disqualification separately? The Senate has twice separated the sanctions, voting first to remove officials and then to disqualify them from further office.

Second, may officials be tried in ordinary courts before impeachment and removal from office? Several officials have been prosecuted and imprisoned before being impeached, but it is unclear whether the President could be subject to a similar process. Alexander Hamilton argued in *The Federalist* No. 69 that a President must first be impeached and removed before he could be tried in an ordinary court of law, but the President is not above the law, and an impeachable offense may not be a crime.

Third, may the Senate impose penalties short of removal and disqualification? On one level, the Constitution does not specifically authorize censure; vesting the power of impeachment in the House seems to exclude other means to punish officials who have committed impeachable offenses. It would also seem to undermine the Founders’ objective of narrowing the range of permissible punishments.
Allowing censure could also upset the system of checks and balances by making it easier for Congress to harass or embarrass a President. Furthermore, censure conceivably constitutes a bill of attainder.

On the other hand, the text of the Constitution seems to imply that “lesser” punishments than removal or disqualification are allowable. Additionally, other clauses and historical practices suggest that censuring may be permissible: The House and Senate have passed over a dozen resolutions condemning or censuring presidential actions. Thus, debates over censure are likely to persist until historical practice resolves the matter.

Discussion Questions

1. How was the United States impeachment system designed to differ from the traditional British system? (Sample answer: The Constitution sets limits on punishments that can be set by Congress during impeachment trials. Congress must gain a supermajority of votes both to remove officials from office and to forbid them from future government employment. The British system, however, allowed legislators to impose many punishments including the death penalty.)

2. What are the punishments for impeachment? (removal from office and disqualification from holding and enjoying any office of honor, trust, or profit under the United States)

The Senate as Tiebreaker for Electing the Vice President – Article II, Section 1, Clauses 2 and 3, and Amendment XII

The Constitutional Convention designed a unique method to select the President called the Electoral College, consisting of electors from each state who would be responsible for choosing the chief executive. Each state would appoint its own electors, the number of which would be determined by the number of Senators plus the number of Representatives in the House for each state.

These electors would each cast two ballots, but at least one had to be for a citizen from another state. The person who received the majority of votes would be President, and the runner-up would be Vice President. If two or three persons received a majority of electoral votes or an equal number of votes, the House of Representatives would choose a President. If no candidate received a majority, the House would choose from among the top five candidates.
The Twelfth Amendment altered the way in which the Electoral College elected the President and Vice President. Under the Twelfth Amendment, electors vote for President and Vice President separately. The House of Representatives has the power to choose a President if no candidate receives a majority of electoral votes; the Senate has the same power for the Vice President. (For more information on the Electoral College and the Twelfth Amendment, turn to Lessons 9 and 10.)

The Senate’s Advice and Consent in Treaties and Appointments — Article II, Section 2, Clause 2

*Essays by Michael D. Ramsey and John McGinnis (pp. 205–212)*

The Senate offers advice and consent to the President on treaties and appointments. For the Framers, treaties combined foreign policy (the responsibility of the President) and lawmaking (the responsibility of Congress). Because treaties become the law of the land, they are not to be entered into or ratified without great care. The President negotiates international treaties, but the supermajority of the Senate must ratify treaties in order for them to have the force of law.

Though the choice of principal officer is the President's responsibility under the Appointments Clause of Article II, the Senate’s advice and consent forestalls the possibility that the appointment power will be abused. The President has the plenary power to nominate, and the Senate’s consent does not bind the President; that is, the President has the power to choose not to appoint an official even though the Senate has confirmed the official.

The Senate has plenary authority to reject nominees. Nothing in the text limits what the Senate may consider when consenting to or rejecting a nominee (except that Congress may not establish qualifications for principal officers). Thus, the Senate may use its advice and consent power to reject a nominee for unsound principles or blemished character. The President's power of repeated nomination checks the Senate’s ability to reject a nominee without a compelling reason. (For more information on treaties and appointments, turn to Lesson 10.)

**Check Understanding**

Have students complete the following assessment to check their understanding of Lesson 4, Part 3. Review any material for questions they have missed.

**Multiple Choice: Circle the correct response.**

1. The _______ presides over presidential impeachment trials.
   a. Chief Justice
   b. Vice President
   c. majority leader
   d. President Pro Tempore
2. Impeached Presidents may be removed from office when at least _______ of Senators concur.
   a. one-third
   b. two-thirds
   c. a quorum
   d. a majority

**Fill in the blank:** Write the correct word or words in each blank.

1. Punishments from impeachment may include “removal from Office, and ______________ to hold and enjoy any Office....” *(disqualification)*

2. The __________ Amendment modified the method of electing a President and Vice President. *(Twelfth)*

3. Treaty-making is a mixture of __________ and __________ power. *(executive, legislative)*

4. The Senate frequently approves treaties with ___________. *(conditions)*

**Short answer:** Write out your answer to each question.

1. What was the original arrangement for electing the President and Vice President? *(Presidential electors voted for two candidates. The one with the most votes, as long as it was a majority of electors, would be President, and the individual with the next greatest number of votes would be Vice President.)*

2. What is significant about the 1836 election in regard to the selection of the Vice President? *(Richard M. Johnson was chosen by the Senate. It is the only time in United States history that the Senate has chosen the Vice President.)*

3. List some of the striking features of the Treaty Clause.
   - It gives the Senate a “partial agency” in the President’s foreign-relations power.
   - It requires a supermajority (two-thirds) of the Senate for approval of a treaty.
   - It gives the House of Representatives no role in the process.
Unit 2
Lesson 5

CONGRESS’S ECONOMIC POWERS

Lesson Objectives:

When you complete Lesson 5, you will be able to:

• Understand the debates about the scope of Congress's power under the Spending Clause and explain how it is a limited power.
• State the purpose of the Appropriations Clause and the Borrowing Clause.
• Understand the difference between direct and indirect taxes.
• Understand the limits on direct taxation under the Direct Taxes Clause and the changes to congressional tax powers with the 16th Amendment.
• State the purpose of the Uniformity Clause and its relationship to indirect taxation.
• Describe the purpose of the Export Taxation Clause, and explain the importance of the Port Preference Clause to federalism.
• Explain the extent of Congress's power concerning commerce with foreign nations, commerce among the states, and commerce with Indian tribes.
• State the purpose of the Coinage Clause, the Weights and Measures Clause, and the Counterfeiting Clause, and understand their importance to a Commercial Republic.
• Explain the purpose of the Post Office Clause, and the Patent and Copyright Clause, and how these clauses support the Commercial Republic.

Part 1:

Spending and Borrowing

Spending Clause
Article I, Section 8, Clause 1

Borrowing Clause
Article I, Section 8, Clause

Appropriations Clause
Article I, Section 9, Clause 7
The Spending Clause — Article I, Section 8, Clause 1

Essay by John C. Eastman (pp. 93–96)

Like the Commerce Clause and the Necessary and Proper Clause, the Spending Clause is often used to justify vast expansions of regulatory power; however, the Spending Clause does not grant unlimited power to Congress. The Spending Clause allows Congress to levy taxes and duties in two specific situations: to pay the country’s debts and to defend the country or promote its general welfare.

The Founders disagreed about the scope of this clause, but even the most expansive understanding of the clause (Hamilton’s) did not see it as authorizing Congress to regulate anything and everything it wished. Hamilton argued that the only limits on the tax-and-spend power are that duties must be uniform, direct taxes must be apportioned by population, and no tax should be laid on articles exported from any state. Hamilton argued that, with the exception of those requirements, Congress has a broad and expansive power to raise and appropriate revenue.

By contrast, James Madison and Thomas Jefferson held to a narrower interpretation of the clause: Congress could not tax and spend for any and every thing judged to be in the best interests of the nation. Congress could tax and spend only to achieve the purposes explicitly outlined elsewhere in the Constitution. A third interpretation, which James Monroe championed (and even Hamilton recognized) is that the words “common” and “general” are themselves a limitation on Congress’s power. Spending must be general, meaning directed toward the benefit of the entire country rather than simply toward a specific region.

There are few examples of Congress’s interpretation of this clause. The Fourth Congress, for instance, decided that it did not have the constitutional power to provide relief to Savannah, Georgia, after it suffered a devastating fire. However, Congress did fund several local projects that were tied specifically to another enumerated power or that served the general welfare of the entire country: for example, appropriations for the Cumberland Gap. Presidents prior to the Civil War were divided as to which of the three interpretations of the clause was correct, but Madison’s, Jefferson’s, and Monroe’s positions largely prevailed.

Modern-day jurisprudence on the Spending Clause begins with the New Deal–era decision in United States v. Butler (1936). Both parties relied on Hamilton’s interpretation of the clause, which the Supreme Court claimed to accept. The Court reasoned that the only limitation on Congress’s power to tax and spend was that spending must be for the “general Welfare.” Although the Court officially accepted Hamilton’s interpretation, its analysis seemed to align more closely with Monroe’s interpretation rather than Hamilton’s. In fact, Butler departs from all earlier interpretations of the clause because the Court gave Congress virtually unlimited discretion to determine what is in the “general welfare.” The Court refuses to examine the constitutionality of any spending program; it will only analyze whether the particular conditions for receipt of funding are constitutional, through the four-pronged test of South Dakota v. Dole (1987).
Before You Read

Ask: Does your family have a budget? What kind of expenses are in your budget? (Answers will vary.) Congress also has a budget. What kind of expenses do you think are in Congress’s budget? (Accept all reasonable responses: For example, military expenses, salaries for Members of Congress, funding for roads.)

Active Reading

Ask: What two purposes of the Spending Clause make up the spending power?” (to pay the debts of the United States and to provide for the common defense and general welfare of the United States)

Check Understanding

Have students write a few sentences summarizing Alexander Hamilton’s, James Madison’s, and James Monroe’s interpretations of the Spending Clause. (Sample answer: Hamilton stated that the only limits on Congress’s tax-and-spend power were the requirements that duties be uniform, that direct taxes be apportioned by population, and that no tax be applied on anything exported from any state. Madison and Jefferson argued that Congress could tax and spend in order to achieve the purposes explicitly outlined elsewhere in the Constitution. Monroe thought that spending must be general, meaning directed toward the benefit of the entire country rather than simply toward a specific region.)

Work in Groups

Break students into small groups and have them use the Internet to research some ways in which Congress spends money today. Have them write a paragraph summarizing their findings and analyze how Madison, Hamilton, and Monroe would view these appropriations.

Borrowing Clause — Article I, Section 8, Clause 2

Essay by Claire Priest (pp. 98–100)

The Borrowing Clause grants Congress the power to borrow money on the credit of the United States. During peacetime, Congress was expected to craft a balanced budget, but the Framers realized that the power to borrow money would be essential during wartime. However, George Washington cautioned that America's credit should be used sparingly and that the accumulation of debt should be avoided.
The Federalists and the Republicans agreed about maintaining public credit but disagreed about implementing this power—specifically, whether the Borrowing Clause authorized a national bank. Hamilton supported the bank as essential to commerce. Jefferson dismantled Hamilton’s program and supported a balanced budget in order to limit the size of government. Wartime exigencies and economic crises led the country toward the modern interpretation of the Borrowing Clause. Both sides accepted the use of the Bank of the United States to control its reserves and later permitted the federal government to issue legal tender.

Litigation related to the Borrowing Clause today focuses on intergovernmental taxation immunity and Congress’s contractual obligations. The Supreme Court has ruled that local governments cannot tax interest generated by debts held by the federal government. The Court has also ruled that Congress has an obligation to pay back money borrowed and that this obligation is enforceable in most instances. The Constitution does not limit the amount that may be borrowed. It is a political question; that is, the political branches must make a prudential judgment to accumulate debt.

Before You Read

Ask: What is debt? (money that you owe) What is a deficit? (when you spend more money than you make) When might a country find it necessary to borrow money from another country? (during a war or an economic crisis)

Make a Real-Life Connection

Help students understand the difference between the Framers’ approach to the national budget and the approach used in modern times. Explain that the Framers understood a balanced budget to be essential during peacetime and that the credit of the United States ought to be protected. Have students look up the current debt and deficit for the United States. Ask them to analyze what the Founders would think of the current budget predicament.

Active Reading

Ask: What did the Jeffersonian Republicans think about a balanced budget? (They thought that a balanced budget reflected a nation’s desire to limit the size and power of the federal government to protect the authority of the states.)

Research It

Have students trace the history of the First Bank of the United States, including a discussion of the constitutionality of the bank. Have students write a few pages answering the following questions. Why was the constitutionality contested? When and for what purpose was the bank established? By whom? What happened to the bank?
Discussion Question

What does the Borrowing Clause reveal about how the Framers viewed their role in international politics? (The Borrowing Clause shows that the Framers thought that the young nation was coming into its own in regard to international politics. The clause reveals that they foresaw a future in which the United States would be considered the political equal of other major countries with sufficient credit to borrow money.)

Appropriations Clause — Article I, Section 9, Clause 7

Essay by Gary Kepplinger (pp. 163–166)

The Appropriations Clause is essential to Congress’s “power of the purse,” or the authority to spend money. The clause first appeared at the Constitutional Convention as part of a proposed division of authority between the House and the Senate. Part of the proposal declared that all “money bills” must originate in the House and that the Senate could not amend or alter these bills. Additionally, no money could be withdrawn from the public treasury unless the House appropriated it. The Committee of Eleven offered a compromise to which the delegates agreed: The Senate could amend money bills, and all money must be appropriated by law.

The Appropriation Clause was an important element of the separation of powers because it limits the executive’s access to funds. The second part of the Appropriations Clause, beginning with the words “a regular Statement and Account,” specifies that an account of expenditures from appropriations must be published periodically.

As the courts have routinely recognized, the Appropriations Clause gives Congress authority over the Treasury. The Supreme Court has declared the clause to be a restriction on the executive power to distribute money. Congress may enact a law directing a payment from the Treasury, and it may also adjust, suspend, or repeal laws concerning appropriation acts. Congress’s power is not unlimited. The Bill of Rights and other constitutional provisions constrain Congress.

Before You Read

Write these sentences on the board: The school district has appropriated funds for a new cafeteria. These funds may not be used for any other purpose. Ask: What does appropriated mean in the first sentence? (set aside) Now, what do you think the Appropriations Clause might be about? (the setting aside of money)
Make a Real-Life Connection

Tell students to think about how they or their families budget money. Ask: Do you set aside money for certain things? What are some of these things? (Answers will vary.) Then ask: In what way is the Appropriations Clause like a budget? (Students may say that money is earmarked for certain things and that this controls excessive spending.)

Make an Inference

Ask: Why is it important for Congress to record and publish a record of its spending? (so that taxpayers are aware of how their money is being spent) Ask: What might happen if Congress’s spending was not recorded? (Politicians might spend money illegally or unwisely.)

Discussion Questions

1. Why is it important to limit the ways in which Congress may spend money? (Answers will vary: All money Congress spends comes from taxpayers and is inherently limited. Because there is only a certain amount of money available to spend, Congress must prioritize how it spends.)

2. How does the Appropriations Clause reflect the separation of powers? (Congress holds the power of the purse. That power is divided between the House and the Senate: money bills must originate in the House, which is closest to the people, but the Senate must also approve any money bill, thus ensuring that members of the House make good decisions regarding the Treasury. The Appropriations Clause also ensures that the Executive may not access funds without Congress’s (and therefore the people’s) consent.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 5, Part 1. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. Which of the following clauses gives Congress authority over the Treasury?
   a. Emoluments Clause
   b. Appropriations Clause
   c. Direct Taxes
   d. Bill of Attainder Clause
2. Which Founding Father argued for a very broad interpretation of the Spending Clause?
   a. James Madison
   b. Alexander Hamilton
   c. James Monroe
   d. George Washington

3. The Framers created the Borrowing Clause to empower Congress to borrow money
   a. in times of war.
   b. to expand the federal government.
   c. to give to the states.
   d. in times of famine.

4. Internal improvements have been justified as a viable national expenditure by using the
   a. Borrowing Clause.
   b. Commerce Among the States Clause.
   c. Spending Clause.
   d. Commerce with Foreign Nations Clause.

Short answer: Write out your answer to each question.

1. For what two purposes does the Spending Clause permit the levying of taxes? (to pay the debts of the United States and to provide for the common defense and general welfare of the United States)

2. How did the Federalist Party want the Spending Clause to be read? (They argued for an expansive reading of the spending power.)

3. Every President adopted a more restrictive interpretation of the Spending Clause until what period in American history? (the Civil War)

4. What ushered in the modern-day jurisprudence on the Spending Clause? (The 1936 New Deal-era case of United States v. Butler. This case gave Congress virtually unlimited discretion to determine what is in the “general welfare.”)

5. What were the three interpretations of the Spending Clause advanced in the years immediately following ratification of the Constitution? (One interpretation argued that the clause authorized spending for various projects such as internal improvements; another was that spending could be only for powers specifically enumerated in the Constitution; a third was that it was a limit on the power to spend, requiring that spending be for national and not merely local benefit.)
6. What was one of the main reasons a Borrowing Clause was essential? *(The nation could not successfully defend itself militarily without the power to borrow quickly and extensively when the need arose.)*

7. Which famous Federalist encouraged the chartering of the First Bank of the United States? *(Alexander Hamilton)*

8. The Appropriations Clause is the cornerstone of what? *(Congress’s “power of the purse”)*

**True / False: Indicate whether each statement is true or false.**

1. In early Congresses, local projects such as schools for public education and local roads and canals were seen as things that would benefit the general public, and monetary appropriations were therefore made from the federal treasury. *(False. Since the “general” benefit is not direct, early Congresses viewed these expenditures as unconstitutional.)*

2. Some taxes will inevitably affect some areas more than others. *(True)*

3. Federalists and Republicans agreed on the need to maintain public credit and on how borrowing power should be implemented. *(False. They did agree on the need to maintain public credit, but they diverged considerably on how the borrowing power should be implemented.)*
Part 2: Powers and Limits of Taxation

Uniformity Clause
Article I, Section 8, Clause 1

Direct Taxes
Article I, Section 9, Clause 4

Income Tax
Amendment XVI

Export Taxation Clause
Article I, Section 9, Clause 5

Port Preference Clause
Article I, Section 9, Clause 6

Understanding Taxation

The American Revolution began as a tax revolt. The colonists’ objections were not to the amount of taxation but to the process by which taxes were levied. Specifically, the colonists objected that Parliament was levying taxes without the consent of representatives in the colonists’ local legislatures. In drafting the Constitution, the Framers vested their representatives in Congress with the power to levy taxes.

There are different types of taxes that a legislature may levy: direct taxes and indirect taxes. The Framers did not want states, interests, or industries to use the national legislature to burden other states, interests, or industries unjustly. Therefore, the Constitution creates certain limitations on indirect taxes and direct taxes: Indirect taxes are subject to the Uniformity Clause, and direct taxes are subject to apportionment.

Indirect taxes were meant to fund the national government in ordinary circumstances. These included “Duties, Imposts, and Excises”—generally, taxes on articles of consumption. If Congress raised rates too high, then people would not purchase the taxed goods, and revenue would decrease.

Direct taxes did not have the built-in protections characteristic of indirect taxes. Direct taxes were imposed directly on individuals, who could not shift their liability to others. To guard against abuse, direct taxes must be apportioned.
**Unit 2**

**Uniformity Clause** — Article I, Section 8, Clause 1

*Essay by Nelson Lund (pp. 97–98)*

The Uniformity Clause requires that indirect taxes, “Duties, Imposts, and Excises” must be uniform. The Uniformity Clause limits Congress’s taxing power by ensuring that indirect taxes are not designed to discriminate against specific regions and political groups. Together with the Port Preference Clause, which limits Congress’s power over taxing and commerce, the Uniformity Clause ensures that no single region would have a competitive advantage or disadvantage over the other regions of the country.

Any tax will naturally affect some regions more than others. Therefore, the challenge of the Uniformity Clause is to distinguish between non-uniformity that is constitutionally forbidden and non-uniformity that is inevitable with legitimate taxes and duties.

The Supreme Court ruled that a tax does not violate the Uniformity Clause if it has “the same force and effect in every place where the subject is found.” The Court later concluded in *United States v. Ptasynski* (1983) that (1) if the subject of a tax is defined in non-geographic terms, then the Uniformity Clause is satisfied, but (2) if the subject of a tax is described in geographic terms, it will be closely examined to determine whether it does in fact violate the clause. Even with these rules, Congress can easily impose taxes that are discriminatory.

**Active Reading**

Tell students that the Uniformity Clause was intended to ensure that geographical areas are treated equally. How could a tax not be uniform? (If Congress imposed a tax on the production of oil, it would be uniform if all producers of oil paid the same tax. However, some states do not produce oil. This tax could run afoul of the Uniformity Clause if the tax on oil was designed to harm oil-producing states or if producers in one state did not have to pay the same tax as producers in other states.)

**Write About It**

Break students into groups and have them use the Internet to find examples today where legislators have approved laws, levied taxes, or given benefits to one state but not another state. Have groups make a list of examples and be ready to discuss each.

**Make an Inference**

Ask: Why isn’t the Uniformity Clause enforced today? (The Supreme Court has not defined actual geographic discrimination.)
Direct Taxes — Article I, Section 9, Clause 4

Essay by Erik M. Jensen (pp. 159–161)

Under the Articles of Confederation, Congress did not have the ability to generate the revenue it needed. The Framers designed the Constitution to give the national government more power to generate the revenue it needed, but they feared using taxation to do this. The taxing authority could be used to burden certain regions of the country unfairly. Indirect taxes (taxes on goods) were not nearly as controversial as direct taxes such as capitation (a tax on each person). The Direct Taxes Clause requires that all capitation or other direct taxes be apportioned according to the census.

There is much debate about what kinds of taxes are direct and therefore subject to apportionment. It is clear from the Founding debates that capitation and land taxes were direct. Capitation was specifically labeled a direct tax in the Constitution. Land taxes generally included slaves, and prior to the Civil War, Congress enacted several real-estate taxes, which were apportioned through a complicated process. Yet the question remained whether direct taxes applied to anything further.

The Supreme Court addressed the question in Hylton v. United States (1796). The case addressed taxes on carriages; the Court held that carriage taxes were excise taxes and therefore did not require apportionment but affirmed that capitation and land taxes were direct taxes subject to apportionment. Based on the language in Hylton, the Court held that taxes on insurance receipts, state bank notes, and inheritance did not require apportionment.

In Pollock v. Farmers’ Loan and Trust (1895), the Court expanded its understanding of direct taxes to include income taxes (though the Court had suggested a few years earlier that income taxes did not require apportionment). After Pollock, the Court continued to approve other unapportioned excise taxes. The Sixteenth Amendment was ratified to enable Congress to pass unapportioned income taxes, which proved to be a good source of revenue.

Active Reading

Explain that a capitation is a “head tax,” a tax on a person regardless of the person’s income or wealth. Ask: Why did the Founders create such a direct tax that did not factor in wealth or income? (The Framers did not want states, interests, or industries to use the national legislature to burden other states, interests, or industries unjustly. For direct taxes, everyone would pay the same amount because this would ensure that Congress was not giving preference to one area of the country or group of individuals.)
**Active Reading**

Ask: Based on your readings of the Direct Taxes Clause and the Uniformity Clause, the Constitution divided governmental levies into what two mutually exclusive categories? (indirect taxes subject to the uniformity requirement and direct taxes subject to apportionment)

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**Income Tax** — Amendment XVI

*Essay by Erik M. Jensen (pp. 411–413)*

The Sixteenth Amendment allowed Congress to enact an income tax without its being subject to the rules of other direct taxes. According to Article I, all direct taxes must be apportioned among the states on the basis of population regardless of a state's financial condition. Thus, two states with the same population but with different per capita income would owe the same amount to the federal government. Though each state would pay the same amount to the federal government, the tax would be more burdensome to the state with low per capita income.

Because the Supreme Court had suggested that income taxes were indirect taxes, Congress enacted an unapportioned income tax during the Civil War. When Congress enacted another such tax years later, the Supreme Court ruled in *Pollock v. Farmers' Loan and Trust* (1895) that income taxes were direct and therefore must be apportioned to be constitutional. To circumvent this decision, Congress pushed for a constitutional amendment to exempt income taxes from apportionment. Despite opposition, the amendment was passed with majority support in Congress.

The Supreme Court has not commented on the scope of the amendment or whether it limits congressional power. The current understanding of Congress’s taxing power is that it is so broad that Congress alone determines its limits regarding income taxes. This interpretation conflicts with the original, limited purpose of the amendment.

**Before You Read**

Explain to the students that in the past, the amount of taxation depended on the state’s population—the fewer people in a state, the less money people had to pay. Ask: How would this create conflict with other states? (States with low per capita incomes would still pay the same amount as other states with the same population but higher per capita incomes. This would create more of a burden on states with low per capita income. These states would be more likely to resist tax increases.)
Active Reading

Ask: Why did the Constitution need be amended to allow for an income tax? (There are two types of direct taxes: land and head taxes. A personal income tax is a direct tax that is not apportioned through the states. For Congress to levy an income tax, it would need constitutional authority to do so.)

Make an Inference

Ask: What do you think an “indirect tax” is? (a tax levied on a good or service, such as a sales tax)

Work in Pairs

Some proponents of an income tax did not think a constitutional amendment was necessary, but others pushed for the amendment. Have students research the opinions on both sides and report why each side thought an amendment was or was not necessary for Congress to levy an income tax.

Export Taxation Clause — Article I, Section 9, Clause 5

*Essay by David F. Forte (pp. 161–162)*

The Export Taxation Clause forbids the taxation of goods exported from any state. The Framers created this clause to show unity among the states, since export taxes would have burdened the Southern states, the primary exporters in the country. Some, however, favored export taxes as a good source of income for the federal government.

Unlike in Commerce Clause cases, the Court has kept the distinction between items intended for export and items intended for local use. The Export Taxation Clause prohibits the government from taxing goods or services closely related to the export process, but it does not prohibit taxes prior to exportation or the taxation of goods and services loosely related to exportation.

The Court often used the Export Taxation Clause to evaluate levies between 1876 and 1923, but it has rarely invoked the clause since then. Although the purpose of the Export Taxation Clause was to prevent Congress from favoring any one section of the country, the Court has interpreted the clause as a flat ban on all export taxes rather than evaluating an export tax’s discriminatory effect.
Check Understanding

Say: On page 161, Forte says that Southerners worried that export taxes could be used to attack slavery indirectly. How might this occur? (Answers will vary. Students may say that government would create an extremely high tax on the exportation of slaves to harm the institution. Article I, Section 9, Clause 1 limits the amount paid on importation of slaves to $10 per head.)

Active Reading

Ask: Why did James Madison, Alexander Hamilton, George Washington, Gouverneur Morris, and James Wilson support export taxes? (They thought they were a necessary source of revenue. The South would likely pay more than the North, but this was justified because the South would need greater naval protection.)

Port Preference Clause — Article I, Section 9, Clause 6

Essay by Nelson Lund (pp. 162–163)

The Port Preference Clause limits Congress’s commerce and taxing powers. The clause prevents a powerful commercial faction from using the legislature to injure a politically weaker rival. Specifically, it prevents strong industries located in one state from using Congress to create a law that limits activity in a rival state’s port. The clause stemmed from the Maryland delegates’ concern that vessels coming into and out of the port in Baltimore might be forced to stop in Virginia.

The Supreme Court has interpreted the Port Preference Clause to forbid Congress from blatantly discriminating between ports of one state and those of another, but it has allowed incidental preferences or unequal taxes. Most recently, Justice Thomas has argued that the most natural reading of the clause was to forbid Congress from using its commerce power to channel commerce into one state’s ports. Under current case law, Congress is on its honor to refrain from favoring one state’s port over another’s.

Active Reading

Point out that Lund begins his commentary by mentioning the Uniformity Clause. Tell students that this clause requires the uniform collection of federal taxes. Ask: In what way is the Uniformity Clause like the Port Preference Clause? (Both clauses prevent Congress from discriminating against a particular state by giving a competitive advantage to one state over another. The Uniformity Clause limits Congress’s taxing power because it ensures that Congress does not impose indirect taxes that discriminate against specific regions and political groups. The Port Preference Clause limits Congress’s taxing and commerce powers.)
Make an Inference

Read aloud the sentence, “Some other delegates objected that Congress should not have its hands tied, lest it be unable to deal adequately with problems such as smuggling on long rivers like the Delaware.” Ask: How could this clause interfere with Congress’s ability to handle problems such as this? (Answers will vary. Example: Congress might not be able to make changes in the ports of one state, such as adding more security, bridges, or checkpoints.)

Discussion Questions

1. What do you think might happen if the ships in Baltimore were forced to stop in Virginia? (Answers will vary. They sell or buy goods in Virginia instead of in Baltimore. Ships might opt not to go to Baltimore at all if they would be forced to stop in Virginia anyway.)

2. Why might the citizens of a state or a country not want a high export tax on the goods they produce? (High taxes would raise the price of goods. People in other states or countries might stop purchasing goods if the price is too high.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 5, Part 2. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. National real-estate taxes were enacted when?
   a. during the Constitutional Convention
   b. in antebellum America
   c. after World War I
   d. after World War II

2. Direct taxes are generally understood to apply to which of the following?
   a. land only
   b. goods only
   c. capitation and land
   d. goods and services

Fill in the Blank: Write the correct word or words in each blank.

1. The _______ prohibits taxation of goods exported between states or from states to foreign nations. (Export Taxation Clause)

2. The ________ was created to prohibit Congress from favoring the ports of a particular state. (Port Preference Clause)
**Unit 2**

**Short Answer: Write out your answer to each question.**

1. What is the purpose of the Uniformity Clause? (to prevent Congress from using the taxing power to give one area of the country an advantage over another)

2. What are “indirect taxes”? (An indirect tax is a tax usually on a good of consumption that can be passed on to someone else. For example, manufacturers or merchants increase the price on goods so that the consumer is paying more for the item, such as cigarettes, liquor, gasoline, etc.)

3. What are “direct taxes”? (taxes that are directly levied on the individual)

4. What two forms of taxation are subject to apportionment? (capitation taxes and taxes on land, which generally included taxation on slaves)

5. The Constitution divided governmental levies into what two mutually exclusive categories? (Indirect taxes subject to the uniformity requirement and direct taxes subject to apportionment)

6. Why was the South opposed to an export tax? (During the late 18th century, the South was a primary exporter of goods and would have borne a disproportionate burden from export taxes.)

7. What is the natural protection of indirect taxes? (If taxes on articles of consumption become too high, revenue will naturally decrease because consumers will stop buying the taxed goods.)

8. What is the Sixteenth Amendment? (It gives Congress the power to lay and collect an income tax without the apportionment requirement.)

**True / False: Indicate whether each statement is true or false.**

1. Congress enacted an unapportioned income tax during the Civil War. (True)

2. Despite heated opposition to the unapportioned income tax, the Sixteenth Amendment was passed by Congress with huge majorities. (True)

3. Some taxes will inevitably affect some areas more than others. (True)

4. Federalists and Republicans agreed on the need to maintain public credit and on how borrowing power should be implemented. (False. They did agree on the need to maintain public credit, but they diverged considerably on how the borrowing power should be implemented.)
Part 3: Creating a Commercial Republic

Commerce with Foreign Nations
Article I, Section 8, Clause 3

Commerce Among the States
Article I, Section 8, Clause 3

Commerce with the Indian Tribes
Article I, Section 8, Clause 3

Bankruptcy Clause
Article I, Section 8, Clause 4

Coinage Clause
Article I, Section 8, Clause 5

Weights and Measures
Article I, Section 8, Clause 5

Counterfeiting
Article I, Section 8, Clause 6

Post Office
Article I, Section 8, Clause 7

Patent and Copyright Clause
Article I, Section 8, Clause 8

Commerce with Foreign Nations — Article I, Section 8, Clause 3

Essay by David F. Forte (pp. 100–101)

The Commerce with Foreign Nations Clause grants Congress the power to regulate commerce conducted with other countries. Under the Articles of Confederation, a state could regulate its commerce with other states and nations. Consequently, foreign nations easily manipulated the states to their own benefit. The Framers agreed that Congress should regulate foreign commerce.

There is disagreement whether Congress’s power to regulate commerce with foreign nations is coextensive with the power to regulate interstate commerce. The Supreme Court has held that Congress has greater power to regulate foreign commerce, since the federal government has sovereignty over foreign affairs. Similarly, the Court has recognized that states have more authority to tax interstate commerce than they have to tax foreign commerce.
Before You Read

Say: The word commerce means “buying and selling.” What is interstate commerce? (buying and selling between states) What is foreign commerce? (buying and selling between countries)

Make an Inference

Ask: What is a tariff? (a tax or duty on an imported product)

Commerce Among the States — Article I, Section 8, Clause 3

Essay by David F. Forte (pp. 101–107)

Together with the Spending Clause and the Necessary and Proper Clause, the Commerce Among the States Clause is one of the most contentious clauses in the Constitution. Together, these clauses are cited to grant extensive regulatory powers to Congress. The Commerce Clause, however, was not designed to justify whatever regulation Congress desires to make.

The Commerce Among the States Clause is a delegation of power to Congress to regulate and promote commerce and to limit the states’ power over interstate commerce. There is some disagreement about the Framers’ understanding of commerce. Some scholars argue that the Framers interpreted the commerce power to extend to the exchange and transportation of goods between states and to closely related activities. Others argue that the Framers saw Congress as having the power to regulate any market activity that affects more than one state.

After their experiences under the Articles of Confederation, the Framers understood regulation of commerce and the money supply to be essential to Congress’s power over economic policy. Article I, Section 10 of the Constitution prohibits the states from coining money and grants Congress alone power over commerce between nations, among the states, and with Indian tribes. Because the Framers created a document of limited enumerated powers, and because they did not expressly include a plenary power over all local commerce, the Framers did not design the Commerce Among the States Clause to enable Congress to regulate local economic activity. Thus, the clause did not give Congress the authority to regulate intrastate commerce (commerce wholly internal to a state). Under the Necessary and Proper Clause (which will be discussed in lesson 8), it is possible for Congress to regulate certain local activities, but only if the regulation comports with another enumerated power of Congress.

The Supreme Court has increasingly recognized vast expansions of Congress’s commerce power. The Court’s understanding of commerce has expanded from the narrow definition of “trafficking and trading of economic commodities” to the broad definition of “any human activity or other phenomenon that has an ultimate im-
impact on activities in one or more states.” In *Gibbons v. Ogden* (1824), John Marshall defined the terms of the clause: “commerce” describes the commercial intercourse between nations, parts of nation, and its branches; “among the states” does not give Congress the power to regulate commerce internal to a state but only commerce concerning more than one state. The Court did not revisit the scope of the commerce power after *Gibbons* until late in the 19th century.

From 1895 until 1928, the Court dabbled with different tests to evaluate the scope of the Commerce Clause. In *United States v. E.C. Knight Co.* (1895), the Court determined that the clause did not extend to manufacturing because there was a qualitative difference between the production of goods and commerce. Gradually, the Court began to approve congressional regulations for manufacturing using a new quantitative analysis: Congress could regulate local activity and manufacturing if it had a “substantial” effect on interstate commerce. Later, in *A.L.A. Schechter Poultry Corp. v. United States* (1935), Justice Cardozo explained that Congress may regulate local activities if they have a proximate effect on interstate commerce.

By the early 1940s, the Court determined that any local activity—either separately or in aggregate—that had a sufficiently substantial effect on interstate commerce was therefore subject to Congress’s commerce power. With this reasoning, the Court functionally turned the commerce power into a general regulatory power and undid the Framer’s limited framework of government. Congress has invoked its commerce power to regulate guns in schools and violence against women and to enact civil rights legislation. In *United States v. Lopez* (1995) and *United States v. Morrison* (2000), the Court struck down some of these laws, arguing that they did not have a substantial effect on commerce and that Congress had exceeded its powers.

It is important to note that even the Founders understood the Commerce Clause to be a restraint on states’ legislative power. State law will inevitably conflict with Congress’s commerce power. These conflicts have been the subject of many Supreme Court cases, producing inconsistent holdings. The Court generally evaluates states laws according to a test articulated in *Pike v. Bruce Church, Inc.* (1970). Essentially, if a state regulation has a legitimate state interest, and only incidentally effects interstate commerce, the Court will uphold the law.

**Check Understanding**

Tell students that after the War for Independence, the states had imposed competing tariffs that restricted the flow of goods among them while trying to attract foreign trade to their own ports. Congress had no authority under the Articles of Confederation to make commerce “regular” to ensure that Americans had access to what they could not produce themselves. The Constitution gave Congress power under the Commerce Clause to lift artificial barriers on interstate commerce as a necessary condition for a thriving commercial republic.
Discussion Question

According to the commentary in your book, how do modern interpretations of the power of the federal government to regulate commerce among the states differ from the original intentions of the Framers? (The Framers regulated commerce between the states to prevent the states from creating artificial trade barriers and to promote commerce in the nation. It was not a broad regulatory power. Modern interpretations of the clause, however, treat it as a general regulatory power. Commerce means any activity—no matter how local—that has an impact on interstate commerce.)

Commerce with the Indian Tribes — Article I, Section 8, Clause 3

Essay by David F. Forte (pp. 107–109)

Congress also derives power to regulate commerce from the Indian Tribes Clause. Because the relationship between Indians, the United States, and the states was ambiguous, the Framers granted Congress alone the power to regulate commerce with Indian tribes. After ratification, Congress regulated Indian affairs through treaties and the Trade and Intercourse Acts. Tribes were considered domestic dependent nations, not foreign nations. They were therefore entitled to property rights and self-rule, subject to the will of Congress.

Federal policy toward Indian tribes has developed through various legislative acts, treaties, and conflicts. The Supreme Court monitors state laws affecting Indians but largely defers to Congress on Indian affairs.

Active Reading

Read aloud the first sentence of the commentary. Tell students that “plenary” means “complete or absolute.” Say: Therefore, the Commerce Clause gave Congress complete control over commerce between the states, foreign nations, and Indian tribes.

Discussion Question

Why was it important to give the federal government the ability to regulate commerce with Indian tribes? (The Constitution gives Congress the power to regulate commerce among three types of sovereign entities: Indian tribes, states, and foreign nations. Indians were an unusual sovereign entity because they resided in the United States as well as within states. They were not technically foreign nations, but domestic dependent nations.)
Bankruptcy Clause — Article I, Section 8, Clause 4

Essay by Todd Zywicki (pp. 112–114)

Congress has the power to create uniform bankruptcy laws. Under the Articles of Confederation, states governed debtor–creditor relations, leading to diverse and contradictory laws. Additionally, many states crafted legislation to benefit debtors and harm creditors. Seeing that uniform bankruptcy laws were essential to promoting commerce, the Framers gave Congress the power to create a coherent and consistent bankruptcy regime to support the young commercial republic.

English law had traditionally distinguished between insolvency (which applied to private debtors) and bankruptcy (which applied to merchants or traders). While some argued that Congress’s power extended only to the debts of merchants and traders, others (including, later, the Supreme Court) argued that Congress could create rules for personal insolvencies as well as commercial bankruptcies.

The original meaning of the Bankruptcy Clause limits Congress’s powers over debtor–creditor relations. First, Congress may establish rules for debtors who are insolvent. Second, Congress’s power extends only to the debtor and creditor, not to third parties. But current law ignores these limits. The Bankruptcy Code represents one accommodation between state and federal law. Most non-bankruptcy laws governing debtor–creditor relationships are state laws. Because the federal Bankruptcy Code honors or incorporates most of these state laws, debtors and creditors will be treated differently depending on state law.

Before You Read

Have students use the dictionary to determine the meaning of “insolvent” (unable to pay debts) and “bankrupt” (being legally declared unable to pay creditors). Explain that historically, these terms have different meanings. “Insolvent” applies to individuals, while “bankruptcy” applies to merchants and businesses.

Active Reading

Ask: Why were the Framers convinced of the need for the national government to oversee bankruptcy? (When the states crafted bankruptcy laws, they created unjust and extremely debtor-friendly laws. Additionally, each state had different and often contradictory laws, which created great problems when a creditor in one state tried to collect a debt from another state. This arrangement was not conducive to interstate commerce.)
Active Reading

Ask: Who could be declared “bankrupt” under English law? (Only merchants and traders. Individuals were declared insolvent.)

Discussion Question

What might happen if a country does not have uniform bankruptcy laws? (State bankruptcy laws will conflict. Creditors might be unwilling to lend money in states with laws that are too debtor-friendly. This would not be conducive to commerce.)

Coinage Clause — Article I, Section 8, Clause 5

Essay by Todd Zywicki (pp. 114–116)

The Coinage Clause gives Congress the plenary power to coin money. Congress may coin money using gold, silver, or other precious metals. It may establish the value for coins domestically and a set value for foreign coins, thereby promoting foreign and domestic commerce and preventing states from applying different values to currencies.

It is unclear whether Congress has the power to issue paper money. During the Founding era, there was a difference between coined specie and interest-bearing notes, or “Bills of Credit.” Given the rampant inflationary uses of bills during the Revolution and the absence of express permission to issue paper money, the Framers did not give Congress the power to issue bills of credit as legal tender.

Throughout the 18th and 19th centuries, the monetary system consisted of different types of legal tender: specie; minted coins (either from the government or from private institutions); foreign coins; and certain bank notes. The government did not issue fiat money (meaning money not backed by specie) as legal tender before the Civil War. Any issuance of fiat money was for limited purposes and was not intended for private use or circulation.

Nevertheless, the Supreme Court decided in Veazie Bank v. Fenno (1869) that Congress had the power under the Necessary and Proper Clause to issue bills of credit to pay for government operations. The Legal Tender Act of 1862 made “greenbacks” legal tender for public and private use, a decision contrary to the Founders’ design. In The Legal Tender Cases (1870), the Court upheld the Legal Tender Act, arguing that the federal government’s money power was inherent to its sovereignty and, consequently, needed no enumerated power from the Constitution.
Discussion Question

Why did the Founders want currency to be backed by precious metals? Why did the Founders oppose paper currency? (Although the Coinage Clause does not specifically require that all currency should be backed by precious metals, this was the practice during the constitutional period. The Founders wanted a stable money supply and recognized that gold- and silver-backed tender would provide this stability. They opposed paper-backed money because it caused many problems. For example, paper currency was frequently introduced intentionally to cause inflation as a way to aid factions such as debtors at the expense of banks and the wealthy who had given out loans.)

Weights and Measures — Article I, Section 8, Clause 5

Essay by Eric Chiappinelli (pp. 116–117)

The Weights and Measures Clause empowers Congress to create a uniform standard for weights and measures. This clause was not designed to remedy a situation, but was intended to promote domestic and foreign commerce by allowing the federal government to adopt and enforce uniform standards of measurement. The clause was adopted without controversy.

Though Thomas Jefferson and John Quincy Adams encouraged Congress to do so, it failed to adopt uniform standards for weights and measures. The Treasury Department, however, established certain standards for customs purposes, and many states established standards for trade purposes. Congress authorized the use of the metric system in 1866 but did not mandate its use. Since 1975, the metric system has been the “preferred system” for commerce, but the National Institute of Standards and Technology of the Department of Commerce routinely publishes the standards for both the English and metric systems.

Before You Read

Explain to students that weights and measures refers to a standard of length and weight. The metric system (meters and grams) and American units (inches and pounds) are examples of weights and measures.

Active Reading

Ask: What was the purpose of the Weights and Measures Clause? (to facilitate domestic and international commerce by permitting the federal government to adopt and enforce national measurement standards)
Unit 2

Discussion Question

Why did the Framers agree unanimously on the Weights and Measures Clause? (The Weights and Measures Clause was not controversial because there was already uniformity of measurement and Congress held the power to establish such standards under the Articles of Confederation.)

Counterfeiting — Article I, Section 8, Clause 6

**Essay by David F. Forte (pp. 117–118)**

Forgery and counterfeiting of currency was a concern expressed at the Constitutional Convention. Although Congress would have had the power to punish counterfeiting under the Necessary and Proper Clause (which will be discussed in Lesson 7), the Framers explicitly added the power for three reasons. First, the Founders wanted to depart from the British legal tradition of defining counterfeiting as a form of treason punishable by a bill of attainder. They therefore separated counterfeiting from treason by specifically defining treason and denying Congress the power to expand the definition. The Founders did, however, give Congress the authority to punish counterfeiting. Second, because counterfeiting foreign currencies would threaten America's international relations, Congress needed the power to punish it. Third, the power to punish counterfeiting is appropriate considering federal supremacy in monetary policy.

Despite the Framers’ decision to include the clause, the Supreme Court’s decisions have limited the clause and ultimately rendered it unnecessary. The Court upheld a state law punishing counterfeiting, thereby enabling states to have concurrent power over counterfeiting. When the Court upheld Congress’s power to punish counterfeiting, it relied not only on the Counterfeiting Clause, but also on the Coinage Clause, the Necessary and Proper Clause, and the Commerce Clause.

**Before You Read**

Ask students what they think the term “currency” means. Ask them to look at a form of currency (a coin or paper bill) and note the imagery.

**Discussion Question**

How was the Counterfeiting Clause a departure from the British law practice of punishing counterfeiting? (British law included counterfeiting as a treasonous offense punishable by a bill of attainder. Under the Constitution, counterfeiting is no longer defined as treasonous, but Congress may punish the offense.)
**Post Office**—Article I, Section 8, Clause 7

*Essay by David F. Forte (pp. 119–120)*

The Articles of Confederation gave Congress the authority to create and control post offices. When drafting the Constitution, the Framers added the power to establish post roads to the power to establish post offices.

Congress created the Office of the Postmaster General through the Act of September 22, 1789. By then, dozens of post offices and thousands of miles of post roads existed. However, the Post Office Clause generated controversy; specifically, did Congress have the authority to create post offices and construct new post roads, or could it only designate locations of post offices and roads to be considered postal roads? Thomas Jefferson and James Monroe interpreted the clause narrowly. Joseph Story, however, relied on the textual similarities of other clauses to support a broad reading of the Post Office Clause.

The Supreme Court has interpreted the Post Office Clause broadly, including recognizing the power to determine what may or may not be mailed. The Court also has recognized some limits on the clause within the Constitution: namely, the First Amendment.

### Work in Groups

Break students into small groups and have them create a list of three possible reasons why individuals in the past might have objected to the construction of a post office in their area. (Students might say lack of affordable land on which to build the post office, lack of road networks, and low volume of mail.)

### Active Reading

Ask: *What was franking?* (an official signature affixed to the mail in place of a stamp) *Why is the franking privilege controversial?* (The franking privilege exempts federal government officials from paying postage if they are using the mail system to conduct official business. Members of the House of Commons and the Continental Congress enjoyed the privilege. Some contend that the privilege is prone to abuse. For instance, during an election period, an incumbent Member of Congress may send innumerable mailings to constituents without paying postage and thereby gain name recognition within the district. An opposing candidate would have to raise the money to pay postage for any mailings.)
**Patent and Copyright Clause** — Article I, Section 8, Clause 8

*Essay by Thomas Nachbar (pp. 120–122)*

The Patent and Copyright Clause gives Congress the authority to secure the rights to works created by authors and inventors. This clause was neither debated, nor part of a larger legal tradition, nor a structural innovation. In *The Federalist* No. 43, Madison briefly justifies the clause as providing a national uniform standard for intellectual property.

The text of the clause does not elucidate its meaning. Courts largely defer to Congress to determine the scope of the clause. Some judicial decisions have clarified terms within the clause; for instance, the term “writings” protects photographs and maps, and the term “author” is more accurately defined as “originator.” The Court has suggested certain limits intrinsic to the clause: Congress cannot grant patents without concern for innovation or the social benefit, and patents must promote the useful arts.

There are still many uncertainties in applying this clause. Congress has laws protecting databases, inventions that cannot be patented, and works that were once protected by copyright but are now considered part of the public domain. Yet it is unclear whether the courts will recognize these as within the scope of the Patents and Copyright Clause (or some other clause). The question of whether certain copyright legislation runs afoul of the First Amendment is also unsettled.

**Before You Read**

Have students think about the word “copyright.” Ask: What kinds of things do you think should be copyrighted? Why do people want to copyright their work? (Students may say that people want to copyright their work so that they get credit for it.) What is the difference between a patent and a copyright? (A patent gives an inventor exclusive property rights to an invention for a determined period of time. A copyright protects an author’s ownership of an original work of authorship; copyrights can cover a wide variety of published or unpublished materials, including artistic, literary, dramatic, and musical works.)

**Active Reading**

Help students understand that copyrights can be renewed multiple times, which can create a perpetual copyright. Ask: Why are perpetual copyrights problematic? (They do not promote commerce, because many items cannot be placed into the public domain. For instance, once books enter the public domain, they often become cheaper and more accessible.)

**Make an Inference**

Point out that copyrights can be claimed only on creative works and that facts cannot be copyrighted. Ask: Why do you think that facts cannot be copyrighted? (Students may say that facts cannot be copyrighted because they are not the independent creation of a single citizen.)
Check Understanding

Have students complete the following assessment to check their understanding of Lesson 5, Part 3. Review any material for questions they have missed.

Short answer: Write out your answer to each question.

1. Who has power to regulate commerce with foreign nations? (Congress)

2. Which clause in the 1787 Constitution has generated more court cases than any other? (the Commerce Among the States Clause)

3. What is the narrowest definition of “to regulate”? (to make regular—or, specifically, to facilitate—the free flow of goods but not, except in cases of danger, to prohibit the flow of any good)

4. What two key economic powers did the Constitution remove from the states and lodge in Congress? (the power to coin money and the power to regulate interstate commerce)

5. The Commerce Clause grants Congress plenary power to regulate commerce between the United States and which three forms of sovereign entities? (the states, foreign nations, and Indian tribes)

6. Under the Articles of Confederation, who governed debtor–creditor relations? (the states alone)

7. Who has the exclusive power to coin money? (Congress)

8. What are “greenbacks”? (paper money printed and issued by the federal government during the Civil War)

9. What was the purpose in granting Congress the power to fix the standard of weights and measures? (to facilitate domestic and international commerce by permitting the federal government to adopt and enforce national measurement standards)

10. Since the power to punish someone who is involved in producing counterfeit money is understood to be included in the Necessary and Proper Clause, for what three reasons would there need to be a separate delegated power to punish counterfeiters?
   • Although the Framers did not punish counterfeiting as treason, they wanted the national legislature to punish counterfeiting.
• The Constitution delegates powers over foreign relations to the national government, and since someone could counterfeit foreign securities and risk an international breach, it was important to keep the power to punish the crime within the powers of the national legislature.
• The clause continues to reinforce the fact that the federal government has supremacy over monetary policy.

Matching: Match the term on the left with the correct definition on the right.

- Fiat money.............. Paper money not backed by gold or silver
- Specie money........... Money backed by gold or silver
- Bills of credit........... A type of “fiat money,” not backed by gold or silver
- Coin...................... Metal, frequently made of precious metal, used as legal currency in the United States
- Tender.................... Currency that is accepted as payment of a debt
- Note ..................... Interest-bearing government bond

True / False: Indicate whether each statement is true or false.

1. The Patents and Copyrights Clause was designed to provide a uniform standard for intellectual property. (True)

2. The Post Office Clause has generated no controversy. (False, there was significant controversy over whether the clause authorized Congress to construct roads and post offices or whether it simply allowed Congress to designate the routes by which mail should be delivered.)
Lesson 6

CONGRESS’S WAR POWERS

Lesson Objectives:
When you complete Lesson 6, you will be able to:
• Understand the elements of Congress's war powers.
• Explain the role of the Define and Punish Clause and the Captures Clause in international affairs.
• Understand the debates about who initiates war as related to the Declare War Clause and the Marque and Reprisal Clause.
• Explain the difference between declaring war and authorizing the use of force as it relates to the Declare War Clause.
• Understand the Founders’ concern about standing armies and its influence on Congress's military powers.
• Explain who has the power to call forth the militia under the Militia Clause.
• Understand the scope of Congress's powers to organize the militia and to regulate the Army and the Navy.
• Explain the purpose of the Military Regulations Clause.

Part 1:
Piracy and War

Define and Punish Clause
Article I, Section 8, Clause 10

Declare War
Article I, Section 8, Clause 11

Marque and Reprisal
Article I, Section 8, Clause 11

Captures Clause
Article I, Section 8, Clause 11
Define and Punish Clause — Article I, Section 8, Clause 10

Essay by Jack L. Goldsmith III (pp. 126–127)

The Define and Punish Clause gives Congress the power to define and punish piracy and "Offenses against the Law of Nations." The power to define and punish piracy was not controversial. Piracy was a well-defined crime in international law, so the Framers saw no need to define it when crafting the statute outlining punishment for piracy.

The Framers were more concerned with defining and punishing "Offenses against the Law of Nations." Specifically, they were concerned that states would not adequately punish infractions of the law of nations, such as attacks on ambassadors, and that such neglect would lead to disastrous international consequences. This situation was a risk under the Articles of Confederation, since Congress could not punish infractions of treaties. James Wilson, though, objected that the language of the clause implied that Congress had the power to define the law of nations, which would make the country look arrogant and even ridiculous. Gouverneur Morris responded that the clause allows Congress to define offenses against the law of nations because the law of nations is often vague.

In 1887, the Supreme Court interpreted the clause to mean that Congress had the power to punish violations of the law of nations and also to punish offenses that would trigger the international responsibility of the country if the offense went unpunished. There are two potential limits to the clause. First, legislation enacted pursuant to the Define and Punish Clause may not violate the Bill of Rights. Second, it is questionable whether the clause allows Congress to regulate civil suits.

Before You Read

Ask: Why is piracy a problem? (Pirates steal property and harm people. Their activities endanger American citizens and commerce.)

Discussion Question

If an ambassador from another country visits the United States and is murdered and his murderers go unpunished, what might happen? (Answers will vary. The country may hold the United States responsible for the harm to the ambassador and consider it to be grounds for war. The country may retaliate against the United States.)
Declare War Clause — Article I, Section 8, Clause 11

Essay by John Yoo and James C. Ho (pp. 127–129)

The President certainly has the power to repel invasions by using military action, and such actions do not require a declaration of war. The debate over the Declare War Clause centers on the power to initiate war. On one side of the debate, Congressionalists argue that the clause prevents the President from initiating hostilities without Congress’s consent. The clause empowers Congress to issue formal declarations of war and to authorize any military engagement. On the other hand, Presidentialists distinguish between “declaring war” and “engaging in war.” Specifically, declaring war implies a legal relationship that invokes certain rights, privileges, and protections under the laws of war. Declarations of war give notice of legal grounds for war and trigger other legal actions such as the imprisonment or expulsion of enemy aliens, the breaking of diplomatic relations, and the confiscation of enemy property. These alter the legal relationships between the warring nations. The President may therefore engage in hostilities short of declaring war.

Only five wars in the history of the United States have been formally declared. Numerous other hostilities have been authorized by Congress. Interestingly, an authorization for the use of force has accompanied each declaration of war. A large peacetime military force has made these debates more intense. Presidents have been more aggressive about asserting their authority to engage in war without congressional authorization. Congress approved the War Powers Act to reassert control in response to the executive. The courts have never intervened to stop a President from waging war without a declaration from Congress.

Active Reading

Ask: What is the difference between Congress declaring war and Congress authorizing the use of force? (While both actions likely result in the use of force, declaring war implies that certain rights, privileges, and protections will be invoked under the laws of war.)

Active Reading

Ask: When is the President allowed to activate military troops without the approval of Congress? (to repel an invasion)

Check Understanding

Point out that only five wars in United States history have been officially declared by Congress. Ask: In what way might military actions that are not officially declared be legitimate? (Sample answers: The President may approve them as “repelling an invasion,” as in the case of a terrorist attack. Congress may be able to approve the use of force that is short of a full war.)
Unit 2

Discussion Question

What would be a situation in which a country would declare war? What would be a situation in which a country would authorize the use of force but not declare war? (Answers will vary. Students may say that one country might formally declare war against another country if, in addition to attacking the country, it stops all trade and wants to make other countries aware of the war. A country may not formally declare war against a country if the country does not have an organized government against which to declare war.)

Marque and Reprisal — Article I, Section 8, Clause 11

*Essay by John Yoo and James C. Ho (pp. 130–131)*

The Marque and Reprisal Clause grants Congress the power to legislate the seizure of property during wartime. “Reprisal” is a seizure of property, and “marque” is the French equivalent of reprisal; therefore, “marque and reprisal” is best understood as a single phrase. Letters of marque and reprisal were official documents by which the sovereign authorized private individuals to engage in hostilities against enemies of the state.

The debate about the Marque and Reprisal Clause is related to the debate about the Declare War Clause. Congressionalists argue that the Marque and Reprisal Clause and the Declare War Clause together deny the executive’s ability to initiate hostilities. The former authorizes lower-level hostilities; the latter, higher-level hostilities. Presidentialists argue that the Marque and Reprisal Clause only grants Congress the ability to authorize privateers to engage in military hostilities. The clause is best read in conjunction with Congress’s power of the purse. Congress holds power to fund military hostilities, either with public funds or through private letters of reprisal; the President may initiate hostilities with whatever resources Congress has made available.

The Marque and Reprisal Clause is rarely invoked. The United States has not issued letters of marque and reprisal since the War of 1812. The Declaration of Paris in 1856 prohibited privateers. While the United States did not ratify this declaration, it upholds the ban in practice.

Active Reading

Help students understand the meaning of privateers from the Founding generation. Explain that privateering was a practical option that would keep military engagements small, protect United States citizens, and limit wartime expenditures. By using privateers, the government could reap the benefits of a military action while minimizing risk.
Work in Pairs

Point out that at the end of the commentary about the Marque and Reprisal Clause, the authors say that during the Iran–Contra controversy, President Reagan privately financed hostilities without congressional consent. Pair up students and have them research the Iran–Contra situation on the Internet and write a paragraph about their findings. Then ask whether they think President Reagan needed congressional authorization.

Discussion Question

Why would a nation use privateers? Why would it not? (International declarations often prohibit the use of privateers in order to ensure that wars are fought fairly and openly. Privateers would protect a nation’s citizens from battle and would possibly limit wartime expenditures. By using privateers, the government could reap the benefits of a military action while minimizing risk. On the other hand, the use of privateers may mean that the citizens are less invested in the war effort.)

Captures Clause — Article I, Section 8, Clause 11

Essay by John Yoo and James C. Ho (pp. 131–132)

The Captures Clause gives Congress the power to make rules regarding the capture, disposition, and distribution of enemy property. That is, Congress alone has the power to make rules to govern the circumstances in which wartime captures are lawful prizes. Based on the use of the term “captures” from the Articles of Confederation and the Constitution, “captures” referred to “the taking of property by one belligerent from another.”

The Captures Clause applies to property and never to captured enemy soldiers. Part of the executive power to conduct war includes the power to confiscate battlefield property; but, as the Supreme Court has explained, the executive needs congressional authorization to capture property away from the battlefield. Presidentialists read this clause in conjunction with the Marque and Reprisal Clause to conclude that Congress may regulate captures of private parties that are not of the armed forces.

Discussion Question

What does the Captures Clause show about how the Framers thought regarding federal power over conquered territory? (The Captures Clause was explicitly created by the Framers to refer only to property, which reveals a belief in the inalienable rights of life, liberty, and pursuit of happiness for all people—even enemy populations.)
Check Understanding

Have students complete the following assessment to check their understanding of Lesson 6, Part 1. Review any material for questions they have missed.

Short answer: Write out your answer to each question.

1. Why weren’t the Framers of the Constitution concerned with defining piracy after creating the Define and Punish Clause? **(The international definition of piracy was well known.)**

2. What sorts of legal actions are triggered by the declaration of war?
   - The internment or expulsion of enemy aliens
   - The breaking of diplomatic relations
   - The confiscation of the enemy’s property

3. List the congressionally declared wars in the history of the United States.
   - The War of 1812
   - The Mexican–American War
   - The Spanish–American War of 1898
   - World War I
   - World War II

4. Against whom were offensive actions taken by the United States in 1802? **(Barbary Pirates, can also accept Tripoli or Barbary States)**

5. What was the significance of the offensive actions taken in 1802? **(It was America’s first real war, but there was no formal declaration of war by Congress.)**


7. When was the last time the United States issued letters of marque and reprisal? **(The War of 1812)**

8. With regard to the allocation of war powers between the President and Congress, what do the Presidentialists maintain? **(The Presidentialists maintain that the Constitution does not prevent the President from initiating hostilities with whatever resources Congress has appropriated.)**

True / False: Indicate whether each statement is true or false.

1. Although the Constitution authorizes Congress to “define” piracy, this proved unnecessary since there was already a well-defined understanding of “piracy” in international law. **(True)**
2. The Supreme Court has intervened on two occasions to stop a war that the President has started without congressional authorization. (False. The Supreme Court has never intervened to stop a war that the President has started without congressional authorization.)

3. During the Revolution, captors could not claim lawful title to captured property until after a prize court had granted it. (True)

4. The United States maintained a large military establishment during peacetime for the first time in its history during the Cold War. (True)
**Army Clause** — Article I, Section 8, Clause 12

*Essay by Mackubin Owens (pp. 132–135)*

The Army Clause gives Congress the power to raise and support armies. The clause was the solution to the Founders’ dilemma of needing a standing army to defend the nation but not allowing that army to be completely subject to the executive. Thus, the Army Clause created a standing army that would be controlled through congressional appropriations.

This clause was very controversial precisely because history had shown that standing armies led by a powerful executive were capable of overthrowing and seizing power and taking liberties away from the people. The Framers would lodge the power of raising and supporting armies in Congress, the branch closest to the people, rather than in the executive.

The Army Clause did not satisfy the Anti-Federalists, who argued that maintaining a military during peacetime would be a tool for tyrants and a threat to the people’s liberty. Anti-Federalists preferred state-controlled militias. The Federalists, on the other hand, recognized that the new nation was extremely vulnerable to foreign attack. Raising an army was a prudential consideration. In light of these concerns, the Army Clause contains a time limit on appropriations: Congress can raise and support an army, but that appropriation is limited to two years.

Since the time of the Constitutional Convention, the legislature has initiated most legal developments affecting the Army Clause. Military appropriations are considered annually by a congressional committee. Since the establishment of the Department of Defense, Army appropriations have been included in a single department-wide appropriation to cover the Army, Navy, and Air Force. Moreover, Army appropriations are annual.
The U.S. Army has changed both in mobilization and in orientation and purpose. The Army relies on professional soldiers rather than on drafting citizens to be soldiers. The draft is controversial; compulsory military service usually occurred only in state militias. The United States did not have a national draft until the Civil War and did not resort to a peacetime draft until 1940. Soldiers are no longer used in domestic policing to enforce the nation’s laws; instead, the Army is used only in foreign conflicts.

**Before You Read**

Ask: What do you think the phrase “army appropriations” means? (money set aside to raise an army)

**Active Reading**

Be sure students understand why the Framers were hesitant about creating a standing army. *How would have their experiences under the rule of King George III have shaped their understanding of a standing army?* (King George III used the army to suppress the people; for instance, he quartered troops in their homes as a form of punishment.)

**Make an Inference**

Your book discusses the use of a draft. *When is a draft issued?* (A draft is implemented when Congress needs to raise an army quickly and lacks the volunteers to do so.)

**Write About It**

Have students use the Internet or the library to research the draft. Have them answer the following questions about the draft.

1. Who must register for the draft?
2. When are you supposed to register?
3. Where do you register?

**Discussion Questions**

1. What is the significance of the time frame of military appropriations? (The Army Clause is the only clause in the Constitution that specifies a time frame for action. The unusual appearance of such a stipulation highlights the Framers’ distrust of standing armies.)

2. How did the Framers guard against the threat of standing armies? (The Framers were hesitant about allowing for a standing army because of historical experience. The Army Clause recognized the necessity of a national defense but subjected it to Congress without allowing the military to act unchecked.)
Navy Clause — Article I, Section 8, Clause 13

Essay by Mackubin Owens (pp. 135–136)

Although the Founding generation was deeply suspicious of standing armies, standing navies did not elicit the same level of concern. The Navy Clause of the Constitution complements the Army Clause, granting Congress authority over military activities on the seas. Unlike the Army Clause, the Navy Clause does not include a time limit for peacetime appropriations, though Anti-Federalists argued that a navy would provoke Europe. The Navy would protect American commerce, independence, and interests.

The Framers recognized the practicality and importance of a standing Navy when the young nation became embroiled in a series of maritime conflicts with Britain. Despite technological changes, the character of the Navy has changed little from its original design. The biggest changes in the Navy involve defense organization.

Work in Pairs

Have students compare and contrast how Federalists and Anti-Federalists viewed standing armies. (Students may say that the Anti-Federalists were strongly against standing armies; standing armies were used to oppress the people. They preferred state militias to defend the nation. While the Federalists also feared standing armies, they saw them as necessary to defend the nation. They worried that the country would be invaded by enemies and its citizens would need protection.)

How did each group view standing navies? (Standing navies were less controversial. Federalists supported navies because they believed that they were essential to the nation’s security; Anti-federalists believed that a navy would provoke European powers and invite war.)

Active Reading

Ask: Why would a standing navy be less dangerous than a standing army? (Navies are limited to the sea, so they are less likely than standing armies to infringe upon citizens’ rights. The Framers were also aware of the importance of maritime trade.)

Discussion Question

Suppose the United States needed to expand the size of its Army and Navy quickly. How might it do this? (It could offer incentives to people who enlist in the Army or Navy. It could enact the draft.)
Military Regulations — Article I, Section 8, Clause 14

Essay by David F. Forte and Mackubin Owens (pp. 136–139)

The Military Regulations Clause of the Constitution explicitly gives Congress the plenary power to govern and regulate the military. The main purpose of the clause is to establish a system of military law and justice separate from and outside of the ordinary jurisdiction of the civil courts. Tradition and experience taught the Founders that military discipline required a separate system of jurisprudence.

Military law existed in the United States prior to ratification of the Constitution. In 1775, the Continental Congress adopted codes of military law for the Army and Navy that were based on British codes. Revised systematically several times, the American Articles of War remained the basic code for the U.S. Army until 1917, when they were revised again to deal with a mass army of civilian soldiers.

However, some people thought that the Articles were too harsh. Criticisms of the Articles and the creation of the Department of Defense led Congress to enact the Uniform Code of Military Justice (UCMJ) in 1950. The UCMJ is a series of federal statutes establishing uniform policies, procedures, and penalties within the military system.

Crimes committed by soldiers while on a military base, in a theater of war, or overseas fall under the jurisdiction of the military. Civil courts have deferred to the decision of the military justice system, particularly relating to issues of military orders. Until 1863, military personnel charged with committing civil crimes were turned over to state courts for trial. Congress expanded court martial trials to cover civil crimes. It is questionable whether civilian offenses, such as robbery or rape, committed by military personnel are within a military court's jurisdiction. In most cases, the civilian dependents of a soldier have access to civilian courts. The Military Extraterritorial Jurisdiction Act imposes a federal jurisdiction for other crimes of military personnel charged with civil crimes. In 1987, the Supreme Court ruled in Solorio v. United States that the military status of the defendant in a case was sufficient to establish a military court's jurisdiction over the case.

Military courts and tribunals are established pursuant to Congress's Article I, Section 8, Clause 9 powers. These courts do not have the same protections or independence as Article III courts and fall into two categories: martial and military courts of inquiry for military personnel and military commissions and provost courts for civilians under military jurisdiction. The UCMJ established what is now the U.S. Court of Appeals for the Armed Forces. This body is a civilian court with appellate jurisdiction over military justice. It may review decisions from the Court of Military Review.
Make a Real-Life Connection

Point out that David Forte and Mackubin Owens discuss the controversy about using military tribunals for the war on terrorism and some of the court decisions on the issues. The Supreme Court has upheld the use of military tribunals to try enemy aliens and United States citizens aiding them and has also held that enemy aliens are not entitled to prisoner of war status. The Court later ruled that detainees had access to federal courts because of federal habeas statutes and that U.S. citizens may contest their status of enemy combatant.

Active Reading

Ask: Why did the Framers give Congress the power to make regulations for the military? (The ability to regulate the military was the logical result of the ability to declare war, raise the Army, and maintain a Navy, but the Framers explicitly granted Congress the power to regulate the military. Placing the power in Congress’s hands helped to define the roles of the other branches with respect to the military. Congress, rather than the executive or the judiciary, would govern and regulate the military.)

Write About It

Have students use the Internet to research *Hamdi v. Rumsfeld* (2004) and write a paragraph or two about the facts, issues, and ruling of the case.

Discussion Question

Why does the military use special courts to try soldiers instead of simply sending the accused to civilian courts? (The military uses special courts to try offenses that are “service related” in order to make allowances for situations that are not applicable to civilian life, such as military orders and regulations.)

Militia Clause — Article I, Section 8, Clause 15

*Essay by Mackubin Owens (pp. 139–140)*

The term “militia” refers to a citizen army. The Militia Clause gives Congress the power to call forth the militias to execute laws, suppress insurrections, and repel invasions. The Anti-Federalists favored state control of the militia. The Federalists disagreed. The Militia Clause created a system in which the militias resided in the states but could be called forth by Congress in moments when the nation as a whole was threatened. In the “Calling Forth” Act of 1792, Congress empowered the execu-
tive to call forth the militia in case of invasion; but the use of the militia to combat an insurrection requires a federal judge to certify that the civil authority cannot meet the threat, and the President must order the insurgents to disband before mustering the militia. In 1795, Congress further authorized the President to federalize the militia.

During the War of 1812, state governors challenged the President’s authority to call up the militia, claiming that governors, not the President, had the authority to determine a state of emergency. In 1827, though, the Supreme Court affirmed that the President had the exclusive authority to determine whether the emergency was sufficient to call forth the militia. State governors maintain concurrent authority for civil or military emergencies.

**Organizing the Militia** — Article I, Section 8, Clause 16

*Essay by Mackubin Owens (pp. 141–143)*

The purpose of the militia was to protect a state’s citizens from other citizens and citizens from the federal government. Anti-Federalists were concerned that Congress would allow the militia to atrophy and therefore advocated an amendment to protect citizens’ right to bear arms. The Second Amendment did guarantee the right, but this did not remove Congress’s control of the armed forces or the militia. While the militias would still serve their original function at the state level, the Organizing the Militia Clause allows Congress to organize, discipline, and arm the militia for federal purposes. Through this clause, the Federalists sought to make the militia into a national reserve of uniform, interchangeable units.

The Uniform Militia Act of 1792 established an “obligated” militia, in which all able-bodied white men between the ages of 18 and 45 were required to enroll, but this did not accomplish the Federalists’ goals. The militia’s poor performance during the War of 1812 was the end of the obligated militia. The uniformed militia replaced the obligated militia, and the National Guard replaced the uniformed militia. State control of these units lessened, and the National Security Act of 1916, which made state forces available for duty overseas as well as domestic disturbances, functionally stripped the states of all militia powers. States may call up the National Guard, but the federal government’s demands take precedence.

**Active Reading**

Ask: Your book uses the terms “obligated” militia and “uniformed” militia in very different ways. What do these terms mean? (“Obligated” militia historically applied to all able-bodied white males between the ages of 18 and 45 who were required to serve; “uniformed” militia applied to individuals who chose to serve.)
Check Understanding

Read aloud the quote by Luther Martin on page 139. Ask: What was Martin’s objection to the Militia Clause? (Martin feared that Congress could unilaterally jeopardize the security of a state by ordering its militia to a distant part of the Union thereby leaving the state effectively defenseless.)

Discussion Question

Why do you think the Calling Forth Act of 1792 allowed the President to call forth the militia in cases of invasion, but required a federal judge to certify that the civil authority could not quell a domestic insurrection before the President could call forth the militia? (Answers will vary. Students should note the difference between an invasion, which threatens the entire nation, and a domestic insurrection, which threatens one state or one city. The Clause allows the President to fulfill his duty to protect the nation, but also prevents the President from abusing militia power in order to interfere in local affairs.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 6, Part 2. Review any material for questions they have missed.

Short answer: Write out your answer to each question.

1. A soldier who commits a crime on a military base will most likely be tried in what type of court? (military)

2. Why would Americans living during the time of the Revolution be apprehensive about a standing army? (There had been many circumstances in history where the “executive” or leader in power used an army to gain rule over the country and set up a dictatorship or empire. They wanted to avoid the possibility of this occurring in the new country.)

3. In what two fundamental ways has the United States Army changed significantly since the constitutional period? (its way of mobilizing and its orientation and purpose)

True / False: Indicate whether each statement is true or false.

1. During the time of the Constitutional Convention, people feared a standing navy more than a standing army. (False. Because standing armies were on land, they were more likely to infringe upon people’s homes and lives. Standing armies were more of a threat than standing navies were.)
2. The Military Regulations Clause establishes a military system that is separate from the ordinary jurisdiction of the civil courts. **(True)**

3. The Anti-Federalists preferred that states rather than the federal government have control of the militias. **(True)**

4. The Army Clause gave the President control of armies. **(False. The Army Clause gave Congress control of armies.)**

5. The National Guard eventually replaced the uniformed militia. **(True)**

6. Since navies were just as much a tool of tyrants as were armies, the Framers debated whether or not the federal government should maintain a Navy. **(False. Armies were the preferred tool of tyrants, and Navies were therefore considered by the Founding generation to be less dangerous to republican liberty than standing armies.)**
Lesson 7

CONGRESS’S TERRITORIAL POWERS, IMPLIED POWERS, CITIZENSHIP, AND THE BUREAUCRACY

Lesson Objectives:

When you complete Lesson 7, you will be able to:

• Explain why the Framers decided to create the seat of national government outside of the state structure, and understand the significance of the Twenty-third Amendment.
• Explain the purpose of the Military Installations Clause.
• Explain the purpose of the Property Clause and the three broad theories of Congress’s power under the clause.
• Understand the significance the Claims Clause.
• Understand why the federal government, rather than the state governments, has power over naturalization and citizenship and explain the scope of Congress’s power over naturalization and citizenship.
• Explain the purpose of the Necessary and Proper Clause.
• Describe what the administrative state is and how it functions outside of the constitutional structure.
Part 1:
Congress’s Territorial Powers: District of Columbia, Military Installations, and Property

Enclave Clause
Article I, Section 8, Clause 17

Electors for the District of Columbia
Amendment XXIII

Military Installations
Article I, Section 8, Clause 17

Property Clause
Article IV, Section 3, Clause 2

Claims
Article IV, Section 3, Clause 2

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**Enclave Clause** — Article I, Section 8, Clause 17

*Essay by Lee Casey (pp. 143–145)*

The Founders created the District of Columbia outside of the state structure. The Enclave Clause grants Congress legislative powers (including the police power) over the “District” that is the “Seat of the Government of the United States.”

In *The Federalist* No. 43, James Madison argued that a “federal district” was necessary to house the federal government. This “district” would be a distinct territory, not part of any state or subject to the laws of any one state, and would be governed by Congress. While the Framers insisted that a “federal town” was necessary, Anti-Federalists opposed the idea, claiming it would be a nursery for tyranny.

The location of the capital, though, was more contentious than its necessity. Many states wanted the honor of being the site of America’s capital. In 1800, the district was fashioned from portions of Virginia and Maryland. In 1846, though, a portion of the district was retroceded to Virginia. The constitutionality of the action is debatable.

Congress has experimented with different methods of governing the District, including home rule. Because of D.C.’s status as a federal city outside of the state structure, residents of the District do not have a Representative or Senators. Numerous proposals to grant D.C. representation have been introduced in Congress, including proposed constitutional amendments. A 1964 plan to return a large portion of the District to the state of Maryland was deemed unconstitutional.
Today, there is still a call for D.C. to become the 51st state, but granting statehood to the District would oppose the structure of the Constitution. The Founders wisely crafted a federal district for the seat of government. They made the capital independent from, and therefore not subservient to, the authority of any particular state.

**Before You Read**

Ask: What do you know about Washington, D.C.? (It is the capital of America. It is where the White House, the Congress, and the Supreme Court of the United States are located.) What are some characteristics of a state? (Answers will vary. Students may note that state governments retain the bulk of the legislative powers. They have the police power; that is, they can legislate with respect to health, safety, and morals. States have authority to determine who may vote for members of the House of Representatives, and a state population determines the number of members. States have two Senators and are guaranteed equal representation in the Senate.)

**Before You Read**

Explain to students that in June 1783, several hundred unpaid and angry Continental soldiers marched on Philadelphia in an attempt to intimidate Congress in Independence Hall. Pennsylvania refused to assist Congress, which adjourned after two days. The Members of Congress fled to New Jersey. This incident impressed the Framers with a need for a “federal town.”

**Active Reading**

Read the second paragraph on page 143 to students (the one beginning with “The incident made a lasting impression”). Ask: What does it mean that “the need for a territory in which the general government exercised full sovereignty...was probably inherent in the federal system itself”? (The federal system needed to have a territory where the federal government would not be subservient to any state’s authority. This is a basic requirement for the federal system to work.)
Electors for the District of Columbia — Amendment XXIII

Essay by Adam Kurland (pp. 426–427)

Amendment XXIII granted residents of the District of Columbia the electoral votes to participate in the election for the country’s President and Vice President. From 1800 until 1960, when Congress passed the Twenty-third Amendment, residents of the District of Columbia were not constitutionally able to participate in presidential elections. Residents voted for President for the first time in 1964 after the states ratified the Twenty-third Amendment.

The Twenty-third Amendment underscores the Founders’ wisdom in designing the federal city. It gives D.C. a voice in selecting the President and Vice President through the Electoral College but clarifies that D.C. is not a state: D.C. receives the number of electoral votes “equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State.” The District of Columbia’s electoral votes cannot exceed the number granted to the least populous state. Currently, the District of Columbia has a maximum of three electoral votes, regardless of population.

Congress decides the method by which the District selects presidential electors. This is comparable to the power given to state legislatures. Congress chose a winner-take-all system to choose presidential electors, meaning that the candidate who receives the majority of votes in a popular vote receives all of the District’s electors. Every state, except Maine and Nebraska, uses the winner-take-all system to select electors.

Before You Read

Ask: How are electoral votes usually allocated? (States are accorded electoral votes according to the number of Representatives plus the number of Senators. More populous states have more electoral votes than less populous states.)

Work in Pairs

Pair students up and ask them to read two paragraphs beginning with the one in the middle of page 426 (the one beginning with “Although not constitutionally required…”). Then have students take opposing views on the following statement and justify their opinions. Write on the board: Congress should approve the creation of the State of New Columbia, which would consist of everything but the White House, the federal Mall, and all federal buildings. (Answers will vary. Students who agree with the statement might give the following reasons: The Constitution states that the District can be no larger than 10 square miles, but this does not mean that the Constitution would need to be amended to make the District smaller than 10 square miles. This would give
citizens representation in Congress but not give the District authority over the federal government. Students who disagree with the statement might give the following reasons: This new state would be unlike any other state in the Union because it functions like a city. The federal buildings would all be located in a separate state. It may create constitutional problems; according to the Twenty-third Amendment, the residents of D.C. would have electoral votes, suggesting that the President would be eligible to vote. It could create a negative precedent for other states.

**Military Installations** — Article I, Section 8, Clause 17

*Essay by Lee Casey (pp. 145–146)*

In addition to the permanent seat of government, the Constitution grants Congress exclusive legislative power over certain federal installations, such as military properties. The Military Installations Clause gives Congress the exclusive power to regulate “federal enclaves,” which is separate from the federal government’s “proprietary” interest in a particular building or parcel of land (which is covered under Article IV, Section 3, Clause 2). A federal enclave may be an individual building, a part of a building, or a vast territory. As with the District of Columbia, the purpose of the Military Installations Clause is to maintain the independence of states and the federal government.

Case law dealing with enclave jurisdiction is complex, and individuals who commit crimes within federal enclaves are subject to federal prosecution. The state in which a federal enclave exists has no authority over the enclave unless it specifically requested such rights when it agreed to the purchase.

**Before You Read**

Have students use a dictionary or the Internet to define “enclave.” (a place enclosed within or as if within a foreign territory) Ask: What do you think a federal enclave is? (a place that is federal and subject to federal laws and regulations)

**Work In Pairs**

Pair up students and have them summarize Joseph Story’s commentary on page 145. (Sample answer: A state should not have control over property purchased with public money for military purposes. Since the security of the Union may depend upon such places, it would not be right to subject them to the rules of only one state.)
Group Work

Break students into small groups and have them use the Internet to compile a list of federal enclaves. (Sample answer: Federal enclaves include such varying installations as the District of Columbia; the National Institutes of Health in Bethesda, Maryland; and Cape Canaveral, Florida, as well as certain national parks, national cemeteries, lighthouses, and locks and dams.)

Active Reading

Ask: How does the Military Installations Clause show that Congress has complete control of the federal military? (Military installations are not governed by the states in which they are geographically located. These installations are subject to federal regulations and, therefore, ultimately to the federal government.)

Discussion Questions

1. Why are military installations and the District of Columbia the exclusive domain of Congress? (The Constitution grants Congress exclusive legislative power over certain federal installations and the District of Columbia in order to maintain the independence of states and the federal government. The military is under the complete control of Congress; to allow a military territory to be subject to the laws of a particular state would undermine Congress’s, and therefore the federal government’s, control of that body.)

2. What powers does a state have over military installations contained within its borders? (A state has no power over military installation within its borders unless certain powers were specified at the time of the sale.)

Property Clause — Article IV, Section 3, Clause 2

*Essay by Thomas W. Merrill (pp. 278–281)*

The Property Clause of the Constitution empowers Congress to regulate federal territories and federal land. Currently, the federal government owns or controls about 30 percent of the land in the United States, ranging from national forests and parks to military bases and federal buildings.

There are three broad theories for interpreting the extent of Congress’s power under the Property Clause: the proprietary theory, the police power theory, and the protective theory. The proprietary theory maintains that Congress is an ordinary landowner. It may set policy regarding the sale and use of the lands but does not hold any legal sovereignty over these lands. In most cases, states in which the land
is geographically located hold sovereign authority. Under the police-power theory, Congress has the sovereign power over the area, federal laws trump state laws, and Congress may enact any regulations (ranging from criminal law to family law and exemptions from taxation) for persons residing on that land. Between these two extremes is the protective theory. Under this third theory, the federal government would have partial sovereignty but not extensive police powers.

The original understanding of this clause is debatable, but structural and historical evidence gives some clues to the extent of Congress’s power. Because the Property Clause is in Article IV (which governs state-to-state relations) rather than Article I, Section 8 with the Enclave Clause, the Property Clause does not grant Congress full police powers over federal territories. However, the Property Clause justifies the Northwest Ordinance, suggesting that Congress has extensive power over territories before they become states. Therefore, both the structure of the Constitution and historical evidence suggest that the Property Clause authorizes Congress to exercise general police power within territories before they become states. Once these territories are admitted as states, Congress could exercise police powers only in accordance with the Enclave Clause. To put it another way, the police-power theory would apply to federal land located in territories, but the protective theory would apply to non-enclave federal land located in states.

Judicial interpretation of the Property Clause has not remained consistent. The Supreme Court affirmed the protective-theory understanding of the clause in *Fort Leavenworth Railroad Co. v. Lowe* (1885). By the end of the 19th century, the protective theory was dominant. Recent decisions, though, embrace the police-power theory for all federal land, regardless of its location within a state.

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**Before You Read**

Ask: Some land in the United States is owned by the federal government. What type of land do you think the federal government owns? (Students may say national parks, wildlife refuges, or military bases.)

**Write About It**

Have students read the Property Clause on pages 278–281 and create a chart for the proprietary theory, police-power theory, and protective theory. Which one gives more authority to the federal government? Which one would be better for the people living on the land? Have students consider issues of sovereignty, representation, and geography.
Unit 2

Discussion Questions

1. How does the Northwest Ordinance explain the extent of Congress’s power under the Property Clause? (Under the Northwest Ordinance, the federal government would establish governance for territories that were not yet states. Once these areas fulfilled the requirements to become a state, Congress would no longer exercise police power over the areas.)

2. How has the judicial interpretation of the Property Clause changed over time? (Judicial interpretations of the Property Clause have changed significantly over time. Early in the 19th century, courts interpreted the Property Clause to grant the federal government sovereignty over territories, but once the territory became a state, Congress could not exercise general sovereignty without a formal cession from the state. Recent decisions embrace the police-power theory for all federal land, regardless of its location within a state.)

Claims – Article IV, Section 3, Clause 2

Essay by Jeffrey Sikkenga (pp. 281–282)

The Framers were concerned that individual states would use the New States Clause (which will be discussed in Lesson 14) to claim territory for which ownership was disputed, thereby preventing Congress from establishing rules and regulations to enable territories to join the Union.

At the Convention, Daniel Carroll suggested adding a clause stating that nothing in the Constitution would affect the land claims of the United States. James Madison, however, noted that states could not in principle claim land ceded by one nation to another. Nevertheless, the question of who had a rightful claim to lands ceded to the United States during the American Revolution was a divisive one. Therefore, the Constitution should be neutral and protect the claims of both the states and the federal government.

Madison’s suggestion passed and proved useful. The Claims Clause defused controversy over Western lands. The country’s political branches successfully handled the final decisions regarding the claims to the Western lands.

Active Reading

Ask: The Framers worried that the New States Clause of Article IV might cause a problem. What was this? (The Framers knew that the land claims for many areas in the West had not yet been settled. The New States Clause required the permission of states in order to create new states out of existing ones. Therefore, the Framers worried that states would try to lay claim to
these disputed territories and stop them from being made part of the United States.) Why did Madison suggest that the clause should mention claims for land made by particular states? (Madison knew that the issue of whether the Union or individual states had rightful claim to lands was controversial. To avoid creating conflict and to be fair, he thought the Constitutional Convention should mention the states.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 7, Part 1. Review any material for questions they have missed.

Fill in the Blank: Write the correct word or words in each blank.

1. Although federal property can be found in every state, the largest concentrations are in the _____. (West)

2. It is possible that the Framers intended the Property Clause to be broad enough at least to constitutionalize the provisions of the _______. (Northwest Ordinance)

3. The _____ allows residents of the District of Columbia to participate in federal elections. (Twenty-third Amendment)

4. The ________ gives Congress the power to regulate areas belonging to the national government such as military properties. (Military Installations Clause)

Short answer: Write out your answer to each question.

1. How many electors does the District of Columbia have according to the Twenty-third Amendment? (The Constitution does not specify a number. It grants the District of Columbia no more electoral votes than the least populous state has. By this wording, the District has three electors currently.)

2. What does the Enclave Clause allow Congress to establish? (a federal district)

3. What happened in June 1783 that reinforced the need for a district subject to Congress’s exclusive jurisdiction and separate from the territory and authority of any single state? (Several hundred unpaid and angry Continental soldiers marched on Philadelphia. When Pennsylvania refused all requests for assistance, Congress had to adjourn, and Members fled to New Jersey.)
4. What does the Twenty-third Amendment do? (It gives the District of Columbia votes in the Electoral College, thereby enabling the District of Columbia to participate in presidential and vice-presidential elections in the same manner in which the states participate in those elections.)

5. Federal enclave jurisdictions may apply to what? (individual buildings, parts of buildings, or vast territories)

6. Describe the “proprietary theory” of the Property Clause. (This interpretation of the Property Clause maintains that the clause simply allows Congress to act as an ordinary owner of the land.)

7. Describe the “police-power theory” of the Property Clause. (This interpretation regards the Property Clause as conferring not only the powers of ownership but also general sovereign authority to regulate private conduct that occurs on federal land or that affects federal land.)

8. Describe the “protection theory” of the Property Clause. (This interpretation of the Property Clause maintains that the federal government would have partial sovereignty but not extensive police powers.)
Part 2: Naturalization and Citizenship

Naturalization  
Article I, Section 8, Clause 4

Citizenship  
Amendment XIV, Section 1

Naturalization — Article I, Section 8, Clause 4

Essay by Joseph Bessette (pp. 109–112)

The Naturalization Clause grants Congress the power to establish a uniform rule of naturalization, the process by which immigrants may become American citizens. Under the Articles of Confederation, states established rules for naturalization, and this resulted in a variety of policies. At the Constitutional Convention, granting the new national legislature the authority to create rules for naturalization was widely accepted.

America had a unique understanding of citizenship. America understood political communities to be free associations of individuals. The European understanding of citizenship did not see citizenship as something that could be forfeited or transferred. But, American naturalization law assumed that a free citizen of one country had a right to transfer his citizenship to another country. Because citizenship required allegiance to one nation, the Founders did not recognize dual citizenship.

Congress passed its first uniform rule in March 1790. Though some states continued to naturalize foreigners, Congress clarified in 1795 that it had exclusive power to establish naturalization rules and standards. The Naturalization Act of 1795 contained many of the criteria that people still must meet to become citizens: being a lawful resident for five years, good moral character and attachment to America's principles, taking an oath to the Constitution, renouncing any hereditary titles. The acquisition of the Louisiana Territory and Florida raised the question of collective naturalization, which the Supreme Court upheld in 1828.

America's unique view of citizenship led to some conflict with Great Britain and France about voluntary expatriation. The American understanding of citizenship presumed that one could renounce prior citizenship, but the European understanding held that men born in a country could never end their allegiance to that nation. As late as the 1860s, Great Britain would not allow naturalization of its former subjects. America responded with the Expatriation Act of 1868.
Federal law and the U.S. Department of State have established the process by which Americans may renounce their citizenship. Until 1958, one's citizenship might be stripped if, for instance, an individual declared allegiance to a foreign state, voted in a foreign election, or deserted during wartime. Since 1958, however, several Supreme Court decisions have limited expatriation so that it seems that no involuntary expatriation is lawful, even voting in a foreign election and deserting during wartime. Another departure from the Founders' understanding of citizenship is the rise in dual citizenship.

**Before You Read**

Explain to students that a person who has been naturalized was born in another country and has become a U.S. citizen. Ask: What are some ways that individuals may become United States citizens? (They may be children of United States citizens or may apply for citizenship.)

**Make an Inference**

Ask: What were some advantages of moving the power of naturalization from the states to the national government? (Leaving the states to determine naturalization would result in a wide variety of laws.)

**Active Reading**

What were the key criteria of the Naturalization Act of 1795? (Sample responses: five years of lawful residence in the United States, a good moral character, the taking of a formal oath to support the Constitution and to renounce any foreign allegiance, and the renunciation of any hereditary titles.)

**Citizenship** — Amendment XIV, Section 1

*Essay by Edward Erler (pp. 384–386)*

Section 1 of the Fourteenth Amendment outlines the conditions for U.S. and state citizenship. In the years before the amendment was approved, citizens of a state were automatically considered citizens of the United States. In *Dred Scott v. Sanford* (1857), the Supreme Court ruled that no black person could be a citizen. The Fourteenth Amendment settled the question of citizenship for newly freed slaves: All persons born or naturalized in the United States and “subject to the jurisdiction” thereof are United States citizens. The Fourteenth Amendment makes United States citizenship primary and state citizenship secondary.
Prior to the adoption of the Fourteenth Amendment, Congress passed the Civil Rights Act of 1866 to clarify the status of citizenship for newly freed slaves, but the constitutional authority for the Civil Rights Act was questionable (it relied on the Thirteenth Amendment), and a constitutional amendment would be more difficult to overturn than a piece of legislation.

The Citizenship Clause of the Fourteenth Amendment has two criteria for Citizenship: One must be born or naturalized in the United States and subject to the jurisdiction of the United States. “Subject to the jurisdiction” means more than being subject to the laws of the country; it requires an exclusive allegiance to it. Diplomats, foreign tourists, Indians, and illegal immigrants would not be subject to the complete jurisdiction of the United States, because these individuals would still owe allegiance to another sovereign.

The American understanding of citizenship departs from the British common-law understanding of citizenship. Under common law, one was born a citizen and could never renounce or forfeit that citizenship. According to the Declaration of Independence, individuals become citizens by consent, which includes the right to forfeit one’s citizenship.

The consent requirement is twofold: The individual must consent to join the community as a citizen, and the community must consent to the individual’s joining. The Supreme Court case of Elk v. Wilkins (1884) reveals this twofold understanding of consent. In that case, an Indian who renounced his tribal allegiance was not automatically a citizen of the United States. The Court explained that neither Indian tribes, nor a member of a tribe, nor any other foreigner can become citizens of their own will. Beginning in 1870, Congress extended offers to members of Indian tribes to become United States citizens if they chose to do so.

The 1898 case of United States v. Wong Kim Ark has confused the understanding of citizenship under the Fourteenth Amendment. The Supreme Court declared that the amendment adopted a common-law understanding of citizenship, suggesting that citizenship was conferred at birth. The Court has not revisited this decision or explicitly held that the Fourteenth Amendment requires birthright citizenship.

**Brainstorm**

Explain that the Citizenship Clause requires that one be born or naturalized in the United States and subject to the jurisdiction thereof to be a citizen. Write the phrase “What It Means to Be a United States Citizen” in the center of the board. Give students five minutes to write down their ideas. Tell students that their responses can relate to freedoms, responsibilities, civic virtues, or anything else pertaining to the topic that comes to mind. Then ask them to share their answers and write their responses on the board. (Answers will vary.)
Active Reading

Erler points out that America’s approach to citizenship was different from European understandings of citizenship. What are the core differences, according to the two clauses, between the Founders’ understanding of citizenship and that of their European counterparts? (European understandings of citizenship were based on the feudal system: People were born under sovereigns and had an absolute fealty to the reigning sovereign. However, American citizenship was based on the idea of consent contained within the Declaration of Independence. The idea of consent presents a new grounding for citizenship: It does not consist of sovereigns and subjects, but of equal citizens who rule and are ruled in turn. Consent is twofold: The individual must consent to join the community as a citizen, and the community must consent to the individual’s joining it. People can choose to renounce and transfer their citizenship, but the trend of Supreme Court decisions indicates that involuntary expatriation is unlawful.)

Discussion Questions

1. Why were the Founders leery of the idea of dual citizenship? (America understood political communities to be free associations of individuals. A free citizen of one country had a right to transfer his citizenship to another country. The Founders required naturalized citizens to renounce their allegiance to their prior nation. Citizenship required allegiance to one nation.)

2. Why did the Founders see consent in citizenship as twofold? (The individual must consent to join the community as a citizen, and the community must consent to the individual’s joining. Individuals have a natural right to emigrate from their homeland, but that does not translate into a right to join the United States without the consent of the American people as expressed through the laws of the United States.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 7, Part 2. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. Which of the following was not a key criterion of the Naturalization Act of 1795?
   a. good moral character
   b. prohibition of discrimination on the basis of race, sex, or marital status
   c. legal residence in the United States for five years
   d. renunciation of hereditary titles
2. The Naturalization Clause transferred the power of naturalization to the power of:
   a. states.
   b. courts.
   c. Founding Fathers.
   d. national government.

3. The Fourteenth Amendment was necessary to overturn what?
   a. the Presidential Eligibility Clause
   b. the Dred Scott decision
   c. the Civil Rights Act
   d. the Thirteenth Amendment

True / False: Indicate whether each statement is true or false.

1. The American understanding of citizenship is indistinguishable from the European understanding of citizenship. (False. In contrast to Europe’s feudal understanding of citizenship, which held that people automatically become subjects of country in which they were born, Americans understood citizenship to be based on consent, not accident of birth.)

2. According to the Declaration of Independence, “obstructing the Laws for the Naturalization of Foreigners” was one of the grievances that led the American colonists to break with Britain. (True)

3. In 1857, the Dred Scott v. Sanford decision held that blacks of African descent could be citizens of the United States. (False. The decision held that no black of African descent, including a freed black, could be a citizen of the United States.)

4. “Subject to the Jurisdiction” of the United States meant exclusive “allegiance” to the United States. (True)

5. Congress began to extend offers of citizenship to various Indian tribes in 1970. (False. Congress began to extend offers of citizenship to various Indian tribes in 1870.)

Short Answer: Write out your answer to each question.

1. What are the key criteria for citizenship under the Naturalization Act of 1795?
   • Five years of (lawful) residence within the United States
   • A “good moral character” attached to the principles of the Constitution
   • Taking a formal oath and renouncing previous titles
2. What is the principle of *jus soli*? *(Persons born within sovereign territory, other than children of enemy aliens or foreign diplomats, are citizens from birth.)*

3. What is the parliamentary rule of *jus sanguinis*? *(Citizens may pass their citizenship by descent to their children at birth, regardless of place.)*

4. What two requirements were set for United States citizens according to the Fourteenth Amendment?
   - Born or naturalized in the United States
   - Subject to its jurisdiction
Part 3: The Necessary and Proper Clause

The Necessary and Proper Clause — Article I, Section 8, Clause 18

Essay by David Engdahl (pp. 146–150)

Although often commonly referred to as the “sweeping clause” or the “elastic clause,” the Necessary and Proper Clause is not in fact as expansive as its nicknames suggest. After listing the 17 specific powers delegated to Congress, Article I, Section 8 of the Constitution concludes by specifying that Congress has the power to pass any law that is both necessary and proper to implement the powers already delegated to it. This lawmaking power is limited and defined by the ends for which it is delegated: “for carrying into execution the foregoing powers.”

This clause makes explicit a power already implied in the grants of powers in Section 8 and elsewhere. The Necessary and Proper Clause is thus a means by which Congress can achieve its constitutionally mandated ends. As James Madison wrote in The Federalist No. 44 to explain the meaning of the clause, “No axiom is more clearly established in law, or reason, than that wherever the end is required, the means are authorized.”

The Necessary and Proper Clause achieves two distinct purposes: It facilitates government organization and effectuates enumerated powers. The organizational function of the Necessary and Proper Clause was evident when Congress organized the judicial branch, determine the number of Supreme Court justices, and established the executive departments, activities that would have been violations of the separation of powers without the Necessary and Proper Clause.

The more significant purpose of the Necessary and Proper Clause is its effectuating aspect. During the ratification debates, some pointed to the Necessary and Proper Clause as an unchecked power to allow Congress to enact sweeping regulations. The author of the clause, James Wilson, argued that Congress may pass laws about something outside of its enumerated powers only if those laws are necessary and proper to effectuate a federal policy within those enumerated powers. The Necessary and Proper Clause is the means to achieve the ends set by other enumerated powers.

The Supreme Court affirmed the means-to-end nature of the Necessary and Proper Clause in McCulloch v. Maryland (1819). Provided that the law is not inconsistent with the letter and spirit of the Constitution and is in the service of another enumerated power, the law is constitutional under the Necessary and Proper Clause.

McCulloch is the classic explanation of the clause, but the Supreme Court has applied and addressed the clause elsewhere in its jurisprudence—for instance, issues
relating to taxation and property. In the *Legal Tender Cases* (1870), the Court upheld Congress’s discretion to choose among the means for a certain end. Even though better means may be chosen (or the Court may disagree), Congress has the discretion to choose. Often, though, the Supreme Court does not articulate a Necessary and Proper jurisprudence. The Court previously appealed to the Necessary and Proper Clause to justify enhanced commerce power, but now it relies on an expansive reading of the Commerce Clause itself to justify regulation. The result of employing the means-to-end logic but not the Necessary and Proper Clause when affirming certain regulations for commerce is a confused jurisprudence.

The Necessary and Proper Clause allows Congress to enact laws that are appropriate for the execution of one of Congress’s powers; it does not authorize Congress to enact any law that it thinks is reasonable or confer a general regulatory power. The means-to-end purpose of the clause has served as a model for the enforcement clauses within the Thirteenth, Fourteenth, and Fifteenth Amendments. In recent cases, the Court has held that a law must be “congruent” and “proportional” to the amendment violation Congress aims to redress. These rulings largely adhere to *McCulloch*: To invoke the Necessary and Proper Clause, a law must be “plainly adapted” to an enumerated end.

**Before You Read**

Ask: What does it mean for something to be necessary and proper? Why is the Necessary and Proper Clause an effectuating power? (It is based on cause and effect. The Necessary and Proper Clause extends only to those things that Congress must do to fulfill its proper functions. In order to have one thing happen, you need something else.) Say: This clause is called the Necessary and Proper Clause. Think of something that is necessary and proper to achieve some end. (Accept all reasonable responses. For example, wearing corrective glasses or contact lenses is necessary and proper for someone who cannot see very well to read.)

**Active Reading**

To ensure understanding, ask: Every so often, the Congress uses the Necessary and Proper Clause to legislate on a matter that would normally be out of its jurisdiction, such as intrastate trade or regulation. How are these applications of the Necessary and Proper Clause justified? (The applications are justified if they are in the service of one of Congress’s enumerated powers. They do not reflect a general regulatory power.)
Active Reading

To ensure students’ understanding, point out the restrictions related to the clause. Ask: When is Congress prohibited from invoking this clause? (Congress cannot use this clause to impede another branch of the government from performing its constitutional role. Congress may only enact laws that are appropriate and necessary to exercise its powers. It cannot use the Necessary and Proper Clause to enact any law that it thinks to be reasonable.)

Discussion Question

Why is the Necessary and Proper Clause considered a “means to an end”? (Congress may use the clause to effectuate another enumerated power but not to enlarge its power overall.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 7, Part 3. Review any material for questions they have missed.

Short Answer: Write out your answer to each question.

1. The Framers crafted the Necessary and Proper Clause for what two great purposes?
   - To facilitate organization of the government, such as empowering Congress to organize the judicial branch
   - To help effectuate the other enumerated powers of Congress

2. What is one limitation of Congress’s powers under the Necessary and Proper Clause? (Congress may not enact laws that interfere with the ability of other branches of government to perform their constitutional duties. It also may not simply enact any law it considers reasonable. The laws it enacts must be necessary for Congress to carry out its duties.)

True / False: Indicate whether each statement is true or false.

1. The Necessary and Proper Clause gives Congress the power to enact laws that are appropriate and needed to carry out its powers. (True)

2. The Necessary and Proper Clause is also referred to as the “sweeping clause” and “the elastic clause.” (True)

3. The Necessary and Proper Clause disregards the principle of separation of powers. (False. It respects and reinforces the principle of separation of powers.)
Part 4: Congress and the Fourth Branch of Government

Delegation of Legislative Power: Legislative Vesting Clause
Article I, Section 1

What Is the Administrative State? A Note on Administrative Agencies

Delegation of Legislative Power — Article I, Section 1

Essay by Douglas Ginsburg (pp. 46–48)

The Framers crafted the separation of powers carefully. The lawmaking power was vested in the legislative branch. Neither the judicial nor the executive power includes a general lawmaking power, and Congress may not delegate or give away its power.

But, sometimes it is difficult to distinguish laws that confer discretion upon the executive from those that call for the executive to exercise legislative power. The executive has discretion in executing law, but some decisions are fundamentally legislative.

The Supreme Court has addressed the question of delegated legislative powers several times. In 1825, the Court recognized that it is difficult to draw the line between the subjects that must be regulated by the legislature and what is subject to another branch’s discretion. In 1928, the Court upheld a statute that delegated to the President the power to raise tariffs, explaining that a legislative action is not a delegation of legislative power if Congress creates an intelligible principle to which the person or body must conform. In 1935, the Court struck down two laws that delegated large amounts of legislative power. A.L.A. Schechter Poultry Corp. v. United States (1935) was the last time the Court struck down a law for violating the Legislative Vesting Clause. In 1980, Justice William Rehnquist argued that a law empowering the Secretary of Labor to determine levels of benzene exposure for employees was a delegation of congressional powers.

Despite a few justices’ doubts about delegation and the requirement that Congress must have an intelligible principle to guide actors, the Court has maintained a hands-off approach to delegations of power. By failing to police the boundary between proper and improper delegations of power, the Court forgoes the opportunity to maintain the structure of government prescribed by the Constitution. The legislature continues to delegate its power to unaccountable bureaucrats in administrative agencies.

Before You Read

Ask students whether they have heard the term “bureaucrat” or “expert.” What do these persons do? Are they elected? (Students may say that they have heard the term on television or the news. They are people who work in the government but do not hold elected positions. Some may say that they make rules.)
Active Reading

Ask: What does it mean to delegate power? (To delegate power means to authorize someone else to exercise a power that they would not otherwise possess).

Discussion Question

Why do you think it is sometimes difficult for the three branches of government to maintain separate powers? (It is impossible and undesirable to divide authority completely. The design of the Constitution intentionally creates overlapping authorities because some powers ought not to be vested in one branch alone.)

What Is the Administrative State?
A Note on Administrative Agencies

Essay by Michael Uhlmann (pp. 229–231)

The administrative state consists of a range of administrative agencies, some of which are small entities with narrow duties and others of which are massive bureaucracies with huge budgets and broad discretionary authority. Some administrative agencies are under the direct control of the executive departments, but most are free-standing agencies that create rules and regulations without any oversight or accountability.

There are two types of stand-alone agencies: executive agencies (which are ultimately accountable to the executive) and independent agencies (which are unaccountable to either the President or Congress). Through these agencies, there are few subjects that the federal government does not regulate.

Congressional statutes determine the purpose, status, and powers of each agency. Most administrative agencies, though, exercise legislative, executive, and judicial powers. They make rules and regulations that have the same force of law as congressional statutes, issue fines and penalties for violations, and conduct trial-type procedures.

In theory, the agencies are subject to the political branches. The President appoints agencies’ leadership, Congress has oversight and budgetary powers, and the judiciary reviews agencies’ actions. But these controls are remote, indirect, and incomplete. Therefore, agencies exercise broad authority without any accountability.

Each of the political branches has attempted to rein in the administrative state, but the executive–congressional competition for control of the agencies points to the question: Who controls the administrative state? In practice, the administrative
state appears to be under both Congress and the President. Since bureaucrats exercise lawmaking power and make rules and regulations under some grant of authority from Congress, they should answer to Congress. Insofar as these experts are housed in executive agencies, they are under the President’s control. Independent agencies are more difficult because they are not under the executive’s control but do not formally report to Congress. Indeed, independent agencies emerged because Congress wanted to legislate over more areas of policy, was willing to delegate its legislative authority to agencies, but was reluctant to vest discretionary control over these agencies in the President.

The result was a battle between the executive and the legislature over who controls the administrative state with the judiciary acting as referee. Prior to the 1930s, the Court sustained some delegations of legislative power but balked at open-ended delegations of power. The Administrative Procedure Act of 1946 quelled the Court’s procedural concerns about how Congress delegated authority, but the substance of agencies’ power remains controversial. At first, the Court would allow agencies great leeway in interpreting statutes and making rules; then it limited agencies’ authority before again allowing them great discretion. In some cases, the Court has upheld broad delegations of power from Congress; in others, it has not. In sum, the Court’s oscillation between allowing the administrative state great freedom and then reining it in reflects its ambivalence about the administrative state’s constitutional status.

As Congress continues to delegate its legislative power and as bureaucrats in administrative agencies make more regulations that govern Americans’ way of life, it is unclear whether the American people will tolerate the constitutional nether-zone the administrative state occupies.

Before You Read

Tell students that early 20th century Progressives laid the groundwork for the modern administrative state to become a fourth branch of government. Thinkers such as Woodrow Wilson, Herbert Croly, and John Dewey argued that policymaking should not be placed in the hands of politicians—elected, inexpert officials who were unfamiliar with the practicalities of modern society. Rather, Congress should delegate its legislative power to enable technically trained experts, removed from day-to-day politics and political control, to make policy.

Make a Real-Life Connection

Have students research an administrative agency, such as the Environmental Protection Agency. Have them look up what regulations the agency issues, what the punishments are for violating those regulations, and the judicial process within those agencies. Have the students share their findings with the class.
Check Understanding

Have students read the Note on Administrative Agencies on pages 229–231 and create a list of how administrative agencies exercise the three powers of government. (Agencies make rules and regulations, which is similar to the lawmaking power. They enforce their regulations and issue fines and penalties for violations, which is similar to the executive power. They then conduct trials and hearings, as an Article III court would.) Ask: What did the Founders think about one person or group exercising all three powers of government? (The Founders were careful to divide the powers of government into three separate branches with separate duties, modes of election, and constituencies. They did not want a single person or group of persons to exercise all three powers of government. They also did not establish a system of government with unelected, unaccountable people make laws.)

Discussion Questions

1. How does the structure of the administrative state create accountability problems? (Sample answer: In theory, agencies are subject to the political branches. The President appoints agencies’ leaders, Congress has oversight and budgetary powers, and the judiciary reviews agencies’ actions. But these controls are remote, indirect, and incomplete. Therefore, agencies exercise broad authority without any accountability.)

2. Why have Presidents tried to assert their authority over hiring and firing practices in administrative agencies? (Many Presidents have tried unsuccessfully to assert their authority over hiring and firing practices in administrative agencies in order to harness the power of these groups for themselves.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 7, Part 4. Review any material for questions they have missed.

Fill in the Blank: Write the correct word or words in each blank.

1. The number and variety of administrative agencies testify to the _____ of the federal government. (growth)

2. The nature and reach of administrative agency powers remains ________. (controversial)
Short Answer: Write out your answer to each question.

1. Why did the Framers of the Constitution design a separation of powers? (so that undue power would not be combined in any department, since that might lead to tyranny)

2. How does Congress’s delegation of its legislative power affect accountability? (By delegating legislative power to agencies staffed with unelected officials, Congress makes government less accountable.)

3. Why are “executive agencies” so called? (They are more accountable to the President than administrative agencies are.)

4. Why are “independent agencies” so called? (They are accountable neither to the President nor to Congress.)

True / False: Indicate whether each statement is true or false.

1. Separation of powers is fundamental to the idea of a limited government accountable to the people. (True)

2. Article I of the Constitution grants all legislative powers to Congress. (False. Article I grants only certain limited legislative powers “herein granted” to Congress.)

3. Administrative agencies are created by the President. (False. They are prescribed by acts of Congress.)

4. Administrative agencies vary enormously in the breadth and detail of their delegated authority. (True)

5. The substantive scope of administrative discretion (whether exercised by executive or independent agencies) has been well defined by the courts with little controversy. (False. This remains a matter of continuing controversy.)

6. Administrative agencies exercise legislative, executive, and judicial powers. (True)

7. Free-standing administrative agencies are either executive agencies or “independent” agencies. (True)
Lesson 8

LAWMAKING AND THE RULE OF LAW

Lesson Objectives:

When you complete Lesson 8, you will be able to:

• List and explain three ways that a bill may become a law according to the Presentment Clause.
• Define “pocket veto” and explain why it is controversial.
• Understand the differences between bills, resolutions, joint resolutions, and concurrent resolutions.
• Define a bill of attainder and an ex post facto law.
• Explain the purpose of the Bill of Attainder and Ex Post Facto Clauses of the Constitution.

The Process and Limits of Lawmaking

Presentment Clause
Article I, Section 7, Clause 2

Pocket Veto
Article I, Section 7, Clause 3

Presentment of Resolution
Article I, Section 7, Clause 3

Bill of Attainder
Article I, Section 9, Clause 3

Ex Post Facto
Article I, Section 9, Clause 3
Presentment Clause — Article I, Section 7, Clause 2

Essay by Michael B. Rappaport (pp. 86–89)

The Presentment Clause, or Lawmaking Clause, outlines the exclusive method for the passage of federal statutes. One of the most formal and detailed clauses in the Constitution, the Presentment Clause involves both the legislature and the executive branches in the lawmaking process: All federal bills must pass both houses of Congress and be subject to the President’s veto. The President has 10 days to veto a bill, or else it becomes law. The President’s veto may be overridden by a two-thirds vote in both houses. During ratification, the Federalists justified both bicameralism and the presidential veto as essential to prevent the legislature from encroaching on executive power and to limit the passage of hasty and unwise laws.

There are two ways that the Presentment Clause may be violated. Congress might authorize one or both of its houses or the President to take legislative-type actions without conforming to bicameralism. Additionally, either Congress or the President might take legislative action on their own initiative without proper statutory authority. Today, several practices are held to be contrary to the Presentment Clause: the legislative veto, executive branch rulemaking, and the line-item veto.

A legislative veto occurs when one house of Congress nullifies an administrative action. This can be seen either as an executive action by the legislature or as a legislative action. In the first case, it would be unconstitutional because it fails to follow the principle of separation of powers; in the second case, it would be unconstitutional because it fails to respect the Presentment Clause. The Supreme Court has held the legislative veto to be unconstitutional.

The most common departure from bicameralism and presentment involves the statutory delegation of executive powers. Essentially, this involves the legislative branch statutorily delegating legislative or executive power to executive branch administrators. This type of delegation violates the Presentment Clause because executive agencies create the rules of action (i.e., laws) rather than Congress.

The 1995 Line Item Veto Act authorized the President to cancel certain spending provisions—to veto specific items but not the entire bill. The Supreme Court held that line-item vetoes violated the lawmaking process outlined in the Presentment Clause. Essentially, the Court ruled that the President had been given the unconstitutional power to repeal a law because the line-item veto could allow him to eliminate an appropriation.

Before You Read

Ask: Your book uses the term “bicameralism” several times in its discussion of the Presentment Clause. What does “bicameral” mean? (Explain that the prefix “bi” means “two” and “cameral” comes from the Latin word “camera,” which means “chambers.” Bicameral means based on two legislative chambers.)
Active Reading

Have students read the Presentment Clause on pages 86–87 and create a list of three ways by which a bill might become a law. Keep in mind that the complexity of the list is not as important as a correct interpretation of the process. (The student’s list should include these steps: (1) A bill becomes a law if the President signs it. (2) A bill becomes a law if a President vetoes it but two-thirds of the Senate and two-thirds of the House of Representatives override it. (3) A bill becomes a law if the President does not sign it but also does not return it to Congress within 10 days provided Congress is in session.)

Make a Real-Life Connection

To illustrate the process of how a bill becomes law according to the Presentment Clause, explain that former President George W. Bush vetoed many bills while in office. One of these was the Stem Cell Research Enhancement Act of 2005, which would have provided funding for human embryonic stem cell research. When President Bush returned the bill to the House of Representatives, more than two-thirds of its members voted to sustain, or uphold, the veto. President Bush also vetoed the Water Resources Development Act of 2007, which would have provided for water conservation and development by allowing the Secretary of the Army to construct projects to improve rivers and harbors in the United States. However, when the President returned the bill to Congress, both the House of Representatives and the Senate voted to override his veto, and the bill became law.

Work in Pairs

Pair up students and have them research a bill that a President has vetoed. Have them write a summary of the President’s message. They should indicate whether the President’s veto was sustained or overridden. Point out that when voting on sustaining or overriding a bill, Members of Congress record the number of “Yeas” and “Nays” as indicated in the Presentment Clause.

Discussion Questions

1. Why did James Madison add “after it shall have been presented” to the Presentment Clause? (Madison inserted the words “after it shall have been presented” into the Presentment Clause to prevent questions as to the beginning of the 10-day period during which the President must consider a bill. According to Madison, the day on which the bill is presented does not count.)
2. In what two ways might the Presentment Clause be violated? (Congress might take action allowing either Congress or the President to pass statutes without conforming to bicameralism or presentment. Congress or the President might also act on their own and take legislative-type actions without authority.)

**Pocket Veto** — Article I, Section 7, Clause 3

*Essay by David F. Forte (pp. 89–91)*

Under the Presentment Clause, the President has partial agency in the legislative process. He can propose legislation and then veto or approve all bills presented to him. Once a bill has passed through Congress, the President has 10 days to review the bill and either approve or veto it. If the President vetoes the bill, he or she must return the bill to the chamber in which it originated—either the House of Representatives or the Senate. Congress may override the veto by a two-thirds majority vote of both houses.

However, what happens if the President refuses either to approve the bill or to return it to Congress? What if the President vetoes the bill but Congress is not in session to receive it and therefore is not able to override the veto? The Pocket Veto Clause addresses these issues. According to the Pocket Veto Clause, if Congress is adjourned, the bill will not become law. That is, if the President does not want to veto the bill in the traditional manner, he or she can simply hold on to the bill until Congress adjourns. The bill then “dies.”

The Pocket Veto Clause has led to controversy between the President and Congress because it is silent about types of adjournment. A *sine die* adjournment occurs when a Congress comes to an end and a newly elected Congress convenes. Intersession adjournments occur between two sessions of the same Congress. Intrasession adjournments occur when Congress takes a break within a session. The President and Congress agree that the President may pocket a veto during a *sine die* adjournment, but Members of Congress have argued that intersession and intrasession pocket vetoes are invalid. However, the Founders apparently intended the pocket veto to be available to the President whenever any recess took place. While other clauses of the Constitution refer to adjournments of various lengths, the Pocket Veto Clause does not deal with the length of adjournments, which seems to indicate that the clause permits the President to exercise a pocket veto any time the Congress as a whole adjourns.

Today, when Presidents exercise the pocket veto, they include a “protective return,” which is a message declaring their objections to the bill. This way, if a court declares the pocket veto invalid, the bill is treated as if the President had vetoed it in the traditional manner, and Congress has the power to override the bill. 
Before You Read

Have students think about the term “pocket veto.” Ask: Why do you think this kind of veto is called a pocket veto? What image comes to mind when you picture a President making a pocket veto? (Students may say that they envision a President receiving a letter and putting it in his pocket.)

Active Reading

Help students understand the meaning of a *sine die* adjournment. Explain that *sine die* is Latin for “without day.” With this type of adjournment, it is anticipated that this particular group of legislators will not meet again.

Make a Real-Life Connection

Tell students that in January 2010, President Barack Obama exercised his pocket-veto authority. In December 2009, Congress passed a war-spending bill that would have funded the Department of Defense before the department ran out of money. To make sure that the President had time to read the bill, Congress even passed a “continuing resolution” (CR), which gave the President an extra week. However, instead of vetoing the bill, President Obama returned it to Congress on December 30 without his signature. Before Congress adjourned, the House appointed a clerk to be available to receive messages from the White House. The House insists that since someone was available, there could not be a pocket veto. Congress further voted to sustain, or uphold, the President’s veto, stating that it was not a pocket veto.

Make an Inference

Point out that Congress dislikes pocket vetoes. Ask: Why do you think Presidents use pocket vetoes? (Students may say that Presidents use pocket vetoes to kill a bill and deny Congress the opportunity to override the veto.)

Presentment of Resolution — Article I, Section 7, Clause 3

*Essay by David F. Forte (p. 92)*

During the Constitutional Convention, James Madison expressed concern that Congress might avoid having a bill vetoed by calling the bill “a resolution.” Madison made a motion to insert the words “or resolve” after the word “bill” in the Presentment of Resolution, but this motion was denied. The next day, Edmund Randolph proposed a clause with more exact wording, which was approved.
Some resolutions, however, are not presented to the President because they will not have the force of law. Concurrent resolutions and simple resolutions (which are used to change the procedures of Congress or determine adjournment, for instance) are not laws and therefore do not require presentment or presidential signature. Concurrent resolutions apply to procedures of both houses, express the sense of Congress on an issue, or set spending goals. Simple resolutions deal with either the procedures or operations of one house of Congress (e.g., censuring a member or setting spending goals for a committee). Some joint resolutions will have the force of law and therefore require presentment. For instance, a declaration of war is a joint resolution that must be presented to the President. An amendment to the Constitution, on the other hand, is a joint resolution that does not require presentment to the President.

**Active Reading**

Be sure students understand the differences between a bill, a resolution, a concurrent resolution, and a joint resolution. A bill must be presented to the President because it has the potential to become a law. A resolution and concurrent resolutions, on the other hand, do not require presentment to the President. Joint resolutions require presentment if they have the force of law.

**Make an Inference**

Ask: What do you think a joint resolution is? (A joint resolution is a legislative measure on a single subject that requires approval by both the House of Representatives and the Senate and is sometimes presented to the President for his signature.)

**Discussion Questions**

1. According to your book, what is the difference between a concurrent resolution and a simple resolution? (Concurrent resolutions are passed by both houses and affect the procedures of both houses. Simple resolutions apply to the operation of only one house of Congress.)

2. What is the difference between a bill and a resolution? (A bill must be presented to the President. A resolution does not have to be presented to the President unless it is intended to become law.)

**Bill of Attainder** — Article I, Section 9, Clause 3

*Essay by Daniel Troy (pp. 154–155)*

The Constitution prohibits the federal government (and state governments, as we will study in Lesson 14) from passing bills of attainder and ex post facto laws. In common law, bills of attainder were legislative acts that condemned certain per-
sons or groups of persons to death without a trial. Bills of attainder also denied the condemned persons' heirs the right to inherit their estates. States enacted bills of attainder after the American Revolution. The Framers forbade bills of attainder as part of a strategy to undo the English law of treason and to guard against serious acts of legislative tyranny.

Chief Justice John Marshall argued that bills of attainder violated the separation of powers. In passing a bill of attainder, Congress acts as judge. However, as Marshall explains, only a court can hold a trial, hear the presentation of evidence, and determine the merits of the claims.

Daniel Troy explains that courts have rarely invoked the Bill of Attainder Clause. The Supreme Court did establish a three-part test to determine whether a piece of legislation is a bill of attainder: If the bill specifies the affected persons, includes punishment under a specific definition, and lacks a trial, then it is a bill of attainder. The courts now have a narrow, specific definition of punishment and rarely invalidate legislation on this basis. For example, denying someone government benefits is not considered punishment, but exclusion from employment may be a form of punishment.

**Before You Read**

Explain that bills of attainder were most often issued by the British Crown for serious crimes such as treason. Individuals suspected of such crimes were quickly executed. Kings sometimes used bills of attainder to get rid of nobles who were gaining too much power.

**Active Reading**

Ask: What does the Bill of Attainder Clause prohibit? (the sentencing of individuals or groups of individuals to death or a serious non-lethal punishment without a trial and denying their heirs the right to inherit their estates)

**Check Understanding**

Say: Bills of pains and penalties issued punishments such as banishment or disenfranchisement. Ask: What does the word “banishment” mean? (to require a person to leave his or her home or country) What does the word “disenfranchisement” mean? (to take away a privilege such as voting)

**Discussion Question**

How does the Bill of Attainder Clause support separation of powers? (It prevents the legislative branch from acting as a judge.)
Ex Post Facto Clause — Article I, Section 9, Clause 3

Essay by Daniel Troy (pp. 156–159)

Ex post facto is Latin for “after the fact.” Ex post facto laws criminally punish conduct that was lawful when committed. In other words, people could face punishment for a past action that is now illegal—even though the action was legal at the time it was committed.

There was considerable debate among the Framers of the Constitution with respect to the Ex Post Facto Clause. Ex post facto laws were commonplace in England, and prior to the Constitutional Convention, some states had passed them. Opposition to ex post facto laws was a bedrock principle among the Founders. Hamilton labeled them a tool of tyrants, and Jefferson proclaimed that they violated natural right. James Wilson argued that a constitutional ban would be ineffective since previous state prohibitions against ex post facto laws had been ineffective. Some argued that a ban on such laws was an absolute necessity. Others argued that opposition to such laws was so widespread that a prohibition was unnecessary. Ultimately, the delegates agreed that a ban would support the rule of law and, therefore, included the clause.

The question arose regarding the application of the Ex Post Facto Clause to civil as well as criminal cases. The Founders considered additional language to clarify that ex post facto laws apply to criminal laws but not to civil laws. In Calder v. Bull (1798), the Supreme Court defined an ex post facto law as any law that (1) makes an action committed before the passage of the law criminal, (2) makes a crime and the punishment for it more serious than it was when the crime was committed, (3) changes and increases the punishment for a crime after it was committed, or (4) alters the legal rules of evidence or testimony so that less proof is required for conviction.

The Ex Post Facto Clause was not originally intended to regulate ex post facto civil laws, and there has been minimal application of the clause to civil laws, but Clarence Thomas and Joseph Story have voiced doubts. Current Supreme Court jurisprudence applies the clause to cases where criminal penalties are applied in the laws of criminal disabilities. Analysis of these cases has focused on the type of penalty and what constitutes punishment. Under this interpretation, the clause only guards against the most severe use of legislative power, especially laws where personal liberties are at issue. The Ex Post Facto Clause, however, does not apply to judicial decisions that have a retroactive effect.

Check Understanding

Before class begins, change the rules of your normal classroom procedure. For example, all students must stand at their desks when addressing you. Do not announce this rule change until midway through the period. At this time, tell students that everyone who did not comply with the rule since the beginning of the class will have to stay after school. Then explain that you have just demonstrated how an ex post facto law operates. Discuss with students the implications of these kinds of laws and why the Framers of the Constitution specifically forbade passage of this type of law.
Check Understanding
Say: Ex post facto laws are retroactive. What does this mean? (made effective in the past)

Active Reading
Ask: Why was the Ex Post Facto Clause heavily debated at the Constitutional Convention? (Answers will vary. Some of the Founders thought that ex post facto civil laws were not in and of themselves invalid. Some thought opposition to ex post facto laws was so widespread that a ban was unnecessary. Others argued that a constitutional ban was necessary because past bans were ineffective.

Discussion Question
In what way is an ex post facto law a form of tyranny? (Such a law can be created to persecute a specific individual or group.)

Check Understanding
Have students complete the following assessment to check their understanding of Lesson 8. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.
1. A legislative act condemning a person to death without a trial is called
   a. a bill of attainder.
   b. an ex post facto law.
   c. a bill of pain.
   d. a bill of penalty.

2. A law that punishes someone for an action that was legal when the person committed it is called
   a. a bill of attainder.
   b. an ex post facto law.
   c. a before-the-fact law.
   d. a bill of penalty.

3. According to the discussion of the Presentment Clause, if the President does not sign a bill within 10 days, and Congress is still in session the bill
   a. is automatically vetoed.
   b. must be returned to Congress.
   c. must be approved by Congress.
   d. automatically becomes law.
Unit 2

4. According to the discussion of the Presentment of Resolutions, a declaration of war is an example of a
   a. bill.
   b. joint resolution.
   c. concurrent resolution.
   d. simple resolution.

5. A pocket veto occurs if the President returns a bill to Congress
   a. that is not signed.
   b. when Congress is not in session.
   c. after 10 days.
   d. when Congress resubmits it.

6. Which of the following must be presented to the President?
   a. a bill
   b. a concurrent resolution expressing the sense of the Congress
   c. a constitutional amendment
   d. a resolution

   **Fill in the blank: Write the correct word or words in each blank.**

1. It is unanimously agreed that the President may pocket a veto during a ______ adjournment. (*sine die*)

2. The formal process by which the Congress sends legislation to the President for consideration is called _______. (*presentment*)

3. While a bill requires presidential presentment, a _______ may or may not require presidential presentment. (*joint resolution*)

4. According to the Presentment Clause, if the President vetoes a bill, the bill may still become law if two-thirds of the members of each house of Congress _______ the bill. (*override the veto by voting to approve*)

5. Today, when Presidents pocket a veto, they include a message declaring their objections. This message is called a _______. (*protective return*)

6. The Presentment Clause is one of the most ________ provisions in the Constitution. (*formal*)

7. _______ is not counted in the 10-day period of the Presentment Clause. (*Sunday*)

8. The Framers were determined to deny the national legislature and states the power to issue bills of attainder after witnessing abuses by _________. (*Parliament*)
9. After the Convention, most Federalists believed the prohibition on ex post facto laws applied only to ________ statutes. (criminal)

**Short Answer: Write out your answer to each question.**

1. How long does the President have to sign a bill after he receives it? (10 days)

2. What is a “pocket veto”? (If the President doesn’t sign a bill within 10 days and Congress is adjourned, a bill is considered vetoed.)

3. How do joint resolutions differ from bills? How are they similar? (Joint resolutions differ only in the fact that they usually deal with a single subject. They are similar in the fact that they require presentment to the President and are designed to have the force of law, just as bills do.)

4. What is a “concurrent resolution”? (Concurrent resolutions apply only to subjects affecting the procedures of both houses. They are not “law” and are not presented to the President.)
Unit 3

THE EXECUTIVE BRANCH

Lesson 9: The Office of the Executive

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### Lesson 10: Powers of the Executive

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Lesson Objectives:
When you complete Lesson 9, you will be able to:
• Describe the features and members of the executive branch.
• Explain the roles of the President and Vice President.
• List the official qualifications for the President.
• Describe presidential terms, succession policies, and compensation.
• Explain how the Electoral College works.
• Explain how Amendment XII changed the Electoral College.
• Explain the rules of presidential terms and succession policies under Article II, Amendment XX, and Amendment XXV.
• Explain standards for presidential impeachment.
• Describe the presidential term limit under Amendment XXII.

Part 1:
Role of the Executive

Executive Vesting Clause — Article II, Section 1, Clause 1

Essay by Sai Prakash (pp. 179-182)

The legislature passes laws but needs someone to carry them into action. Article II establishes the executive branch. In Article II of the Constitution, the Executive Vesting Clause gives to the President the executive power. The President’s main role is in executing, or carrying out, the laws of the country. He may do this by giving directions to other officers of the executive branch or removing these officers from their posts. In addition, the President is granted several important powers in foreign affairs and diplomatic matters.

Under the Articles of Confederation, the legislature also held the executive power, creating an inefficient and ineffective executive. Drawing from this experience, the Framers, in making the new executive branch under the Constitution, created an
energetic executive who was highly visible, responsible and unified for clearly defined tasks. According to Sai Prakash, Anti-Federalists disagreed with this vision of a chief executive, but their concerns did not overturn acceptance of the idea.

Although the executive was granted the whole of the executive power and thereby designated the most powerful individual in the government, his powers were carefully checked. Importantly, Congress holds some crucial executive powers that the President lacks, such as the ability to declare war, grant letters of marque or reprisal, or regulate commerce. The Constitution also limits some presidential powers or requires the President to make certain decisions only with congressional consent.

Prakash writes that scholars and historians have interpreted the Executive Vesting Clause in several different ways. Some have incorrectly argued that the clause gives little actual power and is simply meant to designate a role and title. Other interpretations argue that the clause grants the President several other little-known powers, such as some immunity in court or certain emergency powers during a national emergency over other officers in the executive branch, an argument that the Supreme Court has supported. The Vesting Clause has played a limited role in constitutional litigation. The Court, though, has accepted the interpretation that the Executive Vesting Clause grants powers beyond those enumerated in the Constitution. But there are cases where judicial decisions have limited the clause’s reach.

**Before You Read**

Ask: What is the main role of the President? (The President executes laws.)
Why do you think the Framers created a President that way? (Answers may vary. Sample answer: The Framers would have been wary of creating a new king but still knew the power of a single executive in unifying the nation and carrying out his or her duties effectively.)

**Active Reading**

Ask: Why do you think the Framers wanted to limit the power of the President? (Giving too much power to one person would not fit a republican form of government.) What recent experiences likely affected the thinking of the Framers on this matter? (The recent subjugation of the United States to the King of Great Britain, but also the inefficiency of a plural executive under the Articles of Confederation.)

**Active Reading**

Ask: The beginning of this commentary lists some of the President’s powers. What are these powers? (The President may direct and remove executive officers. The President can control the formation and communication of foreign policy and direct America’s diplomatic corps.)
Active Reading

Ask: What type of executive was named in the Articles of Confederation? (A plural executive, meaning more than one.)

Active Reading

Ask: What are two important limitations on the President’s power as stated in the Executive Vesting Clause? (The President does not have authority that is explicitly granted to Congress. For example, he cannot declare war. Specific constitutional provisions may check customary authority. For example, the President can’t make treaties without the consent of the Senate.)

Discussion Question

Prakash notes the differences among the Vesting Clauses of Articles I, II, and III. Read the Vesting Clauses aloud. Why did the Framers have a different Vesting Clause for each branch? (Congress has the legislative power “herein granted,” while the executive and the judiciary have the whole of the executive power and judicial power. The Framers limited the scope of issues to be addressed by the federal government: for example, commerce, currency, and foreign affairs. The states retain all other powers.)
Part 2: 
The President, Vice President, and Cabinet

Presidential Eligibility
Article II, Section 1, Clause 5

Presidential Term
Article II, Section 1, Clause 1

Vice President
Article II, Section 1, Clause 1

Paying the President: Compensation Clause
Article II, Section 1, Clause 7

Where does the Cabinet come from? Opinion Clause
Article II, Section 2, Clause 1

Presidential Eligibility — Article II, Section 1, Clause 5

Essay by James C. Ho (pp. 189-191)

Article II of the Constitution sets out three eligibility requirements for Presidents. One requirement is that a President be 35 years of age. This minimum age is higher than for Representatives or Senators and reflects the Convention’s belief that an older person would be more mature and knowledgeable and better able to carry out the duties of the office.

The Framers also required that a President must have been a “Resident” of the country for 14 years. By contrast, Members of Congress must be an inhabitant of the states they represent. It is unclear if the use of the word “resident” is on purpose, perhaps to ensure that the President would have developed an attachment to and an understanding of the country. Most scholars suggest that the requirement is met if a candidate has spent most of his time in the United States and maintains a permanent domicile there.

The final requirement deals with citizenship. Presidents must be “natural born Citizens,” meaning that they were citizens who were born in the country (or lived there when the Constitution was adopted). This requirement shows a clear preference for citizens who were born domestically and would therefore be loyal to the United States alone. Some scholars have raised questions about the details of this requirement, such as whether people born to United States citizens in other countries are still considered “native born.”

The Twelfth Amendment extended the eligibility requirements to Vice Presidents as well as Presidents. It does not, however, constitutionally cover officials who serve as temporary Acting Presidents.
Before You Read

Ask: What makes a person a citizen? (Answers may vary but may include birth or residency in a country or moving to a country and passing a citizenship test.) In the eyes of the Founding Fathers, how may citizens who are born in this country differ from citizens, who were born in other countries but became citizens? (The Founding Fathers may have thought that citizens born in this country would be knowledgeable of the principles and practices of republican government. Unlike individuals who were born in another country and were subject to the sovereign of that country, natural-born citizens would be loyal only to the United States.)

Active Reading

Read aloud the second paragraph in the Presidential Eligibility essay on page 189. Ask: Do you think this age requirement is appropriate? (Answers will vary.) How may people’s ideas about age have changed since the writing of the Constitution? (Possible answer: People tend to live longer. If the Constitution were written today, the age requirements might be higher.)

Presidential Term — Article II, Section 1, Clause 1

Essay by David F. Forte (pp. 182-183)

Outlining rules for presidential terms was a complicated task for the Constitutional Convention. The Framers faced two main considerations: the length of a single term in office and the possibility of reappointment after the first term. Both of those topics led to significant debate in the Convention.

Most delegates agreed that a President should be eligible for reappointment. The possibility of reappointment would encourage a President to perform his duties well and allow tested and qualified Presidents to serve the country for an extended time. However, delegates disagreed on whether the legislature or the people should reappoint the President. Appointment by the legislature would make the executive too dependent on the legislature, and therefore unable to check it sufficiently. Reappointment would be in the hands of the public.

After determining that reappointment would be possible, the delegates debated the presidential term limit. According to David F. Forte, proposals ranged from three years to 20 years. Convention members compromised on a term of four years, long enough to make a strong positive effect without becoming a threat to democracy.
**Vice President** — Article II, Section 1, Clause 1

*Essay by David F. Forte (pp. 183-184)*

The Framers also included another important office within the executive branch: the Vice President. The Vice President would be elected at the same time, for the same term, and by the same constituency as the President. Under Article II, the Vice President would be the individual who received the second most votes in the Electoral College (the person with the majority of votes would be President). The Framers intended the Vice President to be linked closely to the President and the executive branch, but to lack any constitutionally mandated executive powers. There would be no plural executive. Basically, the Vice President had little purpose except to take the President's place should the higher office become vacant.

Even though the Twelfth Amendment changed the selection process for the Vice President, the purpose of the Framers remained: the Vice President and President would be free from legislative control. However, the Vice President has the constitutional duty to serve as President of the Senate. This mixing of power between branches concerned some Framers. In reality, for 140 years, the primary role for Vice Presidents was legislative, though without much influence. Only in the 20th century did Vice Presidents gain more executive responsibilities. Forte writes that by the 1950s, Vice Presidents had become busy and important executive officials.

**Before You Read**

Encourage students to review their existing knowledge before proceeding. That can help them understand new material more efficiently.

Ask: How long is a President normally in office? (Four years) What happens if a President dies or becomes unable to lead the country? (He is replaced by the Vice President.) What is the effect of these conventions on our country? (Answers will vary.)

**Discussion Questions**

1. According to Forte, the original understanding of a Vice President is the candidate in a presidential election who got the second-highest vote count (second to the President). Do you think this system would work today? What challenges might it create? (Sample answer: This system would not work today because of the strong political party system in America. Usually, the two top vote-getters are members of different parties and have many different ideas and agendas. If forced to work together, these candidates might be confrontational and ineffective.)
2. How did Vice President John Tyler’s behavior change people’s attitudes toward Vice Presidents? What problem did this pose to future Vice Presidents? (Sample answer: Vice President Tyler succeeded to the presidency after the President’s death. Tyler claimed that he was the new real President, not just a stand-in. Other Vice Presidents have done the same after him. This behavior may cause problems, however, for Vice Presidents that are pushed to replace Presidents who are only temporarily disabled.)

3. Under the Articles of Confederation, there was a group of people who exercised the executive power. The Constitution, though, established a unitary executive. What were the problems with a plural executive? (Sample answer: In the event of disagreement among the executives, no action would be taken. With several people responsible, there is no sole responsibility. Each member of the executive can blame another member for ineffective execution.)

**Compensation Clause** — Article II, Section 1, Clause 7

*Essay by Robert Delahunty (pp. 192-193)*

Article II further outlines the presidential office by setting up guidelines for compensation. The Framers decided that Presidents should be paid for their work, although their salary cannot be altered during their time in office. In addition, Presidents were prohibited from accepting any “Emolument” from any federal or state government during presidency.

These requirements, according to Robert Delahunty, would keep the President independent of other branches of government, prevent conflicts of interest, and reinforce the separation of powers. Lawmakers in modern times have examined the Compensation Clause of Article II to render decisions about retirement benefits to Presidents and lawsuits over Presidents’ property.

**Active Reading**

Point out the use of the word “emolument” in the Constitution. Read aloud the sentences containing the word. *Ask: What do you think the word “emolument” means?* (Money, privileges, or other advantages a person may gain from a job)

**Make a Real-Life Connection**

Point out the two case studies on page 193 about Presidents Ronald Reagan and Richard Nixon and their testing of the Compensation Clause. *Ask: What do you think about this clause and the rulings that clarified it? Do you think it was used correctly in these cases?* (Answers will vary.)
Where the Cabinet Comes From: Opinion Clause –
Article II, Section 2, Clause 1

*Essay by Todd Gaziano (pp. 201-203)*

The Opinion Clause in Article II of the Constitution sets up a system by which the President may require written information from the heads of the executive departments to assist in decision-making. As Todd Gaziano notes, the Founders were careful not to create a “privy council” or group of prime ministers who share the President’s executive duties. These advisors have no formal constitutional power over the President because the President alone shoulders the responsibility for decisions. In practice, though, this clause enabled Presidents from George Washington forward to assemble a group of advisors known as the Cabinet to advise and serve the President in various ways.

**Check Understanding**

Have students complete the following assessment to check their understanding of Lesson 9, Part 1 and 2. Review any material for questions they have missed.

**Multiple Choice: Circle the correct response.**

1. The President is the head of the
   a. Legislative branch
   b. **Executive branch**
   c. Judicial branch
   d. None of the above

2. The official behind the Vice President in the line of succession is
   a. Majority leader
   b. **Speaker of the House**
   c. President
   d. President Pro Tempore

3. The Compensation Clause deals with the question of presidential
   a. Qualifications
   b. **Compensation**
   c. Terms in office
   d. Voting

4. Presidents must be at least _______ years old to take office.
   a. 25
   b. 30
   c. **35**
   d. 40
5. Under normal circumstances, a President will stay in office for a term of _______ years.
   a. Two
   b. Four
   c. Five
   d. Six

6. By the 1950s, Vice Presidents had taken on more _______ duties.
   a. Executive
   b. Economic
   c. Judicial
   d. Congressional

Fill in the blank: Write the correct word or words in each blank.
1. The _______ Vesting Clause gives the President his powers. (Executive)
2. Congress, not the President, has the executive authority to declare _______. (war)
3. Members of the Constitutional Convention proposed term limits ranging from three years to _______ years. (20)
4. One of the Vice President’s most important roles is to serve as President of the _______. (Senate)
5. Anti-Federalists disagreed with the concept of having only one _______. (President)

Short Answer: Write out your answer to each question.
1. What are the age, citizenship, and residency requirements for the President? (The President must be at least 35 years of age, must be a natural-born U.S. citizen, and must have been a resident of the U.S. for 14 years.)

True / False: Indicate whether each statement is true or false.
1. The Constitution requires the President to form a Cabinet. (False)
2. The Constitution establishes a unitary executive. (True)
3. The President’s compensation ensures he will be independent from legislative control. (True)
Part 3:
Selecting a President

Presidential Electors
Article II, Section 1, Clause 2, 3

Electoral College
Article II, Section 1, Clause 3

Amending the Electoral College
Amendment XII

Presidential Vote
Article II, Section 1, Clause 4

Presidential Electors — Article II, Section 1, Clause 2, 3

*Essay by Einer Elhauge (pp. 184-186)*

The Constitutional Convention designed a unique method to select the President called the Electoral College. This plan called for the creation of a college of electors who would be responsible for choosing the chief executive. Each state would appoint its own electors, the number of which would be determined by the number of Senators plus the number of Representatives in the House. For instance, if a state had one Representative in the House and two Senators, it would have three electors. These electors would select the President and Vice President.

A primary concern for this plan was how the electors would be chosen. The Framers proposed and discussed many options. They chose not to allow Congress to select either the President or the electors, since that would give the legislative branch power over the executive. The Framers also opted against popular election of the President or the electors, because the populace would not have enough information about national candidates to select the President and it would be difficult to form a majority around one candidate for elector. As a result, the Convention finally decided to give the responsibility to the states to choose electors, who would then select the President. State legislators, the Convention believed, would be able to choose knowledgeable electors, who in turn would select the wisest, most virtuous executive.

By 1880, all state legislatures had chosen to allow popular election of presidential electors. Under current practice, citizens were able to choose a President’s name on Election Day. Each citizen’s vote, however, actually selects a slate of electors who pledge to select the presidential candidate in accordance with the people’s vote. (Changes in state law required electors to cast their votes in accordance with the outcome of the popular election.) This system has led to some conflicts between state constitutions and state legislatures. Additional questions occasionally arise about the judicial role in this process, such as in *Bush v. Gore* (2000).
Make a Real-Life Connection

Have students calculate how many electors their state has. As a class, make a chart of all the electoral voters for each state and the District of Columbia. Have students determine both the least number of states needed for a candidate to receive a majority of votes and the most number of states needed for a candidate to receive a majority of votes. (Answers will vary depending on the last census.)

Electoral College — Article II, Section 1, Clause 3

*Essay by Tadahisa Kuroda (pp. 186-188)*

Article II of the Constitution articulates specific guidelines for the Electoral College. These handpicked electors were to meet in their home states to reduce the risk of corruption should they all meet in one place. Each elector would cast two votes; one vote had to be for a candidate from another state. This two-vote provision was designed to increase the chances of a presidential candidate winning a majority vote.

The Framers also built in several safeguards against potential future confusion and conflict with electoral votes. For instance, if a state fails to appoint electors, the number needed for a majority vote is reduced accordingly. In the case of tie votes, the House of Representatives is allowed to choose from among the top candidates. According to Tadahisa Kuroda, the House was chosen because it was elected by the people and therefore best represented public interests. The Twelfth Amendment would modify and expand on the procedure for Electoral College voting.

After the Electoral College casts its votes, the Vice President performs one of his two constitutional duties; which is opening the votes. The Vice President, however, does not count the votes. Kuroda notes that the role of the Vice President is closely linked to the creation of the Electoral College voting system, since originally the candidate with the most votes became President, and the runner-up became Vice President.

Before You Read

Ask: What do you know about the Electoral College? Do people generally view it favorably or unfavorably? (Answers will vary. Students may say they’ve heard criticism of the Electoral College based on the popular belief that it makes elections more complex and less democratic. They may say that the Electoral College preserves the role of states and ensures that the President has broad support.)
Unit 3: Amending the Electoral College — Amendment XII

Essay by Charles Fried (pp. 377-379)

The original process of choosing the President and Vice President is described in Article II of the Constitution. The Twelfth Amendment, however, changes an important clause in that section. Under this amendment, electors vote for President and Vice President separately. The House of Representatives selects the President if no candidate receives a majority of electoral votes; the Senate has the same power for the Vice President.

According to Charles Fried, the Twelfth Amendment, ratified in 1804, came about in response to conflicts that arose from the original system of voting. In 1796, John Adams and Thomas Jefferson were elected President and Vice President, though they were members of two different parties. Additionally, voting along party lines often resulted in the House of Representatives selecting the President.

The Twelfth Amendment has occasionally been invoked when no candidate received a majority of votes, such as in the disputed elections of 1824 and 1876. In addition, this amendment states that the Vice President shall act as President, if the House has not selected a President by Inauguration Day. This latter use has been revisited and revised by the Twentieth and Twenty-fifth Amendments.

Before You Read

To ensure understanding, ask: How do third parties usually affect elections? What happens if no candidates receive a majority of votes? (Answers may vary. Students may answer that third-party candidates seldom win but often draw votes away from other candidates from larger parties.)

Make an Inference

Point out the information about Jefferson and Adams on the bottom of page 378. Ask: What does this suggest about the original selection process for President and Vice President? (The Adams–Jefferson partnership showed that two candidates from opposing parties will not work well together.) How might this process work if it was used today? Imagine real modern candidates forced to work together. (Answers will vary. Students will likely say that no modern candidates, such as Barack Obama and John McCain or George W. Bush and John Kerry, would be very likely to work well together because of their differences of opinion on the role of government.)
Presidential Vote — Article II, Section 1, Clause 4

Essay by Einer Elhauge (pp. 188-189)

Article II, Section 1, Clause 4 gives Congress the power to determine when states appoint their electors and when these electors select the President.

Congress set a uniform day (the Tuesday after the first Monday in November) for states to appoint their electors. If, however, a state does not select its electors on that day, then the state legislature can appoint electors, which functionally extends the time for choosing electors. The historical record indicates that this language was to accommodate inclement weather, flooding, or other factors that kept voters from the polls. There is some ambiguity, though, about when an election fails to make a choice and who gets to decide when no choice was made.

Active Reading

Ask students to consider reasons why there might be some leeway in voting schedules. Ask: Why might this have been especially important in the Framers’ time? (Answers will vary. Possible answer: Voting schedules might have been more open back then because most people traveled by foot or on horse, so any trouble with bad weather might delay voters or keep them from participating altogether.)

Discussion Questions

1. The Constitutional Convention debated the number of electors to be chosen per state. What is the formula they arrived at? Why do you think this is effective or not effective? (Sample answer: The number of electors equals the number of Senators plus the number of Representatives in the state. It ensures that all states participate in the process. It allows a large body of electors that can represent a varied constituency.)

2. How did electoral voting change by the 20th century? What happens when a citizen casts a presidential vote today? (Sample answer: When a citizen votes for a candidate for President, that vote translates into a vote for a slate of electors for the Electoral College. Many state laws require the electors in the Electoral College to cast their votes for President and Vice President in accordance with the election results in their state. So if the citizens of a state vote for Candidate X, the slate of electors sent to the Electoral College pledge to vote for Candidate X.)
Check Understanding

Multiple Choice: Circle the correct response.

1. The number of electors from each state is determined by
   a. Congress.
   b. the state’s legislature.
   c. the number of the state’s Representatives plus the number of
      the state’s Senators.
   d. the number of the state’s Representatives minus the number of the
      state’s Senators.

2. Electors meet in their home states to reduce the risk of
   a. corruption.
   b. miscounted votes.
   c. no majority vote.
   d. partisanship.

3. Who is forbidden from being an elector?
   a. Senators
   b. Representatives
   c. Officeholders in the federal government
   d. All of the above

4. The Framers allowed for some leeway in voting schedules primarily due
to the threat of
   a. foreign intrigue.
   b. warfare.
   c. impeachment.
   d. bad weather.

5. In the case of a tie, the ________ has the power to choose a
   President from the top candidates.
   a. Senate
   b. House of Representatives
   c. Speaker
   d. Supreme Court

Fill in the blank & True and False.

1. ________ has the power to choose a President if no candidate receives a
   majority of electoral votes. (The House of Representatives)

2. ________ has the power to choose a Vice President if no candidate
   receives a majority of electoral votes. (The Senate)

3. After the Twelfth Amendment, electors cast one ballot for President and
   one ballot for Vice President. (True)
Part 4: 
Removing, Replacing, and Term Limiting the President

Standards for Impeachment
Article II, Section 4

Presidential Succession
Article II, Section 1, Clause 6

Presidential Succession
Amendment XXV

Presidential Terms
Amendment XX

Presidential Term Limit
Amendment XXII

Standards for Impeachment — Article II, Section 4

Essay by Stephen B. Presser (pp. 225-229)

Article II of the Constitution sets out the rules by which the President, Vice President, or other officials may be impeached. The Framers defined impeachable offenses as “Treason, Bribery, or other high Crimes and Misdemeanors.” The Constitutional Convention selected these words after considering and rejecting other descriptions. Though there is disagreement on what these misdeeds entail, impeachment is understood to be a remedy for extreme situations.

Just as the description reflects the extreme and serious nature of the offenses and the impeachment proceedings, so does the procedure of the impeachment itself. Impeachment requires a majority vote in the House of Representatives. The case then moves to the Senate, in which a two-thirds vote is required to remove an official from office. Article I, Section 3, Clause 7 lists the punishments for impeachment: a convicted official is barred from “Office of honor, Trust or Profit under the United States.”

The Framers did not want impeachment to be merely a tool for removing officials or a political stunt. The threat of impeachment would encourage honorable behavior in office and would provide a remedy for removing those who betray the interest of the country. The track record of impeachments of Presidents and judges suggests, according to Stephen B. Presser, that impeachments have been conducted sparingly and cautiously.
Only a few officials have been impeached and removed from office. The three most well-known trials have been those against President Andrew Johnson (for firing a Cabinet official without congressional approval); President William Jefferson Clinton (for several scandals including obstruction of justice and lying to a grand jury); and United States Associate Justice Samuel Chase (for Chase’s unusual behavior, short temper, and public criticism of President Thomas Jefferson). None of these men were removed from office.

**Before You Read**

Prompt students to recall what they have already learned about impeachment. Ask: What did you learn about impeachment proceedings in previous lessons about the Senate and House of Representatives? (The House of Representatives has the power to begin the proceedings, and the final determination is made by the Senate.)

**Make a Real-Life Connection**

Ask students to consider what Presser wrote about Jefferson’s motivations in impeaching Justice Chase. Ask: When else might officials use impeachment or other accusations for political reasons? What might occur if a current leader was targeted by a political opponent in such a manner? (Answers will vary.)

**Presidential Succession** — Article II, Section 1, Clause 6

*Essay by John Feerick (pp. 191-192)*

Article II of the Constitution outlines a system of presidential succession. If the President dies, resigns, or becomes unable to carry out his duties, the Vice President will take charge. If the Vice President is also incapacitated, Congress may choose another officer to serve until a new President can be elected.

This provision led to a great deal of debate and concern in the Constitutional Convention as well as in early Congresses. In 1792, Congress decided that the line of succession would be the President, Vice President, President Pro Tempore of the Senate, and Speaker of the House of Representatives. But, because of criticism, this law was never implemented.

According to John Feerick, it is unclear whether a Vice President becomes President or is just a substitute. In 1841, Vice President John Tyler set a precedent. Following the death of William Henry Harrison, Tyler claimed to be the President. Since then, the operating principle has been that Vice Presidents become Presidents in the event of death, incapacity, or vacancy of the office. This principle was codified in Amendment XXV.
Before You Read

Point out that Presidents and other officials may create precedents and other informal policies. Ask: What is a precedent? (A behavior that demonstrates an idea that is later used as an example) What are some examples of precedents? (Answers may vary. Students may point out the precedent set by Vice President John Tyler regarding the powers of an appointed President, as discussed earlier in Lesson 9. Other students may point to the precedent set by President Eisenhower in this section.)

Presidential Succession — Amendment XXV

Essay by John Feerick (pp. 429-431)

The Twenty-fifth Amendment revisits presidential succession as outlined in Article II of the Constitution. Article II is unclear about the circumstances under which a President may be deemed unable to discharge his duties and the status of a Vice President when a President dies, resigns, or is incapacitated.

There have been many cases when a President died and was replaced by a Vice President. Beginning in 1841, when Vice President John Tyler took over the presidency after the death of President William Henry Harrison, succeeding Vice Presidents have generally taken on the full duties of regularly elected Presidents. However, there was much question and concern over whether a Vice President taking the presidency due to the President's disability (as opposed to death) would become a new and permanent President or just a temporary replacement.

According to John Feerick, President Dwight D. Eisenhower adopted an informal policy under which Vice Presidents would serve only as Acting Presidents until the elected President declared himself or herself capable of resuming office. The main tenets of this policy and other guidelines were later added to the Constitution in the Twenty-fifth Amendment, which describes the process by which a vacancy in the vice presidential office may be filled.

Research It

Point out the listing of Presidents and Vice Presidents on page 430. Ask students to choose one President/Vice President pair and research their time in office, the reason for succession, and the results of that succession. Students may consult their texts, other books, or online resources for more information. Have students write notes on their findings and then share with the class.
Unit 3

Presidential Terms — Amendment XX

Essay by John Copeland Nagle (pp. 419–421)

According to John Copeland Nagle, the Twentieth Amendment contains mostly technical details and small structural changes to the Constitution and may be considered one of the least controversial amendments. This amendment contains six clauses that deal with presidential term limits and succession and the manner by which the amendment may be approved and enacted.

The first two clauses deal with the “lame-duck” period after an election occurs but before the new officials take office. The creators of the Twentieth Amendment hoped to eradicate lame-duck sessions, since Representatives had been chosen to replace many sitting Members of Congress. In particular, these Framers wanted to ensure that no Presidents would be appointed during lame-duck sessions.

The other major parts of the amendment focus on what should occur if a President or Vice President dies, especially before beginning his term in office. These clauses (Sections 3 and 4) are meant to safeguard the country from any circumstance in which there is no President in office.

Although the Twentieth Amendment was ratified quickly and is not the subject of litigation, its meaning is still debated.

Before You Read

Explain to the students that the Twentieth Amendment is known as the lame-duck amendment. Ask: What is a lame duck? (A person still in office after a successor has been chosen) How do you think that unusual term came to be? (The term likely came from a literal lame duck: a duck that could not keep up with the others in its flock and became a target for hunters or predators.)

Presidential Term Limit — Amendment XXII

Essay by Bruce Peabody (pp. 424–425)

According to Bruce Peabody, the Constitutional Convention considered regulating the number of times a person may be elected President but ultimately chose not to do so. When President George Washington retired after two terms, he set a precedent that presidents would serve no more than two terms. When President Franklin D. Roosevelt was elected to four terms in office, Congress passed the Twenty-second Amendment to cap the number of presidential terms at two.

Peabody explains that there are ambiguities about the application of the amendment. The amendment was agreed upon and added to the Constitution without much discussion, debate, or subsequent testing in court.
Active Reading

Peabody writes that the Twenty-second Amendment has not been challenged in any significant way since its ratification. **Ask: Why do you think that is?** (Answers may vary. Students may say that not many Presidents desire to serve more than two terms, that Washington’s precedent worked very well and should not be changed, or that few Presidents have been popular enough to be reelected numerous times.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 9, Part 4. Review any material for questions they have missed.

**Multiple Choice: Circle the correct response.**

1. The first President to serve two terms in office was
   a. George Washington
   b. Harry Truman
   c. John Adams
   d. Andrew Johnson

**Fill in the blank: Write the correct word or words in each blank.**

1. ______ is the only constitutional way to remove a President. *(Impeachment)*

2. There is no doubt that the Framers saw ______ as a part of the system of checks and balances to maintain the separation of powers and the republican form of government. *(impeachment)*

3. Early on, the acquittal of Justice Samuel Chase set the standard that Supreme Court Justices should not be impeached on the ground of their ______ preferences. *(political)*

4. The responsibility to carry out impeachment proceedings with loyalty to the text of the Constitution remains that of the_____________.
   *(House of Representatives and Senate)*

5. A time when an official is still in office even after a new official has been elected is referred to as a ______ period. *(lame-duck)*

**Short Answer: Write out your answer to each question.**

1. What does the Presidential Succession Clause of Article II do? *(It provides for the Vice President to serve as President in the event of the President’s removal, death, resignation, or inability to serve. It authorizes Congress to establish a line of succession.)*
2. What does the Constitution give as grounds for impeachment? (treason, bribery, other high crimes and misdemeanors)

3. According to Amendment XX, when do the President and Vice President’s terms of office end? (January 20)

4. According to Amendment XXII, a person can be elected President for how many terms? (two terms)

**True / False: Indicate whether each statement is true or false.**

1. The President of the United States may pardon an individual who has been impeached. (False)

2. The Framers placed specific grounds for impeachment in the Constitution because they wanted to prevent impeachment from becoming a politicized offense, as it had been in England. (True)
Lesson 10

THE POWERS OF THE EXECUTIVE

Lesson Objectives:

When you complete Lesson 10, you will be able to:

• Describe the main executive powers of the President.
• Understand the President’s oath of office.
• Explain the President’s role in the lawmaking process.
• Understand the President’s pardon power.
• Explain the President’s role in the military and in foreign relations.
• List the President’s appointment powers.
• Describe the ways the executive interacts and communicates with Congress.

Part 1:

Upholding the Constitution and Executing the Law

Oath of Office
Article II, Section 1, Clause 8

Take Care Clause
Article II, Section 3

The President’s Role in the Law-Making:
Presentment Clause and Pocket Veto Powers
Article I, Section 7, Clause 2–3

Pardon Power
Article II, Section 2, Clause 1

Commissions
Article II, Section 3
While the previous lesson discussed the office of the executive and the qualifications for, selection of, limitations on, and removal of the executive, Lesson 10 will discuss the powers of the President. The Executive Vesting Clause in Article II of the Constitution grants the President the executive power.

The executive exercises vital powers in foreign and domestic areas. He is principally responsible for the nation’s foreign policy: He negotiates treaties, receives ambassadors, and serves as commander in chief of the military. The President may appoint officers. He is responsible for executing, or carrying out, the laws of the land, but also has the discretion to pardon.

Though the Founders created a unitary executive, the legislature exercises several important checks on the executive, holding the power to declare war, advise and consent to appointments, and ratify treaties. As the only wholly national figure, the President reports to Congress on the State of the Union. The President may convene sessions of Congress and has a duty to provide recommendations for legislation.

**Oath of Office** — Article II, Section 1, Clause 8

*Essay by Vasan Kesavan (pp. 194-195)*

After a President is elected to office, he must take the oath of office in order to exercise any executive power. Article II of the Constitution contains the Presidential Oath Clause. Under this clause, a new President must swear to be faithful to the office and do his best to preserve and protect the Constitution. The oath is typically administered by the Chief Justice.

Although Article VI of the Constitution requires federal officers to take oaths in support of the Constitution, the oath for Presidents was specifically included as an internal check to ensure a well-behaved, virtuous executive. According to Vasan Kesavan, some scholars debate whether this oath limits or extends presidential powers. The location and phrasing of the clause suggest that it is limiting insofar as it limits how the President’s executive power is to be exercised. Some scholars, however, think it gives the President extra power to interpret the Constitution and to act in protection of the country.

**Before You Read**

To ensure understanding, ask: What does the word “oath” mean? (An oath is a very solemn promise.) What power does an oath have? (An oath can hold a person to an agreement into which he or she has entered.)
Make an Inference

Remind students that Article VI of the Constitution requires all officers of the United States to take an oath to support the Constitution. Why do you think the Founders included the oath for President but did not write an oath for the rest of the officers? Why are the two oaths different? (Answers will vary.)

What is the significance of the placement of the Oath of Office Clause? (It is positioned after the clauses that set forth the organization of the executive office and before the clauses that specifically shape the executive’s power. In other words, the President is supposed to take the oath after he assumes the office but before he executes it.)

Take Care Clause — Article II, Section 3

*Essay by Sai Prakash (pp. 222-224)*

The Take Care Clause, also known as the Faithful Execution Clause, sets out the main responsibility of the President: He must “take Care that the Laws be faithfully executed.” Based on the Pennsylvania and New York constitutions, the Take Care Clause makes the executive responsible for the enforcement of laws. In fact, George Washington understood this clause to mean he had a duty to execute federal law. This clause does not mean that the President is without discretion or that he is a mere overseer of the execution of laws. The President has broad discretion over how and when to enforce the law. The President may not take actions that are not authorized either by the Constitution or by a valid law.

The President’s discretion has led to controversy. For instance, Sai Prakash describes one controversy regarding congressional appropriations. Presidents since Thomas Jefferson have been impounding funds or even refusing to use any money for particular programs. Opponents of the practice argue that the Take Care Clause reveals impounding to be unconstitutional. This practice is now rare, since the Supreme Court held that President Richard Nixon did not have broad authority to impound funds.

In the modern era, there are two significant challenges to the President’s responsibility to take care that the laws are executed: administrative agencies and the judiciary. Administrative agencies, which we discussed in Lesson 7, execute certain federal laws but are not accountable to the President. Judges have taken it upon themselves to determine whether laws have been executed properly, even when the person or group bringing the case before the court lacks standing (meaning that they have not suffered a wrong or harm). Prakash explains that this behavior is problematic because the executive is responsible for executing the laws, while judges may address the application of the law only when there is a case of before them.
Before You Read

Ask students to think about the words “take care.” Ask: How might a President “take care”? (Answers will vary. Students may say that if the President takes care, he acts carefully or takes responsibility.)

Active Reading

Read aloud this sentence from page 222: “Plainly, the President need not enforce every law to its fullest extent.” Ask: What does this mean? (Students may say that it isn’t necessary to enforce every law to its fullest extent and that the President may use discretion when deciding how aggressively to execute the law.)

Work in Pairs

Pair up students. Say: The wording in the Constitution often leads to debates about how it applies today. It is not always clear what the Framers meant. Ask students to read the Take Care Clause and find other ways of wording it to express its meaning more clearly. Then have them share their findings with the class.

Discussion Question

Should the President have the power to refuse to enforce a law that he thinks is unconstitutional? Why or why not? (Answers will vary. Students may say that the President receives his power from the Constitution and takes an oath to preserve the Constitution; therefore, if he determines a law to be unconstitutional, he does not have a duty to enforce it. Some students may argue that the President should not be able to substitute his interpretation of the Constitution for that of the other branches.)

The President’s Role in Law-Making: Presentment Clause and Pocket Veto Powers –
Veto Powers of Article I, Section 7, Clause 2–3

*Essay by Michael B. Rappaport (pp. 86-89), essay by David F. Forte (pp. 89-91)*

The Presentment Clause, or Lawmaking Clause, outlines the exclusive method for the passage of federal statutes. One of the most formal and detailed clauses in the Constitution, the Presentment Clause involves both the legislative and executive branches in the law-making process: All federal bills must pass both houses of Congress and be subject to the President’s veto. The President has 10 days to review a bill and to approve or veto it. If the President vetoes the bill, he must return it to the chamber in which it originated, either the House of Representatives or the Senate. Congress may override the veto if a two-thirds majority passes the bill in both houses.
But what happens if the President refuses to approve the bill or to return it to Congress? What if the President vetoes the bill but Congress is not in session to receive it and therefore not able to override the veto? The Pocket Veto Clause addresses these issues. According to the Pocket Veto Clause, if Congress is adjourned, the bill will not become law. That is, if the President does not want to veto the bill in the traditional manner, he can simply hold on to it until Congress adjourns. The bill then “dies.”

Check Understanding

What are some reasons a President might veto a bill? (Sample answers: The President may think the bill is unconstitutional. The President may disagree with the policy.)

Pardon Power — Article II, Section 2, Clause 1

Essay by James Pfiffner (pp. 203-205)

James Pfiffner writes that the pardon power, as outlined in Article II, is one of the President’s most unregulated powers. The presidential power to pardon was derived from the Royal Prerogative of Kings. During the period under the Articles of Confederation, many state constitutions granted their governors power to pardon. In the Constitution, the President’s pardon power has two limitations: The offenses must be against the country (i.e., pardons could not excuse violations of state law alone), and they cannot be used in cases of impeachments (i.e., the President cannot pardon himself).

The pardon power is subject to the President’s discretion. It is meant to reflect mercy as well as to carry out justice in the event of wrongful conviction. The pardon power also serves broader public-policy purposes. For instance, the President ensures peace and tranquility when using the power to defuse rebellions or other internal struggles.

Before You Read

Ask: Have you ever heard someone say, “Pardon me.” What do you think the word “pardon” means? (To forgive or excuse.)

Group Work

Break students into small groups. Have them use the Internet to find a list of persons pardoned by former President George W. Bush and former President William Jefferson Clinton. Have the group research one person’s crime and the reason for the pardon and present their findings to the class.
Unit 3

**Active Reading**

Point out Pfiffner’s mention of various groups whose members were pardoned by Presidents. Ask what crimes did these groups commit and the reasons for or effects of their pardons. (The Confederates attempted to leave the United States; the Whiskey Rebels started a rebellion over taxes; Vietnam draft evaders refused to serve in the armed forces when instructed to do so. Other answers may vary.)

**Discussion Question**

Do you think the President should have the power to pardon individuals? Why or why not? (Some students may argue that the President should not have the power to pardon because such a power is too easily abused. Some students will say that the President should have the power to pardon because sometimes justice requires mercy, which the law cannot accommodate.)

**Commissions** — Article II, Section 3

*Essay by Trent England (pp. 224-225)*

Trent England writes that in British tradition, the king created offices and granted commissions as he thought appropriate. Early Americans rejected this practice because they believed it consolidated too much power in the executive. Following Independence, the new state and national governments experimented with decentralized methods of appointing and commissioning officials. In crafting the Constitution, the Framers decided that the power to grant commissions was indeed an executive function and therefore vested in the President the power to “Commission all the Officers of the United States.”

The Appointment power begins with the creation of an office, generally done by Congress. The President nominates principal officers, and the Senate confirms them. Congress may by law vest the appointment of inferior officers in other persons or departments (but not in Congress itself). Finally, the President commissions the chosen officers. The placement of the Commissions Clause is instructive. It is attached to the Take Care Clause rather than included in the discussion of appointments in Article II, Section 2. Though the executive power is vested in the President alone, these clauses suggest that the President exercises this power through government officials, and the President is ultimately accountable for these officers and the decisions they make.
Before You Read

Say: “If I commission [insert a student’s name] to be my assistant, what I have done?” (Made or appointed the student as your assistant.) The Commission Clause gives the President permission to appoint all officers of the United States.

Before You Read

Help students understand the meaning of “officer” as it is used in this clause. Say: The President’s officers are members of his Cabinet. Examples include the Secretary of State, Secretary of the Treasury, Secretary of Defense, and Attorney General.

Check Understanding

Have students write a summary about the way in which the Framers structured the appointment power. (Congress creates the office, and the President appoints principal officers. The Senate approves the nominees, and the President commissions the officers.)

Discussion Questions

1. What is significant about the placement of the Commissions Clause? (Rather than being nestled in the discussion on appointments in Article II, Section 2, the clause is attached with a comma to the Take Care Clause, contemplating that the President will supervise others in their enforcement of the law.)

2. What safeguard exists to ensure that the President does not commission an officer who is unqualified for the job? (The Senate must approve the President’s nominees.)

Check Understanding

Multiple Choice: Circle the correct response.

1. If the President pardons an individual, the individual is
   a. on parole.
   b. forgiven and set free.
   c. given a reduced sentence.
   d. given a new trial.
Fill in the blank: Write the correct word or words in each blank.
1. The President may issue a pardon for an offense against the country unless it involves _______. (impeachment)
2. According to the Constitution, Presidents are required to “take _______ that the Laws be faithfully executed.” (care)
3. The executive power is vested in the _______ alone. (President)
4. In the Presidential Oath Clause, the President pledges to “______, ______, and _______ the Constitution of the United States.” (preserve, protect, and defend)

Short Answer: Write out your answer to each question.
1. When can a pardon be issued? (from the time an offense is committed or even after full sentence has been served)
2. Why can’t a pardon be issued before an offense has been committed? (This would give the President the right to waive the laws, which he cannot do.)
3. What are the purposes of the pardon power? (to temper justice with mercy in appropriate cases and to do justice if new or mitigating evidence comes to bear on a person who may have been wrongfully convicted)

True / False: Indicate whether each statement is true or false.
1. The Framers wanted to maximize presidential responsibility for executive decisions. (True)
2. The Oath of Office Clause is one of several that employ the oath concept, but it’s the only clause that actually specifies language of an oath for a constitutional player. (True)
3. The pardon tool has not been a very powerful constitutional tool of the President. (False. The pardon tool has been and will remain a powerful constitutional tool of the President.)
4. By leaving the advice structure entirely to the President’s discretion, the Framers actually increased the likelihood that the President will obtain useful advice from his principal officers. (True)
5. The Oath of Office Clause empowers the President. (False. The Oath of Office Clause limits how the President’s “executive power” is to be exercised.)
Part 2:  
The President and Foreign Policy

**Commander in Chief**  
Article II, Section 2, Clause 1

**Commander of Militia**  
Article II, Section 2, Clause 1

**Treaty Clause**  
Article II, Section 2, Clause 2

**Ambassadors**  
Article II, Section 3

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**Commander in Chief** — Article II, Section 2, Clause 1

*Essay by John Yoo and James C. Ho (pp. 195-198)*

Under Article II of the Constitution, the President is commander in chief of the armed forces. In early America, people gave their political leaders few powers in times of war. After seeing the failures of weak executive power under the Articles of Confederation and in state governments, the Framers opted for a single, energetic, decisive leader in times of war. The Framers, however, did not want an unchecked executive and therefore granted Congress certain powers, such as the power to declare war and control military resources, to check the executive. To put it another way, the executive held the “sword,” but the legislature held the “purse” (meaning responsibility for budget matters).

As was discussed in Lesson 6, there is much debate on the extent of Congress’s authority to check the President’s commander in chief power. John Yoo and James C. Ho divide the sides into the Congressionalists and Presidentialists. Both sides cite the text of the Constitution and the words of the Framers to support their positions. Congressionalists argue that the Declare War Clause and the Marque and Repression clause grant Congress broad power over wartime activities: specifically, that the President has no authority to initiate hostilities without prior approval from Congress. Presidentialists argue that Congress retains only power over funding and removing executive officers. They argue that the Executive Vesting clause together with the Commander in Chief Clause confer substantial power on the President to engage military forces in hostilities and draw a distinction between Congress’s power to “declare war” and the President’s ability to repel invasions of military force. The modern debate over the allocation of war powers between Congress and the President was triggered by the establishment of a large peace time military force after World War II.
Modern Congressionalists have tried to cement their position by passing the War Powers Resolution, which limits presidential ability to engage hostility and requires congressional consultation for military deployments. This act has proved ineffective, since Presidents enter various conflicts or use military force without congressional approval.

Research It
Point out Yoo and Ho’s mention of the War Powers Resolution on page 198. Ask students to use the material in the text, in other books, and in online resources to find more information about this resolution and its origins, effects, and status today.

Commander of Militia — Article II, Section 2, Clause 1

*Essay by David F. Forte (pp. 199–201)*

Article II grants the President the power to be the commander in chief of the militia. Although the Framers agreed that there should be a national army, they still placed great importance on the militia. When the state militias were called into national service, the President would command them.

In 1792, Congress passed the Uniform Militia Act, which allowed the President to call out the militia to put down rebellions or insurrections. The militia assisted federal forces in several campaigns against American Indians in the Ohio Territory. In 1794, President George Washington issued the first formal call for the militia to put down a rebellion, the Whiskey Rebellion. In subsequent years, Presidents exercised control over the state militias. In 1795, Congress broadened the President’s ability to call forth and command the militia in times of insurrection and invasion, leading state governors to challenge the President’s power. The Supreme Court affirmed that the President’s power over the militia is coextensive with his power over the rest of the armed forces when the militia is engaged in national duties.

The militia system faded after the Civil War but returned with the 1916 National Defense Act as the National Guard. Although state governors have occasionally challenged the use of their states’ Guard units by the federal government, the President has maintained control. Since that time, National Guard members have served as draftees or reserves for the regular Army and have helped to suppress domestic uprisings.
Before You Read

Ask: What is a militia? (A militia is an organization of part-time civilian soldiers.) How does it compare to a regular army? (A regular army contains professional soldiers and is always on duty.) Why might a country have both at the same time? (Militias are easier and less expensive to raise and maintain, and they can be controlled by states instead of a central government.)

Research It

David F. Forte mentions Washington’s use of the militia to put down the Whiskey Rebellion and Eisenhower calling on the National Guard in the Little Rock High School standoff of 1957. Ask students to research the events and write a short paper comparing and contrasting how the Presidents used their power over the militia in each situation.

Treaty Clause — Article II, Section 2, Clause 2

Essay by Michael D. Ramsey (pp. 205-209)

As discussed in Lesson 4, the Treaty Clause is one of the few clauses that divides an executive power between the President and Congress. According to this Article II clause, the President may make international treaties, but the supermajority of the Senate must ratify treaties in order for them to have the force of law.

The Framers saw treaties as involving a combination of foreign policy (the responsibility of the President) and law-making (the responsibility of Congress). Because treaties become the law of the land, they are not to be entered into or ratified without great care.

According to Michael D. Ramsey, some questions remain regarding the Treaty Clause. First, is the Treaty Clause the only way to enter international obligations? Second, how should the President and the Senate interact as they exercise their joint power? Third, who terminates a treaty: the President alone, Congress alone, or the President with consent of two-thirds of the Senate? Finally, what are the limits of the treaty power?

The modern practice of treaty-making largely conforms with the Framers’ vision. The President negotiates treaties, but there is often much consultation between the executive and the members of the Senate. The Senate sometimes approves the treaties with conditions.
The modern practice of executive agreements departs from the Framers’ vision in certain respects. Executive agreements covering matters within the President’s executive power and made pursuant to a treaty or to an Act of Congress seem to align with the Framers’ vision. But executive-congressional agreements that have the consent of the majority of both Houses of Congress and executive agreements made without the approval of Congress or the Senate are more problematic.

Before You Read

Ask: What is a treaty, and what effects may it have? (A treaty is an agreement, often between different countries. Treaties may be economic or military or may have many other functions.) What sorts of treaties might countries make? (Countries make treaties with one another to end conflicts, to start partnerships, and for many other purposes.)

Ambassadors — Article II, Section 3

Essay by Matthew Franck (pp. 220-221)

Article II of the Constitution gives the President the duty to receive ambassadors and other important ministers of foreign nations. Under the Articles of Confederation, Congress received ambassadors, but the Convention vested this power in the executive. Receiving ambassadors amounts to recognizing a nation’s government. Refusing to receive an ambassador amounts to a decision not to “recognize” a foreign government, or at least not to carry on diplomatic relations with it, which has particular implications in international law.

Whether the clause grants the President the unfettered ability to recognize another nation for diplomatic purposes has been the subject of much debate. In the Pacificus-Helvidius debates, James Madison (as “Helvidius”) argued that receiving ambassadors is a merely ministerial duty, but Alexander Hamilton (as “Pacificus”) argued that the clause gave the President the power to decide the obligations of the nation with regard to foreign nations. As a practical matter, Hamilton’s position won. Though Congress possesses other formal powers over foreign affairs, the President’s ability to receive ambassadors gives him considerable advantages in the conduct of foreign policy.

Before You Read

Ask: What is an ambassador? (An ambassador is a representative of one country that deals with another country.)
Active Reading

Ask: Does a President have to receive an ambassador? (Ministerially, the President receives the ambassador, unless the ambassador’s credentials are in serious doubt.)

Work in Pairs

Explain to students that the United States also has ambassadors. Pair up students and have them research the name of a U.S. ambassador to another country. Have them list this person’s responsibilities.

Write About It

Research the debate between Alexander Hamilton (as “Pacificus”) and James Madison (as “Helvidius”) over President Washington’s Neutrality Proclamation of 1793. Have students summarize the purpose of the exchange and explain the main arguments on both sides.

Check Understanding

Multiple Choice: Circle the correct response.

1. Who is commander in chief of the armed forces?
   a. Secretary of State
   b. Secretary of War
   c. President
   d. Vice President

2. The Treaty Clause divides an executive power between the President and the
   a. Senate.
   b. Secretary of State.
   c. Speaker of the House.
   d. Vice President.

3. The President commands the “sword” and Congress controls the
   a. “Officers.”
   b. “Shield.”
   c. “Purse.”
   d. “Treaties.”

4. Treaty-making is a mixture of
   a. executive and legislative power.
   b. executive and judicial power.
   c. judicial and legislative power.
   d. administrative and judicial power.
Unit 3

Fill in the blank: Write the correct word or words in each blank.

1. Congress and the President work together on treaties because treaties combine law and _______. (foreign policy)

2. Article II, Section 2, Clause 1 expressly designates the President as “_________” of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” (Commander in Chief)

3. Out of only five declarations of war in the history of our nation, the first did not take place until the _______. (War of 1812)

4. The Framers agreed that when the states’ militias were needed to defend the country, the ________, not the governors, would be in charge. (President)

Short Answer: Write out your answer to each question.

1. As commander in chief, does the President have the power to declare war? (No, Congress has the formal power to declare war.)

2. Under the Articles of Confederation, who had the powers “of sending and receiving ambassadors”? (Congress)

3. What is significant about the placement of the Commissions Clause? (Rather than being included in the discussion on appointments in Article II, Section 2, the clause is attached with a comma to the Take Care Clause, implying that the President will supervise others in their enforcement of the law.)

4. In what ways did states limit executive power through their state constitutions? (South Carolina expressly provided that the executive could neither “commence war” nor “conclude peace.” Other states limited executive war power through frequent election, term limits, and selection of the executive by the legislature.)

True / False: Indicate whether each statement is true or false.

1. Few constitutional issues have been so consistently and heatedly debated by legal scholars and politicians in recent years as the distribution of war powers between Congress and the President. (True)

2. Because Congress controls the federal “purse,” it is impossible for the President to engage in lengthy hostilities without the support of Congress. (True)
Part 3:
Appointing Officers

Appointments Clause
Article II, Section 2, Clause 2

Inferior Officers
Article II, Section 2, Clause 2

Recess Appointments Clause
Article I, Section 2, Clause 3

Appointments Clause — Article II, Section 2, Clause 2

Essay by John McGinnis (pp. 209-212)

The Appointments Clause of Article II sets out the rules for the appointment of constitutional officers. Officers are either principal or inferior officers, and each type has a different manner of appointment. The Appointments Clause applies to principal officers. An appointment consists of three distinct, sequential acts: The President nominates a candidate, the Senate confirms the nominee, and the President appoints the official.

The Framers designed the appointment process to ensure that the President would be accountable for the selection of officers and that his appointments would not be the result of secret deals.

The President has a plenary power to nominate. The power to nominate is an exclusive executive prerogative. Though the choice of officer is the President’s responsibility, the Senate’s advice and consent forestalls the possibility of abuse of the appointment power.

Congress has established qualifications for those who can serve as officers, but it is unclear how far these qualifications may go before they contravene the Framers’ intent in assuming the President’s accountability for the initial choice. The Senate has plenary authority to reject nominees, and nothing in the text limits what the Senate may consider when consenting to or rejecting a nominee. Thus, the Senate may use its advice and consent power to reject a nominee for unsound principles or blemished character. The President’s power of repeated nomination checks the Senate’s ability to reject a nominee without a compelling reason. The Senate’s consent, however, does not bind the President; the President has the power to choose not to appoint an official whom the Senate has confirmed.
Unit 3

Active Reading

Ask: What is an officer under the Constitution? (Officers are generally persons holding high-ranking positions in the executive or judicial branches.)

Research It

The confirmation debates involving Supreme Court nominees are especially heated. Have students research two nominees for the Supreme Court (preferably from two different centuries) and compare the process. Did the Senate confirm both? Why or why not?

Inferior Officers — Article II, Section 2, Clause 2

Essay by Douglas Cox (pp. 213-215)

The Appointments Clause of Article II sets out the rules for the appointment of constitutional officers. Congress creates two types of officers under the Constitution: principal and inferior officers, each of which has a different manner of appointment. According to Douglas Cox, principal officers must be appointed by the President with the advice and consent of the Senate, but inferior officers (which is what most officers are) may be appointed by the President, courts, or heads of departments without the consent of the Senate. These two methods are the only means of appointing officers under the Constitution. Significantly, Congress may not vest the power to appoint in Congress itself. Congress's role is limited to the Senate's ability to offer advice and consent to nominees and to decide in which departments to vest the appointment power for a particular office.

The Framers designed this clause to prevent Congress from using the appointment power to fill offices with individuals who would be subservient to Congress, thereby limiting the power of the President to creating or filling offices arbitrarily. Scholars have noted ambiguities in the clause. For instance, what is the difference between principal and inferior officers besides the different mechanisms for appointments? Who are heads of departments? The courts have attempted to provide guidance on these questions by listing factors and duties that would fall on inferior rather than principal officers and by looking to the Opinion Clause to determine the meaning of “heads of departments.” In general, however, such designations are made on a case-by-case basis.

Work in Pairs

Ask students to compare principal and inferior officers and write a summary of the similarities and differences.
Recess Appointments Clause — Article II, Section 2, Clause 3

*Essay by Michael A. Carrier (pp. 215-216)*

The Recess Appointments Clause is an extension of the President's appointment power. It allows the President to use Recess Appointments to fill vacancies that occur while the Senate is in recess. Recess Appointments last until the end of the following Senate session, meaning that most recess appointments today may last one to two years.

Presidents have used this power to appoint officials during intersession recesses (the time period between two congresses) and intrasession recess (a recess of a current session of Congress). In early America, Senate recesses lasted six to nine months. The Recess Appointments Clause safeguarded the system by allowing appointments without requiring the Senate to stay in session perpetually. However, as Michael Carrier writes, Presidents in modern times may use this power to select officers without having to face the senatorial confirmation process.

**Make a Real-Life Connection**

Carrier notes that the Senate remains in session throughout most of the year. Have students research the recess appointments of the Clinton, Bush, or Obama Administrations. Why would these Presidents exercise their recess appointments power in a time when Congress is perpetually in session?

**Discussion Question**

In what way might a President abuse the Recess Appointments Clause?
(by using the power to select officers without having to face the senatorial confirmation process)

**Check Understanding**

Multiple Choice: Circle the correct response.

1. Most officers are considered:
   a. Principal officers
   b. Inferior officers

2. A recess appointment lasts until:
   a. The end of the year
   b. **The end of the “next Session” of the Senate**
   c. The appointee dies
   d. 12 months has passed
Fill in the blank: Write the correct word or words in each blank.

1. Debates among the Framers and subsequent practice confirm that the President has _____ power to nominate. (plenary)

2. The appointment power is one of the powers of the _______. (President)

3. A recess appointment lasts until the _____ of the “next Session” of the Senate. (end)

Short Answer: Write out your answer to each question.

1. What was the Founders’ purpose in having presidential power of nomination and then congressional approval of the nominees? (The President is accountable for the person(s) he might nominate, but approval by the Senate ensures that the President will not appoint someone for personal gain.)

2. The Appointments Clause divides constitutional officers into which two classes? (principal officers, who must be appointed through the advice and consent mechanism, and inferior officers, who may be appointed through advice and consent of the Senate but whose appointment Congress may place instead in any of the “three repositories of the appointment power”)

3. What are the three repositories of appointment power? (the President alone, the courts of law, and the heads of departments)

4. Why did the Framers adopt the Recess Appointments Clause? (to prevent government paralysis)

True / False: Indicate whether each statement is true or false.

1. There are very few specific reasons why a Senate may constitutionally refuse to confirm a nominee. (False. The Senate may constitutionally refuse to confirm a nominee for any reason.)

2. Congress itself may not exercise the appointment power. (True)

3. Most government employees are subject to the Appointments Clause. (False. Most government employees are not officers and thus are not subject to the Appointments Clause.)

4. The phrases “inferior officers” and “Heads of Departments” were not precisely defined in the Constitution. (True)
Part 4: Communicating with Congress

State of the Union
Article II, Section 3

Recommendations Clause
Article II, Section 3

Convening of Congress
Article II, Section 3

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State of the Union — Article II, Section 3

*Essay by Matthew Spalding (pp. 216-217)*

The Framers thought that the President would be uniquely qualified to summarize, explain, and assess information about the country. He would have unique knowledge of military operations, foreign affairs, and the execution of the laws and would be the only national representative of the entire people. Therefore, Article II of the Constitution gives the President the duty of periodically providing information to Congress about the “State of the Union”—a duty, writes Matthew Spalding, that encourages transparency and accountability in the executive branch. Other constitutionally defined communications with Congress include veto messages, advice and consent of the Senate, and recommendations. These communications are examples of the partial agency of one department in the working of another department.

Beginning with George Washington, early Presidents gave “Annual Messages” to the Senate, focusing on foreign affairs or reporting recommendations from department heads. In the 20th century, the State of the Union became less about reporting and assessing and more about advocating policies. With improvements in communication technology, the State of the Union now reaches a much wider audience via television, radio, the Internet, and other media.

Make a Real-Life Connection

Point out to the students that Presidents traditionally did not give an oral address to Congress for the State of the Union. Have students read an example of a State of the Union address that was sent to Congress and compare it to a more recent one spoken before Congress. *What are the differences in content and focus? Does the mode of delivery make any difference?*
Recommendations Clause — Article II, Section 3

*Essay by Vasan Kesavan, James Pfiffner, and J. Gregory Sidak (pp. 217-219)*

The Recommendations Clause is another example of how the Framers divided powers among the branches of government. When presented with a bill from Congress, the President may sign it into law or veto it. Under the Recommendations Clause, though, the President may make recommendations to Congress for legislation.

The language of the clause underscores the republican nature of the process. These recommendations are not royal edicts, but suggestions to the people's and the states' representatives. The President's recommendations provide a more national perspective, since his constituency differs from that of the House and Senate. Under this clause, the President alone may judge when it is “necessary and expedient” to make a recommendation. Congress may not compel the President to make particular recommendations. The legislature, though, will not hesitate to criticize a President who fails to propose legislation regularly. Furthermore, Congress does not have a duty to implement the President's suggestions. It may be wise for Congress to pass legislation in accordance to the President's suggestions because the President still holds the veto power, but there is no constitutional requirement to do so.

In practice, early Presidents spent little time trying to influence Congress, except in times of war. Twentieth century Presidents, though, have departed from this tradition. Most notably, Franklin D. Roosevelt took an active role in shaping Congress's legislative agenda by recommending new laws.

**Work in Pairs**

The authors note that Franklin D. Roosevelt made notable use of the Recommendations Clause. Pair up students and ask them to read about some of Roosevelt’s proposed laws during his time in office. Then have each pair research one law and give a brief report on its content and effects. (Answers will vary. Roosevelt’s proposed legislation dealt with the economy, banks, employment, and many other areas of concern.)

Convening of Congress — Article II, Section 3

*Essay by David F. Forte (pp. 219-220)*

In the Declaration of Independence, the Americans objected to the traditional British policy that allowed the king to convene and adjourn Parliament at will. In Article I, the Framers gave Congress the power to convene. Recognizing that emergencies may arise when Congress is adjourned, the Convening of Congress Clause of Article II gives the President a limited power to convene Congress on “extraordinary Occasions.” Presidents rarely call special sessions, except to address emergencies such as military conflicts and economic crises. Presidents may also adjourn Congress, but only when Congress disagrees on its own time of adjournment.
In practice, the President has exercised this power only a few times in American history, to address crises such as war or economic emergencies. In the later 20th century and the 21st century, because Congress is functionally in session year-round, the President’s power to convene is little used.

**Make an Inference**

British kings had the power to convene or adjourn Parliament at will. To ensure understanding, ask: How may kings have used or misused this power? (Answers may vary. Members of Parliament would be utterly subject to the king’s will. There would be little independence from the will of the crown, because the King could control the meetings of Parliament.)

**Discussion Questions**

1. What are some executive powers held by Congress? Why were they not given to the President? (Congress has the executive abilities to declare war, regulate commerce, and grant letters of marque or reprisal. The Framers gave these powers to Congress to maintain the balance of powers and avoid making a single executive who is too powerful.)

2. Why did the Constitutional Convention design the presidency as a singular position? What concerns might they have had? (The Convention thought that the most effective design for an executive branch would be based on a singular President who could remain independent, be energetic, act quickly and decisively, and be a highly visible leader who assumed many responsibilities and could be held liable for them. The Framers may have had some concern, however, based on their recent dealings with the powerful single monarch of Britain. But, the Framers also understood the problems of a weak executive power, based on their experience under the Articles of Confederation.)

**Check Understanding**

Have students complete the following assessment to check their understanding of Lesson 10. Review any material for questions they have missed.

**Fill in the blank: Write the correct word or words in each blank.**

1. Historically, annual messages focused primarily on ________ and introduced the reports and recommendations of department heads. (foreign relations)

2. Active presidential involvement in pressing for legislation began with _________. (Theodore Roosevelt)
Short Answer: Write out your answer to each question.

1. How does the State of the Union address in the 20th century differ from those given historically? (Addresses have become less reporting and assessment and more policy advocacy and political persuasion.)

2. Although there was an expectation that the State of the Union message would be delivered in person, who thought that practice too royal and had his clerks read the message to Congress instead? (Thomas Jefferson)

True / False: Indicate whether each statement is true or false.

1. The President is not required to present information about the State of the Union to Congress. (False. The President is required to do this as a means of transparency and accountability.)

2. George Washington gave the first “Annual Message” in the Senate chamber in January 1790. (True)

3. Since the power to make laws is vested solely in the legislative branch, the President is not allowed to make recommendations that would affect the legislative process. (False. Article II, Section 3, the Recommendations Clause, specifically states that the President can make recommendations “from time to time.”)

4. The President has the power to convene Congress in emergency situations. (True)

5. The President has no power to adjourn Congress. (False. The President may adjourn Congress if the Houses cannot agree on a time.)

Unit 3
Lesson 11: Courts and Judges

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Lesson Objectives

When you complete Lesson 11, you will be able to:

- Describe the independent judiciary as established by the Judicial Vesting Clause.
- Understand the meaning of judicial review and the justiciability doctrine as used by the Supreme Court and other courts.
- Understand the early decentralized judicial structure of the Supreme Court and the current hierarchical judicial structure.
- Understand the difference between Article III courts and non–Article III courts.
- Understand the difference between inferior courts and the Supreme Court.
- Explain the appointment process for federal judges and Supreme Court justices and how a federal judge may be impeached or removed from office.
- Explain the purpose of the Good Behavior Clause of Article III.
- Understand the requirements of the Judicial Compensation Clause.

Part 1:
Understanding the Judiciary

Judicial Vesting Clause — Article III, Section 1

*Essay by Robert J. Pushaw, Jr. (pp. 231–234)*

The third branch of the federal government is the judiciary. While the legislative branch writes laws and the executive branch enforces them, the judicial branch applies the laws to the parties in disputes before them. The Vesting Clause of Article III, Section I of the Constitution vests the judicial power in a Supreme Court and other, lower federal courts to be established by Congress.

The independent judiciary was a novel institution in America. In England, the judicial power was traditionally part of the executive power. The Framers saw adjudication to be a discrete function and separated it from the executive. Additionally, the judiciary, like Congress and the President, derives its powers from the people.
The central meaning of the judicial power has remained consistent over the years: neutrally deciding cases by interpreting a law and applying it to the facts of a given case and rendering a verdict. According to Robert J. Pushaw, Jr., the power of federal courts falls into three categories: judicial review, justiciability, and equitable authority.

Judicial review means that courts may review actions of the federal government to determine whether they violate the Constitution. Judicial review is permissible because the Supreme Court has the power to hear cases arising under the Constitution and the laws of the United States. The practice of judicial review is justified—and, importantly, controlled—by the idea of the Constitution as the fundamental law that limits government.

The early Supreme Court used a restricted notion of judicial review. It did not strike down a statute until Marbury v. Madison in 1803. In Marbury, Chief Justice John Marshall argued that Congress violated the Constitution in attempting to expand the Court’s original jurisdiction (referring to those cases that the Supreme Court may hear before the lower courts have ruled on them). Though it would invalidate federal laws that violated the Constitution, the Court would not consider political questions (e.g., questions of policy).

The Court continued to exercise restraint until 1857, when it invalidated another federal law, the Missouri Compromise, in Dred Scott v. Sandford. Dred Scott was a disastrous attempt to transform judicial review into a vehicle by which judges could substitute their opinions for those of the political branches. By the late 19th century, the Supreme Court interpreted its powers broadly and began to invalidate laws that did not explicitly violate the Constitution in areas previously left to the political branches.

Federal courts may hear only cases that are justiciable (suitable for resolution in court). The purpose of justiciability is to ensure the appropriate exercise of the judicial power. The Supreme Court has developed several justiciability doctrines to reflect the requirements in Article III and to maintain certain self-imposed prudential limits. First, federal courts’ judgments are final and cannot be revised or reexamined by the other branches. Second, federal judges will not render legal advice to political officials outside of the context of a particular case. Third, federal courts will not address political questions, meaning questions entrusted to the legislative or executive branches. Other justiciability doctrines that have developed include standing (who can sue); ripeness (whether a case is sufficiently developed factually and legally); and mootness (whether the dispute is ongoing). The Court has not deviated from rules forbidding non-final judgments or advisory opinions, but it has strengthened the other standards in some cases to avoid ruling on litigation challenging the administrative state or relaxed the standards in other cases to broaden access to the federal courts and vindicate certain constitutional rights.

The judiciary also holds certain inherent authority required for the exercise of judicial powers. For instance, courts have the power to manage discovery of facts, make rulings on evidence to be introduced, appoint experts, compel witnesses to testify, and sanction courtroom misconduct.
The judiciary’s equitable authority is also one such inherent power. Equitable authority is complicated. The root of equitable authority lies in English courts of equity, which were separate from courts of law. Courts of equity would provide special forms of relief. Under their original design, if a person did not or could not receive a desirable or just judgment in the court of law, the person could refer his case to a court of equity. Equitable decisions concern injunctive relief (making a person do something; for example, requiring an employer to rehire an employee who has been fired).

**Before You Read**

Remind students about what they learned in Lessons 1 and 2 about the Constitution being the supreme law of the land and the idea that every branch has a duty to interpret and obey the Constitution. To ensure understanding, ask: What do you remember about the other branches of government? How does the judicial branch fit? (Answers will vary. Students should note that the legislative branch makes laws, the executive branch enforces laws, and the judicial branch applies the law to particular cases and controversies. It is not true that the judiciary is the sole interpreter of the Constitution.)

**Active Reading**

To ensure understanding, question students on what they have read. Ask: What is a political question? (a question of policy to be decided by the political branches, the legislature, or the executive) What is judicial review? (Courts may review actions of the federal government to determine whether they violate the Constitution.) What does it mean for a claim to be ripe? (It refers to whether the facts and issues of a case have been sufficiently developed. For instance, a case would not be ripe if it is not clear what law is at issue.) What does it mean for a case to be moot? (A case is moot if the controversy ends prior to the verdict.) What is standing? (Standing refers to who has the ability to sue. For instance, if person A harms person B, then person B would have standing to sue person A. However, person C, who was not involved with either party or the incident, would not be able to sue person A.) What does it mean to remove a case? (Removing a case means changing the location of a case from one court’s jurisdiction to another court’s jurisdiction.)

**Work in Pairs**

Pair up students and have them read the case of *Marbury v. Madison* (1803). Have students write a few paragraphs explaining the parties in the case, the facts of the case, the controversy, and the argument for judicial review. Have the students discuss their findings with the class.
Check Understanding

Read aloud the passage on page 232 beginning with “For example, in The Federalist” and ending with “any shape they please.” Have the students summarize Alexander Hamilton’s defense of judicial review. (Hamilton defended judicial review of government actions as follows: Courts have a duty to resolve conflicts in accordance with the law; the Constitution is the supreme law; therefore, judges should follow the Constitution rather than a conflicting ordinary law.)

Discussion Question

How does the Founders’ understanding of judicial review compare with that of modern-day courts? (The Founders understood judicial review to mean that the Supreme Court would decide particular cases and would consider whether the laws in question were consistent with the text of the Constitution. The modern-day view departs from the Founders’ view. Under the modern view, judicial review means that judges decide whether the law comports with their own—not the Constitution’s—standards of reasonableness and rationality, shaped by the spirit and course of developing court decisions and constitutional interpretation.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 11, Part 1. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. The Judicial Vesting Clause is found in Article ________ of the Constitution.
   a. II
   b. III
   c. IV
   d. VI

2. In which case did Chief Justice John Marshall defend judicial review?
   a. Dred Scott v. Sandford
   b. Lochner v. New York
   c. Marbury v. Madison
   d. Powell v. McCormack

3. Which case invalidated the Missouri Compromise and attempted to transform judicial review into a vehicle by which judges could substitute their opinions for those of the political branches?
   a. Dred Scott v. Sandford
   b. Lochner v. New York
   c. Marbury v. Madison
   d. Powell v. McCormack
Fill in the Blank: Write the correct word or words in each blank.

1. The federal judiciary consists of a Supreme Court and other, lower courts to be established by ________. (Congress)

2. Federal courts have three main powers: judicial review, ________, and equitable authority. (justiciability)

3. Alexander Hamilton defended judicial review because courts are bound to resolve conflicts in accordance with ______, and the Constitution is the __________. (the law, supreme law)

Short Answer: Write out your answer to each question.

1. What is the judicial power? (the power of courts to decide cases neutrally by interpreting a law and applying it to the facts of a given case and rendering a verdict)

2. What two novel Federalist ideas did the separation of powers incorporate?
   • “Judicial power” became a distinct part of government, whereas in England it had been treated as an aspect of executive authority.
   • Like Congress and the President, federal judges ultimately derived their power from the people, even though they were unelected and given tenure and salary guarantees.

3. The powers of federal courts can be divided most usefully into which three components?
   • Judicial review
   • Justiciability
   • Equitable authority
Part 2: The Structure of the Judiciary

**Supreme Court**
Article III, Section 1

**Inferior Courts**
Article III, Section 1, and Article I, Section 8, Clause 9

**A Note on Non–Article III Courts**

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**Supreme Court** — Article III, Section 1

*Essay by Bradley C. S. Watson (pp. 234–236)*

During the drafting of the Constitution, delegates disagreed on the question of a national judiciary. Some delegates argued that state courts should enforce federal laws. Others argued for a national judicial power to enforce federal laws. In Article III, Section 1, the Constitution establishes a Supreme Court but empowers Congress to establish the number of justices, to create the lower court structure, and to alter the Court’s appellate jurisdiction (referring to those cases that the Court may review after another, lower court has ruled on them). The Supreme Court would be a legal, not political, body. It would not make or veto laws; it would apply them to the parties in cases before the Court.

In accordance with Article III, Section 1, and Article I, Section 8, Clause 9, Congress passed the Judiciary Act of 1789, which created the federal court system, consisting of a Supreme Court, circuit courts, and district courts, to exercise the judicial power of government. The act also limited the Supreme Court’s appellate jurisdiction. The First Chief Justice, John Jay, clarified that Congress could not assign the judiciary non-judicial tasks, such as advising the President on treaties. Chief Justice John Marshall reiterated that the judiciary was not a political body and that Congress cannot grant to the Court any power not authorized in the Constitution.

Originally, the Supreme Court had six justices, but Congress increased and decreased the number throughout the 19th century. In early America, these justices spent most of their time presiding at the circuit court level and gathered only a few times during the year to handle appellate cases and the few cases of original jurisdiction. With the reorganization of the judiciary and expansion of the nation, the number of Supreme Court justices and circuit courts expanded. Since 1869, Congress has set the number of Supreme Court justices at nine.
Write About It

On page 235, Bradley C. S. Watson mentions Franklin Delano Roosevelt’s attempt to increase the number of Supreme Court justices. Have students read about the court-packing scheme, why Roosevelt wanted it, and what the result was. Have students then write one to two paragraphs about their findings. (Roosevelt’s plan was to add justices to the Court and to include a mandatory retirement age for judges. This was in response to several rulings against Roosevelt’s New Deal programs. The plan was very unpopular, even with members of Roosevelt’s own political party.)

Make a Real-Life Connection

Have students research where the Supreme Court is located, the number of circuit courts in the United States, the number of district courts in their state, and what geographic areas these lower federal courts cover. Have students identify the federal circuit in which their state is located.

Discussion Question

Who has the power to set the number of Supreme Court justices? Has the number of justices changed over time? (The Constitution gives Congress the power to establish the number of justices on the Supreme Court. This number started at six, but Congress has changed the number of justices over the years. Currently, there are nine Supreme Court justices.)

Inferior Courts — Article I, Section 8, Clause 9, and Article III, Section 1

Essay by David Engdahl (pp. 123–126)

Article III of the Constitution vests the judicial power in the Supreme Court and inferior courts. Articles I and III give Congress power to create and organize the “inferior” courts and the “supreme” Court. Congress may organize these courts, distribute subject-matter jurisdiction, designate courts for trials or for appeals, and legislate rules of evidence.

For the Founders, the words “supreme” and “inferior” did not refer to a hierarchical judicial structure, but to the breadth of geographic location or subject-matter jurisdiction. At the Convention, James Madison advocated establishing inferior tribunals, dispersed throughout the country, with final jurisdiction in many cases. The delegates agreed with Madison and adopted several clauses to achieve that end: The Inferior Courts Clauses (Article I, Section 8, Clause 9, and Article III, Clause 1) give Congress the power to create and organize the courts; the Appellate Jurisdiction Clause (Article III, Section 2, Clause 2) enables Congress to limit the cases that
the Supreme Court may review from lower courts and thereby allow these inferior courts to have final jurisdiction in many cases. Congress may not add jurisdictions that the Constitution does not already grant to federal courts and may not exclude jurisdictions from inferior courts.

The Judiciary Act of 1789 established a federal court system that was unlike today’s federal court system. This early system was largely decentralized. Single-judge district courts would review cases of admiralty, civil forfeiture, and federal-question issues. Three-judge circuit courts were the principal federal tribunals. They would try diversity cases, most federal crimes, and cases removed from state courts; they could also review district court decisions. Supreme Court justices spent most of their time presiding at the circuit level. The Supreme Court met only twice each year to hear appellate cases and try cases within its original jurisdiction, and it seldom reviewed the activity of lower courts.

This basic framework remained in place for many years, but some opposed the idea of a decentralized judiciary. James Wilson argued that the judiciary should resemble a pyramid, with one supreme tribunal superintending the others. Gradually, the original decentralized judiciary gave way to a more centralized system. The reorganization reduced Supreme Court justices’ circuit-riding duties and allowed them to focus on appellate work, which would enable the Court to settle questions of law when circuit courts disagreed. Although the centralized court system provided for uniform resolution of legal questions, it eclipsed the original conception of the judiciary as oath-bound, independent adjudication of a particular litigant’s case.

To be sure, a hierarchical system is neither constitutionally ordained nor prohibited. A centralized judiciary seemed safe and desirable initially. But when combined with the 19th century idea that judges could revise laws through their decisions, the result was a system outside of the Framers’ design. Congress may attempt to decentralize the judicial structure by, for example, limiting the Supreme Court’s appellate jurisdiction (though not by preventing such cases from accessing federal courts).

Check Understanding

Recall what you learned about the Necessary and Proper Clause. How does the Necessary and Proper Clause allow Congress to determine the structure of the federal judiciary? (The Constitution does not specifically say either how many courts should exist or how many justices should serve on the Supreme Court. It specifies the kinds of cases that federal courts may hear but, for instance, gives Congress discretion over the Supreme Court’s appellate jurisdiction. Without the Necessary and Proper Clause, statutes organizing the judiciary and other branches would have violated the principle of enumerated powers and the principle of separation of powers.)
Discussion Question

Read Alexis de Tocqueville’s remarks on pages 124–125. Ask: According to Tocqueville, how does the decentralized court system safeguard the Constitution? (Tocqueville describes the process by which a decentralized system of judges safeguards the Constitution against bad laws. It does not require one Supreme Court to strike down a law as unconstitutional; it requires instead a series of independent judgments regarding particular cases.)

Active Reading

Read aloud this sentence from page 123: “Madison repeated his earlier argument that ‘unless inferior tribunals were dispersed throughout the Republic with final jurisdiction in many cases, there would be docket overload and oppressive expense.’” Ask: Why did Madison think this would happen? (Without the inferior courts, the U.S. Supreme Court would have to hear every case falling into the jurisdiction set out by the Constitution. With many inferior courts, parties would not need to travel so far in order to have a judge hear their case.)

Work in Pairs

Pair up the students and have them write a summary of the federal court system established by the Judiciary Act of 1789. (Sample answer: Single-judge district courts heard admiralty matters, tried forfeiture proceedings, and had jurisdiction over minor federal crimes. Three-judge circuit courts tried diversity cases and most federal crimes and heard cases removed from state courts. They could also review most of the single-judge district decisions. Supreme Court justices spent most of their time presiding over the several circuit courts.) Ask: How was this court structure decentralized? (It divided authority among several courts.) How was authority divided? (by subject) Did the Constitution mandate a decentralized court system? (The Constitution does not require either a decentralized or a hierarchical system. Either structure is constitutionally permissible.)

A Note on Non–Article III Courts

Essay by Loren Smith and Gary Lawson (pp. 239–241)

According to Loren Smith and Gary Lawson, three categories of adjudication occur under the Constitution. The first category consists of life-tenured judges exercising the federal judicial power under Article III. The second category consists of Article I judges and courts. The third category of adjudicators (and the most numerous) consists of career employees of the executive branch. The scope of authority, appointment process, and length of service vary in this last category.
Article III establishes Supreme Court justiceships, and federal statutes create other Article III judgeships. Concerning the second category of adjudication, there are four types of Article I courts: courts for territorial governance, regulation of the armed forces, the payment of money owed by the federal government, and taxation. Judges in federal territories are created under Congress’s Article IV powers, and judges in the District of Columbia are created under Congress’s Article I powers. These courts determine many kinds of cases, including criminal cases, but are not necessarily subject to Article III requirements. Military courts-martial receive their authority from Articles I and II and exercise essential criminal jurisdiction. The United States Court of Appeals for the Armed Forces is a civilian court tasked with reviewing court-martial criminal sentences.

Sovereign immunity justified the creation of the third type of Article I court. Sovereign immunity prevents citizens from suing the government. Therefore, people had no remedy against the federal government for breach of contract, taking property, or governmental torts. In the early years of the Republic, people would sometimes implore Congress for a private bill of relief. In 1855, Congress created the Court of Claims to hear claims against the United States that would have been settled with a private bill. In cases of takings claims, contract claims, tax-refund actions, and tort actions, the government must waive sovereign immunity. The waivers of sovereign immunity usually require these cases to go before non–Article III courts such as the Court of Federal Claims, the Tax Court, and the Court of Veterans Appeals. These courts are subject to Article III appellate review.

All Article I judges are appointed by the President and confirmed by the Senate. They are officers under the United States, and their salaries and tenure are determined by congressional statute.

It is unclear what the limits are on Congress’s power to entrust adjudication to non–Article III courts. Although Congress has allowed Article III courts to review the decisions of non–Article III courts, it is unclear to what extent non–Article III courts must be subject to appellate review in Article III courts.

**Research It**

Point out Loren Smith and Gary Lawson’s mention of several types of non–Article III courts on page 240 (first paragraph of the right-hand column). Ask students to choose one kind of court listed—such as the Court of Federal Claims, Court of Appeals for the Armed Forces, or Tax Court—and research that court’s scope of authority, origin, and membership. Have students summarize their findings in one or two paragraphs and share them with the class.
Check Understanding

Have students complete the following assessment to check their understanding of Lesson 11, Part 2. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. The largest category of judges contains career employees of the
   a. House of Representatives.
   b. executive branch.
   c. Supreme Court.
   d. legislative majority.

2. What is the current number of Supreme Court Justices?
   a. 5
   b. 6
   c. 9
   d. 12

3. Courts-martial are a part of the judicial branch that deals with trials
   a. against the government.
   b. in the military.
   c. related to taxes.
   d. in overseas territories.

4. In the Judiciary Act of 1801, the Federalist Congress reduced the number
   of justices sitting on the Supreme Court to five, hoping to prevent which
   incoming President from appointing a justice when the sixth sitting
   justice retired?
   a. Abraham Lincoln
   b. Franklin D. Roosevelt
   c. Theodore Roosevelt
   d. Thomas Jefferson

Fill in the Blank: Write the correct word or words in each blank.

1. The first non-Article III court was the ______. (Court of Claims)

2. In the Judiciary Act of 1789, Congress set the number of Supreme Court
   Justices at ______. (six)

3. Who was the first Chief Justice? (John Jay)

4. The delegates to the Constitutional Convention concluded that the judi-
   ciary was to be a ______ rather than a political body. (legal)

5. The Court of Federal Claims, the Tax Court, and the Court of Veterans
   Appeals are examples of __________ courts. (Non–Article III)
True / False: Indicate whether each statement is true or false.

1. Over the past century, the scope of inherent judicial powers has decreased due to the decrease in the amount and complexity of litigation.  
   (False. The scope of inherent judicial powers has grown dramatically to cope with the vast increase in the amount and complexity of litigation.)

2. The Judiciary Act of 1789 confined the Supreme Court to questions of law rather than fact.  
   (True)

3. As the nation expanded, so did the number of circuits and the number of Supreme Court justices to sit on them.  
   (True)

4. The Constitution does not require a hierarchical judicial system.  
   (True)

Matching

1. Match the term on the left with the “power” on the right.
   
   Legislative..................making laws
   Executive......................administering the laws
   Judicial.......................applying laws to particular cases
Part 3: Membership, Payment, and Expulsion

Appointing Judges and Justices: Appointments Clause
Article II, Section 2, Clause 2

Good Behavior Clause
Article III, Section 1

Judicial Compensation Clause
Article III, Section 1

Impeaching and Removing Judges
Article I, Section 3, Clause 6

Appointing Judges and Justices: Appointments Clause
Article II, Section 2, Clause 2

Essay by John McGinnis (pp. 209–212)

The Appointments Clause of Article II governs how Supreme Court justices are appointed. The clause ensures that the President is accountable for the appointment and that the appointment is not the result of secret deals. An appointment consists of three distinct, sequential acts: First, the President nominates a candidate; second, the Senate confirms the nominee; finally, the President appoints the official. Although the President has plenary power to nominate, the Senate has plenary authority to reject nominees; nominees may be rejected for having unsound principles or blemished character.

Judges in inferior federal courts are also appointed by the President and confirmed by the Senate. These judges have the same tenure and compensation guarantees as Supreme Court justices. It is possible to consider lower federal judges inferior officers, which would allow Congress to vest their appointment in the President, courts of law, or heads of department. Nevertheless, Congress has not dispensed with presidential appointment and senatorial confirmation requirements for life-tenured inferior court judges.

Research It

Have students research the appointments process for judicial nominees. Has the Senate rejected a judicial nominee? If so, what were the circumstances and the Senate’s reasoning for so doing?
Good Behavior Clause — Article III, Section 1

Essay by Jonathan Turley (pp. 236–237)

The Good Behavior Clause of Article III of the Constitution affirms that judges hold their office for life, a fundamental element of the separation of powers and the idea of an independent judiciary. Colonial judges served at the whim of the Crown, and the colonists objected to this practice in the Declaration of Independence.

In the Constitution, the Good Behavior Clause states that judges on the Supreme Court and inferior federal courts “shall hold their Offices during good Behaviour.” Jonathan Turley notes that a proposed version of this clause included a distinct standard for removal, but the Constitutional Convention rejected the removal language. Both the language of the clause and the records of the Convention support the interpretation of the clause as affirming life tenure for judges rather than creating a distinct standard for removal.

The meaning of the clause is often discussed in the context of impeachment trials. The Good Behavior Clause reminds the other branches that the judiciary is independent: Judges are not to be removed for light or transient causes or because of the whim of some faction. Yet several judges have been successfully impeached and removed from the bench. Therefore, the clause also reminds judges that life tenure is not a license for corrupt or abusive behavior.

Active Reading

What does the Good Behavior Clause communicate to judges and the other branches of government about a judge’s roles? (While not a distinct standard for removal, the Good Behavior Clause informs judges that they have life tenure, but life tenure is not a license for corrupt or abusive behavior. It also reminds other branches of government that the judiciary is independent, and its members are not to be removed arbitrarily.)

Judicial Compensation Clause — Article III, Section 1

Essay by Jonathan Turley (pp. 238–239)

Together with the Good Behavior Clause, the Judicial Compensation Clause protects the independence of the judiciary. The Judicial Compensation Clause clearly states that compensation may not be diminished during judges’ service. It is linked to the Good Behavior Clause because the guarantee of life tenure requires that judges not be made dependent upon another branch for their compensation.

Unlike the Sinecure Clause of Article I, the Judicial Compensation Clause does not prohibit increases in compensation. During the Constitutional Convention, Madison proposed preventing both decreases and increases in judicial compensation to
safeguard judges’ independence. Delegates rejected Madison’s proposal because judges would hold their positions for life, allowing inflation to reduce salaries functionally. Therefore, the final language of the clause prevents decreases in salary but allows increases.

Most of the controversy over the Judicial Compensation Clause focuses on indirect diminishment of compensation: for instance, the effects of Medicare and Social Security taxes. Some taxes are permissible; others are not. Cost-of-living adjustments (COLAs) to keep pace with inflation are ultimately determined at the discretion of Congress.

**Before You Read**

Ask: How might changes in salary be used to make the judiciary dependent upon other branches? How might this lead to corruption in government?  
(Sample answer: A legislature or executive could threaten judges with pay cuts or reward them with pay raises to influence their decisions and actions.)

**Check Understanding**

Recall what the Constitution says about compensation for other branches. Why did the Framers specify how officials were to be paid? (The separation of powers requires that each branch exercise its specific duties without being dependent on other branches. Salaries are one way to make a person or branch dependent on another person or branch. The Federalist gives examples of state legislatures that functionally control the state’s executive because they can increase or decrease the executive’s pay.)

**Impeaching and Removing Judges** — Article I, Section 2, Clause 5; Article I, Section 3, Clause 6; and Article II, Section 4

*Essays by Stephen B. Presser (pp. 60–62), Michael J. Gerhardt (pp. 67–69), and Stephen B. Presser (pp. 225–229)*

Article II sets the standards for impeachment and lists the officers who may be impeached: the President, the Vice President, and all other civil officers, which includes judicial officers.

Article II sets a high bar for impeachment, ensuring that it will be used only in the most severe cases. At the Constitutional Convention, the Founders voted down efforts to allow impeachment for “neglect of duty” or “maladministration,” fearing that such language would allow the legislative branch to impeach any executive or judicial official who acted contrary to their whims. Instead, the Founders limited impeachment to cases of treason, bribery, or “high Crimes and Misdemeanors.” “High
Crimes and Misdemeanors” was a legal term used in English impeachment proceedings that extended to both criminal and noncriminal derelictions of duty.

Numerous federal judges have been impeached since the Founding. During Jefferson’s Administration, the legislature sought to remove Justice Samuel Chase for political reasons, but the Senate was unable to reach the two-thirds majority required for removal from office. This case set an important precedent: Judges are not to be removed for political reasons. Other impeachment proceedings against judges have come as a result of actual crime and corruption, not because of the judges’ political opinions.

Federal judges and Supreme Court justices are removed according to the procedure in Article I. The House of Representatives is in charge of impeachment, or the bringing of charges against a public official. The Senate has the sole power to try all impeachments, including the impeachments of federal judges. Senators must be under oath during the impeachment trial, and conviction requires a supermajority vote of two-thirds of the Senate.

Article I limits the punishment for impeachment to “removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States” but leaves the impeached official open to further trials and punishments according to the law. The Senate has interpreted the provision to mean that “removal” and “disqualification” are separate punishments requiring separate votes.

**Active Reading**

To ensure understanding, ask: What are the grounds for impeachment? (Sample answer: There are just a few grounds for impeachment, but they are all very serious offenses. They include conviction of treason, bribery, or other high crimes and misdemeanors.) What does “high Crimes and Misdemeanors” mean? (The term comes from English law and refers to both criminal and noncriminal derelictions of duty.)

**Discussion Question**

In what ways does impeachment support the separation of powers? (Answers will vary. Students should understand that impeachment was intended to be used only in cases of dereliction of duty and crime, not for political reasons. Impeachment allows the legislature to remove corrupt or incompetent members of the other two branches. The threat of impeachment checks the executive and judicial branches and helps to ensure that they perform their duties properly. At the same time, the strict standards for impeachment prevent the legislature from using impeachment simply as a tool to control the executive and the judiciary.)
Check Understanding

Have students complete the following assessment to check their understanding of Lesson 11, Part 3. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. Justices of the Supreme Court are appointed by
   a. the President.
   b. the Senate.
   c. the Attorney General.
   d. judges on the appellate courts.

2. Justices are appointed for a term of
   a. two years.
   b. four years.
   c. six years.
   d. life (on good behavior).

3. The ________ protects judges’ salaries and the independence of the judiciary.
   a. Judicial Power Clause
   b. Appointments Clause
   c. Compensation Clause
   d. Good Behavior Clause

4. COLAs most directly affect the ________ of the judiciary.
   a. caseloads
   b. salaries
   c. term limits
   d. appointments

Fill in the Blank: Write the correct word or words in each blank.

1. The Good Behavior Clause is a constitutional contract that can be rescinded only through an act of __________. (impeachment)

2. The Judicial Compensation Clause states clearly and unambiguously that the compensation of federal judges cannot be __________ during their service. (diminished)

3. Punishments from impeachment may include “removal from Office, and __________ to hold and enjoy any Office of honor, Trust or Profit under the United States.” (disqualification)

4. The acquittal of Justice Samuel Chase set the standard that Supreme Court justices should not be impeached on the ground of their __________. (political preferences)
5. The responsibility to carry out impeachment proceedings with loyalty to the text of the Constitution remains in the hands of the ______________________ and the ______.
   (House of Representatives, Senate)

Short Answer: Write out your answer to each question.

1. How are Supreme Court justices appointed? (Supreme Court justices are appointed according to the Appointments Clause of Article II, which states that an appointment consists of three sequential acts: The President nominates a candidate, the Senate confirms the nominee, and the President appoints the nominee.)

2. What are the standards for impeachment of federal judges? (treason, bribery, or other high crimes and misdemeanors)

3. Why did the Framers choose to give federal judges tenure and salary guarantees? (to ensure their impartiality and prestige)

True / False: Indicate whether each statement is true or false.

1. Colonial judges were given protection under a good-behavior program in effect since the early 1700s. (False. Colonial judges were given no such guarantee and served at the whim of the Crown.)

2. There are very few specific reasons why the Senate may constitutionally refuse to confirm a nominee. (False. The Senate may constitutionally refuse to confirm a nominee for any reason.)
Lesson 12

EXERCISING THE JUDICIAL POWER

Lesson Objectives

When you complete Lesson 12, you will be able to:

- Explain the scope of judicial powers as outlined in Article III and when a federal question is presented.
- Understand why federal courts decide cases involving treaties and ambassadors.
- Understand the scope of admiralty law.
- Explain the purpose of vesting the federal judiciary with the power to settle interstate disputes and disputes involving parties of different states, and understand the differences between parties involved under the Interstate Disputes Clause, the Citizen–State Diversity Clause, and the Diversity Clause.
- Describe the controversy over the Citizen–State Diversity Clause and state sovereign immunity, and understand the purpose of the Eleventh Amendment.
- Understand the purpose of the Land Grant Jurisdiction Clause.
- Understand what cases the federal judiciary may hear under the Federal Party Clause.
- Explain the difference between original jurisdiction and appellate jurisdiction, and understand the types of cases that the Supreme Court hears as part of its original jurisdiction.

Part 1:
What Types of Cases Can the Judiciary Hear?

Judicial Power
Article III, Section 2, Clause 1

Treaties
Article III, Section 2, Clause 1

Ambassadors
Article III, Section 2, Clause 1
Admiralty
Article III, Section 2, Clause 1

Interstate Disputes
Article III, Section 2, Clause 1

Citizen–State Diversity
Article III, Section 2, Clause 1

Suits Against a State
Amendment XI

Diversity Clause
Article III, Section 2, Clause 1

Land Grant Jurisdiction Clause
Article III, Section 2, Clause 1

Federal Party
Article III, Section 2, Clause 1

Unit 4

**Judicial Power** — Article III, Section 2, Clause 1

*Essay by Arthur Hellman (pp. 241–244)*

Article III, Section 2 of the Constitution delineates the scope of the judicial power over nine types of cases and controversies. The most important category encompasses “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” This category is often referred to as the “federal question” jurisdiction. The Framers intended the scope of this clause to be broad, but there was little discussion of the clause at the Constitutional Convention. During ratification, some criticized the clause, saying that there would be no limit to the judiciary’s power. James Madison responded that the judicial power should be broad enough to correspond to the legislative power.

The key question for this clause is to determine when a case arises under federal law and therefore falls within the judicial power of the United States. The answer is largely found in two Supreme Court cases: *Osborn v. Bank of the United States* (1824) and *Cohens v. Virginia* (1821). In *Osborn*, Chief Justice John Marshall stated that a federal question is a question for which the answer depends in some way on federal law. Thus, a case “arises under the Constitution or laws of the United States” if a federal question is part of the plaintiff’s claim. In *Cohens*, the state of Virginia argued that a case “arises under the Constitution or laws of the United States” only if the Constitution or federal law was the basis for the claim of the party who had initiated the lawsuit. The Court disagreed, ruling that cases are defined by the rights of both parties (therefore, it did not matter which party invoked federal law or the Constitution) and that a case could “arise under the Constitution or laws of the United States” whenever the decision depended on the Court’s interpreting either federal law or the Constitution.
These definitions are broad, but they do not address the question of when cases can be removed from state courts to federal courts. Various Supreme Court decisions have established that cases may be removed from state courts when a defense under federal law has been invoked.

Congress can authorize federal courts to hear cases in which a federal question is (1) a logical antecedent of the plaintiff’s claim; (2) the basis of a defense actually raised; or (3) the basis of the decision actually made. It is unclear whether Congress may authorize jurisdiction over cases in which a litigant is a member of a class that Congress seeks to protect (though a federal question is not present) or when Congress has taken an interest under an Article I grant of power.

Finally, federal jurisdiction extends to cases, not issues. When a federal court has jurisdiction over a case that arises under federal law, the jurisdiction extends to the whole case, meaning that the federal court can consider other issues whether state or federal.

**Before You Read**

Ask: What is jurisdiction? (Sample answer: Jurisdiction is the authority that a legal body has to make decisions in cases and controversies. Courts have jurisdiction over people and subjects. Jurisdiction may also refer to when a court may hear a case, either under original or appellate jurisdictions.)

**Check Understanding**

Ask: What makes a case a federal question? (Generally, a case is a federal question if it would require the courts to interpret either federal law or the Constitution.)

**Discussion Question**

Briefly describe how the question of judicial power was handled at the Constitutional Convention. (Sample answer: The Framers did not spend much time debating the Judicial Power Clause until the time came to ratify it. At that point, many criticized the broad scope of the clause, though others defended it as necessary. James Madison said the power had to be as broad as that of the legislature, but other Framers feared that the judiciary would claim unlimited powers.)

**Treaties** — Article III, Section 2

*Essay by Dennis W. Arrow (pp. 244–246)*

Article III grants the federal judiciary jurisdiction over all treaties entered into by the United States. The Constitutional Convention approved this change unanimously. In *The Federalist*, Alexander Hamilton defended the federal judiciary's authority
over treaties, noting that the federal judiciary’s power should extend to all cases of peace in the Union, whether those issues relate to interaction between the United States and foreign nations or states and other states.

The Supreme Court will hear cases involving treaties only when they are properly brought before it. The Court will not offer advisory opinions about entering into treaties (though it has crafted several prudential rules for interpreting them). Courts will rely on the executive branch’s clarifications, interpretations, and understanding of the treaty. They are less likely to defer to the legislature’s interpretations of treaties. Courts will follow the evident meaning of the text, will not infer an obligation that is not within the treaty, and will not determine whether a treaty obligation has been broken.

Finally, courts will recognize the legal validity of a treaty only if it has been executed into law. Some treaties are self-executing, meaning that Congress does not need to pass laws to enact them. Treaties that do require legislation to put them into action are non-self-executing. Because federal law and a properly executed treaty have the same status in law, courts will enforce the latter in time. Thus, if a federal law conflicts with a prior treaty obligation, courts will enforce the more recent federal law.

Under current federal law, federal district courts have original jurisdiction over civil actions arising under treaties, and cases in which the validity of a treaty is questioned may be appealed to the Supreme Court.

**Before You Read**

In 1793, during a critical time of war between Britain and France, President George Washington sent the Supreme Court 29 questions on matters of international law and treaties. The Court refused to answer his questions, protesting that the judiciary did not share in the executive power and that the Court would not issue advisory opinions.

**Discussion Question**

Why did the Framers give the federal judiciary the power to hear cases involving treaties? (Alexander Hamilton expressed the Founders’ consensus that the federal judiciary’s authority should extend to all cases of peace in the Union, whether those issues relate to interaction between the United States and foreign nations or states and other states. Chief Justice John Marshall explained that the purpose of the clause was to ensure that those who have real claims under a treaty should have their causes decided by the national tribunals. This would avoid the apprehension as well as the danger of state prejudices.)
**Ambassadors** — Article III, Section 2, Clause 1

*Essay by David F. Forte (pp. 246–247)*

The provision allowing the federal judiciary to hear cases involving ambassadors was not controversial at the Constitutional Convention, because cases involving an ambassador or other foreign ministers may be crucial to ensuring peace with other nations. Cases involving ambassadors are part of the Supreme Court’s original jurisdiction.

Nevertheless, as David F. Forte explains, there are certain types of cases involving ambassadors and diplomats that the judiciary may not consider: for instance, divorce cases involving ambassadors or foreign diplomats. Additionally, foreign diplomats and ambassadors have diplomatic immunity. Even though the Constitution enables the federal judiciary to hear cases involving ambassadors and other foreign ministers, these individuals may still invoke diplomatic immunity to protect them from prosecution.

**Check Understanding**

Ask students to recall information they have learned in prior lessons about treaties and ambassadors. *Ask: What other branches and individuals are responsible for dealing with treaties and ambassadors?* (The President has the power to make international treaties with the consent of the Senate. In addition, the President has the duty of receiving ambassadors and other important ministers of foreign nations.)

**Active Reading**

According to David F. Forte, what are some restrictions on the federal judiciary’s power to hear cases involving ambassadors? (Sample answer: The federal judiciary does not handle suits involving United States diplomats, retired foreign ambassadors, divorce, or consuls.)

**Discussion Question**

Why did the delegates give the federal judiciary power to hear cases involving ambassadors? (The federal government has the powers concerning international affairs and diplomacy. The states do not have power to engage in foreign affairs. Because cases involving ambassadors or other foreign ministers may be crucial to ensuring peace with other nations, the federal judiciary hears those cases.)
Admiralty — Article III, Section 2, Clause 1

*Essay by David F. Forte (pp. 247–249)*

Joseph Story defined admiralty and maritime jurisprudence to extend to all acts of torts on the high seas, as well as within the ebb and flow of the seas, and all maritime contracts. At the Constitutional Convention, the debate over admiralty focused on whether to lodge admiralty questions in a separate court or in the federal judiciary. Even the Anti-Federalists agreed that admiralty issues should be subject to the national government’s power.

Under the Judiciary Act of 1789 and current federal law, district courts have exclusive jurisdiction over admiralty issues, meaning that state courts cannot hear such cases. Congress extended admiralty jurisdiction to include all navigable lakes and waters, other cases of injury of persons or properties caused by navigable vessels, and insurance contract disputes.

Although the federal judiciary has exclusive jurisdiction over maritime and admiralty, there is a category of cases over which states have concurrent (or shared) jurisdiction as part of state common law jurisprudence. In *The Moses Taylor* (1866), the Court distinguished between *in rem* suits (concerning property) and *in personam* suits (concerning persons). Federal courts have exclusive jurisdiction over the former and share jurisdiction, in certain cases, with the states over the latter. The extent of the states’ jurisdiction is disputed, and the courts and Congress continue to define appropriate limits.

**Before You Read**

Read students Blackstone’s quote on page 247 (first paragraph under Admiralty). Blackstone writes that maritime courts have jurisdiction “to determine all maritime injuries, arising upon the seas, or in parts out of the reach of the common law.” Explain that admiralty law deals with maritime questions and offenses. This is not a body of law that concerns the Navy or the military. Rather, it is a body of law that governs relationships between private entities that operate vessels on the oceans, including issues of marine navigation, sailors, marine commerce, and the transportation of passengers and goods by sea. Some commercial activities occurring wholly on land also are maritime in character and, therefore, are covered under admiralty law.
Interstate Disputes — Article III, Section 2, Clause 1

Essay by Paul Rosenzweig (pp. 250–252)

Under the Articles of Confederation, disputes between states over economic and territorial issues were common. The procedure for settling suits under Article IX of the Articles of Confederation was cumbersome, though at times successful. The Framers of the Constitution devised a clearer method for resolving interstate conflicts. Establishing a federal judiciary to resolve interstate disputes would ensure, as Joseph Story described, “that contentions between the states should be peaceably terminated by a common judicatory; and because in a free country, justice ought not to depend on the will of either litigant.”

The Constitution does not compel or limit the Supreme Court concerning the kinds of interstate disputes it will hear. Most commonly, the questions at issue concern contractual disagreements, water rights disputes, and boundary disputes.

Active Reading

In his article, Paul Rosenzweig references Article IX of the Articles of Confederation. Ask students to find the Articles of Confederation online or in a reference book and to read Article IX and examine the original means of addressing interstate disputes. Ask: Why were interstate disputes common in early America? (In early America, disputes between states were common especially because of disagreements involving economic issues and territorial boundaries.) How were these disputes settled under the Articles of Confederation? (The Articles of Confederation presented a convoluted process for solving such disputes. This process, despite some success, often proved to be an impediment to dispute resolution.) Do you think this would be an effective way to settle disputes? (Sample answer: In several instances, states were able to use this method to solve disputes successfully. But, this process was extremely cumbersome and complex; therefore, it is unlikely that states would be able and willing to use this process to resolve disputes.)

Active Reading

Why did the Framers not want one state court to hear and decide a dispute between two or more states? (The Framers were concerned that state courts would not be impartial in a case concerning their state and that this would lead to further conflicts. As Hamilton noted in The Federalist No. 80, the federal judiciary would be impartial in disputes between states.)
**Citizen–State Diversity** — Article III, Section 2, Clause 1

*Essay by Ernest A. Young (pp. 252–253)*

The Citizen–State Diversity Clause enables the federal judiciary to hear disputes between a state and citizens of another state. The Anti-Federalists opposed the clause, arguing that it would remove the states’ sovereign immunity. Some Framers agreed and welcomed the possibility as a check on state governments. James Madison, Alexander Hamilton, and other Federalists argued that Article III left states’ preexisting sovereign immunity intact.

In *Chisholm v. Georgia* (1793), the Supreme Court rejected the Federalists’ analysis, confirmed the Anti-Federalists’ fears, and held that sovereign immunity did not protect a state from suit. In response to this case, the Eleventh Amendment was proposed and adopted in 1795.

**Check Understanding**

Ask: What is the difference between interstate disputes and Citizen–State Diversity? (Interstate disputes involve disputes between two states. Citizen–State diversity involves disputes between a state and a citizen of another state.)

**Active Reading**

Why did the Anti-Federalists oppose the Citizen–State Diversity Clause? (The Citizen–State Diversity Clause allows federal courts to hear cases brought against a state by citizens of other state. Anti-Federalists objected that this would deprive states of their sovereign immunity.)

**Suits Against a State** — Amendment XI

*Essay by Ernest A. Young (pp. 375–377)*

The Eleventh Amendment was ratified in 1795 in response to the Supreme Court case of *Chisholm v. Georgia* (1793). In *Chisholm*, the Court held that federal courts could hear suits brought by individuals against state governments for monetary damages, notwithstanding states’ claims of sovereign immunity. The states, concerned that they might be held responsible for their Revolutionary War debts, quickly ratified the amendment to protect their sovereign immunity.

Dating back to English common law, the idea of sovereign immunity gives states immunity from private lawsuits. During the Founding period, the Anti-Federalists were concerned that Article III of the Constitution, which allowed federal courts to hear cases brought against the states by citizens of other states, would deprive states
of their sovereign immunity. Though several key Framers denied that the clause removed sovereign immunity under the Constitution, the Supreme Court nonetheless determined that it did do so.

Even after ratification of the Eleventh Amendment, serious questions relating to state sovereign immunity remain. For example, did the states’ immunity apply in suits based in federal law? Was state sovereign immunity part of the Constitution, or could Congress remove it?

The courts answered the former question in 1890, ruling that the Eleventh Amendment bars private lawsuits against the states, even those brought under federal law. Essentially, states had sovereign immunity in a variety of suits, and the Eleventh Amendment was simply a “patch” for the hole that *Chisholm* created. The Supreme Court has extended that immunity in ways that are not supported in the text of the Eleventh Amendment.

Regarding the second question, most common law doctrines are subject to legislative override. Debates during the Constitutional Convention and ratification focused on whether Article III did or did not override state sovereign immunity. In 1996, the Supreme Court held that Congress could not override the sovereign immunity of states, clarifying that the states’ immunity is enshrined in the Constitution, not just in common law. A few years later, the Court held that Congress could not override state sovereign immunity for suits in state courts. This ruling is not based on the text of the Eleventh Amendment, which speaks exclusively of suits in federal courts. Instead, the Court argued that state sovereign immunity is enshrined within the structure of the Constitution itself.

Despite these rulings, Congress may abrogate state sovereign immunity when acting pursuant to its enforcement powers under the Thirteenth, Fourteenth, and Fifteenth Amendments. Additionally, Congress can require states to waive their own immunity before granting them federal money; the United States can sue the states (allowing federal agencies to file suit against the states); and individual state officers can be sued in their private capacity for money damages. All of these loopholes have chipped away at the original intent of the Eleventh Amendment.

**Active Reading**

*What is sovereign immunity?* (Sovereign immunity gives states immunity from private lawsuits.) *Why did states ratify the Eleventh Amendment?* (In *Chisholm v. Georgia* (1793), the Supreme Court held that sovereign immunity did not protect a state from suits by individuals seeking monetary damages. The states, concerned that they might be held responsible for their Revolutionary War debts, quickly ratified the amendment to protect their sovereign immunity.)
Make a Real-Life Connection

To ensure understanding, ask: Under what circumstances might an individual sue a state or the United States? Ask students to create and share a realistic scenario in which this occurs. Then compare their responses to real cases in which the United States has been a defendant or plaintiff. (Answers will vary.)

Diversity Clause — Article III, Section 2, Clause 1

Essay by Terence Pell (pp. 253–255)

While the Citizen–State Diversity Clause concerns disputes between a state and citizens of another state, the Diversity Clause gives the federal judiciary jurisdiction over disputes between citizens of different states. Though little discussed at the Constitutional Convention, the purpose of this clause is to protect litigants from the bias of state tribunals.

Congress has conferred the power to try diversity cases by statute, but it has not conferred the full power. For instance, only suits of a certain amount of money may go to federal court, and parties must be “completely” diverse, meaning that no party on one side of the dispute may be a citizen of the same state as any party on the other side. A complex body of law determines which state’s law federal courts should apply to resolve the dispute.

Active Reading

Ask: How does the Diversity Clause protect litigants? (The Diversity Clause allows the judiciary to try cases between citizens of different states. This protects litigants from state court bias, particularly against the out-of-state party.)

Work in Pairs

Put students into small groups of two to three. Ask them to reread the material on the Citizen–State Diversity Clause and the Diversity Clause. Ask: How are these two clauses similar? How are they different? (Both clauses deal with parties from different states. In the Citizen–State Diversity Clause, one of the parties is a state. The Diversity Clause concerns private parties from two different states.)
Land Grant Jurisdiction Clause — Article III, Section 2, Clause 1

Essay by John C. Eastman (pp. 255–256)

The Land Grant Jurisdiction Clause gives the federal judiciary jurisdiction over conflicts between citizens of the same state claiming lands under different states’ grants. The Framers were concerned about disputes over the Western lands. Many states had overlapping claims on lands, and the possibility of land disputes would prove dangerous to the new Union. State tribunals might not be able to judge such conflicts impartially, while a federal tribunal would be impartial.

Much of the conflict was defused when states ceded their land throughout the 1780s and Congress passed the Northwest Ordinance. Further agreements and compromises between the states have rendered the clause obsolete, although a few minor conflicts have arisen. More serious land disputes involve the states themselves. In cases where land disputes occur between citizens of different states, federal courts hear these cases under the Citizen–State Diversity Clause.

Research It

Point out John C. Eastman’s explanation of conflicting land grants on page 255. Ask students to choose one state listed (such as Massachusetts, Connecticut, North Carolina, South Carolina, Georgia, or New York) and find some information on related land claims and disputes. Ask students to share their findings and use them to show on a map the many border conflicts in early America that made the Land Grant Jurisdiction Clause important.

Active Reading

According to John C. Eastman, the Land Grant Jurisdiction Clause stands for what two important propositions? (First, federal courts should decide cases in which the state courts would have an apparent bias. Second, geographic imbalance between members of the Union would threaten the Union.)

Discussion Question

Why did the Framers include the Land Grant Jurisdiction Clause in the Constitution? (Conflicts over land were common in the early United States, particularly as the nation expanded westward. Land-grant and boundary-line disputes were common and could threaten the peace and tranquility of the new Union. Under the Land Grant Jurisdiction Clause, federal courts could resolve these disputes without bias toward a particular party.)
Federal Party — Article III, Section 2, Clause 1

Essay by Paul Rosenzweig (pp. 249–250)

In cases where the United States is a party, it would be improper and unjust to allow one state to decide a case that concerns the whole people. Although a late addition to the Constitution, the Federal Party Clause is a vital part of the federal judiciary's jurisdiction.

The most interesting legal questions about this clause concern what constitutes the entity of the “United States” and when the United States has consented to be a party. The “United States” as a distinct entity can be distinguished from federal officers acting in their official duty and from federal entities and instrumentalities. The text of the clause clearly allows the United States to be a plaintiff (the party that initiates the lawsuit). The difficulty emerges when the United States is the defendant (the party whom the plaintiff sues).

The Federal Party Clause does not specify when suits are permitted. Absent a waiver, sovereign immunity shields the federal government from lawsuits. Congress can waive—and has waived—sovereign immunity from suits in a variety of cases.

Active Reading

Note Paul Rosenzweig’s use of the term “sovereign immunity.” Ask students to consider the meanings of both words and then try to define the phrase. (A sovereign is a ruler; immunity means being unhurt or unaffected.) Ask: What is sovereign immunity? (Sovereign immunity gives states immunity from private lawsuits.)

Discussion Questions

Can the United States be treated as a legal entity and participate in lawsuits? If so, who has jurisdiction? (Sample answer: The United States itself is a legal entity and may sometimes be a party in a legal case. It may take the role of defendant or plaintiff. In these instances, federal courts will have jurisdiction.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 12, Part 1. Review any material for questions they have missed.
### Matching

Match the clause on the left with the appropriate example situation.

1. **Judicial Power Clause**: “All Cases, in Law and Equity, arising under this Constitution [or] the Laws of the United States”
   - A man sues his city, claiming that the municipal ban on handguns violates his Second Amendment rights. (1)

2. **Treaties Clause**: Treaties made under the authority of the Constitution or federal Law
   - An American citizen sues following the Treaty of Paris because he will be unable to collect money owed to him by British subjects. (2)

3. **Ambassadors Clause**: “Cases affecting Ambassadors, other public ministers and Consuls”
   - An ambassador from another country is arrested in New York. (3)

4. **Admiralty Clause**: “To … all Cases of admiralty and maritime jurisdiction”
   - Two private boats collide on the high seas, and three sailors are injured. (4)

5. **Federal Party Clause**: “Controversies to which the United States shall be a Party”
   - The United States is sued for decreasing the value of a residential property near a recently constructed interstate highway. (5)

6. **Interstate Disputes Clause**: “Controversies between two or more states”
   - Virginia sues West Virginia regarding water rights. (6)

7. **Citizen–State Diversity Clause**: “Controversies ... between a State and Citizens of another State ... and between a State ... and foreign States, Citizens or Subjects”
   - A citizen of Oregon sues the state of Missouri. (8)

8. **Diversity Clause**: “Controversies...between Citizens of different states”
   - A citizen of Arizona sues a citizen of New York. (7)

9. **Land Grant Jurisdiction Clause**: “Controversies ... between Citizens of the same State claiming Lands under Grants of Different States”
   - A suit arises between two citizens of Wyoming, both claiming lands on the border between Wyoming and Colorado. It is unclear in which state the lands fall. (9)
Multiple Choice: Circle the correct response.

1. The Eleventh Amendment says that citizens of one state
   a. can sue in federal court.
   b. can sue the United States.
   c. cannot sue another state in federal court.
   d. cannot sue other citizens.

2. Cases involving ambassadors are tried in
   a. U.S. District Court.
   b. the Senate.
   c. the Supreme Court.
   d. the House of Representatives.

3. When first created, federal statutes are ______ properly executed treaties.
   a. equal to
   b. preempted by
   c. less important than
   d. more important than

4. Maritime and admiralty issues deal with
   a. treason.
   b. ambassadors.
   c. the military.
   d. the sea.

Fill in the Blank: Write the correct word or words in each blank.

1. The Eleventh Amendment overruled the Supreme Court’s decision in
   ______________. (Chisholm v. Georgia, 1793)

2. From the beginning, the Framers intended the scope of the jurisdiction of
   federal judicial power to be _____ (broad)

3. A necessary element of Congress’s power to authorize jurisdiction over
   cases is that there must be a ______ question present somewhere in
   the case. (federal)

4. Without a waiver, sovereign immunity shields the federal government
   and its agencies from ____ (suit)

5. The Eleventh Amendment was ratified in ____ (1795)

6. The Diversity Clause protects litigants from facing bias in other ______.
   (states)
Short Answer: Write out your answer to each question.

1. In 1845, breaking from English precedent, Congress extended admiralty jurisdiction to include what? (navigable lakes and rivers)

2. Today, what do legal questions surrounding the Federal Party Clause involve? (determining what precisely constitutes the entity of the “United States” and when the United States has consented to be a party to a lawsuit)

3. The movement to adopt a Constitution grew out of what? (substantial dissatisfaction with the ineffectiveness of the national government under the Articles of Confederation)

4. Why did the Framers include the Land Grand Jurisdiction Clause, the Interstate Dispute Clause and the Diversity Clause? (to promote “peace and harmony” among the states by providing an impartial federal tribunal in matters where “a state tribunal might not stand indifferent in a controversy where claims of its own sovereign were in conflict with those of another sovereign”)

True / False: Indicate whether each statement is true or false.

1. Throughout the Constitutional Convention, the Framers consistently expressed the desire that a national judiciary should have jurisdiction over legal issues arising from the nation’s international rights and obligations. (True)

2. The Supreme Court has never crafted prudential rules in its interpretation of treaties. (False)

3. During constitutional debates, even the Anti-Federalists agreed that admiralty questions should be lodged in the federal judiciary. (True)

4. The Constitution neither compels nor limits the Supreme Court in deciding what kinds of disputes between states it will hear. (True)
Part 2:
When Can the Judiciary Hear These Cases?

Original Jurisdiction
Article III, Section 2, Clause 2

Appellate Jurisdiction Clause
Article III, Section 2, Clause 2

Original Jurisdiction — Article III, Section 2, Clause 2

Essay by Paul Verkuil (pp. 256–258)

The Supreme Court has two types of jurisdiction: original and appellate. Original jurisdiction refers to instances when the Supreme Court can hear a case first, and appellate jurisdiction refers to those when the Court hears a case on appeal after another, lower court has reviewed it. The Supreme Court holds original jurisdiction over few, but important, types of cases. As Marbury v. Madison (1803) clarified, Congress cannot add to the Supreme Court's original jurisdiction. In Marbury, Chief Justice John Marshall reinforced the significance of original jurisdiction (1) by limiting its scope to the categories of cases specified in the Constitution's text and (2) thereby shifting its focus from executive matters to suits between states.

While Congress may not add to the Court's original jurisdiction, it has given lower federal courts concurrent jurisdiction over cases in which parochial bias would be less present, such as cases dealing with ambassadors and suits between the United States and a state. Under current federal law, the Supreme Court has exclusive original jurisdiction over suits between two or more states and concurrent jurisdiction, with lower federal courts, over all other disputes listed in the Original Jurisdiction Clause.

Few cases have come before the Supreme Court under the Original Jurisdiction Clause: less than 200 state-to-state disputes and two cases involving ambassadors. Between 1790 and 1900, the only suits the Court heard on its original-jurisdiction docket were boundary disputes. By the 20th century, disputes over water rights and Commerce Clause claims were more prominent. The Court has also heard suits filed by states against the United States as part of its original jurisdiction.

Simply because a conflict falls within the original jurisdiction of the Supreme Court does not mean that the Court will hear it. The Court has declined to hear cases between states that were too trivial (concerning state universities playing football) or too broad (concerning interstate water pollution). Once a court has accepted a case under its original jurisdiction, the Supreme Court appoints a Special Master to hold hearings, collect testimony, and find facts. Parties file briefs and present arguments. Then the Special Master issues a final report. If parties take exception to the report, the Court will hear the case much as it would hear cases on appeal.
Check Understanding

To ensure understanding, ask: What is the meaning of original jurisdiction? (Original jurisdiction is the power of a court to hear a case for the first time.)

Work in Groups

The Constitution describes two types of jurisdiction for the Supreme Court: original and appellate. Divide students into groups and have them make a chart of the types of cases that fall under the Supreme Court’s original jurisdiction and appellate jurisdiction. Then have students think of examples of cases that would fall under the original jurisdiction. Make sure they identify which clause would be applicable (Students may for example cite cases dealing with foreign ambassadors, cases involving “other public ministers and Consuls,” or cases between the states and the United States.

Appellate Jurisdiction Clause — Article III, Section 2, Clause 2

Essay by Andrew S. Gold (pp. 258–261)

The Appellate Jurisdiction Clause of Article III establishes that the Supreme Court will have appellate jurisdiction, “both as to Law and Fact,” over the cases previously mentioned in Article III, but that Congress may make exceptions to those cases.

The most contentious phrase of Article III, Section 2 concerned the Court’s ability to review cases on the basis of “law and fact.” Anti-Federalists were concerned that the Court would overturn jury findings and decisions of lower courts. Alexander Hamilton argued that granting the Supreme Court appellate jurisdiction would not eliminate the right to trial by jury and that Congress could prevent the Court from reexaming jury cases as to fact. Joseph Story argued that the Court’s ability to review as to law and fact refers to the Court’s admiralty and maritime jurisdiction. The Seventh and Fifth Amendments assuaged the Anti-Federalists’ concerns.

The Appellate Jurisdiction Clause grants Congress the power to limit the class of cases that could reach the Supreme Court as long as those cases may be heard in either original or appellate form in another court under Congress’s power. There has been some dispute about the extent of Congress’s power to limit the Supreme Court’s appellate jurisdiction. Some justices have argued that only Congress can determine the Court’s appellate jurisdiction. Other justices have argued that the Court’s appellate jurisdiction comes from the Constitution; Congress can make exceptions to the Court’s appellate jurisdiction, but it does not create it. Nonetheless, in DeRousseau v. United States (1810), the Court relied on standard rules of statutory interpretation to conclude that Congress, by listing certain classes of appeals that may reach the Court, tacitly intended to “except” all others from Supreme Court review.
The issue of Congress's power to limit the Supreme Court's appellate review came to a head in *Ex parte McCardle* (1869). After the Supreme Court heard the oral argument for the case, Congress repealed the provisions of the statute that had authorized Supreme Court review. Because Congress could limit the Court's appellate review, the Court concluded that it had no jurisdiction to decide the case. In *United States v. Klein* (1871), the Court determined that Congress cannot use its power over the Court's appellate jurisdiction to override a constitutional provision. The Court has recognized other limits to Congress's power; for instance, Congress may not use its power under the Appellate Jurisdiction Clause to reopen a case that has been decided.

Recent scholarly debate on this clause focuses on legislation that would remove existing Supreme Court jurisdiction and the extent of Congress's power to limit the Court’s appellate jurisdiction. Some argue that Congress's power is unlimited. Others argue that Congress's power is limited by other parts of the Constitution, such as the Bill of Rights protections. Some debates turn on the meaning of the terms “regulation” and “exceptions.” Others focus on distinctions between categories of jurisdictions that Congress can and cannot exempt.

The Supreme Court has not weighed in on this debate. It continues to follow the lead of John Marshall, who argued that “Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people.”

**Before You Read**

Ask: *What is an appeal?* (An appeal is a request for a new hearing made by the losing party.) *What is appellate jurisdiction?* (Appellate jurisdiction refers to the power of a court to hear appeals from trial courts or other lower tribunals.)

**Active Reading**

In general terms, what are the differences between original and appellate jurisdiction? (The Supreme Court has two types of jurisdiction: original and appellate. Original jurisdiction refers to when the Supreme Court can hear a case first, and appellate jurisdiction refers to when the Court hears the case on appeal after another lower, court has reviewed it.)

**Discussion Question**

What were some concerns about the scope of the Supreme Court’s power under the Appellate Jurisdiction Clause? How did the Framers amend the Constitution to dispel these fears? (Anti-Federalists were concerned that the Supreme Court would overturn jury findings and decisions of lower courts.)
The Federalists countered that granting the Supreme Court appellate jurisdiction would not eliminate the right to trial by jury and that Congress could prevent the Court from reexamining jury cases as to fact. The Seventh Amendment and the Double Jeopardy Clause of the Fifth Amendment assuaged the Anti-Federalists’ concerns.)

**Check Understanding**

Have students complete the following assessment to check their understanding of Lesson 12, Part 2. Review any material for questions they have missed.

**Multiple Choice: Circle the correct response.**

1. Between 1790 and 1900, the only suits between states that the Supreme Court heard on its original docket concerned
   a. civil rights issues.
   b. property issues.
   c. maritime disputes.
   d. boundary disputes.

2. The power of the Supreme Court to hear cases being appealed from a lower court is called
   a. original jurisdiction.
   b. appellate jurisdiction.
   c. judicial review.
   d. judicial power.

**Fill in the Blank: Write the correct word or words in each blank.**

1. The Court explicitly declared in *Marbury v. Madison* (1803) that Congress ______ add to the Supreme Court’s original jurisdiction. *(cannot)*

2. The Supreme Court appoints a _________ to hold hearings, find facts, and collect testimony for cases the Court hears under its original jurisdiction. *(Special Master)*

3. Congress may not pass legislation to ______ a case already decided and finalized. *(reopen)*

**Short Answer: Write out your answer to each question.**

1. Why were the Anti-Federalists opposed to the Appellate Jurisdiction Clause? *(They believed it meant the end of civil juries and would allow a second trial of those who were criminally charged at the appellate level.)*

2. What appeased the Anti-Federalists who were concerned about the possibility of a second trial of those who were criminally charged? *(The Double Jeopardy Clause of the Fifth Amendment)*
3. From the beginning, the most important kinds of suits between states involved disputes over what? *(Boundaries)*

**True / False: Indicate whether each statement is true or false.**

1. The Double Jeopardy Clause of the Fifth Amendment was a result of Anti-Federalist concerns about the Appellate Jurisdiction Clause. *(True)*

2. There have been fewer than 200 state-versus-state original cases in the history of the Republic. *(True)*

3. Congress determines what cases the Supreme Court may hear under its Appellate Jurisdiction. *(True)*
Lesson Objectives

When you complete Lesson 13, you will be able to:

• Explain the protection of the writ of habeas corpus and when the writ of habeas corpus may be suspended.
• Describe the difference between criminal trials and civil trials and summarize the history of criminal trials in the English tradition and in the early United States.
• Understand the role of the jury in the Constitution and its importance in the criminal process and describe how the role of the jury has changed.
• Understand the types of treason and how the Constitution defines it.
• Understand the punishment for treason under current law.
• Explain the punishments for treason under common law and under current federal law.
• Explain the purpose of the Interstate Rendition Clause.

Habeas Corpus — Article I, Section 9, Clause 2

Essay by Jonathan Turley (pp. 152–154)

Protecting the writ of habeas corpus means that no person may be held without a legal cause.

The writ of habeas corpus was an English legal procedure. Sir William Blackstone praised it as “the glory of the English law” and noted that the right of citizens to demand review of their incarceration guarded against government abuse and incompetence. The colonial governments agreed. Writs of habeas corpus (literally, “you shall have the body”) were issued before the Revolution, and by 1787, several state constitutions already guaranteed habeas corpus. In The Federalist No. 84, Alexander Hamilton invoked the writ of habeas corpus as proof that the Constitution protected individual liberty.

The scope and meaning of the Habeas Corpus Clause have been controversial ever since its ratification. While the clause states the conditions under which the writ may be suspended (during rebellion or invasion), it does not specifically state either that it should be suspended during such crises or who should suspend it. Convention
delegates agreed that Congress could suspend the writ, but it is not clear that only Congress could do so. During the Civil War, Lincoln suspended the writ of habeas corpus, and Congress retroactively supported the suspension.

In *Ex parte Bollman* (1807), Chief Justice John Marshall argued that Congress could suspend the writ. Congress has suspended the writ three times since the Civil War: in South Carolina in 1871 to deal with the Ku Klux Klan, in the Philippines in 1905 in connection with a local revolt, and in Hawaii during World War II.

A related question was the courts’ authority to issue writs of habeas corpus, a power not expressly granted in the Constitution. Justice Marshall argued that Congress had a duty to authorize writs of habeas corpus. Beginning in 1789, Congress passed many statutes providing habeas corpus rights for a variety of prisoners. Congress also statutorily granted courts the authority to issue writs.

**Before You Read**

Explain to students that a writ is a legal document, or an order, issued by the court. Tell them that habeas corpus is Latin for “you shall have the body.”

Ask: **What do you think the writ of habeas corpus is?** (It is a legal action by which a prisoner can be released from unlawful detention.)

**Make an Inference**

Point out that on page 152 (middle of the second full paragraph in the right-hand column), Turley says that the writ of habeas corpus may be suspended during times of rebellion or invasion. Ask: **Why may it be necessary to suspend habeas corpus during these times?** (The suspension of habeas corpus was a contentious issue at the Constitutional Convention, although there was consensus that the writ could be suspended in extreme circumstances. During such unusual times as invasion or rebellion, it would be important to be able to hold prisoners to maintain order. Once the invasion or rebellion was quelled, the writ of habeas corpus would be restored.)

**Make a Real-Life Connection**

What might happen if a government was allowed to take prisoners without a reason? (Answers will vary. A government might imprison anyone it did not like, such as people of an opposing political party.) **Think of an instance today in which the writ of habeas corpus might be suspended.** (Answers will vary. Accept all reasonable responses. Students may say that persons might be arrested without a legal cause if they were suspected of terrorism.)
Criminal Trials — Article III, Section 2, Clause 3

Essay by Rachel E. Barkow (pp. 261–264)

Article III cements the role of the jury in the structure of government. The right to a trial by jury traces back to the Magna Carta in 1297. Since the 16th century, a jury has consisted of 12 citizens who sit in sworn judgment of the criminal allegations against a peer. In America, the Charter of the Virginia Company in 1606 guaranteed the colonists all the traditional rights of Englishmen, including the right to trial by jury.

Before the American Revolution, the colonists used the right to trial by jury to resist English authority; for instance, John Peter Zenger was acquitted of charges of seditious libel for publishing materials that opposed the king. In response, George III expanded the jurisdiction of non-jury courts, like Admiralty courts, and threatened to transport colonists overseas to be tried in England, where the jury would not be sympathetic to the idea of American independence.

The Declaration of Independence condemned the king for depriving the colonists of their right to a trial by jury. Article III of the Constitution states that all criminal trials must be tried by a jury in the state and district in which the alleged crime was committed. Thus, the jury has become part of the structure of government.

In the early history of the United States, juries decided questions of fact and questions of law. Judges would not tell jury members what the law meant; instead, lawyers argued questions of law before the jury, and the jury decided how the law should be interpreted and applied. In 1895, however, the Supreme Court ruled that juries could not decide legal questions. Today, judges tell the jury what the law means, and jurors are obliged to follow that definition. Although their power to determine questions of law has been eroded, juries still retain the raw power to check general laws, because a verdict of not guilty is not reviewable.

In 1930, the jury’s power was eroded again when the Supreme Court ruled that a defendant could waive his right to a jury trial in favor of a bench trial (a trial where the judge decides everything and there is no jury). However, the Court did maintain that the prosecutor could demand a jury trial even if the accused wished to waive his right.

Two other major changes in the American criminal justice system have further sidelined the role of the jury. First, few defendants ever see a jury, because an increasing number of cases are resolved through plea bargains. Second, Congress and many state legislatures have crafted sentencing laws: Rather than allowing the judge to exercise his broad discretion in sentencing a convicted criminal, legislatures pass laws specifying how particular findings of fact must affect sentencing. In 2000, the Supreme Court ruled that state legislatures did not have complete power to define punishments because it would undercut the jury’s constitutional role.
**Active Reading**

How are juries part of the original structure of government? (Some Framers were concerned that judges, because they were part of the government, would not be an adequate check on government abuse of the criminal process. The jury would ensure that individuals did not lose their liberty under a criminal law until the people themselves concurred.)

**Discussion Question**

How has the power of the jury trial changed in modern times? (Juries used to make decisions based on both fact and law. Now juries decide questions of fact, not law. Traditionally, criminal cases were almost always tried by a jury. Now, however, defendants may waive jury trials in favor of bench trials, or they may simply settle out of court or through plea bargains.)

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**Treason** — Article III, Section 3, Clause 1

*Essay by Bradley C. S. Watson (pp. 264–266)*

Under common law, treason was a form of treachery or breach of faith committed between two parties who enjoyed an established relationship of mutual trust. There were two forms of treason: petit treason and high treason. Petit treason refers to a wife killing her husband or a servant killing his lord. High treason involves a subject betraying a sovereign.

The American colonies' understanding of treason originates in the common law. By the 18th century, treason laws in America consistently reflected the law in England, but more precise definitions and standards of proof, as well as more lenient punishment, were gradually adopted.

The Framers' definition of treason in the Constitution reflected their concern with individual rights and wariness of arbitrary government. It was not designed to enable factions to target mere political opponents. Under the Constitution, treason consists of levying war against the United States or giving aid and comfort to its enemies. Either a confession in open court or the testimony of at least two witnesses to the same overt act would serve as proof. Hamilton defended the clause as one of the guarantors of rights within the Constitution.

The Supreme Court has discussed the treason clauses on a few occasions. In *Ex parte Bollman* (1807) and *United States v. Burr* (1807), Chief Justice John Marshall rejected the notion of “constructive treason.” Conspiracy short of actually levying war is not treason. Short of manifest participation in a treasonable act, conviction for treason was nearly impossible. During several World War II treason cases, the Supreme Court held that specific intent was necessary rather than simply offering aid.
Because of the Constitution’s definition of treason and standards of proof associated with it, Congress has passed laws to prosecute certain hostile acts (espionage and terrorism) that are short of treason but nonetheless harmful to the United States.

**Before You Read**

Ask students what they know about the crime of treason. What does it mean? (Treason is a breach of faith between subject and sovereign—in other words, between a citizen and his country.)

**Research It**

The article by Bradley C. S. Watson mentions several instances of treason cases throughout history. Assign each student (or small groups of students) a case of treason from a different era (for instance, trials from early America, from the Civil War era, from the World War I and World War II eras, and from the “War on Terrorism” era). Have students research these trials and share their findings with the class.

**Discussion Question**

How did the Framers define treason? (The Framers defined treason as the act of “levying War” against the United States or giving aid and comfort to its enemies.) Why did they define it so narrowly? (The Framers’ definition of treason in the Constitution reflected their concern with individual rights and wariness of arbitrary government. It was not designed to enable factions to target mere political opponents.)

**Punishment of Treason** — Article III, Section 3, Clause 2

*Essay by Bradley C. S. Watson (p. 266)*

Under common law, treason was punishable by death. Those convicted of treason were considered to be *attaint*—meaning stained or dead in the eyes of the law—prior to execution. Consequently, two additional punishments accompanied execution: The convicted forfeited their property to the Crown and were unable to pass down any title or inheritance, a punishment known as “corruption of the blood.”

Under the Constitution, Congress would set the punishment for treason, but it could not include forfeiture of property or corruption of the blood. The First Congress established the penalty of death for treason and seven years imprisonment for concealing knowledge of a treasonous act. In practice, the punishments for treason have been more lenient: Sentences of death have been commuted, and many convicted of treason have been pardoned. Of the two state convictions for treason, only one resulted in the death penalty.
Active Reading

Ask: What does the word “misprision” mean? (Misprision means failing to report a crime, in this case treason.) How might a person be accused of misprision of treason? (Sample answer: A person who hears about a treasonable conspiracy but fails to report it to authorities may be found guilty of misprision of treason.)

Discussion Question

Though treason is a severe offense, some forms of punishment are not permissible. What kinds of punishments are restricted and why? (Article III restricts the punishments for treason otherwise found in English common law. Under common law, those who were convicted of treason were considered to be attaint (stained or dead in the eyes of the law) prior to execution. Consequently, two additional punishments accompanied execution: Those who were convicted forfeited their property to the Crown and were unable to pass down any title or inheritance, a punishment known as “corruption of the blood.” The Constitution, however, forbids these punishments. In fact, there are separate provisions forbidding the state and federal governments from passing bills of attainder.)

Interstate Rendition Clause — Article IV, Section 2, Clause 2

Essay by Richard Peltz (pp. 273–275)

The Interstate Rendition Clause, or Extradition Clause, ensures that criminals may not evade prosecution in one state by escaping to another state. For the clause to be enforceable, there must be a valid criminal charge, a flight to evade prosecution, and an executive request for return.

The Framers included the words “treason,” “felony,” and “other Crimes” in the clause to specify that all crimes—including political ones—were grounds for extradition. The Interstate Rendition Clause does not apply to flight to evade civil liabilities or private debts. Moreover, it is irrelevant whether the charged individual intended to flee to avoid the law.

Controversy arose during the antebellum period about application of the Interstate Rendition Clause to the issue of slavery. Before the Civil War, for example, Northern governors refused to send fugitive slaves back to the Southern states. Since the Civil War, the Supreme Court has ruled that executives may determine whether another state has charged an individual with a crime and whether that individual is a fugitive (meaning present in that other state when the crime occurred).

Currently, every state has adopted some form of the Uniform Extradition and Rendition Act for extradition matters. Some states go further than the requirements of the Interstate Rendition Clause and agree to extradite subpoenaed witnesses or individuals. It is unclear whether such arrangements offend the clause.
Before You Read

Activate students’ prior knowledge from the previous lessons. Ask: How are the legal systems of different states related? (Courts have to make judgments on cases related to the laws of other states; courts recognize other states’ judgments; sometimes there is a conflict about which state’s laws apply in the dispute.) What do you think would happen if somebody committed a crime and then tried to avoid being charged by going to another state? (The state that charged the person might demand his return.)

Active Reading

Have students review the Fugitive Slave Clause. Have them compare that clause to the Interstate Rendition Clause. Why is the language different even though the two clauses seem to cover similar subjects? (Students should note that the language of the Interstate Rendition Clause is much harsher: It speaks of criminals fleeing justice and returning these criminals to the state that has jurisdiction over the crime. The Fugitive Slave Clause does not mention the words “slave,” “justice,” or “criminals.” It speaks of persons held in service according to state law and parties who claim that such labor is due. The text of the Fugitive Slave Clause does not give moral sanction to slavery.)

Discussion Question

Give an example of extradition, which is part of the Interstate Rendition Clause. It can be a true example from the news or a fictional one. (Answers will vary. Sample answer: If Joe Smith robs a store and kills the clerk in Pennsylvania and then flees to New York, the governor of Pennsylvania may ask New York to return Smith to his home state. Upon Smith’s return to Pennsylvania, he will be tried for his crimes.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 13. Review any material for questions they have missed.

**Multiple Choice: Circle the correct response.**

1. Who was pardoned by the general amnesty of December 25, 1868?
   - a. Suffragettes
   - b. Confederates
   - c. Slaves
   - d. Abraham Lincoln
2. The only crime defined in the Constitution is
   a. tax evasion.
   b. murder.
   c. corruption of blood.
   d. treason.

3. In the two successful prosecutions for treason at the state level, which defendant was executed?
   a. Thomas Dorr in Rhode Island in 1844
   b. John Brown in Virginia in 1859

Fill in the Blank: Write the correct word or words in each blank.

1. The Writ of Habeas Corpus is one of the many imports from _______.
   (England)

2. Participants in the Whiskey Rebellion were pardoned by President _________________. (George Washington)

Short Answer: Write out your answer to each question.

1. List a few of the ambiguities of the Habeas Corpus Clause.
   • One of the most obvious ambiguities is the absence of an affirmative grant of the right to suspend habeas corpus.
   • Another ambiguity is the fact that the clause does not affirmatively state who can suspend the writ.

2. In what three instances since the Civil War has Congress suspended the writ of habeas corpus?
   • In South Carolina in 1871 to deal with the Ku Klux Klan
   • In the Philippines in 1905 in connection with a local revolt
   • In Hawaii during World War II

3. What types of crimes are covered in the Interstate Rendition Clause? (treason, felony, and “other Crimes”)

4. What is exempted from the scope of the Interstate Rendition Clause? (civil liabilities and private debts)

5. How many citizens serve on a jury of one’s peers? (12)

6. What was “petit treason”? (a wife killing her husband or a servant or ecclesiastic killing his lord or master)

7. What was “high treason”? (a breach between a subject and a sovereign, such as betrayal, neglect of duty, or renunciation of allegiance to a sovereign to whom a subject owes allegiance)
**True / False: Indicate whether each statement is true or false.**

1. Federal courts may not compel state executives to extradite fugitives who have been properly demanded. *(False)*

2. Under the Constitution the punishment for treason may not include the corruption of blood. *(True)*

3. The need for a trial by jury in criminal cases was one of the few subjects of agreement between Federalists and Anti-Federalists. *(True)*

4. In the nation’s early history, the jury not only applied the law to the facts it found, but also decided questions of law. *(True)*

5. If the prosecutor insists upon a jury trial, the court must grant it. *(True)*

6. Under common law, punishments for treason generally included drawing, hanging, beheading, and quartering. *(True)*
Unit 4
Lesson 14: The Constitution, Federalism, and the States

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Lesson Objectives

When you complete Lesson 14, you will be able to:

- Explain the division of power between the federal and state governments.
- Explain the purpose of the Full Faith and Credit Clause and the Privileges and Immunities Clause of Article IV and what they require of the states.
- Describe how new states join the Union according to the New States Clause.
- Understand the absolute and qualified prohibitions on the states in Article I, Section 10 of the Constitution: including the State Treaties Clause, the State Coinage Clause, the State Bill of Attainder, State Ex Post Facto Clauses, the Obligation of Contracts Clause, and the Import–Export Clause.
- Explain the purpose of the State Action Clause and the Enforcement Clause and the scope of Congress's power under the clauses.
- Understand the three main theories about the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment.
- Understand the original meaning of the Due Process Clause of the Fourteenth Amendment and how the Supreme Court has applied the clause.
- Understand the original meaning of the Equal Protection Clause of the Fourteenth Amendment, what it requires of states, and generally how the Supreme Court has applied the clause.
- Explain the purpose of the Apportionment of Representatives Clause, the Disqualification for Rebellion Clause, and the Debts Incurred During Rebellion Clause.

Introduction:

Understanding Federalism and the Relationship Between the States and the Federal Government

While everyone knows that this is a nation of states, few seem to think that this division is more than a quirk of history. Yet federalism is a crucial component of our system of government and part of the very infrastructure that makes our political liberty possible.
At the Constitutional Convention, despite a clear recognition of the need for additional national authority in the wake of the Articles of Confederation, there was great concern that an overreaction might produce an all-powerful national government. While they harbored no doctrinaire aversion to government as such, the Founders remained distrustful of government, especially a centralized national government that resembled the British rule against which they had revolted. The solution was a unique American innovation: a federal government with strong but limited national powers that respected and protected the vitality of the states. Half a century later, Alexis de Tocqueville would celebrate democracy in America as precisely the result of the political life supported and encouraged by this decentralized structure.

The United States Constitution is but one aspect of constitutional government in the United States. There are now 50 state governments, each with its own constitution, and these state governments are key components of our “compound republic.” Although national powers were clearly enhanced by the Constitution, the federal government was to exercise only delegated powers, the remainder being reserved to the people or the states as defined in their constitutions. The federal government was not supposed to hold all, or even most, of the power.

The distinction between national and state government is inherent throughout the Constitution. As Madison explains in *The Federalist No. 39*, the government created by the Constitution is “partly national and partly federal.” The House of Representatives is elected directly by the people, but to give states more leverage within the national government, equal state representation in the Senate was blended into the national legislature (and permanently guaranteed in Article V). The executive is the most national of the branches, yet the Electoral College process by which the President is elected is based on states. It is striking that in this powerful national government there is not a single official chosen by a national constituency. The process by which the Constitution is amended is ultimately based on state approval. The document was ratified by the states.

To the extent that the United States federal government acts on individuals, it is national; but in the extent of its powers, it is limited to certain national functions. “Since its jurisdiction extends to certain enumerated objects only,” Madison concludes, it “leaves to the several States a residuary and inviolable sovereignty over all other objects.” Here is how Madison described this in *The Federalist No. 45*:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will 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 States.

In the same way that the separation of powers works within the federal and state constitutions, federalism is the basic operational structure of American constitutional government as a whole and provides the process by which the two levels of government...
ment check each other. In America’s federalist system, political power is divided between the federal government and the states; the power allotted to each is then further subdivided among distinct and separate departments. Madison explains in *The Federalist* No. 51 that, because of this arrangement, “the different governments will control each other; at the same time that each will be controlled by itself.”

“This balance between the National and State governments ought to be dwelt on with peculiar attention, as it is of the utmost importance,” Hamilton argued at the New York state ratifying convention. “It forms a double security to the people. If one encroaches on their rights they will find a powerful protection in the other. Indeed, they will both be prevented from overpassing their constitutional limits by a certain rivalship, which will ever subsist between them.”

Although federalism was a practical invention of the Constitutional Convention, the idea of maintaining strong state governments was nothing new. The general notion that political authority and decision-making should be kept as decentralized and close to home as possible was a well-established theme of the Anti-Federalists. The view of those who doubted the political efficacy of the new Constitution was that good popular government depended upon a political community that would promote civic or public virtue as much as—if not more than—it did on a set of institutional devices designed to check the selfish impulses of the majority. However, the structure of federalism is not only an “auxiliary precaution.” By keeping authority and functions divided between two levels of government, federalism recognizes legitimate national power at the same time that it protects a sphere of state autonomy and local self-government.

**Check Understanding**

Have students recall the Supremacy Clause and explain how it supports the idea of federalism. (The Supremacy Clause was designed to permit both levels of government to act individually without interference from one another. However, in the case of a conflict, valid federal laws take priority over state law. The Supremacy Clause supports the Framers’ understanding of federalism by creating a mechanism to deal with conflict between the states and the federal government.)

**Active Reading**

Read aloud the Ninth and Tenth Amendments. Ask students how the language of the amendments supports the Founders’ idea of federalism? (The Ninth Amendment states that the list of rights in the Constitution is not exhaustive. The people retain rights that are not listed in the Constitution. The Tenth Amendment states that all government powers—except for those that the Constitution grants to the federal government—belong to the states or the people. These amendments support federalism insofar as they reiterate that the Constitution is a document of limited powers, the states retain a whole host of powers not granted to the federal government, and the people retain a whole host of rights, even those not listed.)
**Part 1: The States and Their Relationships with Other States**

**Full Faith and Credit Clause**  
Article IV, Section 1

**Privileges and Immunities Clause**  
Article IV, Section 2, Clause 1

**New States Clause**  
Article IV, Section 3, Clause 1

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**Full Faith and Credit Clause** — Article IV, Section 1

*Essay by Erin O’Hara (pp. 267–269)*

As James Madison noted, the Full Faith and Credit Clause of the Constitution promotes “harmony and proper intercourse among the states.” It chiefly unites court systems of different states insofar as it ensures that courts of one state honor the judgments of courts in another state. The Supreme Court has applied this clause in three distinct ways: determining when one state’s court may take jurisdiction over claims involving another state, determining which state law applies in a case with multi-state disputes, and recognizing and enforcing judgments from another state’s court.

First, the Court has used the Full Faith and Credit Clause to require state courts to hear claims that arise under sister-state laws. A state court cannot categorically refuse to hear claims that arise under another state’s laws, but it may be exempt from this requirement if, for instance, it does not recognize the equivalent claim based on local law. Additionally, a state cannot limit a litigant’s options for a hearing to its local courts alone.

Second, the Supreme Court guidelines regarding the application of a state’s laws for a multi-state dispute have varied. At first, the laws of the state where the dispute occurred were applied, even if the trial took place in a different state, but if the state had an interest in the case, the state’s court could apply its own laws. Today, state courts have a degree of discretion regarding which state’s law to apply.

Third, the Supreme Court has ruled that states must recognize and enforce (to the same extent that the deciding state would) the decisions of other states’ courts. There are a few exceptions to this rule relating to personal jurisdiction, deeds of land, and penal claims.
In recent years, questions have emerged about the application of the Full Faith and Credit Clause to issues of marriage, divorce, and child-rearing. For instance, state courts change child support and custody judgments made in another state if these alterations are “in the best interests of the child.” The Defense of Marriage Act (1996) allowed states not to recognize same-sex marriages from other states.

**Active Reading**

Ask: When would one state court not be required to enforce judgments made by another state court? (when a defendant was not present in court when a judgment against him or her was made, when judgments are related to claims that are purely penal, in cases involving land deeds.)

**Check Understanding**

Ask: Why does James Madison cite the Full Faith and Credit Clause as one that promotes “harmony and proper intercourse among the states”? (The Full Faith and Credit Clause ensures that states recognize and honor the judgments of other states’ courts. It also provides guidance for state courts to determine when the laws of another state apply in a proceeding.) Have students read the Interstate Rendition Clause. Ask: What does the Interstate Rendition Clause do and how is it important to a functioning legal system? (The Interstate Rendition Clause ensures that criminals may not evade prosecution in one state by escaping to another state.)

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**Privileges and Immunities Clause** — Article IV, Section 2, Clause 1

*Essay by David F. Forte and Ronald Rotunda (pp. 269–273)*

The Privileges and Immunities Clause ensures that states do not discriminate against citizens of other states in judicial processes and economic activities. Because the concept of privileges and immunities referred to the long tradition of rights afforded to the colonists as Englishmen, the Framers approved the clause without controversy.

The concept of privileges and immunities meant that colonists were part of a unified political community, could travel freely and establish permanent residencies in any other colonies, received certain legal rights and were guaranteed access to courts, and were able to sell their goods in other colonies.

Before independence, the Declaration and Resolves of 1774 outlined several natural rights of the colonists, including the right to “life, liberty, and property.” The delegates to the First Continental Congress distinguished between natural rights and privileges and immunities, describing the latter as positive rights granted by royal charter or provincial law.
The Articles of Confederation contained a clause protecting the privileges and immunities of citizenship. Although revised several times, the final version of the clause created common citizenship, guaranteed freedom of travel, and provided equal protection of the laws by protecting freedom to conduct business.

Based on James Madison’s objections, the Privileges and Immunities Clause in the Constitution was simplified. It created common citizenship, but Congress still retained power to determine who could become citizens. It also prevented states from discriminating against citizens of other states in judicial processes and economic activities.

Many states distinguished between privileges and immunities on one hand and natural rights on the other. Privileges and immunities remained positive rights. A state could repeal them, and an individual had no right to claim them for himself. Natural rights are not granted by the state; they are inherent in the nature of man, and the state only secures them. The Supreme Court held in *Corfield v. Coryell* (1823) that privileges and immunities included natural rights. However, in the *Slaughter-House Cases* (1873), the Court rejected this idea.

### Before You Read

In many of the charters of the original colonies, the Crown guaranteed some variation of franchises, privileges, immunities, or liberties to colonies to create a common subject status among free-born Englishmen. “Liberties” were not rights of individuals, but the right of a corporation, manor, or abbot to make and enforce laws within their respective jurisdictions. In contrast, “immunities” were exemptions from the force of the law that were granted by the king. Immunities gave individuals, towns, or other entities freedom from having to abide by a legal obligation. The courts enforced various privileges such as the right to trial by jury, the rights of possession and inheritance of land, and the right of merchants in certain towns to trade freely.

### Active Reading

Have students read the section on the Declaration and Resolves of 1774 (beginning at the bottom of page 270 and ending at the top of page 271). Ask: What natural rights did the colonists possess? (the rights to life, liberty, and property) What method did delegates use to describe colonists’ immunities and privileges? (They referenced English grants: royal charters and provincial laws.) What distinguished natural rights from immunities and privileges? (Immunities and privileges were positive rights. Natural rights were inherent in the nature of man.)
THE CONSTITUTION, FEDERALISM, AND THE STATES

Make a Real-Life Connection

Read the section on the privileges and immunities granted to the colonists on page 270 (start with the final paragraph beginning with “In America, there were specific practical effects” and stop at “allowed for a robust exchange of goods and commercial paper”). Ask: Do American citizens today enjoy the same privileges and immunities? (Americans are citizens of one country. People in the United States travel freely. People start businesses in any town or state freely. The Internet has also allowed individuals to buy and sell products in every state.)

New States Clause — Article IV, Section 3, Clause 1

Essay by David F. Forte (pp. 276–278)

The New States Clause outlines the process by which new states enter the Union. Congress admits new states. New states could be created within an existing state, or multiple existing states could form a single new state, with the consent of both Congress and relevant state legislatures.

The Committee of Detail at the Constitutional Convention originally proposed that new states be admitted on the same terms as existing states. Gouverneur Morris opposed considering new states equal to the original ones. Although James Madison supported the equality of states, the explicit equality requirement was removed from the language by a vote of 7 to 2. The Constitution was silent on the equality of states.

Using its discretion, Congress declared that all new states would be on equal footing with the original ones. Congress also decided to admit states formed from territory acquired by the Union after the Constitution went into effect. Gouverneur Morris and the New England Federalists opposed this practice, arguing that Congress could admit states only from the territory held by the Union prior to the Constitution. Later practice rendered Morris’s and the Federalists’ argument moot. The Supreme Court has upheld Congress’s practice of admitting new states on equal footing to the original.

Before You Read

Ask: What does the word “equality” mean? (Two or more things are equal if they have the same pertinent properties.) How are new states added to the Union? (Answers will vary. Students may mention that territories may apply for statehood and that Congress decides which territories to admit.)

Make a Real-Life Connection

Have students research which state was first to join the Union, which state joined the Union most recently, and when their home state joined the Union.
Active Reading

Ask: What have you learned about the role of the states in our system of government? (Answers will vary. States determine the qualifications for voting. States select members of the Electoral College. States hold the largest portion of the legislative power.) Are there clauses in the Constitution that suggest all states are equal? (States receive equal representation in the Senate, a provision that cannot be amended. There are certain clauses in the Constitution that limit Congress’s ability to give preference or advantages to one state over another: for instance, the Port Preference Clause and the Taxation Clauses.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 14, Part 1. Review any material for questions they have missed.

Fill in the Blank: Write the correct word or words in each blank.

1. _____ opposed admitting new states to the Union on an equal footing with the original states. (Gouverneur Morris)

2. The _____ outlined several natural rights of colonists, including the rights to life and liberty. (Declaration and Resolves of 1774)

3. “Liberties” and “franchises” constituted the power of a governing unit to make ______. (rules)

4. “Immunities” were exceptions that the king granted from the force of the ______. (law)

5. The _____ proposed the Privileges and Immunities Clause. (Committee of Detail)

Short Answer: Write out your answer to each question.

1. Article IV of the Articles of Confederation sought to create what? (a common citizenship, a right to travel, and equal protection for commercial activities)

2. What is the essential purpose of the Full Faith and Credit Clause? (to assure that the courts of one state will honor the judgments of the courts of another state without the need to retry the whole cause of action)
3. What were some practical effects of the guarantees of privileges and immunities to colonists in the New World?

- Membership in a common political community
- A right to travel
- A series of particularly defined rights centering around access to the courts
- Equal protection of the laws for commercial activities based on the right of every freeman to a lawful calling

True / False: Indicate whether each statement is true or false.

1. The first sentence of the Full Faith and Credit Clause appeared almost verbatim in the Articles of Confederation. (True)

2. The Crown granted to the original colonists in the New World the legal rights of serfs and indentured servants. (False. The Crown granted to the colonists in the New World the legal rights of freemen.)

3. New states cannot be formed out of existing states. (False. Providing that all parties—the new state, the existing state, and Congress—consent, a new state can be formed out of an existing state.)

4. All the Framers agreed that New States would be considered equal to the states already in the Union. (False. Some Framers opposed considering new states equal to the original states.)
Part 2: The Constitution’s Limitations on the States

State Treaties  
Article I, Section 10, Clause 1

State Coinage  
Article I, Section 10, Clause 1

State Bill of Attainder and State Ex Post Facto Laws  
Article I, Section 10, Clause 1

Obligation of Contracts  
Article I, Section 10, Clause 1

Import–Export Clause  
Article I, Section 10, Clause 2

Compact Clause  
Article I, Section 10, Clause 3

State Treaties — Article I, Section 10, Clause 1

Essay by Brannon P. Denning (pp. 167–168)

The Constitution establishes a limited government. A centralized national government certainly has the potential to threaten individual liberty, but so do state governments. Our Constitution recognizes the threat from both levels of government and therefore contains specific limitations on the powers of each. Article I, Section 9 focuses on the limits of the federal government; Article I, Section 10 limits state governments’ actions. Section 10, Clause 1 consists of absolute prohibitions on the states; Section 10, Clauses 2 and 3 consists of qualified prohibitions on the states, meaning prohibitions that Congress may suspend.

The State Treaties Clause is an absolute prohibition. States may not enter into a “treaty, alliance, or confederation” and may not issue letters of marque and reprisal. Treaties, alliances, and confederations are formal, binding agreements between different countries under the jurisdiction of international law. Article I empowers Congress alone to grant letters of marque and reprisal, which traditionally allowed holders to engage in hostilities and seize enemy property.

The Framers included these separate restrictions on states to ensure that the federal government exercised all power over foreign affairs. James Madison and Joseph Story defended the clause as appropriate, since the federal government would be responsible for directing foreign affairs, which includes possessing the military means to protect the nation. Though it rarely has the opportunity to address this clause, the Supreme Court has affirmed that compacts are different from treaties. States may enter into compacts or agreements with the consent of Congress. However, under no circumstances may they enter into treaties with other nations.
Active Reading

Ask: The main purpose of the State Treaties Clause is to give the federal government power over what? (foreign affairs)

Check Understanding

Ask: What do you know about treaties that the United States has with other countries? (Treaties become law after the President has negotiated and the Senate has consented to them. Treaties are between countries, not between portions of countries; therefore, an individual state cannot enter into a treaty with another country.)

Check Understanding

Ask: What are letters of marque and reprisal? (They are forms of permission, usually granted to private individuals, to attack enemies of the nation and seize property.)

State Coinage — Article I, Section 10, Clause 1

Essay by David F. Forte (pp. 168–170)

The State Coinage Clause prohibits the states from making any form of money, including coins and bills of credit (meaning paper money not backed by specie). The purpose of this clause was to transfer power over economic policy from the states to the new federal government.

Both before and during the American Revolution, states issued various types of paper currencies to regulate their economies. These wildly fluctuating currencies resulted in complex debtor–creditor relationships and weak interstate commerce. In 1764, Parliament banned the colonies’ use of bills of credit as legal tender. During the Revolution, states again issued bills of credit to finance the war. After 1783, specie was limited, and states’ currency issues exacerbated the depression of 1784. Seeing the problems of state bills of credit, the Framers included the State Coinage Clause to prevent states from issuing paper money. After ratification, Alexander Hamilton pushed through a federal monetary reform program that included absorbing previous state and federal debt, creating a national bank, and levying taxes.

There was still a demand for circulating currency. Though states could not directly enter the monetary field, private and state-chartered banks would issue bank notes redeemable for specie. The Supreme Court upheld the practice because state governments were not issuing them. The number of such banks increased, and the value of their notes fluctuated, prompting Congress to tax the notes. Once the Supreme Court upheld the tax as constitutional, the use of state bank notes declined and eventually ceased altogether.
Before you Read

Ask: What do you recall about Congress’s power over monetary policy from Lesson 5? (Answers will vary. Students may mention that the federal government retains full control of monetary policy, citing Congress’s power to coin money, punish counterfeiting, and establish rules of bankruptcy. They may note that the Founders were leery of bills of credit and intended that Congress issue money backed by precious metals to ensure a stable monetary supply.)

Active Reading

Ask: What were some of the monetary policy changes Alexander Hamilton implemented after the ratification of the Constitution? (He implemented a program that included creating a national bank, introducing new tariffs, levying internal taxes, and having the federal government assume all previous federal and state debts.)

Work in Groups

Tell students that during the Founding period, the people of Rhode Island demanded paper money from the Assembly. They voted out the lower house of the Assembly and replaced the members with demagogues who favored creating massive inflation to allow certain factions to pay off their debts. Only the state senators, who were elected for five-year terms, were able to stem the tide of popular opinion. Bearing this incident in mind, have students create a list of three reasons why the Framers may thought that individual states should not be allowed to monitor currency. (Answers may vary. Students may, for instance, note that wildly fluctuating state currencies led to weak interstate commerce, created complex debtor-creditor relations, and allowed state legislatures to enact irresponsible inflationary policies.)

State Bill of Attainder and State Ex Post Facto Laws – Article I, Section 10, Clause 1

*Essay by David F. Forte (pp. 170–171)*

As Article I, Section 9, Clause 3 prohibits the federal government from passing bills of attainder and ex post facto laws, so the State Bill of Attainder and State Ex Post Facto Clause prohibits states from passing similar laws. The Framers had witnessed Parliament’s unjust use of bills of attainder in cases of treason. Such laws were contrary to the rule of law and violated the separation of powers, since bills of attainder usually sentenced an individual to death without a trial.
Many Founders (and political thinkers including Sir William Blackstone and Baron de Montesquieu) likewise considered ex post facto laws contrary to fundamental legal principles. Though it was universally agreed that ex post facto criminal laws were unjust by their very nature, there was some ambiguity about ex post facto civil laws. There is a difference between a law that alters pre-existing legal relationships and one that affects pre-existing legal relationships.

During the Constitutional Convention, George Mason suggested removing the prohibition on ex post facto laws so that states could enact useful retroactive legislation. The prohibition on state ex post facto laws remained but was interpreted to apply to state criminal laws only. The Supreme Court upheld this interpretation in *Calder v. Bull* (1798).

Other clauses limited potentially harmful retroactive civil laws. The Obligation of Contracts and State Coinage Clauses prevent states from passing potentially harmful retroactive civil laws relating to money and contracts. The Takings Clause and the Due Process Clause of the Fifth Amendment prevent the federal government from passing certain harmful retroactive civil laws.

**Research It**

Ask students to conduct research independently or in pairs about the uses of bills of attainder. Specifically, students should work to find answers to the following questions: What are bills of attainder? What role did bills of attainder play in the English legal system? What acts of injustice were committed by English legal officials using bills of attainder? What were some of the Founders’ arguments against them?

**Work in Pairs**

Remind students that an ex post facto law punishes people after they have committed an action that was legal when they did it. Pair up students. Have each pair come up with an example of an ex post facto law to share with the class. (Answers will vary.)

**Discussion Questions**

Why are ex post facto criminal laws harmful but ex post facto civil laws sometimes acceptable? (Ex post facto criminal laws are unjust by their very nature because they punish a person—deprive the person of life or liberty—for an act that was not a crime when committed. Some civil laws may alter or affect pre-existing legal relationships, but those changes in the law may be necessary or helpful to the political community as a whole.)
Obligation of Contracts — Article I, Section 10, Clause 1

Essay by Richard A. Epstein (pp. 171–175)

The Obligation of Contracts Clause prohibits the states from passing laws “impairing the obligation of contracts.” Rufus King suggested the prohibition, relying on a central provision of the Northwest Ordinance. Although the original language of the clause suggested that it was meant to apply to previously formed contracts, the final version of the clause contains no such time limitation.

The Anti-Federalists were concerned that the Obligation of Contracts Clause, together with the limitations on state economic powers, would render the states incapable of helping debtors. Madison responded that the Obligation of Contracts Clause would promote general prudence, industry, and commerce. (Previous state economic policies directed at debtor relief included unjust laws that harmed state economies and commerce generally.) The Obligation of Contracts Clause thus performed two purposes: It protected individuals against their states and prevented the states from intruding on federal interests.

Unlike other prohibitions on the states in Article I, Section 10, Congress could not authorize violations of the Obligation of Contracts Clause’s provisions. The Framers designed the clause to protect interstate commerce from burdensome state regulation. The wording of the clause, however, does not distinguish between interstate and local contracts; therefore, it seems to apply to both. Indeed, the clause was the only open-ended federal constitutional guarantee that applied to the states. Accordingly, it was the subject of much constitutional litigation.

The Supreme Court’s interpretation of the Obligation of Contracts Clause is convoluted. Some litigation has focused on application of the clause to state actions. Chief Justice John Marshall interpreted the clause broadly to restrain government from reneging on contracts, but this interpretation coexisted uneasily with the principle of state sovereign immunity, which prevents a state from being sued for breach of ordinary commercial contracts. Although immunity did not allow states to renege on their contracts for services already performed, the extent of protection offered by the Obligation of Contracts Clause in light of sovereign immunity is a subject of debate.

Most litigation over the Obligation of Contracts Clause, however, focuses on state regulation of private agreements. The clause protects pre-existing contracts; that is, the state could not change the rules of the legal system to benefit one party to the agreement. In Ogden v. Saunders (1827), the Supreme Court ruled that the clause does not limit the state’s power to regulate contracts yet to be formed. On one level, this is commonsensical. On another level, a broad refusal to apply the clause prospectively has potential for misuse: For instance, it would be possible for legislatures to enact partisan legislation to limit the contracting abilities of certain parties. In practice, the ruling in Ogden meant that state economic regulation was outside the scope of constitutional litigation. Most litigation of state economic regulation has occurred under the Commerce Clause or the Due Process Clause.
There are two exceptions to the Obligation of Contracts Clause: the just compensation exception and the police-powers exceptions. The Obligation of Contracts Clause does not prevent the government from using its eminent-domain power to take property with just compensation. Likewise, a state may still use police power to regulate for the sake of health, safety, morals, and the general welfare. During the New Deal, the Supreme Court greatly expanded the scope of the police power, blurring the distinction between general welfare and special interests. *Home Building & Loan Ass’n v. Blaisdell* (1934) was a turning point, and *Exxon Corp. v. Eagerton* (1983) found that a “broad society interest” was sufficient to curtail contracts. Though there does not seem to be a limit to states’ police power over private contracts, the Court remains suspicious of state legislation to extricate a state itself from its own contract obligations.

**Active Reading**

Ask: Why were the Anti-Federalists concerned about the Obligation of Contracts Clause? (They thought that, together with the economic limitations of Article I, it would render states unable to provide relief to debtors.)

**Active Reading**

Have students think back to Congress’s powers regarding a commercial republic in Unit 2. Ask: How does the Obligation of Contracts Clause limit state power? (The clause limits the states’ power to change the terms of contracts to favor debtors over creditors or to prevent contracts between certain parties.) Ask: How does the Obligation of Contracts Clause help to foster a commercial republic? (The Obligation of Contracts Clause fosters a commercial republic because commerce requires contracts—to rent shop space, use equipment, sell certain products, and purchase goods and services. Preventing states from interfering with contracts and empowering Congress to establish other uniform rules enabled commerce to flourish between parties of a single state, between two or more states, and between the United States and other nations.)

**Import–Export Clause** — Article I, Section 10, Clause 2

*Essay by Brannon P. Denning (pp.176–178)*

The Import–Export Clause is a qualified prohibition on the states. It forbids the states from imposing duties on imports or exports unless Congress consents to the tax or the duties are necessary for states’ inspection laws. The clause states that the proceeds resulting from duties and imposts go to the United States Treasury. Finally, it gives Congress the authority to change laws related to this clause.
In restricting the states’ ability to tax commerce, the Import–Export Clause complements Congress’s economic powers under Article I to raise revenue and to regulate commerce among the states, with Indian tribes, and with foreign nations. It is most likely that the Founders designed the clause to apply to foreign and domestic goods. James Madison was leery of allowing states to tax imports to protect native industries because such restrictions had proven harmful to commerce and state relations.

Early Supreme Court interpretations in cases such as *Brown v. Maryland* (1827) and *Almy v. California* (1861) affirmed the understanding that the clause applied to domestic and foreign imports and exports. In *Woodruff v. Parham* (1869), the Court held that the clause applied to foreign imports and exports only and reasoned that earlier cases were either wrong or correct under the “Dormant Commerce Clause” theory. Later cases clarified the definition of imports and exports for the purposes of state taxation. The Court’s interpretation of the Import–Export Clause shifted again in *Michelin Tire Corp. v. Wages* (1976). The Court ruled that a nondiscriminatory state tax would be invalid if it (a) interfered with the ability of the federal government to regulate foreign commerce uniformly, (b) gave revenue derived from imports to the states instead of the federal government, or (c) risked interstate disharmony. Recently, Justice Clarence Thomas argued that the Court’s jurisprudence on the Import–Export Clause has been incorrect since *Woodruff* and that the clause applies to both domestic and foreign imports and exports.

**Check Understanding**

The idea behind the “Dormant Commerce Clause” theory is that Congress’s power to regulate commerce among the states, with nations, and with Indian tribes implies a restriction on state power.

**Discussion Question**

How does the Import–Export Clause complement the powers granted to Congress in Article I of the Constitution? (The Constitution gave Congress the power to regulate commerce among the states, between the United States and other countries, and with Indian tribes. Congress also may levy taxes on goods or services, provided these taxes align with the requirements of Article I. To prevent the states from encroaching on Congress’s power and from creating barriers to trade, the Framers prohibited the states from levying taxes on imports and exports.)

**Compact Clause** — Article I, Section 10, Clause 3

_Essay by Michael S. Greve (pp. 178–179)_

The purpose of the Compact Clause was to ensure that the federal government, not individual states, would have authority over foreign and interstate affairs. James
Madison inspired portions of the Compact Clause. Part of Madison’s agenda for the Constitutional Convention was a proposal to empower Congress to veto any state law. The Convention rejected this proposal three times. Instead, state laws would be subject to the Supremacy Clause: State laws are in effect unless they are inconsistent with federal law or the Constitution. Certain classes of state activity that could threaten the Union or sister states would be prohibited except with the consent of Congress.

The Compact Clause prohibits a variety of activities that threaten the Constitution: state protectionism, standing armies, and warfare. It requires states to obtain permission from Congress to impose “duty of tonnage”; keep troops or warships if there is not a war currently in progress; enter into compacts (agreements) with other states or countries; or fight a war unless invaded. The prohibition on states’ charging duties of tonnage prevents state protectionism and protects Congress’s commerce power. Because standing armies were a grave threat to the new republic, the Constitution prohibits them on the state level. States may maintain militias but not a standing army. However, the most significant portion of the clause concerns the ability of states to enter into agreements, both written and verbal, with foreign nations or other states.

Most constitutional litigation on the clause focuses on the phrase regarding agreements and compacts with other states or countries. The Supreme Court has ruled that the clause applies to a broad array of foreign compacts but has interpreted it to apply to a narrow class of state agreements. Furthermore, the Court has ruled that interstate agreements need the approval of Congress if they violate the supremacy of the federal government, which has functionally deprived the clause of much of its force.

Active Reading

What activities by the states does the Compact Clause expressly prohibit? (performing the following activities without the consent of Congress: levying taxes on tonnage, keeping troops during peacetime, keeping warships during peacetime, making a compact or agreement with another state or country, and entering into a war)

Check Understanding

Though the clause clearly prohibits states from forming compacts without the consent of Congress, it is not clear that Congress must consent prior to the formation of the compact. Ask: Based on what you have read, do you think that Congress needs to consent before or after the agreement is formed? (Reasoning will vary. Students may argue that because the purpose of the clause is to prevent states from engaging in behavior that would harm other states or the Union, congressional consent should be required before the agreement. On the other hand, some may argue that requiring consent prior to the agreement may be unproductive because it would be difficult to understand the full scope of the agreement until after the agreement is formed.)
Check Understanding

Have students complete the following assessment to check their understanding of Lesson 14, Part 2. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. The Obligation of Contracts Clause extended to the states a prohibition that was already in effect in the
   a. Northwest Territory
   b. Parliament
   c. state constitution of Virginia
   d. Articles of Confederation

2. Which court case first concluded that the imports and exports referred to in the Import-Export Clause referred only to foreign imports and exports?
   a. Woodruff v. Parham (1869)
   b. Brown v. Maryland (1827)
   c. Low v. Austin (1879)
   d. Michelin Tire Corp. v. Wages (1976)

3. The Compact Clause prohibits the states from engaging in which of the following?
   a. standing armies
   b. warfare
   c. state protectionism
   d. all of the above

Fill in the blank: Write the correct word or words in each blank.

1. The Import-Export Clause restricts the _____ power to tax commerce, thereby strengthening ________ Commerce power.
   (States’, Congress’s)

2. In the antebellum period, the Obligation of Contracts Clause was the only open-ended federal constitutional guarantee that applied to the ________ (states)

3. The Framers were more concerned about _____ ex post facto laws than ________ ex post facto laws in the federal government. (criminal, civil)

Short Answer: Write out your answer to each question.

1. Why did the Framers deny states the ability to form treaties? (They wanted the Constitution to centralize much, if not all, power over foreign affairs.)
2. Why did the elimination of the states’ power to coin money cause controversy? (The power to make money traditionally signaled political sovereignty, and taking away this power signaled a shift in power from the states to the federal government.)

True / False: Indicate whether each statement is true or false.

1. Adding a prohibition against ex post facto laws was an afterthought at the Constitutional Convention. (False. Opposition to ex post facto laws was a bedrock principle among the Framers.)

2. The Compact Clause and the Import-Export Clause are qualified prohibitions on state activity. (True)

3. There are many ways to enter into international obligations. (False. It appears that the Compact Clause is exclusive and provides the only route by which to enter into treaties with foreign countries.)
**Unit 5**

**Part 3:**
The Civil War, the Fourteenth Amendment, and the Federal Government’s Relationship with the States

**State Action**
Amendment XIV, Section 1

**Privileges or Immunities Clause**
Amendment XIV, Section 1

**Due Process Clause**
Amendment XIV, Section 1

**Equal Protection Clause**
Amendment XIV, Section 1

**Apportionment of Representatives**
Amendment XIV, Section 2

**Disqualification for Rebellion**
Amendment XIV, Section 3

**Debts Incurred During Rebellion**
Amendment XIV, Section 4

**Enforcement Clause**
Amendment XIV, Section 5

In the United States Civil War, several Southern states attempted to secede from the Union in order to protect their local institution of human slavery (see Lesson 19 on Slavery and the Constitution). The resolution of the war had important significance for the relationship between the federal government and the states, especially as it had to do with the protection of civil rights.

By passing the Civil Rights Act of 1866, Congress attempted to overturn the “black codes” that Southern states implemented to curtail the civil rights of freed slaves. The act proclaimed that all citizens are entitled to the same rights and protections of the rule of law. Andrew Johnson vetoed this act, explaining that Congress did not have authority to enact such legislation. Congress responded with a constitutional amendment. The Fourteenth Amendment constitutionalizes the protections of the Civil Rights Act of 1866 and empowers Congress to enforce the amendment with appropriate legislation.
State Action — Amendment XIV, Section 1

Essay by Patrick Kelley (pp. 386–390)

The State Action Clause of the Fourteenth Amendment prohibits the states from abridging the privileges and immunities of citizens; depriving anyone of life, liberty, or property without due process of law; or denying any person in their jurisdictions the equal protection of the law. Two questions arise concerning the application of this clause: Do these limitations apply to states and those acting under state authority, and is Congress's power to enforce the amendment aimed at states and state actors alone? Under the original understanding of the clause, Section 1 limits the behavior of states and their actors, and Section 5 is directed at the activities of states and their actors.

The historical context of the clause helps explain its meaning and purpose. Prior to the Fourteenth Amendment, Congress passed the Civil Rights Act of 1866 to overturn the “black codes” that Southern states implemented to curtail the civil rights of freed slaves. The act proclaimed that all citizens are entitled to the same rights. President Andrew Johnson vetoed this act, explaining that Congress did not have authority to enact such legislation. Congress responded with the Fourteenth Amendment to constitutionalize the Civil Rights Act of 1866. Sections 1 and 5 of the Fourteenth Amendment were designed to provide a solid constitutional base for the legislation, and Section 1 embedded the essential proscriptions of the act in the Constitution itself, therefore making it impossible for future Congresses to overturn the protections.

Despite the Fourteenth Amendment's history, some modern interpreters argue that Section 1 recognizes a broad, general, constitutional principle of equality. This interpretation eliminates the distinction between the behavior of private individuals and that of public actors because, in certain circumstances, private behavior that undermines equality could be considered a state action.

Such an interpretation is too broad, as the debate on a proposed constitutional amendment prior to the Fourteenth Amendment indicates. Under the proposed amendment, Congress would have had the power to make all laws necessary and proper to secure to all persons in every state equal protection of their rights to life, liberty, and property. Congress rejected this broad language because the wording could have been interpreted to give Congress a plenary power to regulate the actions of private individuals and thereby supplant state civil and criminal law. Considering this proposed language and the final language of Sections 1 and 5, the provisions limit only the actions of states or those acting under state authority.

There is no indication that Section 5 of the Fourteenth Amendment was meant to grant broad power to Congress to regulate private behavior. In the Civil Rights Cases (1883), the Supreme Court ruled that the Civil Rights Act of 1875 was unconstitutional because Congress did not have authority under the Fourteenth Amendment to regulate the behavior of private individuals.
In *United States v. Guest* (1966), though, the Supreme Court ruled that Congress had authority under Section 5 to regulate the actions of private individuals who conspired with public actors to deprive individuals of rights protected under Section 1. Two concurring opinions suggested that Congress could use its Section 5 power more broadly to regulate purely private behavior. In *United States v. Morrison* (2000), however, the Court returned to the *Civil Rights Cases* ruling that Section 1 applies to states or state actors and not to the conduct of private individuals.

The Supreme Court has consistently held that state action is necessary to trigger judicial enforcement of Section 1 of the Fourteenth Amendment. There are certain limited cases wherein the action of a private individual can be classified as a state action. These cases fall into one of two categories: (a) cases in which private entities are performing public functions or exercising powers traditionally reserved to the state or (b) cases in which the government becomes intertwined with a private entity so that the private entity functionally acts as the government.

**Active Reading**

Ask: What three specific actions does Section 1 of the Fourteenth Amendment prohibit? (It prevents states from abridging the privileges and immunities of citizens; depriving anyone of life, liberty, or property without due process of law; or denying any person in their jurisdictions the equal protection of the law.)

**Make An Inference**

Ask: Who is a state actor? (someone who acts on behalf of a state) Why is it important to determine who is a state actor? (because the Constitution allows Congress to regulate the behavior of state officials but not private individuals) Why does it matter whether the federal government can regulate private activity or only state actor activity? (Congress does not exercise the full legislative power. It exercises only the set of powers herein granted. States have a tremendous ability to legislate on matters of health, safety, and morals and the general welfare. There is a difference between bad behavior on a private level and bad behavior on the state level. For instance, the remedy for the bad behavior of a private citizen can include suing that person or moving away. In part because of sovereign immunity, there is no comparable remedy for an unjust state executive, legislature, or judiciary.)
Privileges or Immunities Clause — Amendment XIV, Section 1

Essay by Calvin Massey (pp. 390–394)

The Privileges or Immunities Clause prevents individual states from creating or enforcing laws that violate “the privileges or immunities of citizens of the United States.” There are three main theories concerning the original meaning of this section of the Constitution. The main points of division are whether the clause mandates that states apply their laws equally to all citizens or whether it requires state laws to have certain substantive content. The substantive view reads the clause to mandate certain content in state law—a substantive package of entitlements. The content of privileges and immunities includes either (1) all rights in the Articles (such as habeas corpus and protections against ex post facto laws) and the rights guaranteed in Amendments I–VIII or (2) the natural rights of liberty and property possessed by all individuals in a free government.

Those who interpret the Privileges or Immunities Clause to mean that states must apply their laws (whatever their content) equally to all citizens ground their interpretation in the text and history of the amendment. First, under the Citizenship Clause, a citizen of a nation is a citizen of a state; therefore, the privileges and immunities of national citizenship include those of state citizenship. Second, because it uses the word “citizens” (rather than the term “persons” from the Due Process and Equal Protection Clauses), the clause is best understood to reference a group of individuals, not a set of rights. Third, Members of the Thirty-ninth Congress objected to state legislatures’ practice of discriminating against classes of citizens, granting one class more rights than another. Fourth, the Privileges and Immunities Clause of Article IV informs the understanding of the Privileges or Immunities Clause of Amendment XIV. The drafters of the amendment understood the Article IV clause to ensure that states treated citizens of other states the same as they did their own citizens. Finally, Members of Congress invoked the Privileges or Immunities Clause to justify the Civil Rights Act of 1875, which prohibited those who had a duty to serve the public indiscriminately from privately discriminating against individuals.

Another theory about the clause is that the phrase “privileges or immunities” refers to the rights outlined in the Constitution and the Bill of Rights in particular. Proponents of this view cite the text and the comments of Representative John A. Bingham, who often declared that the privileges or immunities of citizenship are the first eight amendments to the Constitution. They argue that framers of the clause designed it to make the Bill of Rights and all other rights associated with citizenship binding on the states. Though there is evidence for this position, Congress approved several constitutions of reconstructed states that contained provisions contrary to the federal Bill of Rights.
A third interpretation argues that the clause was designed to secure certain natural rights of property and liberty. This reading of the clause is consistent with Justice Bushrod Washington’s interpretation of the Privileges and Immunities Clause of Article IV in *Corfield v. Coryell* (1823). Justice Washington argued that privileges and immunities consist of fundamental rights and liberties that belong to individuals by nature. Thus, like the Privileges and Immunities Clause in Article IV and the Civil Rights Act of 1866, the Privileges or Immunities Clause secures certain natural rights of all citizens, regardless of race.

In the *Slaughter-House Cases* (1873), the Supreme Court concluded that the privileges or immunities of citizenship were substantive but gutted the clause of most of its content. The substance did not include either natural rights or provisions contained in the Bill of Rights. The Court argued that the clause did not empower the federal government to protect civil rights, a responsibility traditionally entrusted to the states. Following this decision, the Privileges or Immunities Clause became a dead letter. The Court interpreted the Equal Protection Clause to include the equality function and the Due Process Clause to provide the substantive protections once theorized to be part of the Privileges or Immunities Clause of the Fourteenth Amendment.

### Check Understanding

Point out the two clauses in the Constitution that refer to privileges and immunities of citizenship: the Privileges and Immunities Clause of Article IV and the Privileges or Immunities Clause of Amendment XIV. Remind students to note the difference between the Privileges and Immunities Clause of Article IV and the Privileges or Immunities Clause in Amendment XIV. **Ask: What was the purpose of the Privileges and Immunities Clause?** (The Privileges and Immunities Clause created common citizenship and ensured that states do not discriminate against citizens of other states in judicial processes and economic activities.)

### Active Reading

**Ask:** How did the Supreme Court’s decision in the *Slaughter-House Cases* gut the substantive meaning of the Privileges or Immunities Clause and what was the effect of the decision on the Equal Protection and Due Process Clause? (In the *Slaughter-House Cases* (1873), the Supreme Court concluded that the privileges or immunities of citizenship were substantive, but the substance did not include either natural rights or provisions contained in the Bill of Rights. After the *Slaughter-House Cases*, the Court interpreted the Equal Protection Clause to include the equality function and the Due Process Clause to provide the substantive protections once theorized to be part of the Privileges or Immunities Clause of the Fourteenth Amendment.)
Theories Regarding the Original Meaning of the Privileges or Immunities Clause

<table>
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<tr>
<th>Theory</th>
<th>Supporting Points</th>
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| **#1** | • Citizenship Clause references state and United States citizens, so state citizens have the privileges and immunities of United States citizens.  
• The use of the word “citizens” suggests the clause was developed to protect the rights of individuals.  
• Drafters were influenced by the Privileges and Immunities Clause. Its purpose was to ensure that states treated those from other states as they would their own citizens.  
• The clause was used to develop the Civil Rights Act of 1875, which was aimed at stopping racial discrimination. |
| **#2** | • This was the view favored by John A. Bingham  
• Bingham said the privileges and immunities were outlined in the Bill of Rights.  
• The theory is consistent with the anti-slavery view of the Constitution.  
• The text of the clause itself suggests privileges or immunities refers to a set of substantive rights. |
| **#3** | • Justice Bushrod Washington stated that the Privileges and Immunities Clause referred to natural rights.  
• Congress developed the 1866 Civil Rights Act to ensure that all persons would have several basic rights.  
• This interpretation is also consistent with the interpretation of Article IV's Privileges and Immunities Clause. |
**Due Process Clause** — Amendment XIV, Section 1

*Essay by James W. Ely, Jr. (pp. 394–398)*

The language of the Due Process Clause of the Fourteenth Amendment is almost identical to the language of the Due Process Clause of the Fifth Amendment. Both state that persons cannot be deprived of their “life, liberty, or property without due process of law.”

The modern interpretation of the Due Process Clauses of the Fifth and Fourteenth Amendments understands them to impose certain substantive and procedural due process requirements on state and federal governments. As will be discussed in Lesson 17, the original meaning of the Due Process Clause limits the substance of executive and judicial actions by requiring them to be grounded in law and prevents the legislature from prescribing novel judicial procedures for the deprivation of life, liberty, or property. The term “substantive due process” in modern discourse typically refers to specific content limitations on legislation.

Some originalist defenders of substantive due process cite Sir Edward Coke’s understanding that the “law of the land” in the Magna Carta refers to procedural and substantive protections. They further argue that this understanding was incorporated into many state constitutions. Originalist opponents of the theory of substantive due process counter that limitations on monarchs do not translate into limitations on legislatures and that other clauses of the Constitution specifically address substantive rights. Therefore, critics conclude, due process of law requires government to act according to rational modes of procedure (“due process”) and pursuant to valid legal authorizations (“of law”).

Prior to the Civil War, state courts dealt more with issues of the Due Process Clause of the Fifth Amendment than the Supreme Court did. Some state courts interpreted the clause to require certain procedures; a few courts interpreted substantive requirements.

The Supreme Court initially interpreted the Due Process Clause of the Fourteenth Amendment narrowly, arguing that it performed the same function as the Due Process Clause of the Fifth Amendment and that it did not incorporate the Bill of Rights against the states. Some judges, though, argued that the clauses protected certain substantive rights, such as the liberty of contract. The Court then began to embrace the idea that the Due Process Clause protected certain fundamental liberties, in particular economic liberties. For instance, in *Lochner v. New York* (1905), the Court held that a state law infringing on liberty of contract violated the Due Process Clause.

After the New Deal, the Supreme Court transformed the interpretation of the Due Process Clause of the Fourteenth Amendment. The Court no longer invoked the clause to review economic legislation. Instead, it invoked the clause to safeguard controversial non-economic rights such as the right to privacy.
The Court used the Due Process Clause to incorporate various sections of the Bill of Rights against the states. This collection of cases over several years created the “selective incorporation doctrine,” which is selective because the Second, Third, and parts of the Fifth and Seventh Amendments were not included in the portions of the Bill of Rights that were incorporated against the states. With this doctrine, the Court has incorporated many of the freedoms in the Bill of Rights and has found other rights not in the Constitution. This doctrine remains controversial.

**Before you Read**

Ask: Have you ever heard of the phrase “due process of law” before? What do you think it means? (Answers will vary. Many students have likely heard the phrase and may state that due process of law refers to the legal procedures put in place both by state authorities and by the federal government.)

**Active Reading**

Ask: What is the selective incorporation doctrine for the Due Process Clause? (Under the selective incorporation doctrine, portions of the Bill of Rights apply to the states, but other parts do not. The Second, Third, and parts of the Fifth and Seventh Amendments were not included in this doctrine.) Ask: Why is it controversial? (The doctrine is controversial because it is unclear what criteria judges use to determine which amendments are incorporated, and judges’ decisions appear to be based on their policy preferences.)

**Equal Protection Clause** — Amendment XIV, Section 1

*Essay by David Smolin (pp. 398–404)*

The Equal Protection Clause of the Fourteenth Amendment prohibits any state from denying an individual “equal protection of the laws.” As David Smolin explains, the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause form a coherent triad. A state’s legislature may not deny to any citizen within its jurisdiction any privilege or immunity (however defined). Once a law is validly passed, the state or its agents may not arbitrarily enforce it against any person within the state’s jurisdiction without violating the Equal Protection Clause. Finally, every person accused of violating a law enjoys the full panoply of procedural rights before the courts of the state.

The original understanding of the Equal Protection Clause is much narrower than the modern understanding that emerges from the Supreme Court’s decision in *Brown v. Board of Education* (1954). Understanding the original meaning of the clause centers on two questions: how far and in what relation to rights did the Framers intend equality to apply, and what does it mean to treat persons equally?
Considering the text and history of the Fourteenth Amendment, the framers of the amendment intended equal protection to mean that individuals have the “same right” to make contracts, sue, give evidence, sell property, and have the benefit of legal proceedings, among other things. They recognized the importance of federalism but designed the amendment to ensure federal protection of the fundamental rights flowing from citizenship and personhood. But there is a difference between civil, political, and social equality, and the amendment was designed to protect civil equality. (The Fifteenth Amendment’s guarantee of the right to vote was part of political equality.) Moreover, though the text of the clause was certainly designed to protect newly freed slaves, it is not limited to racial classifications. Union loyalists in the South would also receive the protection of the Equal Protection Clause. This decision reflected the framers’ plan to protect other groups (such as Union loyalists in the South) and their understanding that humans are equal and that all therefore possess certain basic human rights.

When the Supreme Court gutted the Privileges or Immunities Clause of its meaning in the Slaughter-House Cases (1873), the substantive meaning of that clause was transferred into the Due Process and Equal Protection Clauses. In Brown, the Court relied on the Equal Protection Clause to invalidate segregated public schools, arguing that “separate but equal” violated the Equal Protection Clause.

Whether or not the Brown ruling is compatible with the original understanding of the Framers’ intent is the subject of much debate. Some point to the Republicans’ attempt in 1866 to desegregate education and cite the understanding that education was considered a civil right, not a political or social right, as evidence that the ruling is consistent with the original meaning. Furthermore, segregation was part of the black codes that the Civil Rights Act of 1866 (and therefore the Fourteenth Amendment) sought to remedy. The framers of the amendment presumed equal treatment to mean the same treatment of rights of personhood and citizens. Although it is possible to read the clause as not commanding integration, it was not intended to countenance legally enforced segregation and certainly not the white supremacist racism that was systematically and legally enforced throughout the South from 1896–1954.

Since Brown, the Supreme Court has developed a system of tests to evaluate violations of the Equal Protection Clause, including racial and non-racial classifications. Indeed, valid laws make distinctions between persons, but laws are problematic if they do not proscribe the same rule for all of those who are similarly situated. Racial classifications were evaluated under a “strict scrutiny” review and subject to a strict means–ends test. The Court evaluated the government’s interest in establishing the classification, the end that it is designed to achieve, and whether there is another way to achieve that end without using race-based classifications. Racial classification and its corollaries are subject to strict scrutiny. Although the unequal treatment that is part of affirmative action would appear to violate the clause, the Supreme Court has upheld this practice in some instances.
Other classifications are presumed to be constitutional. When the Court evaluates these other, non-racial classifications, it determines only whether there is a rational relationship between the classification and the government’s interest. Beginning in the 1970s, some have pushed for an intermediate scrutiny to evaluate classifications based on sex or legitimacy. The Court has thus far refused to extend heightened scrutiny for many other distinctions and it is unclear how, if the court were to use a heightened standard of scrutiny, it would determine which classifications receive this heightened scrutiny.

**Discussion Question**

On page 399, David Smolin refers to the Privileges or Immunities Clause, the Equal Protection Clause, and the Due Process Clause as a “coherent triad.”

How do these clauses work together? (A state’s legislature could not deny to any citizen within its jurisdiction any privilege or immunity, however defined. Once a law was validly passed, the state or its agents could not enforce it arbitrarily against any person within the state’s jurisdiction without violating the Equal Protection Clause. Finally, every person accused of violating a law would enjoy the full panoply of procedural rights before the courts of the state.)

**Research It**

Have students research *Brown v. Board of Education* (1945). What was the reasoning of the Court? How did the Equal Protection Clause change after the case? Is the Court’s reasoning based on the original understanding of the clause? If not, how would you rewrite the Court’s opinion to reflect the original understanding?

**Apportionment of Representatives** — Amendment XIV, Section 2

*Essay by Paul Moreno (pp. 404–406)*

The Fourteenth Amendment addresses several key and contentious post–Civil War issues relating to representation in Congress, the political status of high-ranking rebels, and the debts of the United States and Confederate States. Section 2 of the amendment concerns representation in Congress. Specifically, representation will be apportioned according to the whole number of persons in each state. Under the Three-fifths Clause of Article I, only three-fifths of the slave population would count toward representation in Congress. With the slaves now free, the South stood to gain many new Members of Congress, but Section 2 of the Fourteenth Amendment was quite controversial in the South because of its implications for enfranchisement.
The states determined qualifications for voting, and few states—even Northern states—allowed free blacks to vote. Therefore, the clause did not compel states to enfranchise blacks, but it was designed to encourage Southern states to do so. It also allowed states to disenfranchise those who participated in the rebellion or other crime, but it did not mandate the disenfranchisement.

Once the Fifteenth Amendment was passed, the Apportionment of Representatives Clause became largely unnecessary. However, the Achilles’ heel of Reconstruction was that Congress did not enforce either the Fifteenth Amendment or Section 2 of the Fourteenth Amendment when states began to disenfranchise blacks. As a result, blacks could not protect themselves through the political process.

Section 2 of the Fourteenth Amendment would still apply to future instances of rebellion or insurrection within the country. Since the clause allows disenfranchisement for participation in rebellion or other crime, states may disenfranchise convicted felons.

**Active Reading**

Point out the use of the word “apportioned” in Section 2 of the Fourteenth Amendment (page 404). Read the sentence containing the word aloud to students. Ask: What do you think the word “apportioned” means? (assigned, given out, distributed)

**Active Reading**

Ask: What was the Framers’ reason for developing Section 2 of the Fourteenth Amendment? (They wanted to encourage Southern states to enfranchise blacks, but they did not want to require them to do so, since many state laws, including Northern state laws, prevented blacks from voting.)

**Check Understanding**

What does the Constitution say about qualifications for voting? Who selects members of the House, members of the Senate, and the Executive? What are the requirements for those electors? (Initially, the House of Representatives was the only part of the government directly elected by the people. The Constitution made no specific qualifications for voters. Instead, the states set the qualifications for voting for members of the House. State legislatures selected both Senators and electors for the Electoral College. Under the Seventeenth Amendment, Senators are selected through popular vote, but state legislatures determine the qualifications for voting. The Electoral College selects the President. Initially, state legislatures would select the electors. Now, popular vote for President determines which electors are sent to the Electoral College. Nevertheless, states determine the qualifications for voting.)
Disqualification for Rebellion — Amendment XIV, Section 3

*Essay by Paul Moreno (p. 406)*

The Disqualification for Rebellion Clause concerns the political status of high-ranking rebels—specifically, those who previously had taken an oath to support the Constitution but then participated in a rebellion or insurrection or assisted individuals engaged in such activities. The clause forbids those individuals from serving in certain offices. The Disqualification for Rebellion Clause was the most controversial section of the Fourteenth Amendment because it appeared to be vindictive and to encroach on the President’s pardon power. Additionally, it made it difficult for Southern states to ratify their constitutions (especially in time for the election of 1868). While the first version of the draft disqualified those who aided the Confederacy until 1870, the revised version was less severe but lacked a time limit.

Eventually, Congress lifted the disqualification for many individuals, including Members of Congress, judicial officers, and military officers. By 1898, Congress had removed all disqualifications for disloyal conduct, but Section 3 of the Fourteenth Amendment is still in operation and could be applied again to future insurrections or rebellions.

**Check Understanding**

Remind the students that the President has the power to pardon people who have been convicted of a crime. Ask: Why did this clause appear to intrude on presidential pardons? (Article II gives the President the power to pardon. President Washington, for instance, used this power to pardon rebels. But the Fourteenth Amendment forbids those who participated in a rebellion from serving in office. Congress, by two-thirds vote, can remove this disability.)

**Active Reading**

Ask: What offices are individuals who supported or engaged in a rebellion prevented from holding under the Disqualification for Rebellion Clause of the Fourteenth Amendment? (any civil or military office within the state or federal government, including Senator, Representative, President, and Vice President)

Debts Incurred During Rebellion — Amendment XIV, Section 4

*Essay by Paul Moreno (pp. 406–407)*

The Debts Incurred During Rebellion Clause declared the validity of the public debt of the United States authorized by law. It clarified that neither the United States nor any state would be responsible for debts incurred to aid the rebellion. Moreover, former slave owners may not claim reimbursement for the loss of slaves. Section 4 of the amendment generated little controversy, except from some former slave owners in loyal slave states who thought they should be compensated for their hardship.
In applying this clause, federal courts decided that no contracts involving Confederate bonds could be enforced and that courts should hesitate to recognize the contracts at all. Contracts involving Confederate currency, on the other hand, could be enforced. The issue of repudiating debt emerged again when Congress took the United States off the gold standard. The Court argued that Congress did not have authority to refuse to repay the bonds in gold, but the damage to bondholders was minimal.

**Active Reading**

Ask: Why did federal courts decide that contracts involving Confederate currency should be enforceable? (People still had to conduct business during the Civil War, and the only currency available in the rebel states at the time was Confederate currency. Therefore, its use in contracts was a matter of necessity rather than an open declaration of an individual’s participation in and support for the rebellion.)

**Enforcement Clause** — Amendment XIV, Section 5

*Essay by Roger Clegg (pp. 407–409)*

The Enforcement Clause of the Fourteenth Amendment delegates to Congress the power to pass legislation to enforce the first four sections of the amendment. The Enforcement Clause serves the same purpose as the Necessary and Proper Clause, and similar enforcement clauses are in the Thirteenth, Fifteenth, and Nineteenth Amendments.

The Enforcement Clause grants a limited power to Congress. Legislation may be directed at states and individuals acting under state authority. State actions must be an intentional violation of the Fourteenth Amendment. In the *Civil Rights Cases* (1883), the Supreme Court ruled that Congress could not use its powers to prevent private individuals from acting in a discriminatory manner. Legislation must remedy or prevent some violation of a provision of the Fourteenth Amendment; this power does not justify legislation to remedy violations of other amendments, such as the First Amendment.

The Court ruled that Congress may ban categories of activities that generally violate the amendment. For instance, Congress banned literacy tests for voting, even though it is possible to use them in a constitutional manner. The Court has also held that Congress’s legislation must be tailored to address the infringement.

**Check Understanding**

The text compares the Necessary and Proper Clause of Article I, Section 8 to the Enforcement Clause of the Fourteenth Amendment. Have students think back to the Necessary and Proper Clause. *Ask: What is the purpose of the clause?* (It gives Congress the power to make the laws appropriate to carry out the rest of its powers.) *Ask: How is the purpose of the Necessary and Proper Clause similar to the purpose of the Enforcement Clause of the*
Fourteenth Amendment? (Both clauses give Congress the power to pass laws to further an already established end. In the case of the Necessary and Proper Clause, the ends are those powers delegated in the Constitution. In the case of Section 5 of the Fourteenth Amendment, the ends are those listed within the Fourteenth Amendment. Neither of these clauses was designed to be a blank check for Congress to make whatever law it desires.)

Work in Groups

Break up the students into groups. Have each group focus on a different clause of the Fourteenth Amendment. Using the discussion in the Heritage Guide to the Constitution and the recommended resources, have students write a paper comparing the original understanding of the provisions of the Fourteenth Amendment with the modern Supreme Court’s interpretation of those provisions. Have students share their reports with the class.

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 14, Part 3. Review any material for questions they have missed.

Fill in the blank: Write the correct word or words in each blank.

1. The abolition of slavery increased the ________________ of former slave states in the House of Representatives. (number of representatives)

2. One of the main motivations for the creation of the Civil Rights Act of 1866 was to ban the _____ introduced in Southern states. (black codes)

3. After the Slaughter-House Cases of 1873 gutted____________________, its protections were subsumed under the Equal Protection clause and the Due Process Clause. (the Privileges or Immunities Clause)

4. With respect to the Due Process Clause of the Fourteenth Amendment, the Supreme Court has decided that some parts of the Bill of Rights are incorporated against the states under what is known as the _________________. (selective incorporation doctrine)

5. Congress drafted the Fourteenth Amendment and sent it to the states for approval in ____ ; it was added to the Constitution in ____ . (1866, 1868)

6. Because a citizen of the nation is a citizen of a state, the privileges and immunities of national citizenship necessarily include the privileges or immunities of ________________. (state citizenship)
7. Modern law interprets the Fifth and Fourteenth Amendments to impose the same substantive due process and procedural due process requirements on the ________ and _______ governments. (federal, state)

**Short Answer: Write out your answer to each question.**

1. Which President vetoed the Civil Rights Act of 1866? (President Andrew Johnson)

2. What did the Civil Rights Act of 1875 mandate? (equal access to public accommodations, common carriers, and places of amusement)

3. What was a central focus of the Thirty-ninth Congress? (to protect newly emancipated slaves from discriminatory state laws)

4. The Supreme Court’s decision in the *Slaughter-House Cases* (1873) did what to the Privileges or Immunities Clause? (the decision stripped the clause of meaningful substance)

5. When it first appeared, what was the meaning of the phrase “due process of law”? (It meant that judgments could issue only when the defendant was personally given the opportunity to appear in court pursuant to an appropriate writ—i.e., was served process.)

**True / False: Indicate whether each statement is true or false.**

1. Most commentators agree that the intended scope of the Equal Protection Clause was applied to all actions by the government as a command to treat persons equally. (False. While this is the modern constitutional view, most commentators agree that the intended scope was much narrower.)

2. The language of the Equal Protection Clause protects only Blacks. (False. The language is not race-specific and is designed to protect all persons.)

3. Although Amendment XIV, Section 2 allowed for disenfranchisement of persons who had engaged in the rebellion, none of them were denied the right to vote on those grounds. (True)

4. The only objection to the Debts Incurred During Rebellion Clause of the Fourteenth Amendment was by some slave owners who thought they should be compensated for the loss of slaves. (True)

5. There is no indication that state legislatures that ratified the Fourteenth Amendment would have understood Section 5 as a broad delegation of power to Congress to regulate private behavior. (True)
Unit 6

AMENDMENTS AND THE BILL OF RIGHTS

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Unit 6
Lesson 15

THE AMENDMENT PROCESS AND THE BILL OF RIGHTS

Lesson Objectives
When you complete Lesson 15, you will be able to:

• Describe the procedure for amending the Constitution and explain why the Framers created an amendment process.
• Understand what the Eighteenth Amendment did and why it is a failed amendment.
• Explain the relationship of the Twenty-first Amendment to the Eighteenth Amendment and the effect of the Twenty-first Amendment on states’ power over alcohol regulation.
• List the amendments included in the Bill of Rights and understand the debate during ratification about the necessity of a Bill of Rights.
• Explain the three originalist theories of the purpose of the Ninth Amendment and how this amendment affects the Bill of Rights.
• Describe the main reasons why the Framers developed the Tenth Amendment.
• Understand how the Supreme Court has applied the Ninth and Tenth Amendments and why these decisions have been controversial.

The Amendment Procedure
More than 5,000 bills proposing to amend the Constitution have been introduced in Congress since 1789, but only 27 amendments have been added to the Constitution. Each successful amendment represents the codification of a national consensus that crossed the hurdles set out in Article V to assure that this consensus would be deliberative, reasonable, and legitimate. The Article V amending process affirms the rule of law and links our highest law to the republican idea that government ultimately derives its just powers and legitimate authority from the consent of the governed and that the governed can alter their government to affect their safety and happiness.

At key moments, under unusual circumstances, the amendment process expands our constitutional discourse beyond the courts and our political institutions to engage the American people in national deliberations about core principles and fundamental questions. In so doing, it invokes their sovereign authority, through the extraordinary process of constitutional lawmakers, to settle the issue at hand.
Amendments — Article V

Essay by Trent England and Matthew Spalding (pp. 284–287)

As Matthew Spalding and Trent England explain, Article V provides the mechanisms by which the Constitution can be amended. This provision belies the claims that the Constitution is unable to adapt to changing times. The Founders clearly understood that there would be situations they could not predict and that the Constitution would need to be amended to address such demands.

The amendment process of the Articles of Confederation required a proposal by Congress and unanimous ratification by all 13 state legislatures. Such a structure effectively made amendments impossible to pass. The amendment process for the Constitution rectifies this failure; as James Madison explained in *The Federalist No. 43*, “It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults.” Amending the Constitution is deliberately difficult but not impossible.

The amendment process adheres to the Founders’ concept of structural federalism based on the mixed sovereignty of the state and national governments. It ensures that sufficient deliberation and discussion take place and that the amendment truly reflects the reasoned will of the American people. There are two methods for proposing a constitutional amendment: Either Congress proposes the amendment after two-thirds agreement in each house, or two-thirds of the state legislatures petition Congress, which will then call a convention for proposing amendments. Congress chooses the mode of ratification: either by three-fourths of the states’ legislatures or by three-fourths of the states’ ratifying conventions.

Amending the Constitution by convention is still full of unknowns, as even the Founders recognized. Madison spoke out strongly during the Constitutional Convention, posing the questions: “How was a Convention to be formed? By what rule decide? What the force of its acts?” It is unclear whether a call for a convention ever “expires,” or can be redacted, or whether one specific amendment must be put forth in the petition for a convention. These ambiguities explain why Congress has proposed every successful amendment—27 out of the thousands of proposed amendments—and an amendment convention has never been convened.

State legislatures have come close to meeting the two-thirds requirement for proposing an amendment at times, but every time, the threat of a disorderly convention has pushed Congress to take on the matter itself. The Founders regarded an amendment convention as something to be employed only in an extreme situation (such as the convention that led them to create the Constitution itself). Madison brought up the possibility of a convention during the Nullification Crisis of 1832 as a desperate attempt to quell the rumblings of nullification and secession. Abraham Lincoln considered the merits of a convention during the turmoil of the Civil War. However, as soon as the war was over, he advocated an amendment through congressional means; the result was the Thirteenth Amendment.
The courts have rarely addressed the amendment process. The Supreme Court has weighed in on a few procedural challenges, including whether the amendments Congress proposes must be presented to the President and time limits for ratification. Substantive challenges to amendments have been unsuccessful.

The Founders recognized the need for prudent flexibility within the Constitution, but also that laws must remain immutable for a time for their full weight to be felt. Article V allows for amendments to the Constitution as necessary over time but creates a structure to ensure deliberation and respect for the document as a whole.

### Active Reading

Read students the following Madison quote from *The Federalist* 43 on the amendment process: “It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults.” **Ask the students to paraphrase Madison’s quote** (The Constitution’s Amendment process is not so difficult that it can never be amended, but it is not so easy as to allow it to change constantly.) **Ask**: Why did the Founders alter the amendment process of the Constitution to make it easier than that of the Articles of Confederation? (The Founders altered the process because the Articles of Confederation required unanimous approval of the states, making ratification of an amendment virtually impossible. The new Constitution required only three-fourths of the states to approve it. This would allow the Constitution to be altered with some ease when and if changes became necessary.) **Ask**: How and why is the process of amending the Constitution still difficult? (The process is difficult because the Founders wanted to ensure that a majority faction would not radically alter the Constitution on a whim. Amending the Constitution is a two-step process. First, there is a process to propose the amendments: Either Congress proposes the amendment after two-thirds agreement in each house, or two-thirds of the state legislatures petition Congress, which will then call a convention for proposing amendments. Then there is the ratification process: either by three-fourths of the states’ legislatures or three-fourths of the states’ ratifying conventions. These steps ensure that only an amendment with very broad support will be approved.)

### Research It

Have students research one of the thousands of amendments that have been proposed but not ratified since 1789. **What was the intent of the amendment? Who proposed it? If the states have petitioned the Congress to vote on the amendment, how many states have supported the amendment?** (Answers will vary.)
Research It

Have students research one of the 17 amendments that were ratified after the Bill of Rights (Amendments XI–XXVII). How and by whom were these amendments proposed? How quickly were they ratified? What were some of the factors that led to their eventual ratification? (Answers will vary.)

Check Understanding

When the Framers developed the Constitution, they envisioned that it would create a system of “mixed sovereignty.” Ask: What is “mixed sovereignty”? In what ways can a system of mixed sovereignty be disturbed? (A mixed sovereignty system means that both the state and federal governments have power over citizens, but they have power over different objects of government. State governments exercise general powers. The federal government has a narrow set of responsibilities. There will be times when laws conflict, but the Constitution provides a process for reconciling conflicts. The mixed sovereignty system is disturbed when states attempt to usurp federal powers or the federal government usurps state powers.)

Understanding the Limits to the Amendments: A Failed Amendment

Each successful amendment to the Constitution represents the codification of a national consensus that crossed the hurdles set out in Article V. Because the purpose of the Constitution is to establish a structure of government and certain processes for government, most amendments—most successful amendments—change a procedural or structural issue. For instance, the Twelfth Amendment fixed a problem in the Electoral College.

The Eighteenth and Twenty-first Amendments are unique. The Eighteenth Amendment attempted to constitutionalize a particular policy. The Twenty-first Amendment repealed the Eighteenth and returned legislative power regarding that policy to the states.

Prohibition — Amendment XVIII

Essay by David Wagner (pp. 416–417)

Ratified in 1919, the Eighteenth Amendment was one of the four “Progressive” amendments to the Constitution. Though temperance movements had been present throughout American history, the influence of Progressivism explains the quick
approval and ratification of the Eighteenth Amendment: Congress passed it with six hours of debate, and the states ratified it within one month. The other “Progressive” amendments may explain the support for Prohibition. The Sixteenth Amendment permitted an income tax and therefore freed the government from dependence on liquor taxes. The Seventeenth Amendment mandated the direct election of Senators, making Senators more vulnerable to popular pressure in favor of the temperance movement. Finally, the Nineteenth Amendment reflected a growing support for women’s suffrage and the temperance movement, the staunchest supporters of which were women.

Section 2 of the Eighteenth Amendment led to some friction between Congress and the states. Although Section 2 asserts that Congress and the states shall have concurrent powers to enforce the amendment, the courts largely deferred to Congress. In 1919, Congress passed the Volstead Act, which defined “intoxicating liquors” as any drink containing .05 percent alcohol or more. Later, the Supreme Court ruled in the National Prohibition Cases (1920) that the states could not enact legislation that conflicted with congressional enactments regarding Prohibition.

The amendment ultimately failed for several reasons. First, it attempted to constitutionalize a policy, but the states were not inclined to enforce the law. Second, organized crime maintained the widespread presence of alcohol in the United States. Finally, the Great Depression led to a drop in tax revenues. All of these factors combined to lead to ratification of the Twenty-First Amendment in 1933, ending this failed Progressive experiment in social reform.

**Check Understanding**

Tell students that the Progressive Movement began in the early 20th century. Progressives advocated expanding the scope and activity of government, including centralizing power in the federal government; established the key features of the administrative state; and attempted to democratize political processes. Both major political parties had Progressive wings. Prominent Progressives included Woodrow Wilson, Theodore Roosevelt, John Dewey, Frank Goodnow, Robert La Follette, and Herbert Croly.

**Active Reading**

Ask: Why did Amendment XVIII ultimately fail? (The amendment failed because it was an attempt to constitutionalize a particular policy. In the end, the states would not enforce the law, organized crime kept alcohol easily available, and the Great Depression led to a drop in tax revenues.)
Repeal of Prohibition — Amendment XXI

Essay by David Wagner (pp. 421–424)

The Twenty-first Amendment, passed in 1933, repealed the Eighteenth Amendment and returned power over alcohol regulations to the states. The amendment has three sections, but the second is the source of most conflict. Section 1 repeals the Eighteenth Amendment, and Section 3 focuses on ratification by state conventions. Section 2 bans the importation or transportation of alcohol into any state when such an act would violate the laws of the state.

The difficulty surrounding the amendment (Section 2 in particular) lay in the uncertainty as to which continued federal intrusion would be allowed. Did the amendment give states absolute control over regulating alcohol, notwithstanding the Import–Export Clause or the Commerce Clause, or did it permit states enough autonomy without infringing on the scope of the rest of the Constitution? From the debates surrounding the amendment, it is clear that Congress did not retain the power to regulate alcohol in the states.

This amendment has received significant legal attention. In two cases in 1936 and 1939, the Supreme Court ruled that the Twenty-first Amendment was an absolute exception to the Commerce Clause, thus giving states full regulatory powers. However, in 1964, the Court reversed itself and went on to strike down a Kentucky law taxing imported whiskey as violating the Import–Export clause. In 1984, the Court finally gave a balancing test, arguing that state law could directly conflict with federal policy only if the interests of the state were closely related to the powers reserved to the state by the Twenty-first Amendment.

The Court has continued to chip away at the Twenty-first Amendment, ruling in 1987 that Congress could use its power over federal highway funds to regulate state drinking ages indirectly and finding in 1996 that a Rhode Island law that restricted advertising the price of liquor violated the First Amendment. States may choose to be completely dry, but beyond that, state power to regulate alcohol is subject to the Commerce Clause, the Necessary and Proper Clause, the Spending Clause, and the Supremacy Clause.

Check Understanding

Ask: What is the Commerce Clause? (The Commerce Clause of Article I gives Congress the power to regulate and promote commerce among the states.)
Ask: What is the Import–Export Clause? (The Import–Export Clause is a qualified prohibition on the states. It forbids the states from imposing duties on imports or exports unless Congress consents to the tax or the duties are necessary for states’ inspection laws. The clause states that the proceeds resulting from duties and imposts go to the United States Treasury.)
The Bill of Rights and the Purpose of the Constitution

The Bill of Rights was not part of the original 1787 Constitution. The lack of a bill of rights was a rallying cry for the Anti-Federalists, who were opposed to the creation of a national government. The Federalists argued that the Constitution did not need a bill of rights because Congress could exercise only a limited number of powers. Bills of rights were common in state constitutions because states exercised general legislative power. Creating a list of specifically protected rights in the federal Constitution could lead to the presumption that Congress had certain powers that it was never intended to hold.

James Wilson warned, “if we attempt an enumeration, everything that is not enumerated is presumed to be given” to the national government. Additionally, as Alexander Hamilton pointed out in *The Federalist* No. 84, historical bills of right, such as the Magna Carta, had been grants of rights from a sovereign or king; but in the United States, the people are sovereign, and the branches of government have no powers except those specifically delegated to them.

The Federalists agreed to include a bill of rights at the First Congress in April 1789. The phrase “Bill of Rights,” which is never mentioned in the Constitution, refers to the first 10 amendments to the Constitution. The Framers intended the first 10 amendments to be separate declaratory and restrictive clauses, not an exhaustive enumeration of rights. Thus, instead of limiting the natural rights of Americans to those rights specifically listed, the 10 amendments harken back to the Declaration of Independence and set forth certain inalienable natural rights of man.

To this end, the Founders included what we now know as the Ninth and Tenth Amendments. The Ninth and Tenth Amendments briefly encapsulate the twofold theory of the Constitution: The purpose of the Constitution is to protect *rights* that stem not from the government, but from the people themselves and to limit the *powers* of the national government to those that are delegated to it by the people in the Constitution. The Ninth Amendment clarifies that the Bill of Rights did not exhaustively list every right held by the American people. Instead, the American people always retain the right to self-governance, and the government has only those powers that the people have chosen to delegate to it. The Tenth Amendment states explicitly that all powers not specifically granted by the Constitution to the federal government belong to the states or to the people.
The Ninth Amendment clarifies that the Bill of Rights is not an exhaustive list of individual rights. Guaranteeing specific rights in Amendments I–VIII does not mean that the people do not retain other rights that are not listed. There are three different originalist theories about the purpose of the Ninth Amendment.

Traditionalists argue that the Ninth Amendment accomplishes three objectives. First, the amendment is intended to guard against the principle of statutory interpretation known as *inclusio unius est exclusio alterius* (“the inclusion of one thing necessarily excludes all others”). Second, it acknowledges in effect that the Federalists were correct to argue that a bill of rights was unnecessary. Third, it affirms republican principles including the principle of self-government.

The principle of *inclusio unius est exclusio alterius* applied to rights would be dangerous to liberty. Listing certain rights as immune from congressional regulation would imply a grant of general legislative power in Congress to legislate over all other rights not listed. For this reason, Federalists labeled a federal bill of rights unnecessary and dangerous.

Though the Federalists eventually agreed to include a bill of rights in the Constitution, they crafted the Ninth Amendment to buttress their position that Congress is not automatically granted general legislative power.

The Ninth Amendment affirms the republican nature of the Constitution and the federal government. The phrase “rights retained by the people” refers to the inalienable and natural rights as articulated in 18th century America, chief among them the right to self-government. The amendment therefore reinforces the constitutional structure and reaffirms the sovereignty of the people, although it does not provide an independent basis for judicial enforcement.

Other scholars, such as libertarian originalist Randy Barnett, argue that the Ninth Amendment provides a set of judicially enforceable unenumerated rights. These rights do not consist in anything a judge decides or some product of an evolving Constitution. Rather, the Framers designed the amendment to protect natural rights—individual rights that no government may deny.

The Constitution grants Congress a limited set of enumerated powers, but as these scholars argue, the Necessary and Proper Clause could permit Congress to encroach on the people’s liberty. Madison in particular saw the necessity of a bill of rights and included the Ninth Amendment after the list of specific enumerated rights to clarify that the foregoing list was partial. Barnett further argues that Madison distinguishes between mechanisms that limit powers and those that secure rights, with the Ninth Amendment being an example of the latter.
A third interpretation of the Ninth Amendment is that Madison drafted it in response to specific allegations from several state ratifying conventions about the extent of the powers granted to the federal government. In particular, some argued that the Necessary and Proper Clause would allow Congress to invade areas of state power and that the Supreme Court would construe federal power too broadly. The Ninth Amendment would guard against the Supreme Court interpreting Congress's powers so broadly as to encroach on states' authority. Madison maintained that the purpose of the Ninth Amendment was to restrict the ability of the Court to expand Congress's power, not to enable the Court to find new rights. (Madison drafted the Tenth Amendment to affirm that states held powers not explicitly granted to Congress.)

Courts have had little opportunity to interpret the Ninth Amendment. Between ratification and the New Deal, the courts understood it to limit federal power. The amendment was ignored and ultimately dismissed in the Legal Tender Cases (1871), for the Court argued that the limited nature of the Bill of Rights meant that Congress had other unenumerated powers. After 1937, the Supreme Court no longer served as a check on the scope of Congress's power. In 1965, however, the Court embraced the amendment—though not its original meaning—as the source of an unenumerated rights doctrine. With this doctrine, the Court argues that the Constitution protects rights to privacy, abortion, and other non-economic rights. This doctrine remains controversial.

Check Understanding
Read James Madison’s commentary regarding the Bill of Rights on page 367 (begin with “It has been objected” and end with “it may be guarded against”) aloud to students. Ask: Can you summarize Madison’s argument in your own words in three sentences or less? Ask students to share their ideas with the class. (Answers will vary. Sample answer: Some people think that because a bill of rights would contain certain rights, those not identified would be presumed to be given to the government. This is a valid concern, but we can avoid this problem.)

Active Reading
Have students summarize the three interpretations of the Ninth Amendment. (Under the traditional originalist view, the Ninth Amendment ensures that the statutory rule of interpretation, inclusio unius est exclusio alterius, is not employed; acknowledges in effect that the Federalists were correct to argue that a bill of rights was unnecessary; and affirms republican principles including the principle of self-government. The libertarian originalist interpretation holds that the Ninth Amendment guarantees a set of unenumerated individual natural rights. The third interpretation holds that the Ninth Amendment addresses concerns about the scope of the federal government’s delegated powers in light of the Necessary and Proper Clause. The Ninth Amendment would prevent the Supreme Court from expanding Congress's power.)
Research It

In *The Federalist* B4, Alexander Hamilton argues that a bill of rights is unnecessary and dangerous. James Madison was a co-author of the *The Federalist* but drafted and supported the Bill of Rights. Have students research Madison’s writings about the necessity of a bill of rights and assign them to write a few paragraphs explaining what Madison thought about the Bill of Rights during ratification, the extent of his involvement in determining the final text of the amendments, and whether he changed his mind about the need for a Bill of Rights.

Reserved Powers of the States — Amendment X

*Essay by Charles Cooper (pp. 371–375)*

The Ninth Amendment clarifies that the people retain all rights beyond those expressly listed in the Bill of Rights. The Tenth Amendment clarifies that the branches of the federal government may exercise only the powers constitutionally granted to it. Thus, any powers not constitutionally granted to the federal government (or prohibited from state exercise) are reserved to the states or the people. The Framers had two main purposes for the Tenth Amendment: It was a necessary rule of construction to explain how the Bill of Rights is to be understood, and it reaffirmed the nature of the federal system.

The Tenth Amendment explains how the Bill of Rights should be understood. Bills of rights were common in state constitutions because states exercised general legislative powers. Because the Constitution granted Congress limited powers, a bill of rights would be unnecessary and possibly dangerous. A bill of rights could imply federal legislative powers that are broader than those granted in the Constitution. Therefore, the Tenth Amendment creates a rule of construction that warns against interpreting the amendments to grant additional powers beyond those granted in the Constitution. For instance, the First Amendment directs that “Congress shall make no law...abridging freedom of speech, or of the press.” Article I never granted any power to Congress over speech or the press in the first place; the Tenth Amendment clarifies that the Bill of Rights does not grant any additional powers beyond those granted in Articles of the Constitution.

The Tenth Amendment reinforces the federal system created by the Constitution and acts as a bulwark against federal intrusion on state authority and individual liberty. The Constitution establishes a novel system of government and a unique relationship between the states and the federal government. Each government possesses direct authority over citizens. Yet, as James Madison emphasized in *The Federalist* No. 45, the powers of the federal government were limited and assigned, while the powers of state governments were quite numerous and general. The concept of enumerated powers is central to the Constitution’s creation of a partly federal, partly national government. The Tenth Amendment is a concise summation of the very idea and structure of a government of limited powers.
Judicial interpretations of the Tenth Amendment were sparse in the early days of the Republic. No decision turned upon the application of the amendment. By the 19th century, the meaning of the Tenth Amendment was widely and frequently misrepresented. Some invoked it to support the states’ rights doctrine and the claim that the Constitution created a system of “separate and distinct” sovereignties rather than a partly federal, partly national system. In the Legal Tender Cases of 1871, the Supreme Court engaged in the type of reasoning that the Tenth Amendment was designed to guard against, arguing that there are additional powers created by the Constitution “neither expressly specified nor deducible from any one specific power.”

Since the New Deal Court, the Supreme Court has recognized few limits on Congress’s enumerated powers. Congress regulates manufacturing, agriculture, and other areas involving activities and business conducted within individual states. In National League of Cities v. Usery (1976), the Court reasoned that the Tenth Amendment protects the states from federal encroachments, specifically regarding implementation of the Fair Labor Standards Act in individual states. The Court reversed itself a few years later in Garcia v. San Antonio Metropolitan Transit Authority (1985), prompting Court observers to think that the federal judiciary would no longer entertain federalism challenges.

Recently, the Supreme Court has used the Tenth Amendment to enforce limits on congressional powers, particularly when the federal government attempts to control state operations. Outside of this range of cases, however, it has not invoked the Tenth Amendment: The Court recognized the limits on Congress’s powers in United States v. Lopez (1995) and United States v. Morrison (2000) without reference to the Tenth Amendment.

Recent decisions applying the Tenth Amendment have been controversial. Some object that the cases go far in applying non-textual theories of federalism. Others object that they do not go far enough to restrict the modern expansion of enumerated powers. Meanwhile, the Supreme Court remains unsure of how to apply the Tenth Amendment. On one level, prohibiting the federal government from controlling the states is a relatively straightforward application. The difficulty comes when evaluating whether laws actually conform to Congress’s Article I powers or encroach on actual state authority. If laws are grounded in Congress’s Article I powers, the Tenth Amendment is satisfied. If they are not, the Tenth Amendment is violated.

Work in Groups

The Bill of Rights was not part of the original 1787 Constitution. The lack of a bill of rights was a rallying cry for the Anti-Federalists, but the Federalists argued that the Constitution did not need a bill of rights because Congress could exercise only a limited number of powers. Divide the students into groups and present the following resolution: “Be it resolved that a Bill of Rights is unnecessary for our federal Constitution.” Assign groups to argue for and against the resolution. Encourage them to use their book and the suggestions for further research as they prepare their arguments.
Discussion Question

Have students write a few paragraphs describing how the Ninth and Tenth Amendments sum up the Constitution. (The Ninth and Tenth Amendments encapsulate the twofold theory of the Constitution: that the purpose of the Constitution is to protect rights inherent in the people themselves and that the Constitution limits the powers of the government to those powers that are delegated by the people. The Ninth Amendment clarifies that the Bill of Rights is not a complete list of rights, but that the American people always retain their right to self-governance. The Tenth Amendment mandates more explicitly that the federal government holds only those powers specifically given to it by the Constitution and that all other powers are reserved to the states and the people.)

Active Reading

Read the section on page 371 regarding the Tenth Amendment as an interpretative rule to students (beginning with “That interpretative rule” and ending with “by which restrictions may be imposed”). Ask: What was the Federalists’ logic for creating this interpretive rule? (Federalists argued that a bill of rights would not be necessary or even useful, since it would prohibit Congress from using powers it did not possess in the first place. For instance, it would not be necessary to develop an amendment instructing Congress not to pass laws restricting the freedom of the press if passing such laws was never a right held by Congress.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 15. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. The phrase *inclusio unius est exclusio alterius* roughly means that including one thing indicates that all others are
   a. prohibited.
   b. implied.
   c. included.
   d. excluded.

2. When arguing that a bill of rights was needed, Anti-Federalists pointed to prohibitions already in the Constitution, including the
   a. Privileges and Immunities Clause.
   b. *writ of habeas corpus*.
   c. Interstate Rendition Clause.
   d. right to obtain legal counsel.
3. The Supreme Court has held that state control of liquor is subject to federal power under which Clause?
   a. Alcoholic Beverages Clause
   b. Usurpation Clause
   c. **Commerce Clause**
   d. none of the above

4. The Bill of Rights consists of
   a. the first five amendments.
   b. all of the amendments.
   c. **the first 10 amendments**.
   d. none of the amendments.

5. Americans have unnamed rights guaranteed by the
   a. Second Amendment.
   b. Sixth Amendment.
   c. Seventh Amendment.
   d. **Ninth Amendment**.

6. The only amendment to be repealed is the
   a. Fifteenth Amendment.
   b. **Eighteenth Amendment**.
   c. Nineteenth Amendment.
   d. Twentieth Amendment.

7. The Federalists eventually agreed to pass the Bill of Rights
   a. at the Virginia Ratifying Convention.
   b. in the House of Representatives.
   c. **in the First Congress**.
   d. in the Supreme Court.

8. The event that convinced the Federalists that they needed to grant some authority to a national government that functioned independently of the states was the
   a. drafting of the Articles of Confederation.
   b. **failure of the Articles of Confederation**.
   c. ratification of the Articles of Confederation.
   d. repeal of the Articles of Confederation.

9. With respect to the Tenth Amendment, James Madison asserted in *The Federalist* No. 45 that the powers of the states were more ____ than those of the federal government.
   a. numerous
   b. narrow
   c. subjective
   d. definitive
Fill in the blank: Write the correct word or words in each blank.

1. James Madison drafted the ____________ to affirm that the states retained all powers not delegated to the federal government. (Tenth Amendment)

2. The Constitution created a novel system of mixed ___________. (sovereignty)

3. The Eighteenth Amendment was considered one of the ___________ amendments passed and ratified in quick succession. (Progressive)

4. Prohibition was repealed in 1933 by the _______________. (Twenty-first Amendment)

5. When the nation repealed Prohibition in 1933, it vested primary control over alcoholic beverages in the _____. (states)

6. According to one interpretation, the Ninth Amendment was drafted to address concerns that the Supreme Court would interpret the _______________ to increase the powers of Congress. (Necessary and Proper Clause)

Short Answer: Write out your answer to each question.

1. From the time of its ratification until the New Deal, the Ninth Amendment was understood as a principle limiting what? (the construction of federal power to the detriment of the states)

2. The Tenth Amendment expresses which principle that undergirds the entire plan of the original Constitution? (that the national government possesses only those powers that are delegated to it)

3. During the ratifying conventions, many Anti-Federalists demanded what? (A bill of rights)

4. When combined with the import taxes, the income tax in the early 1900s freed the government from dependence on a tax on what? (liquor)

5. In which two ways can an amendment to the Constitution be proposed? (by a two-thirds vote in both houses of Congress or by two-thirds of the state legislatures petitioning Congress, which then calls a convention for proposing amendments)

6. In which two ways can a proposed amendment be ratified? (by a three-fourths vote of the state legislatures or by ratifying conventions in three-fourths of the states)
True / False: Indicate whether each statement is true or false.

1. State legislatures, rather than Congress, usually initiate the amendment process. (False)

2. Despite the Twenty-first Amendment, the federal government has gradually eroded states' rights of control over alcoholic beverages. (True)

3. The Eighteenth Amendment was considered one of the Progressive amendments, along with the Sixteenth, Seventeenth, and Nineteenth Amendments. (True)

4. The Tenth Amendment states that the federal government possesses only those powers specifically granted to it. (True)
Unit 6
Lesson Objectives

When you complete Lesson 16, you will be able to:

- Explain the purpose of the Establishment of Religion Clause of the First Amendment, the restrictions that it places on Congress, and cite the Supreme Court’s three approaches to the Establishment of Religion Clause.
- Understand the difference between separating religion from politics and separating church from state.
- Explain the Free Exercise of Religion Clause and the four related key issues.
- Outline the principles and exceptions of the Freedom of Speech Clause.
- Describe the history of and debate regarding the Freedom of the Press Clause.
- Discuss the purpose of the Freedom of Assembly and Petition Clause.
- Understand the Founding generation’s concerns about standing armies and the difference between a standing army and a militia.
- Understand the purpose of the Second Amendment and to which government it applies.

Part 1:

Amendment I

Establishment of Religion
Amendment I

Free Exercise of Religion
Amendment I

Freedom of Speech and Freedom of the Press
Amendment I

Freedom of Assembly and Petition
Amendment I
**Establishment of Religion**—Amendment I

*Essay by John Baker (pp. 302–307)*

The First Amendment was not created to divorce religion from politics. In reality, the Northwest Ordinance of 1787 stated that religion was “necessary” for good government and human happiness. George Washington asked for God’s blessing during his First Inaugural Address and reiterated the importance of religion in fostering the morality needed for good government during his Farewell Address in 1796. The Framers saw religion as beneficial to government and designed the Establishment of Religion Clause to protect the free exercise of religion.

Because six of the 13 colonies had established state churches, the wording of the Establishment of Religion Clause would prohibit Congress from establishing a national church but would not interfere with the states’ ability to establish churches. The House and the Senate each proposed different wording to prohibit an established national church and protect the individual right to the free exercise of religion. The word “respecting” was a vital inclusion in the final version because it forbade Congress from either creating a national religion or disbanding any state’s church. The Founders did not view established churches on the state level as violating free exercise of religion. In fact, religious freedom and toleration flourished throughout early America.

Despite the text of the amendment, the Supreme Court ruled in *Cantwell v. Connecticut* (1940) that the First Amendment applied to the states as well as to Congress. Since then, contemporary constitutional law on the Establishment Clause has been incoherent. There are several schools of thought on the clause—the separationist view, the no-coercion view, and the endorsement view—which have not been reconciled.

In *Everson v. Board of Education of Ewing* (1947), the Supreme Court argued that the purpose of the Establishment Clause was to create a “wall of separation,” “high and impregnable,” between church and state. The “wall of separation” language is from one of Thomas Jefferson’s private letters to the Danbury Baptist Association in Connecticut in 1802, but the letter is silent as to the height and impenetrability of such a wall. To enforce the strict separation of religion and government, the Court crafted a three-part test—the “Lemon test” set out in *Lemon v. Kurtzman* (1971)—to determine violations of the Establishment Clause: (1) the law must have a secular purpose; (2) the primary effect must neither advance nor inhibit religion; and (3) the law must not foster an excessive entanglement of religion with government. If a law fails one prong, it fails the test and therefore is an establishment of religion. The Lemon test is rarely used today.

Contrary to the separationist view, Justice William Rehnquist in *Wallace v. Jaffree* (1985) argued that the Establishment Clause prohibits government from coercing people to practice or support religion but does not demand that religion be totally separate from government.
In *Lynch v. Donnelly* (1984), Justice Sandra Day O’Connor argued that the clause forbids the state to endorse one religion above all others. If a reasonable observer would view the state action as sending a message to non-adherents that they are not full members of the community, then the state has endorsed a religion and therefore has violated the Establishment Clause.

The Supreme Court’s incoherence on the Establishment Clause became especially apparent in 2005 when the Court held a display of the Ten Commandments to be unconstitutional in Kentucky but constitutional in Texas.

**Before You Read**

Ask: What role does the government play in the religious lives of U.S. citizens? (Answers will vary. Students may mention the idea of a “wall of separation” between church and state. They may also mention that Americans worship freely without government interference.)

**Active Reading**

Ask: What two specific actions by government does the Establishment of Religion Clause prohibit? (Congress is not allowed to establish an official national religion or to dissolve a state establishment of religion. The Founders did not view state establishments of religion as a violation of the Establishment Clause.)

**Write About It**

Have students research one of the state establishments of religion during the Founding era. Ask each student to write a few pages on his or her findings and share them with the class.

**Check Understanding**

Tell students that the Founders supported the separation of church and state. They therefore opposed any use of the federal government’s coercive power to require citizens to join a specific religious sect. For example, the Founders would have been opposed to a law that required people to attend certain religious services every week or face a penalty. However, the Founders did not support the separation of religion and politics. They realized that religion was necessary for morality and that morality was needed in politics; thus, they did not oppose government endorsement or encouragement of religion for the ultimate purpose of encouraging citizens and politicians to be moral.
Free Exercise of Religion — Amendment I

Essay by Thomas Berg (pp. 307–311)

The Free Exercise of Religion Clause forbids Congress from prohibiting individuals from freely exercising their religion. The boundaries of this right are debated. The narrower interpretation treats religious activity as a type of free speech or some other constitutional right. The broader interpretation sees the right of free exercise as independently valuable. The tension between the broad and narrow interpretations plays out in four key issues relating to the Free Exercise of Religion Clause.

First, what is included in the “exercise” of religion? Is it a right to believe or a freedom to act in a manner consistent with those beliefs? Narrowly interpreted, the First Amendment protects belief, meaning the holding of certain opinions, but not actions motivated by that belief. Under the broader interpretation of the amendment, actions motivated by belief are protected. The Supreme Court initially adopted a narrow reading of the clause and ruled that the First Amendment protects belief but not action: For instance, polygamy is not protected by the First Amendment. In later rulings, the Court has adopted the broader interpretation, ruling that the amendment protects religiously motivated actions.

Second, if the First Amendment protects belief and action, can a religious belief exempt one from complying with general law? Many states, for instance, accommodated Quakers by allowing them to testify by an affirmation rather than swearing an oath, which would have violated a tenet of their faith. Supporters of the narrower interpretation of the Free Exercise of Religion Clause argue that specific statutory exemptions are permissible but not required. Supporters of the broader interpretation argue that exemptions from the law are appropriate and necessary responses to conflicts between legal and religious duties (so long as the religious activity does not harm public peace or others’ rights).

Accommodations to or exemptions from general laws point to philosophical differences about the relationship between civil government and religion. Theorists such as John Locke argued that religious belief does not remove the obligation under the law and that exemptions are therefore not required. On the other hand, early Americans saw religion as a duty to God. In a conflict between religion and civil government, an exemption from the law is necessary. A separate question is: Who provides the exemption, the legislature or the court?

Third, should exemptions from general laws be made on the grounds of secular beliefs in addition to religious ones? The Founders used the term “conscience,” which some have argued encompasses philosophical and religious beliefs.

The final issue is the question of what constitutes a violation of the right to practice religion freely. Is withholding a benefit equivalent to a violation of one’s freedom of conscience? Does industrial development in ceremonial areas considered sacred by Native Americans interfere with their freedom to practice their religion? These are complex issues that are unlikely to be settled soon.
Before You Read

Ask: Are there limits to a citizen’s free exercise of religion? (Answers will vary. Some students may mention that religious practices should not violate state or federal laws or harm individuals or society. Other students may say that all citizens should be completely free to practice any religion they choose and that the government should never interfere with this freedom.)

Research It

The Founders saw religion as important to maintaining free government. Have students research a Founder’s public speeches or proclamations about religion and explain that Founder’s view. Students may use textbooks, other books, or online resources. Ask students to share their findings with the class.

Discussion Question

Should people be excused from obeying certain laws because of their religious beliefs or practices? Why or why not? (Answers will vary. Some students may say that it is okay to make exceptions in certain cases, such as excusing people from work on certain days so they can go to church or excusing people from military service. Others may argue that state and federal laws should apply to all citizens equally. It also raises the question: Should everyone be entitled to an exemption? For instance, if members of a new religious group claim that taking illegal drugs is part of their belief system, should they be exempt from drug laws?)

Freedom of Speech and Freedom of the Press — Amendment I

*Essay by Eugene Volokh (pp. 311–316)*

Freedom of speech and freedom of the press are important but not well-defined provisions of the Constitution. The Framers certainly recognized the importance of such freedoms as vital to the advancement of truth, science, morality, and arts in general, but few Founding-era courts discussed the scope of these rights.

The most prominent debate on freedom of the press concerned the Sedition Act of 1798, wherein Congress made it a crime to publish writings intended to defame the government, Congress, or the President or to incite unrest in the country. The debate turned on whether government (1) could prevent the publication of works that would violate the Sedition Act or (2) could merely punish people for publishing such works after the fact.
John Marshall, a Federalist Congressman, argued that freedom of the press meant that one could publish freely without first obtaining permission, but the Freedom of the Press Clause did not protect against criminal prosecution after publication. James Madison did not agree with this view. He argued that penalties imposed after publication would restrict freedom of the press every bit as much as laws allowing prior restraint would.

Federalist supporters of the Sedition Act argued that freedom of the press does not extend to seditious speech against the government, because seditious speech destroys confidence in government. By contrast, the Republicans argued that freedom of speech necessarily covers speech that criticizes the government.

The consensus on the original meaning of the Freedom of Speech Clause is also unsettled. For instance, does the clause protect anonymous political speech? Some, including Justice Clarence Thomas, point to the Founders’ use of anonymous speech as proof that anonymous political speech is protected. Justice Antonin Scalia, however, disagreed in *McIntyre v. Ohio Elections Commission* (1995).

Contemporary jurisprudence on the Freedom of Speech and Freedom of the Press Clauses does not reference their original meaning. Rather, the Supreme Court has developed its own set of categories of protected and unprotected speech and press. First, the guarantees in the Freedom of Speech and Freedom of the Press Clauses protect individuals against the actions of government, not against the actions of private individuals. Second, they apply to both the state and federal levels. Third, they cover speakers and writers, regardless of medium (book, magazine, or Internet) or membership with an institutional press. (Radio and television receive less constitutional protection.) Fourth, the Freedom of Speech Clause covers expressive actions, such as carrying a flag or wearing a symbol, and actions that are necessary for a person to deliver an effective talk, such as buying a podium and microphone. Fifth, both political speech and speech about science, religion, art, and a variety of other topics are protected. Sixth, free speech extends to all viewpoints, even ones that most of society considers evil.

The Court recognizes some limitations on freedom of speech and press, including speech inciting individuals to break the law; obscene works; threats of violence; fighting words, which are personal insults directed toward a specific individual that are likely to cause a fight; speech owned by others that may violate intellectual property laws; and certain types of commercial advertising such as misleading statements.

**Before You Read**

Ask: What does “freedom of speech” mean? (American citizens may speak their opinions freely without being punished for their opinions.) Ask: What does freedom of the press mean? (Freedom of the press safeguards the ability to write and publish one’s opinions freely. It is not limited to an institutional press such as a news agency. It is an individual right.)
**Active Reading**

Ask: What types of media are protected by freedom of speech today? (The Founders understood freedom of speech to cover political speech. The modern Supreme Court considers freedom of speech to cover books, newspapers, movies, the Internet, and—to a lesser extent—radio and television.) What types of statements made by an individual might not be protected by freedom of speech? (statements that an individual knows are untrue, statements that are meant to provoke people to commit crimes, statements that contain threats of violence, and certain insults provoking a fight)

**Make an Inference**

Say: Imagine if a political party in the government could control the ability of individuals and institutions to write or publish. Ask: What would newspapers and news broadcasts cover? What could individuals freely discuss in writing? (Answers will vary. Sample answer: Whichever party was in power would be able to determine what news would be covered. Individuals would likewise be limited as to what they could publish. If the other party came to power, the news coverage would reflect the change in power.)

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**Freedom of Assembly and Petition** — Amendment I

*Essay by David Bernstein (pp. 316–318)*

The Freedom of Assembly and Petition Clause ensures the right to assemble peacefully and to “petition the Government for a redress of grievances.” Current jurisprudence wrongly considers these two rights to be forms of free speech, but the First Amendment distinguishes these rights from each other and from the Free Speech Clause.

As the 1774 Declarations and Resolves of the First Continental Congress reveal, the right to petition was a more robust right than the right to free speech. The first formal recognition of the right to petition is in the Magna Carta. In 1642, Massachusetts became the first colony to grant this right to citizens; by the time of the Revolution, five other colonies had likewise guaranteed this right. Petitions were the primary avenue for citizens to communicate with local governing bodies and assemblies. The assemblies thoroughly reviewed these petitions and responded to them.

While Congress readily included the right to petition in the Bill of Rights, the right to assembly was more controversial. Several viewed the right to assemble as an adjunct right rather than an independent one. The right was included in the Bill of Rights as a separate right because the right to assemble encompassed the right of the people to assemble to alter the structure of the government.
The right to petition does not guarantee that the government will respond in any particular way or at all. The judiciary is the only branch with a duty to respond to petitions. The executive arguably has an obligation to respond, but the presence of unaccountable administrative agencies complicates this. In the legislature, hearing and ruling on petitions was once a vital task for the House of Representatives. Committees would consider petitions and then report to Congress, resulting in a bill to consider the issue or a rejection of the petition. Although Congress refused to consider petitions regarding slavery, Members did consider petitions about other highly controversial issues.

Today, Congress treats petitions in a pro forma manner, and citizens rely on the modern democratic system to voice their opinions. The Supreme Court considers the right to petition and the right to assemble to be forms of free speech—more specifically, a right to expressive association.

**Before You Read**

**Ask:** What are petitions? (Petitions are formal written requests to an authority such as a government; people sign them to protest or to give an opinion about a specific issue.) How would you exercise your right to assemble? (Answers will vary. Students may mention attending a rally or holding a political meeting.)

**Active Reading**

**Ask:** How has Congress handled petitions in the past? (Congress took petitions very seriously. The House of Representatives heard petitions on the floor. Committees were given the responsibility of reviewing, considering, and reporting on petitions. The government typically responded to all petitions.) What types of petitions would Congress not consider? (petitions regarding the abolition of slavery)

**Discussion Questions**

Petitions are no longer used as a primary means for U.S. citizens to communicate with the government. **Do you think the American government should treat petitions as seriously as it did during colonial times? Why or why not?** (Answers will vary. Students who think petitions should be taken seriously may point out that petitions would allow citizens to communicate directly with officials in the various branches of government. Petitions are addressed to all of the people’s representatives, not just the petitioner’s individual Member of Congress. Students who do not think petitions should be taken as seriously will likely argue that the ability to e-mail, call, or write freely to their Members is more effective than formal petitioning.)
Check Understanding

Have students complete the following assessment to check their understanding of Lesson 16, Part 1. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. Freedom of religion is guaranteed by the
   a. First Amendment.
   b. Second Amendment.
   c. Third Amendment.
   d. Ninth Amendment.

2. The First Amendment does not guarantee
   a. Freedom of speech.
   b. Freedom of petition.
   c. Freedom from unreasonable searches.
   d. Freedom of assembly.

3. The Freedom of Speech Clause can be applied only to restrict the actions of
   a. private employers.
   b. churches.
   c. property owners.
   d. government officials.

4. _____ argued that the freedom of the press guarantee did not stop authorities from laying charges after publications had been released.
   a. James Madison
   b. John Marshall
   c. Thomas Jefferson
   d. John Adams

5. The first colony to grant its citizens the right to petition was
   a. Delaware.
   b. Pennsylvania.
   c. Vermont.
   d. Massachusetts.

Fill in the blank: Write the correct word or words in each blank.

1. According to the exceptions to freedom of speech protection, commercial advertising that is _________ is not protected. (misleading)

2. The law passed by Congress in the late 1700s that made it a crime to defame Congress, the President, or the government was the _____. (Sedition Act)
Short Answer: Write out your answer to each question.

1. In *Everson v. Board of Education of Ewing* (1947), the Supreme Court focused on which phrase from Thomas Jefferson’s letter to the Danbury Baptists? *(wall of separation between church and state)*

2. Since *Everson v. Board of Education of Ewing* (1947), the Supreme Court has developed what three different and conflicting views regarding the Establishment of Religion Clause?
   - Separationism
   - Coercion
   - Endorsement

3. What is the small set of rather narrow exceptions to the modern legal doctrine of free speech protection?
   - Incitement
   - False statements of fact
   - Obscenity
   - Child pornography
   - Threats
   - Fighting words
   - Speech owned by others

4. In 1840, the House had a “gag rule” against petitions about what subject? *(slavery)*

5. The right to petition, along with the right to assemble peaceably, became less important as what happened? *(as modern democratic politics gradually replaced petitioning and public protests as the primary means for constituents to express their views to their representatives)*

True / False: Indicate whether each statement is true or false.

1. Under modern Supreme Court jurisprudence, the right to petition and the right of peaceable assembly have been almost completely collapsed into freedom of speech. *(True)*

2. Even before the incorporation of the religion clauses and without intervention by the federal courts, religious freedom and tolerance had spread throughout the United States. *(True)*
Part 2: Amendment II

Right to Keep and Bear Arms — Amendment II

Essay by Nelson Lund (pp. 318–322)

Modern debates about the Second Amendment focus on whether it protects an individual’s right to bear arms or the states’ power to maintain militia organizations such as the National Guard. The Founders, however, thought the amendment’s meaning was obvious and questioned whether it added anything to the Constitution.

To understand the Second Amendment, one must grasp the Founders’ distrust of standing armies. Because most standing armies throughout history eventually had turned against the people, the Founders would form armies when necessary to respond to foreign invasion. Militias and civilian armies would respond to sudden emergencies.

The problem with militias was that they were poorly trained and inefficient compared to professional soldiers. Citizens might be reluctant to bear the costs for supplies and weaponry and spend the time for unpaid military training. Militia training would vary from state to state, leaving open the possibility that the combined forces might be too weak to defend the nation. Confronted with this dilemma and considering other options, the Constitutional Convention expected some kind of militia to exist and gave Congress the authority to regulate it.

Anti-Federalists objected to the federal government’s control and wanted states to control the militia instead. They argued that states would find it difficult to defend themselves against federal oppression and pointed to European history as justification for their concerns. Federalists responded that, unlike Europeans, American citizens were armed and able to defend themselves against such acts. Implicit in this debate were two linked assumptions: The federal government had authority over the army and militia, but it had no power to disarm citizens. The Second Amendment, thus, was a statement of two well-understood, uncontroversial ideas.

Since the adoption of the Second Amendment, the traditional militia structure has been incorporated into the federal military structure, and Americans no longer fear the military as a tool of domestic oppression. Also, changes in weaponry mean that citizens no longer privately own the same weapons as would be used by the military. The weapons that an average 18th century citizen would own for hunting and self-defense were the same ones used in civil defense. Twenty-first century citizens do not privately own the same modern weaponry as used by the military.

Under current jurisprudence, courts are divided on the question of whether the Second Amendment is an individual right to bear arms or a corporate right of the community to maintain an armed militia. Moreover, the Second Amendment applies to the federal government but not the states; consequently, most gun-
control regulations are made at the state level. Apart from strict regulations in the District of Columbia, the federal government has done little to prevent civilians from owning and using firearms. In 2008, however, the Supreme Court ruled in District of Columbia v. Heller that the Second Amendment protects an individual right to bear arms, even among citizens in federal enclaves. Although the Supreme Court has ruled that other amendments in the Bill of Rights apply to the states, it is unclear whether the Court will apply the Second Amendment to state governments.

**Active Reading**

To ensure understanding, ask: What is a militia? (a body of citizens organized for military service) How is a militia different from a standing army? (An army is made up of professional soldiers. A militia is made up of civilians.)

**Check Understanding**

Remind students that the Founding Fathers did not attempt to solve the problem of whether the country should have state-controlled militias or a unified militia under federal control. Instead, they gave Congress the authority to regulate the militias as well as the Army and Navy. Ask: Why did Anti-Federalists object to this shift in power? (The Anti-Federalists feared that giving Congress the authority over militias removed the states’ ability to defend themselves against an oppressive federal government.)

**Write About It**

Have the students read District of Columbia v. Heller (2008). What are the arguments for the Second Amendment as an individual right to bear arms and as a corporate right of the community to maintain a militia?

**Check Understanding**

Have students complete the following assessment to check their understanding of Lesson 16, Part 2. Review any material for questions they have missed.

**Multiple Choice: Circle the correct response.**

1. Anti-Federalists wanted the militia to be controlled by
   a. the federal government.
   b. the Founders.
   c. the President.
   d. state governments.
2. Militias are different from armies mainly because people belonging to militias are not
   a. professional soldiers.
   b. loyal to one nation.
   c. citizens of a nation.
   d. supervised by officers.

3. After the Second Amendment was adopted, the traditional militia
   a. grew more powerful as the federal military weakened.
   b. came into disuse as the federal military grew.
   c. was disarmed by federal authorities.
   d. was forced to join the federal military.

Fill in the blank: Write the correct word or words in each blank.

1. The Founding generation mistrusted standing ______. (armies)

2. ___________ argued that having the militia under federal control would prevent states from being able to defend themselves against federal oppression. (Anti-Federalists)

3. ___________ argued that the American people could respond to military force if necessary because, unlike Europeans, they were armed. (James Madison)
Lesson Objectives

When you complete Lesson 17, you will be able to:

- Explain the Third Amendment's ban on quartering troops.
- Understand the 18th century cases that led to the development of the Fourth Amendment.
- Explain the purpose of the Searches and Seizures Clause, the exceptions to the clause, and how the clause is enforced.
- Outline the requirements for a valid warrant under the Warrant Clause, current warrant requirements, and situations in which officials are exempt from these requirements.
- Understand the difference between a jury and a grand jury and explain the accusatory and protective functions of grand juries.
- Understand the purpose of the Grand Jury Exception Clause and the debate regarding the constitutional rights of members of the military.
- Define the rights protected by the Double Jeopardy Clause and the five key concepts related to double jeopardy.
- Describe the history of the Self-Incrimination Clause.
- Describe the history of the phrase “due process of law” and the original meaning of “life, liberty, and property,” and understand how the modern Supreme Court's interpretation of the Due Process Clause has departed from the clause's original meaning.
- Describe history and purpose of the Takings Clause.
Part 1: Amendment III

Quartering of Troops – Amendment III

Essay by Andrew P. Morriss (pp. 322–323)

Under the Intolerable Acts of 1774, British soldiers were quartered in colonists’ private homes to punish colonists. The Third Amendment bans peacetime quartering of troops and requires that wartime quartering must have legislative approval. The Amendment was uncontroversial. Indeed, six of the original 13 states also banned the quartering of soldiers.

The purpose of the Third Amendment is so clear that it rarely is litigated in court. The recent citations of the Third Amendment make no reference to private property rights in wartime and instead argue that the amendment supports a zone of personal privacy that is hidden in the Constitution.

Before You Read

Ask: What do you think it means to quarter soldiers in private homes? (to let them stay in private homes) Explain that the Third Amendment restricts the quartering of troops in private lodgings.

Active Reading

Ask: According to the commentary, how has the problem of quartering soldiers been solved today? (Communities are paid to host military bases.)

Check Understanding

Explain that the Intolerable Acts of 1774 were a series of laws passed in response to the Boston Tea Party. One of these acts was the Quartering Act, which allowed British troops to stay in houses if barracks were not available. Ask: Why did the colonists consider the Quartering Act “intolerable”? (It was a punishment for rebellion. Colonists had to care for the soldiers, providing them with food, water, shelter, and bedding out of their own pockets.)

Discussion Question

The Third Amendment reflects an effort to balance what rights and requirements? (The Third Amendment balances the right to private property against the potential need for wartime military quarters.) Why is this amendment seldom litigated today? (Its meaning is clear, and the creation of military bases has largely solved the problem of quartering troops.)
Check Understanding

Have students complete the following assessment to check their understanding of Lesson 17, Part 1. Review any material for questions they have missed.

**Multiple Choice: Circle the correct response.**

1. The British quartered soldiers in America
   a. during conflicts with the French and Indians.
   b. because legislative authority was unclear.
   c. because there were no army bases.
   d. All of the above.

2. How many of the original 13 states banned the private quartering of soldiers?
   a. 0
   b. 6
   c. 9
   d. 13

**Fill in the blank: Write the correct word or words in each blank.**

1. The Third Amendment reflects an effort to balance ____________ with the potential need for wartime _________________.
   (private property rights, military quarters)

**True / False: Indicate whether each statement is true or false.**

1. The Third Amendment is one of the most frequently debated and frequently challenged in the Supreme Court. (False)

2. The most significant episodes of conflict over quartering concerned the British quartering of soldiers in private homes to punish the people of Boston. (True)
**Part 2:**
**Amendment IV**

**Searches and Seizures**
Amendment IV

**Warrant Clause**
Amendment IV

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**Searches and Seizures** — Amendment IV

*Essay by Gerard V. Bradley (pp. 323–325)*

The Searches and Seizures Clause of the Fourth Amendment protects U.S. citizens against unreasonable searches and seizures. Three notable 18th century cases (two from England and one from the colonies) influenced the Framers’ drafting of the Fourth Amendment. The two English cases, *Entick v. Carrington* (1765) and *Wilkes v. Wood* (1763), involved plaintiffs who produced pamphlets criticizing the government. When arresting these individuals, officials seized books and papers from the plaintiffs’ property. A court agreed with the plaintiffs that the officers’ actions constituted trespassing. The third case involved “writs of assistance,” which permitted customs officials to search for smuggled goods without any suspicion that such goods might be found. Several colonial smugglers were caught with illegal items after such a suspicionless search. The smugglers’ lawyer, James Otis, argued that such searches were invalid, but he did not obtain a judgment in favor of the defendants.

The original meaning of the Searches and Seizures Clause is debated. Some argue that the clause has meaning independent from the Warrant Clause: The word “unreasonable” indicates an independent prohibition on the actions of government officials. Others argue that the Searches and Seizures Clause does not authorize the courts to do anything. They assert that the clause is simply a statement of moral principle that explains the Warrant Clause. Under this interpretation, the right to be secure in their persons, papers, and effects is a right of the people, meaning those comprising the political community, rather than an individual right.

What makes a search or seizure “reasonable” is the perennial question in Fourth Amendment litigation. Based on the body of law on the Fourth Amendment, there are four important clarifications and exceptions regarding reasonable searches: (1) in a criminal context, if a police officer can demonstrate probable cause and obtain a warrant for the search, the search is “reasonable”; (2) some warrantless searches are reasonable if exigent circumstances are present, an object is in plain view, or regulatory agencies conduct the search; (3) with reasonable suspicion, police can question individuals without arresting them; (4) some government officials (in the school or airport context, for instance) may conduct random, suspicionless searches to prevent some particular harm.
The Searches and Seizures Clause is enforced through the “exclusionary rule.” Under this rule, if evidence is seized illegally, it cannot be used against the individual in a criminal trial. The exclusionary rule formerly applied in federal court cases but not in state criminal cases. In a controversial ruling in *Mapp v. Ohio* (1961), however, the Supreme Court stated that it applies to both state and federal courts.

The exclusionary rule is controversial in part because it was not within the Framers’ design for the Searches and Seizures Clause. Criminals should not go free because an officer blundered in obtaining evidence. Officers, however, could be sued for trespass. Supporters of the exclusionary rule argue that it deters officers from making illegal searches, since the products of illegal searches cannot be used.

**Active Reading**

Ask: *When can police officers stop an individual for questioning?* (when there is some reason for a police officer to suspect that an individual is involved in a criminal activity, although the period of questioning must be brief if the individual is not being arrested)  

Ask: *In what types of situations can searches and seizures be conducted when there is no suspicion of criminal activity?* (Searches and seizures may be conducted when evidence hidden from view may be classified as dangerous or disruptive. Airport officials can search passengers and their luggage, and public schools may conduct drug testing of athletes.)

**Write About It**

Invent a scenario in which a police officer would be able to conduct a search that would be reasonable. Ask students to identify which of the four categories outlined on pages 324-325 applies to their scenario.

**Discussion Question**

There is debate about the original meaning and purpose of the Searches and Seizures Clause. Do you think the Searches and Seizures Clause was designed to be an independent prohibition on the actions of government officials or to be a preamble for the Warrant Clause? Explain the reasons for your answer. (Answers will vary. Students who think the clause is effective on its own will likely cite the use of the word “unreasonable.” They may also point out that it specifically protects an individual’s person, home, papers, and belongings. Those who think it is introductory or explanatory in nature will most likely argue that the Searches and Seizures Clause is not necessary because the Warrant Clause protects citizens.)
Warrant Clause — Amendment IV

Essay by William J. Stuntz (pp. 326–329)

One of the most clearly written clauses of the Constitution, the Warrant Clause of the Fourth Amendment sets forth the four major requirements for search warrants: (1) probable cause must be present; (2) the official seeking the warrant must swear that the information provided to obtain the warrant is true; (3) the warrant must specify where the search will be conducted; (4) the warrant must state what officials are looking for in their search.

Although the Warrant Clause is clearly worded, two questions are not answered: What constitutes probable cause, and are warrants ever required for officers to search a location or arrest an individual? Today, the accepted definition of probable cause is that something (typically, a crime when the term is used in relation to the Warrant Clause) is occurring “more likely than not.”

The second question is not as straightforward. Many historians argue that the Warrant Clause did not necessarily mean that warrants were always required. The Framers crafted the text of the Warrant Clause to protect against the type of behavior involved in Wilkes v. Wood (1763), Entick v. Carrington (1765), and the Writs of Assistance Case (1761). In each of these cases, the Crown conducted very broad searches under very general warrants that did not establish probable cause and did not specify either the site or the purpose of a search. The Warrant Clause specifies what is required for a warrant, but not when warrants are required.

The issue of warrants did not arise much in early America. Police forces emerged in America in the 1830s. Before that point, private parties conducted investigations and would report the evidence to a magistrate or constable, who would conduct the arrest and search the arrestee’s person and home. Warrants protected police officers against lawsuits alleging unlawful searches and seizures.

The application of the Warrant Clause is different today. Current doctrine on the Warrant Clause deals with the conditions of a valid warrant and when a warrant is required. A warrant requires the existence of probable cause and a description of the specifics (place and purpose) of a search. But such warrants may be issued exclusively by judicial officers. Current jurisprudence recognizes administrative warrants, which are warrants used in regulatory settings without probable cause, as valid warrants. Police may not use administrative warrants to enforce criminal laws. In most cases, police need a warrant any time they search an individual’s private home or office space. Law officials must also obtain a warrant for wiretaps.

There are roughly six major categories of exemptions from the warrants requirement. First, police are usually exempt from getting a warrant if circumstance can be classified as exigent (that is, if obtaining a warrant in a timely manner would be impossible). For example, an officer may enter a home without a warrant if he hears a scream and a gunshot. Second, police do not need a warrant to arrest people if they are outside their home. However, police must have probable cause to make such an
arrest. Third, police may conduct searches directly related to the arrest of an individual. Fourth, police can legally seize items that an arrestee possesses without first obtaining a warrant. Fifth, police officers do not need a warrant to search any part of a vehicle, including the trunk, but they do need to be able to establish that they had probable cause for doing so. Sixth, police officers can detain and frisk individuals to find weapons, but officers must have reasonable suspicion that the individual is engaged in criminal activity.

There are also exemptions for certain types of non-police government officials, such as school principals, government employers, border personnel, and airport personnel. For example, principals may search student lockers and border guards may search vehicles of individuals entering or leaving the country without first getting a warrant.

Because the Supreme Court has established the situations in which warrants are and are not required, most litigation relating to the Fourth Amendment concerns the Searches and Seizures Clause.

### Before You Read

**Ask:** What is a search warrant? *(It is an order issued by a judge. It gives police officers the ability to search a person’s property such as a home or office. Police typically suspect the owner of committing a crime and are searching for evidence.)*

### Active Reading

**Ask:** According to the Warrant Clause, what are the requirements for a search warrant? *(There must be probable cause; the official seeking the warrant must swear that the information relating to the warrant is true; the warrant must identify the property that will be searched; the warrant must outline what officials are looking for.)* **Ask:** Why does the author describe warrants as both a “foe” and a “friend” of the police officer? *(Around the time of the Founding, it was in an officer’s best interest to obtain a warrant. Although a warrant was not necessary, it ensured the officer would not later be sued for an illegal search or seizure. Today, officers must obtain warrants to conduct searches. Therefore, warrants can interfere with the ability of the police to search properties where they suspect criminal activity is occurring and collect evidence of such activity.)*

### Discussion Question

**In what sense was the original understanding of the Warrant Clause clear?** *(The Warrant Clause made clear the conditions necessary for a valid warrant to be issued.)* **In what sense was the original understanding unclear?** *(It was unclear with respect to the basic question of whether warrants were ever required for law enforcement officials to conduct searches or make arrests.)*
Check Understanding

Have students complete the following assessment to check their understanding of Lesson 17, Part 2. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. The government critic _____ had both his papers and those of his friends seized during a search.
   a. Carrington
   b. Wood
   c. Entick
   d. Wilkes

2. The individuals James Otis defended in the court case involving “writs of assistance” were accused of
   a. smuggling.
   b. trespassing.
   c. stealing.
   d. treason.

3. The warrant used in the Writs of Assistance Case did not meet the requirement in the Warrant Clause regarding
   a. the things to be seized.
   b. probable cause.
   c. oath or affirmation.
   d. the place to be searched.

Fill in the blank: Write the correct word or words in each blank.

1. Although the warrant seems the police officer’s foe today, at the time of the Founding, it was the constable’s _____, a legal defense against any subsequent tortuous claim. (friend)

2. The phrasing of the Warrant Clause limits warrants but does not ______ their use. (mandate)

3. The _____ rule is the primary means of enforcing the Searches and Seizures Clause. (exclusionary)

4. When a warrant is granted, any resulting search is considered _____ under the law. (reasonable)

5. Seizing belongings in an individual’s possession when an arrest is made and creating a record of them once they are brought back to the police station is known as an _____ search. (inventory)
6. Generally, police need a warrant to search a home or office or to conduct a _____ to record sounds. (wiretap)

Short Answer: Write out your answer to each question.
1. What is the set of basic requirements for search warrants? (First, probable cause must be present. Second, the official seeking the warrant must swear that the information provided to obtain the warrant is true. Third, the warrant must specify where the search will be conducted. Finally, the warrant must state what officials are looking for in their search.)

2. What were the three notable 18th century cases that influenced the Framers’ drafting of the Fourth Amendment? (Entick v. Carrington, Wilkes v. Wood, and the Writs of Assistance Case)

3. What are the two interpretations of the original meaning of the Searches and Seizures Clause?
   • The clause has meaning independent from the Warrant Clause: The word “unreasonable” indicates an independent prohibition on the actions of government officials.
   • The Searches and Seizures Clause is simply a statement of moral principle that explains the Warrant Clause.

True / False: Indicate whether the statement is true or false.
1. The Warrant Clause specifies when warrants are required. (False)
Part 3:
Amendment V

Grand Jury Requirement
Amendment V

Grand Jury Exception
Amendment V

Double Jeopardy
Amendment V

Self-Incrimination
Amendment V

Due Process Clause
Amendment V

Takings Clause
Amendment V

Grand Jury Requirement — Amendment V

*Essay by Andrew Leipold (pp. 329–331)*

The Grand Jury Requirement Clause states that an individual cannot be brought to trial for a capital offense without first being indicted by a grand jury. A federal grand jury is typically composed of 23 community members who meet in a closed courtroom to hear the prosecutor present evidence against a suspect. The prosecutor leaves; the jury deliberates; and if a majority agrees that there is enough evidence to justify charging the suspect, the jury issues a “true bill,” which becomes the indictment.

Grand juries have both accusatory and protective functions. The accusatory function has roots in 12th century England, wherein grand jurors were expected to bring evidence and share suspicions about fellow community members. By the 17th century, grand juries served more of a protective function: Jurors would investigate and protect citizens against unfounded charges. The Framers added the grand jury requirement of the Fifth Amendment primarily for its protective functions.

Unlike most other provisions in the Bill of Rights, the Grand Jury Requirement Clause is not incorporated against the states. States do not need to use a grand jury to indict. States that convene grand juries are not required to use the same procedures as federal grand juries use.

Current law restricts the abilities of grand juries to protect against prosecutorial overreach. The Supreme Court has limited a suspect’s ability to challenge the federal grand jury procedures. A suspect cannot control what the jury hears or challenge the indictment. Prosecutors also are not required to present evidence favorable to the suspect.
Changes in the nature of law enforcement have also shifted the grand jury toward a more accusatory function. Prosecutors are highly professionalized, and laws are complex. Although their subpoena power enables grand juries to collect large amounts of evidence, jurors have little ability to determine whether enough evidence has been presented. Also, because the prosecutor controls what evidence the grand jury hears, jurors typically agree with the prosecutor and therefore return a “true bill” most times. As a result of the accusatory aspects of grand juries, many suspects waive the right to have a grand jury review their cases.

**Active Reading**

Ask: How did grand juries serve a protective role in early America? (A grand jury indictment was necessary to bring the defendant to trial. Grand juries could refuse to indict even though the evidence against an individual was strong. This had the effect of protecting the defendant against the charges.)

What does it mean that the “Grand Jury Requirement Clause is not incorporated against the states”? (States are not required to use grand juries to indict. If they decide to use grand juries, they don’t have to use the same procedures as federal courts.)

**Active Reading**

Ask: How does a grand jury check the prosecution’s power to indict individuals? (In order to indict an individual, a prosecutor must first secure a true bill. Although rare, grand juries still sometimes refuse to indict.)

What is the difference between a jury and a grand jury? (Grand juries decide to bring charges against someone. In the criminal context, a jury hears the criminal allegations against the individual and decides whether he or she is guilty or not guilty. Juries also hear civil cases, make factual determinations, and issue verdicts about many non-criminal issues.)

**Discussion Question**

What was the Framers’ motivation for adding the Grand Jury Requirement Clause to the Fifth Amendment? (They added it primarily for its protective functions. Juries would investigate and protect fellow citizens against unfounded charges.)

How did this motivation differ from the traditional English one? (Traditionally, grand juries were more often used to expand upon accusations against other citizens in their communities. In other words, these grand juries were more accusatory than protective.)
**Grand Jury Exception** — Amendment V

*Essay by David F. Forte (pp. 331–333)*

The Grand Jury Exception Clause identifies cases in which persons may be charged without a grand jury indictment. Specifically, cases involving members of the military or the militia during times of war or public danger are not subject to the Grand Jury Requirement Clause.

After the Fifth Amendment was ratified, Congress defined offenses against the military and how they were to be adjudicated. There was limited judicial review of the decisions of military tribunals. In 1950, the Supreme Court argued that citizens engaged in military service do not have Fifth Amendment rights and that lawful military tribunals are not subject to judicial review because of disputed facts. In the same year, the Uniform Code of Military Justice granted due process rights similar to those under the Fifth Amendment. The Court of Military Appeals has held that members of the military have full constitutional rights unless those rights are explicitly or implicitly excepted.

The Supreme Court can review decisions of the U.S. Court of Appeals for the Armed Forces, and some federal courts can review cases collaterally, primarily through the writ of habeas corpus, to determine whether the military tribunal possessed jurisdiction. In a controversial ruling in *Burns v. Wilson* (1953), the Supreme Court held that military courts have the same responsibility as civilian courts to protect a person’s constitutional rights. The Court qualified this ruling by noting that the application of constitutional rights to military personnel may be different from their application to civilians and that civilian courts can review claims only if military courts refuse to consider them.

Federal courts have applied *Burns* in different ways. Sometimes courts do not defer to military courts on constitutional law claims. Other courts will review claims that are not given full consideration in military courts. Overall, though, persons in the military system possess due process rights.

**Check Understanding**

Ask: What is the purpose of the Grand Jury Requirement Clause? (It ensures that individuals cannot be charged with a capital offense without first being indicted by a federal grand jury.) Are all courts required to use grand juries? (No, the clause applies only to federal courts. For that reason, grand juries are often not used by state courts.)

**Discussion Question**

What kinds of courts are typically affected by the Grand Jury Exception Clause? What makes these courts exceptional? (The Grand Jury Exception Clause typically refers to military courts. Congress has deemed military offenses to be a separate category of offenses and procedures. Traditionally, there is little or no judicial review of the rulings of military tribunals.)
Double Jeopardy — Amendment V

*Essay by G. Robert Blakey (pp. 333–335)*

The prohibition against double jeopardy means that a person acquitted of a crime may not be tried again for the same crime by the same court. The concept of double jeopardy came to the U.S. Constitution from English common law. Sir William Blackstone, author of the *Commentaries on the Laws of England*, described the principle that “no man is to be brought into jeopardy more than once of the same offence.” Every state prohibited double jeopardy prior to the Bill of Rights; therefore, it was included in the protections in the Bill of Rights.

The Supreme Court’s interpretation of the clause is complex and often unclear. Over time, the Court has identified three specific protections of the Double Jeopardy Clause. First, if an individual has been acquitted of a crime, he cannot be prosecuted a second time for the same offense. Second, an individual cannot be prosecuted a second time for the same offense if he is found guilty of the crime. Finally, defendants can only receive a single punishment for a single offense. The Court applies the Double Jeopardy Clause, despite the text, to both felonies and misdemeanors. It also applies the clause to the states and to the federal government.

Double jeopardy jurisprudence covers five concepts: sovereign, sanction, trial, retrial, and offense. The clause limits the actions of a single sovereign. An individual may be tried for the same offense in federal court and in state court, because individual states and the federal government are distinct sovereigns. The type of sanction the court imposes determines whether the Double Jeopardy Clause applies. For double jeopardy to apply, the sanction must be a criminal punishment. Determining when the Double Jeopardy Clause applies depends on when lawful trial begins and ends. Jeopardy attaches when a trial begins with the swearing in of either the first witness or the jury and ends with an acquittal. The Double Jeopardy Clause does not always prohibit a retrial. If there is a mistrial or hung jury, a second trial is possible without violating the Double Jeopardy Clause. Finally, the definition of an offense is crucial to determining violations of the Double Jeopardy Clause. Courts must decide whether an individual offense is part of or distinct from another offense to determine whether it can be brought to trial. The test from *Blockburger v. United States* (1932) was crafted for this end.

**Active Reading**

Point out the word “jeopardy” in the Double Jeopardy Clause. Read the Fifth Amendment clause on page 333. Ask: What do you think the word “jeopardy” means? (risk of loss, danger) What is a hung jury? (when a jury cannot reach a verdict of guilty or not guilty) What is a mistrial? (when there was an error in the trial that requires it to be ended without a verdict) What does it mean to be acquitted of a crime? (to be found not guilty)
**Work In Pairs**

Ask students to create a graphic organizer in the form of a table to summarize the five important concepts related to the Double Jeopardy Clause. The table should include the following headings: Concept, Definition, Real-World Example. Ask students to share the entries they included in their tables.

**Sample answer:**

<table>
<thead>
<tr>
<th>Concept</th>
<th>Definition</th>
<th>Real-World Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sovereign</td>
<td>The clause protects against double prosecution by one sovereign.</td>
<td>A person prosecuted by one state court can be prosecuted by a federal court.</td>
</tr>
<tr>
<td>Sanction</td>
<td>A sanction must be a form of criminal punishment for the Double Jeopardy Clause to apply.</td>
<td>If a person is just ordered to pay a civil fine, that is not considered criminal punishment.</td>
</tr>
<tr>
<td>Trial</td>
<td>The beginning and end of a trial must be clearly defined.</td>
<td>A trial begins when the jury is sworn in.</td>
</tr>
<tr>
<td>Retrial</td>
<td>Retrials are sometimes permitted under the Double Jeopardy Clause.</td>
<td>If there is a mistrial, a retrial can be held.</td>
</tr>
<tr>
<td>Offense</td>
<td>Individuals cannot be tried more than once for a single statutory offense.</td>
<td>If two offenses have enough elements in common, they are considered a single offense and therefore qualify for protection under the Double Jeopardy Clause.</td>
</tr>
</tbody>
</table>

**Active Reading**

What are the three protections of individual rights embodied in the Double Jeopardy Clause? (no second prosecution for the same offense after an acquittal, no second prosecution for the same offense after a guilty verdict, and no multiple punishments for the same offense)

**Self-Incrimination — Amendment V**

*Essay by Donald Dripps (pp. 335–337)*

The Self-Incrimination Clause of the Fifth Amendment states that no individual shall be forced to be a “witness against himself” in a criminal case. Some scholars argue that the Framers created this clause to prevent judicial torture and the practice of questioning witnesses after swearing them to the oath *ex officio.*
Other historians argue that an American practice influenced the clause. The Self-Incrimination Clause of the Fifth Amendment protected a widely accepted practice. It was common in early America for defendants to represent themselves in court. They could make voluntary statements and question witnesses, but the accused could not be forced to be a witness in the case and testify against himself and quite possibly lie to protect himself. During the pretrial questioning, the magistrate would press a defendant to admit wrongdoing.

Judicial interpretation of the clause has changed over the years. In the early 1800s, the Supreme Court held that the clause applied to the federal government and not to the states. By the 1880s, the Court reasoned that the clause protected personal books and papers. In 1964, though, it determined that the clause did apply to state government prosecutions. *Miranda v. Arizona* (1966) altered Fifth Amendment jurisprudence significantly, because the Court held that information from an interrogation was presumptively unconstitutional absent specific warnings. Subsequent cases defined the meaning of custody, interrogation, waiver, and the consequences for invoking Fifth Amendment protections. The Court has also recognized certain threats as forms of compulsion that violate the Fifth Amendment: For instance obtaining information by threatening to fire a government employee violates the Fifth Amendment. Reversing its decision from the 1880s, the Court considers private papers and other physical evidence to be protected under the Fourth Amendment, not the Fifth. Finally, evidence is not incriminating if a witness provides it in exchange for immunity.

Witnesses must specifically claim their Fifth Amendment rights to refrain from incriminating themselves. Otherwise, it is assumed they have decided to waive these rights. Likewise, if a defendant chooses to take the stand in a criminal case, he waives his Fifth Amendment rights on cross-examination questions. Finally, waivers of Fifth Amendment rights obtained through coercion are not valid.

**Before You Read**

Ask: Have you ever heard somebody say “I plead the Fifth” or “I take the Fifth”? What do you think this means? (Answers will vary. Some students may have heard this plea while watching movies or television. They may point out that it was usually used by an individual who had been accused of a crime. Students may say an individual used it to avoid answering a question. A possible reason for this is that the answer might contain information that could later be used against that individual.)
Make an Inference

Ask: Why may an individual be reluctant to provide testimony even if that individual was granted immunity? (Answers will vary. An individual who is granted immunity cannot be prosecuted based on information provided during a specific case. However, it would make officials aware the individual was involved in criminal activity. It could also give them a solid starting point if they wanted to investigate the individual for another offense. For example, authorities might learn about places the individual frequents where criminal activity occurs. If an individual is granted only use and derivative use immunity, he or she is not fully protected against future prosecution for related offenses.)

Discussion Question

What early American practice prompted the Self-Incrimination Clause? (In early America, defendants would represent themselves in court. They could make voluntary statements and question witnesses, but the accused could not be forced to be a witness in the case and testify against himself and quite possibly lie to protect himself. The Self-Incrimination Clause allows people to avoid lying.)

Due Process Clause — Amendment V

Essay by Gary Lawson (pp. 337–341)

The concept of “due process of law” appeared for the first time in a 1354 statute concerning court procedures. At that time, it simply meant that a defendant had to be given a chance to appear in court. When the Bill of Rights was drafted, eight states had clauses restraining government from depriving persons of life, liberty, or property except pursuant to the law of the land. The Founders likely considered “law of the land” equivalent to the phrase “due process.”

Around the time of the Framing, the phrase “without due process” meant “executive or judicial action without lawful authorization and/or not in accordance with traditional forms of justice.” The Supreme Court extended the principle to Congress, such that Congress could not authorize novel forms of adjudication.

The clause protected against deprivations of life, liberty, or property without due process, but it did not protect against deprivations of other interests. During the ratification of the Due Process Clause, liberty meant the “power of locomotion, of changing situation, or removing one’s person to whatsoever place one’s inclination may direct.” The definition of life was quite broad, to include the enjoyment of life, limbs, body, health and reputation. Property was more ambiguous; it could have referred simply to land or, more broadly, to anything of exchangeable value. Property rights were distinct from privileges or government benefits. The key ques-
tion, though, is whether federal or state law defines these terms for the purpose of the Due Process Clause. It is generally accepted that federal law provides general boundaries, while states—within reason—can define specific interests protected by the Due Process Clause.

The modern application of the clause departs from the Founders’ understanding. First, the meaning of “life, liberty, and property” has varied. At one point, the Supreme Court collapsed the three into any interest the loss of which would be grievous. More recently, the Court sees the three as distinct but focuses on liberty and property. The Court has expanded liberty to mean not only the absence of bodily restraint, but the freedom to marry, contract, raise children, worship, etc. Justice Anthony Kennedy has famously remarked that liberty means being able to define one’s meaning in the universe. State law primarily defines property to include traditional understandings of property (land, valuable items, etc.) but also government benefits and licenses.

There are several situations that determine the applicability of Due Process Clause protection. First, the clause applies only to government actors. If a private individual deprives another individual of life, liberty, or property, there is no violation of the Fifth Amendment. Second, the deprivation must be intentional. Third, administrative agencies account for most government actions, either in their rulemaking or in their adjudicative functions. The Due Process Clause is not considered to require a legislature (or, in this case, a rulemaker) to follow a certain procedure. The adjudicative process for administrative agencies is subject to due process, but there is a sizable gap between protections in a courtroom and those in administrative adjudication.

Write About It

Have students read James Madison’s essay “Property.” In a few paragraphs, have students summarize Madison’s main argument. (Answers will vary. However, students should have a good grasp of a few key concepts. They should understand that Madison’s definition of “property” extends to much more than land or other goods. It also extends to one’s own labor, thoughts, and conscience. Additionally, they should understand that with rights comes the responsibility not to violate the rights of others. Finally, they should understand that the end of government is to protect each person’s property impartially.)

Discussion Question

Read aloud the quote by Justice Anthony Kennedy on page 340 (end of the first paragraph of the right-hand column). Ask: How does Kennedy’s understanding of liberty compare to that of the Framers of the Fifth Amendment? (Kennedy’s understanding of liberty is limitless. His definition of liberty essentially mandates that every person has the right to define his or her own liberty. Kennedy’s understanding of liberty clearly departs from that of the Framers of the amendment. At the time the Due Process Clause was ratified,
the Framers understood liberty to mean “power of locomotion, of changing situation, or removing one’s person to whatsoever place one’s inclination may direct.” How does Kennedy’s understanding of liberty compare to ideas of liberty the Founders articulated in the Declaration of Independence? (The Founders would also have rejected Kennedy’s idea that liberty is self-defined and boundless. They understood liberty in a broader sense, based on self-evident truths. The Founders had a clear concept of the inalienable rights of man, and designed a government limited to protecting these liberties. Without such limits, the government would be too powerful and could arbitrarily give or take rights with or without the consent of the people.)

Discussion Question

How does the currently accepted definition of “life, liberty, and property” compare to the historical meaning and use of the phrase? (During ratification, liberty meant the “power of locomotion, of changing situation, or removing one’s person to whatsoever place one’s inclination may direct.” Life meant the enjoyment of life, limbs, body, health and reputation. Property was more ambiguous; it could have referred to land or to anything of exchangeable value. In recent decades, Supreme Court decisions have collapsed the separate ideas of life, liberty, and property. They have also greatly expanded the meaning of the phrase to include almost anything: interests, government benefits, licenses, the right to marry, and the right to raise children.)

Takings Clause — Amendment V

Essay by Douglas W. Kmiec (pp. 341–345)

The Takings Clause of the Fifth Amendment forbids the government from taking an individual’s private property for public use without compensation. According to James Madison, one of the most important purposes of government is to protect the property of its citizens. Curiously, though, the concept of property is rarely mentioned in the Constitution, and no state requested that the Takings Clause be included in the Bill of Rights. One explanation is that the acquisition and possession of property was a natural right, integral to the common law. Despite the understanding of property as a natural right, James Madison deemed a restriction on government’s power appropriate. Property, moreover, is defined through statutes.

One question related to the Fifth Amendment concerns the source of the federal government’s power of eminent domain. States acquired their takings power through the common law, but, the source of the federal government’s power of eminent domain is unclear. One answer is that the takings power is inherent in the sovereign’s power. Another answer is that the federal government has eminent domain through the Necessary and Proper Clause.
Another question related to the Fifth Amendment concerns how and to what extent either the federal government or a state government can change the definition of property without offending the natural right to property. According to Justice Oliver Wendell Holmes, regulations must not go “too far,” which is not a very formidable judicial limit.

Court decisions over the years have helped to clarify the limits of the government’s power with respect to instituting property regulations. Regulations that authorize physical occupation of a property are considered takings. Regulations that completely eliminate a property’s economic use are also considered takings. The Takings Clause also prevents agencies from using the permit process and regulatory power to achieve what they wish without cost. Whether environmental restrictions constitute a taking is an unresolved legal question.

The most common and most difficult cases related to the Takings Clause concern regulations that significantly reduce the economic use of a property. The Supreme Court typically employs an ad hoc balancing test to determine whether the government’s action constituted a taking, asking (1) what the economic effect is on the property owner, (2) the extent to which regulation interferes with investment, and (3) the extent and character of the government’s action. In most cases, property owners are not successful when they pursue these types of claims. However, they are still willing to seek a judicial remedy when regulations infringe on their property rights.

Most recently, in the case of Kelo v. City of New London (2005), the city of New London, Connecticut, used its eminent domain power to acquire private property for a redevelopment project. The property owners argued that the redevelopment was not a public use because the property was going to be transferred to another private party to develop. The Court upheld the city’s acquisition of the property by using a rational basis–like standard that asserted public benefit to be valid public use.

Active Reading

Point out the use of the word “indefatigable” on page 344 (last paragraph of the left-hand column). Read the sentence containing the word aloud. Point out that the middle of the word sounds like “fatigue.” Ask: What do you think the word “indefatigable” means? (tireless, unable to be tired out or fatigued)

Write About It

Have students read Kelo v. City of New London (2005). Students should write a brief report that includes an overview of the situation, the verdict, how the Takings Clause was applied, and the significance of the case.
Active Reading

Have students summarize the two potential sources of the federal government’s eminent domain power. (One answer is that the takings power is inherent in the sovereign’s power. Another answer is that the federal government has eminent domain through the Necessary and Proper Clause.)

Discussion Question

If the Takings Clause of the Fifth Amendment were not in the Constitution, would government still have the power of eminent domain? (Answers may vary. Some may say yes, arguing that eminent domain is a power inherent in the sovereign or granted to the federal government through the Necessary and Proper Clause. Some may say no and point to the debate between the Federalists and the Anti-Federalists about including a Bill of Rights. The Federalists opposed a Bill of Rights, claiming that it would be a pretext for the government to proclaim rights that it does not have. Because no state proposed the Takings Clause and the origin of the federal government’s power of eminent domain is questionable, it would seem that the eminent domain power emerged only when Congress’s power was restricted in the Takings Clause.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 17, Part 3. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. Most modern court cases related to the Takings Clause involve regulations that reduce a property’s _____.
   a. economic use
   b. functional use
   c. value
   d. dimensions

2. Typically, a federal grand jury contains _____ members.
   a. 20
   b. 21
   c. 22
   d. 23
3. Amendment V guarantees all of the following except
   a. that no one can be forced to give a confession of guilt.
   b. that no one will be put in double jeopardy.
   c. that no one’s property will be taken for public use without fair payment.
   d. that excessive bail will not be required.

4. Double jeopardy is
   a. being tried twice for the same crime.
   b. being asked to pay two kinds of taxes.
   c. being jailed twice for the same crime.
   d. being tried for two crimes at the same time.

Fill in the blank: Write the correct word or words in each blank.
1. According to _____, the phrases “due process of law” and “law of the land” have practically the same meaning. (Sir Edward Coke)

2. After the Fifth Amendment was ratified, the power to decide how military offenses should be handled was given to _____ (Congress)

3. According to the Double Jeopardy Clause, an individual cannot be prosecuted again for the same crime after a guilty verdict or an _____ (acquittal)

4. Testimony provided by a witness cannot be used to prosecute that witness if the individual is granted transactional _____ (immunity)

Short Answer: Write out your answer to each question.
1. Grand juries have historically served what two functions? (accusatory and protective)

2. Current double jeopardy jurisprudence falls under what five basic headings?
   • Sovereign
   • Sanction
   • Trial
   • Retrial
   • Offense

3. What are the two potential sources of the federal government’s eminent domain power? (It may be inherent in the sovereign’s power or the Necessary and Proper Clause may be the source.)

4. Why did the Founders add the Grand Jury Requirement Clause to the Fifth Amendment? (primarily to protect those accused of crimes from prosecutorial overreach)
5. A typical federal grand jury consists of how many citizens from the community? (23)

6. What are the three protections of individual rights embodied in the Double Jeopardy Clause?
   - No second prosecution for the same offense after an acquittal
   - No second prosecution for the same offense after a guilty verdict
   - No multiple punishments for the same offense

True / False: Indicate whether each statement is true or false.

1. The Supreme Court has ruled that states must use grand juries. (False)

2. All state constitutions drafted prior to the Bill of Rights contained a double-jeopardy provision. (True)

3. Five states proposed language for the Takings Clause. (False. No state proposed the Takings Clause.)

4. Grand juries began as an effort to decrease the king’s power. (False. They began as an effort to increase the king’s power.)

5. In early America, it was common for individuals to represent themselves in court. (True.)
Lesson 18

PROCEDURAL RIGHTS: AMENDMENTS VI, VII, AND VIII

Lesson Objectives

When you complete Lesson 18, you will be able to:

• Describe the purpose of the Speedy Trial Clause, the Public Trial Clause, and the Jury Trial Clause of the Sixth Amendment and explain how they protect the rights of accused persons.

• Understand how the interpretation of the Jury Trial Clause has changed since the Framing.

• Outline the requirements of the Arraignment Clause and understand how they have been internalized in general legal procedure.

• Describe the purpose of the Confrontation Clause and the Right-to-Counsel Clause.

• Outline the requirements of the Compulsory Process Clause and understand how it helps a defendant build a defense.

• Outline the history and debate surrounding the Right to Jury in Civil Cases Clause and understand how the clause is applied today.

• Explain how courts may review jury verdicts according to the Reexamination Clause and explain how recent Supreme Court decisions have undermined the Clause.

• Outline the meaning of the Cruel and Unusual Punishment Clause of the Eighth Amendment and understand how the Supreme Court has departed from the clause’s original meaning.
Part 1: Amendment VI

Speedy Trial Clause
Amendment VI

Public Trial
Amendment VI

Jury Trial
Amendment VI

Arraignment Clause
Amendment VI

Confrontation Clause
Amendment VI

Compulsory Process Clause
Amendment VI

Right-to-Counsel Clause
Amendment VI

Speedy Trial Clause — Amendment VI

Essay by George Thomas (pp. 345–347)

The Speedy Trial Clause of the Sixth Amendment states that the “accused shall enjoy the right to a speedy...trial.” The right to a speedy trial dates back to the Assize of Clarendon of 1166 and the Magna Carta, developed in 1215, and its purpose was to prevent the monarch from imprisoning someone for a lengthy period. Because it was essential and related to rights of habeas corpus and non-excessive bail, the Founders included the right to a speedy trial in the Bill of Rights without debate.

The Framers understood the rights to habeas corpus, non-excessive bail, and a speedy trial to be interrelated. Under common law, if the accused was detained for a lengthy period before trial, the judge would typically grant the habeas petition and dismiss the indictment. As long as the statute of limitations had not expired, the state could indict the defendant at a later date. Thus, in early American cases, judges would decide the issue of pretrial detention through habeas laws rather than through the Speedy Trial Clause.

Today, the Speedy Trial Clause applies both to the states and to the federal government. It protects defendants not only from lengthy incarceration before trial, but also from the harm to the defense that can result from long delays. The right to a speedy trial begins once an arrest is made or an indictment is granted rather than when the investigation begins. The Federal Speedy Trial Act establishes time limits within which indictments must be made and trials must commence.
The remedy for most constitutional violations is a new trial, but the remedy for a violation of the Speedy Trial Clause is normally dismissal of the indictment or vacating of the conviction without possibility of retrial. The Supreme Court gives lower courts significant discretion to decide speedy trial claims, but courts should consider (1) whether and how the defendant asserts his right to a speedy trial, (2) the length of delay, (3) the reason for delay, and (4) the prejudice the defendant suffers.

**Before You Read**

Ask: Why do you think a speedy trial is important? (Answers will vary. Sample answers: The accused may be in prison for an indeterminate period, witness’s memories may fade, victims of crimes do not have closure, and defendants cannot redress wrongs in a timely way.)

**Make a Real-Life Connection**

Tell students that some international judicial bodies, such as the International Criminal Court (ICC), do not protect the liberties that are enshrined in the Constitution. For instance, the ICC does not grant accused defendants the right to a speedy trial. Based on what students know about the United States Constitution and the Speedy Trial Clause, have them explain why American involvement in the ICC might be problematic. (American involvement in the ICC might lend legitimacy to a body with fundamentally wrong principles. Additionally, if the United States became involved, it might risk having its own citizens hauled into the international court and denied their constitutionally protected rights.)

**Public Trial** – Amendment VI

*Essay by Richard W. Garnett (pp. 347–348)*

The Public Trial Clause reflects the Founders’ disdain for private legal proceedings of the sort that were common in England’s infamous Star Chamber. The Founders agreed that trials were almost by definition open and public. The Public Trial Clause applies to all criminal prosecutions.

The Supreme Court has held that, like most other protections in the Bill of Rights, the Public Trial Clause applies to both the state and federal governments. The public trial right is not absolute. In some instances, a defendant may waive his right to a public trial (but First Amendment considerations prevent a completely private trial). The Public Trial Clause does not require that every part of a trial be public: Jury deliberations, for example, are private, and judges can occasionally make certain portions of a trial private.
The public trial requirement prevents the courts from persecuting defendants; encourages judges, lawyers, and jurors to perform their duties properly and responsibly; discourages untruthful testimony; safeguards citizens’ First Amendment rights; and promotes confidence in America’s legal system.

**Before You Read**

The Star Chamber was a British special court that held power directly from the king. The concept of a Star Chamber dates to the medieval period, with the earliest known reference to a Star Chamber occurring in 1398. Originally created by Henry VII (r. 1457–1509) to hear cases appealed up from the common law courts, the Star Chamber was restructured by Henry VIII (r. 1509–1547) and his ministers to hear cases directly, particularly during the administration of Lord Chancellor Thomas Wolsey between 1514 and 1529. The court was a supplement to common law and not bound by common law. It was made up of councilors appointed by and answerable to the king. These councilors heard cases in secret and acted as both judge and jury. As a result, the potential for abuse was tremendous. It was finally abolished by the Long Parliament in 1641 through the Habeas Corpus Act of 1640, after James I (r. 1603–1625) and Charles I (r. 1625–1649) both attempted to keep Parliament in recess and give parliamentary power to the Star Chamber instead.

**Check Understanding**

Read aloud the following quote by Sir William Blackstone on page 347 (first full paragraph of the right-hand column): “[A] witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal.” Ask: What do you think Blackstone meant by this? (Witnesses might give different testimony privately compared to the testimony they would provide during a public trial. A witness would be hesitant to say certain things publicly that he might be willing to say in private.)

**Jury Trial** — Amendment VI

*Essay by Albert W. Alschuler (pp. 348–352)*

The Jury Trial Clause upholds the right to a trial by an impartial jury in criminal cases. Members of the jury are composed of individuals from the area where the crime was committed. Juries were the most democratic institutions in the colonies, and the right to trial by jury was crucial. In colonial America, juries were typically composed of 12 members who had to reach a unanimous verdict.
Since the Framing, the interpretation of the Jury Trial Clause has changed in several significant respects. The Supreme Court ruled in 1968 that the clause applied to both federal and state proceedings. The requirements concerning who may serve on a jury have also changed. Federal courts initially looked to state laws to determine who could serve on a jury. All states limited jury service to men, and all states except Vermont required jurors to be property owners or taxpayers. A few states prohibited blacks from serving on juries. The Sixth Amendment did not require states to expand the right to serve on a jury; nor was the Equal Protection Clause of the Fourteenth Amendment thought to grant political rights such as the right to serve on a jury. However, the Supreme Court has ruled that both the Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment prohibit the jury qualifications of the Founding era. Race and sex are no longer grounds for preventing individuals from serving as jury members.

The Supreme Court has altered the rules regarding the size of a jury and the requirement of unanimity. For hundreds of years, juries consisted of 12 individuals. In 1970, however, the Supreme Court ruled that juries could consist of as few as six members instead of 12. Unanimous decisions are required in federal cases, but non-unanimous verdicts (e.g., votes of 11–1, 10–2, and 9–3) are permissible for 12-person juries in state courts. Six-person juries must reach a unanimous decision.

Historically, juries could decide questions of fact, and some colonies allowed juries to decide questions of law. In 1895, the Supreme Court declared that federal juries may not decide questions of law. Though some in the 1960s and 1970s tried to revive the practice of juries deciding questions of law, a federal court of appeals ruled in 1997 that juries may not disregard instructions regarding the law, and courts have denied juries the ability to acquit a defendant because they disagree with the law.

Jurors are required to be impartial, but impartiality does not require jurors to be unaware of the circumstances of a case. Jurors may have some knowledge of a case before they enter the courtroom, but they are expected to consider only the evidence presented in reaching a verdict.

Few criminal cases today go to trial. Nearly half of felony convictions are achieved without juries. Guilty pleas and plea bargains account for the vast majority of felony cases. Guilty pleas were rare and discouraged during the Founding era, when jury trials were routine. Though these individuals are sentenced without jury trials, the Supreme Court recently concluded that certain federal sentencing guidelines violate the right to trial by jury.
Active Reading

How has the interpretation of the Jury Trial Clause changed since the Founding? (The number of people for a jury, the unanimity requirements, the requirements for jurors, and what juries can decide have changed. For hundreds of years, juries consisted of 12 individuals. Now they can consist of as few as six members. Non-unanimous verdicts (e.g., votes of 11–1, 10–2, and 9–3) are permissible for 12-person but not for six-person juries. The Supreme Court has ruled that the Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment prohibit the jury qualifications of the Founding era. Race and sex are no longer grounds for preventing individuals from serving as jury members. Historically, juries could decide both questions of law and questions of fact, but now juries may not decide questions of law.)

Write About It

Have students read passages from Alexis de Tocqueville’s Democracy in America praising the jury system (Volume One, Part Two, Chapter Eight). What is the role of juries according to Tocqueville? Why does he praise them?

Discussion Question

Many cases are discussed extensively in the media before they are brought to trial. How does extensive media coverage affect the requirement that jurors be impartial? (Answers will vary. Sample answer: Jurors must be able to evaluate the case based on the evidence presented. It is possible that a juror may have heard something about the accused though media coverage, but that does not mean that he or she will not be able to evaluate the evidence. Jurors are responsible for separating the facts they see from outside speculation and opinions.)

Arraignment Clause – Amendment VI

Essay by Paul Rosenzweig (pp. 352–353)

The Arraignment Clause requires that individuals charged with a crime “be informed of the nature and cause of the accusation.” This right was part of early English common law and is deeply embedded in the American legal system.

The accused’s right to be informed of charges dates back to 12th century England. There were two court systems: the common law and ecclesiastical courts. Common law courts required that the accused be informed of the accusations, but ecclesiastical courts practiced the inquisitorial system in which the accused was not informed of the nature of the charges against him. In 1164, King Henry II began to reform
ecclesiastical courts' procedure to match the common law courts' accusatorial system. The Magna Carta also incorporated this trend. These efforts floundered in the 16th century when the inquisitorial system of justice became common once again, most notoriously in the Star Chamber.

America's legal system was based on the common law accusatorial system, and the right to be informed of the nature of the crime was included in many state constitutions. Therefore, the Arraignment Clause was an uncontroversial inclusion in the Bill of Rights.

When first introduced, the Arraignment Clause was intended to give an accused adequate time to prepare a strong defense. As the concept of double jeopardy developed, the notice requirement allowed the accused to notify the court of a prior acquittal. The notice requirement also informed the court of the nature of the charges and allowed it to decide whether the charges were legally sufficient.

Currently, the Arraignment Clause has been internalized in the general legal procedure. Indictments must include the statute the accused allegedly violated, the date of the alleged offense, and the name of the accused. If that information is present, defendants are generally unable to challenge an indictment by claiming that it violates the Arraignment Clause.

**Active Reading**

Ask: What three main purposes does the Arraignment Clause serve? (It gives the accused a chance to construct a strong defense; it gives the defendant an opportunity to claim a prior acquittal and prevent the court from trying the same offense twice in violation of the Double Jeopardy Clause; and it informs the court of the charges and enables it to decide whether the charges are legally justified.)

**Check Understanding**

First, ask each student to construct a brief scenario in which an individual commits some type of crime. Next, ask students to trade their scenarios with a classmate. Finally, ask students to create a sample indictment that meets the criteria outlined at the top of page 353 (the section that begins with “Generally, a charging instrument...”). Ask students to share the scenario and their corresponding indictment. Then elicit opinions about whether the indictment contains all of the necessary elements outlined on page 353.
Confrontation Clause — Amendment VI

Essay by John G. Douglass (pp. 354–355)

The Confrontation Clause states that an accused has the “right to be confronted with the witnesses against him.” The clause suggests some basic limits: Witnesses for the prosecution must testify in open court, in the presence of the accused, and are subject to cross-examination by the defense. There are some ambiguities, though. For example, must confrontation always be face-to-face? Are there limits to cross-examination? Is hearsay permissible? The clause does not support the 17th century practice of “state trials,” wherein magistrates would obtain affidavits and depositions in private and use them as evidence in lieu of personal testimony.

Under current law, the accused has the right to be present in court when witnesses for the prosecution testify and to have an opportunity to cross-examine those witnesses. Applying these principles has proved difficult in two areas: hearsay and child witnesses. Hearsay is a statement made out of court by someone else (the declarant). The difficulty with hearsay is that it is impossible to confront the declarant if he is dead, is otherwise unavailable, or refuses to testify. Courts have traditionally allowed some hearsay testimony. In general, testimonial hearsay cannot be used against a defendant who has no opportunity to confront witnesses, but some hearsay issues remain unsettled. In exceptional circumstances—such as when a prosecution witness is a child—the Supreme Court has allowed testimony via closed-circuit television rather than face-to-face.

Work in Groups

Divide students into groups of six or eight. Assign three to four students to argue against the statement and three to four to argue in favor of it. Write the following statement on the board: Be it resolved that no witness for the prosecution will be granted an exception from physically appearing in court. Give students adequate time to prepare their arguments. Then give each group a chance to hold their debate in front of the class. (Suggested format: Three minutes for opening arguments, three two-minute rounds of rebuttals, and two minutes for closing statements for each side.) Encourage students to consult the section on the Confrontation Clause on pages 354 and 355 and also come up with their own arguments based on the original meaning of the clause.

Compulsory Process Clause — Amendment VI

Essay by Stephen Saltzburg (pp. 355–357)

The Compulsory Process Clause states that the accused has the right to the processes necessary to obtain “witnesses in his favor.” An essential part of the accused’s right to present a defense, the Compulsory Process Clause guarantees the accused
the right to call witnesses and a process by which to obtain witnesses. Both common law and several state constitutions following the Revolution protected the right of a defendant to call witnesses on his behalf. Subsequently, the right was included in the Sixth Amendment without controversy.

The Supreme Court had little opportunity to address the Compulsory Process Clause until 1967, when it decided that the clause applied to the states in addition to the federal government. In the same case (Washington v. Texas), the Court also declared that a Texas law permitting the prosecution to call a witness but prohibiting the defense from calling the same one (except under certain conditions) violated the Compulsory Process Clause. Unlike other rights, the right to call witnesses is at the defense’s initiative. A defendant’s rights under the Compulsory Process Clause are not unlimited; there are procedural limitations, such as complying with certain rules of evidence.

**Make an Inference**

After reading the section on the Compulsory Process Clause, ask: How might America’s legal system be different without the Compulsory Process Clause? (Answers will vary. Students may suggest that there would be many more convictions because the accused would be less able to create a strong defense. It would be difficult for jurors to evaluate the truthfulness of testimony because there would be no cross-examination to challenge statements. Another possible outcome is that cases would be resolved much more rapidly. Defendants might be more willing to plea bargain rather than go to trial.)

**Right-to-Counsel Clause — Amendment VI**

*Essay by Donald Dripps (pp. 357–358)*

The Right-to-Counsel Clause gives those who are accused of a crime the right to defend themselves against the charges with the assistance of an attorney. Under early English law, defendants in felony cases did not have the right to an attorney but could employ counsel for treason charges. In crafting the Right-to-Counsel Clause, the Founders wanted to enable individuals to have the right to retain counsel for felony and treason charges. The purpose of the Sixth Amendment was to remove legal obstacles preventing defendants from privately retaining lawyers.

It is not clear that the right to counsel meant a right to have the public pay for the counsel if a defendant cannot afford to hire an attorney. During the Founding era, many defendants represented themselves in court. Representation of defendants by professional attorneys became more common during the 19th century. Sometimes, lawyers—motivated by public-spiritedness, the desire for courtroom experience, or public exposure—would volunteer to defend poor defendants. Some places paid for this representation with public funds.
In 1938, the Supreme Court ruled that the Sixth Amendment required federal courts to provide legal counsel if a defendant could not afford to hire an attorney. Alternatively, a defendant could waive his right to an attorney. As late as 1963, several poorer states, all in the South, would not provide legal counsel for poor defendants (many of whom were black).

In the 1963 case of *Gideon v. Wainwright*, the Supreme Court ruled that the Right-to-Counsel Clause applied to state courts as well as federal courts. Prior to 1963, the Supreme Court addressed the right to counsel for indigent defendants under the Due Process Clause of the Fourteenth Amendment. For instance, in *Powell v. State of Alabama* (1932), the Court ruled that the Due Process Clause required states to provide counsel for poor defendants charged in capital cases or certain felony cases that presented the need for legal advice. But *Gideon* left open three issues: (1) when does the right-to-counsel arise, (2) are there cases where counsel is unnecessary, and (3) how competent does counsel need to be to satisfy the Sixth Amendment?

The Supreme Court has decided that the right to counsel arises under the clause when formal proceedings begin and end when a final judgment is delivered. Although petty offenses (meaning misdemeanors punishable with less than six months jail time) traditionally were adjudicated without counsel, the Court has ruled that the accused is entitled to counsel whenever an offense may result in incarceration. The Court has developed a two-part test to evaluate claims of ineffective counsel: The defendant must establish (1) that the lawyer’s conduct was professionally incompetent and (2) that, with better representation, the outcome of the case would likely have been different.

**Before You Read**

Ask students to think about an occasion on which they heard a suspect being read his or her rights. Ask: Can you recall the officer saying anything about legal representation or attorneys? (Some students may recall the following statement: If you cannot afford an attorney, one will be appointed to you.)

**Make a Real-Life Connection**

Take students on a field trip to watch an arraignment and trial. Have them write a report on which clauses of the Constitution they see in action. (Answers will vary but could include the the right to trial by jury, the right not to incriminate oneself, the right to a speedy and public trial, the right to be informed of the crime, the right to call witnesses, and the right to counsel.)
Discussion Question

What was the original purpose of the Right-to-Counsel Clause? (In crafting the Right-to-Counsel Clause, the Founders wanted to ensure that individuals would have the right to retain counsel for felony and treason charges. They wanted to remove legal obstacles preventing defendants from privately retaining lawyers)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 18, Part 1. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. Which right is not protected under the Sixth Amendment?
   a. the right to a speedy trial
   b. the right to a jury trial
   c. the right to a grand jury
   d. the right to a public trial

2. The Arraignment Clause enables a defendant to know
   a. legal sufficiency analysis.
   b. trial by jury.
   c. the charges against him.
   d. the prosecution’s witnesses.

3. According to Sixth Amendment jurisprudence, an individual has the right to legal counsel
   a. once an indictment is issued.
   b. once an investigation begins.
   c. once a trial date is set.
   d. once a jury is selected.

4. The right to obtain counsel is assured by the
   a. Second Amendment.
   b. Sixth Amendment.
   c. Seventh Amendment.
   d. Ninth Amendment.

Fill in the blank: Write the correct word or words in each blank.

1. Closing a criminal trial may violate a defendant’s Sixth Amendment rights as well as the freedom of the press, which is protected by the _____ Amendment. (First)
2. In the vast majority of felony convictions, the defendant waives the right to a jury trial by pleading _____ (guilty)

3. In 12th century England, the accusatorial system had to specify charges against a defendant, but the _____ system did not. (ecclesiastical)

4. Under the Confrontation Clause, any testimony provided by prosecution witnesses in court is subject to _____. (cross-examination)

5. With respect to the Right-to-Counsel Clause, the Supreme Court has ruled that no charges that may result in ____ may be considered petty. (incarceration)

6. The right of the accused to be informed of the charges against him traces its origin at least as far back as ____ century England. (12th)

7. In 1938, the Supreme Court held that the Sixth Amendment required court-appointed counsel for defendants who are too poor to afford ________________. (private counsel) The Sixth Amendment, however, applied only in ____ cases. (federal)

Short Answer: Write out your answer to each question.

1. In the Confrontation Clause, the verb “confront” has been understood to mean what? (the right to challenge the witness and to test the witness’s credibility through cross-examination)

2. Applying the basic principles of confrontation and cross-examination has proven to be especially difficult in which two circumstances?
   • Hearsay
   • Child witnesses

3. By guaranteeing the right to counsel, the Founders specifically rejected what English practice? (the practice of prohibiting felony defendants from appearing through counsel except upon debatable points of law that arose during trial)

True / False: Indicate whether each statement is true or false.

1. The public-trial right in the Sixth Amendment is deeply rooted in Anglo-American history and tradition. (True)

2. The Supreme Court has ruled that non-unanimous verdicts are permissible in federal courts but not in state courts. (False. Non-unanimous verdicts are permissible in state courts but not in federal courts.)
3. The constitutional requirement that anyone accused of a crime must be “informed of the nature and cause of the accusation” has become internalized by the judicial system and is interwoven into the fabric of daily procedure. (True)

4. Today, nearly half of the convictions in felony cases tried are the products of trials before judges sitting without juries. (True)

5. The Compulsory Process Clause was an essential part of the right of an accused to present a defense. (True)

6. Petty offenses have always been adjudicated with counsel from the time of the Founding to this day. (False. Petty offenses have been adjudicated without counsel from the time of the Founding to this day, although the modern Supreme Court has held that no offense can be deemed petty for purposes of the exception to the right to counsel if the accused does in fact receive a sentence that includes incarceration, however brief.)
Part 2:  
Amendment VII  
Right to Jury in Civil Cases  
Amendment VII  
Reexamination Clause  
Amendment VII

Right to Jury in Civil Cases — Amendment VII

*Essay by Eric Grant (pp. 358–361)*

The Right to Jury in Civil Cases Clause upheld the right to trial by jury in common law cases. At the Constitutional Convention, Hugh Williamson argued that the right to jury in civil trials should be included in the Constitution. Two delegates moved to insert the sentence “And a trial by jury shall be preserved as usual in civil cases,” but the Convention rejected this wording and did not include it in the Constitution.

The absence of a right to trial by jury in civil cases accounted for the greatest opposition to the Constitution. The Anti-Federalists suggested that the failure to protect the right to trial by jury in civil cases meant that these juries would be abolished for these cases. The Federalists defended the omission, stating that Congress, not the Constitution, should determine the rules for civil cases. This was a weak argument for two reasons. First, most states’ constitutions protected the right to trial by jury in civil cases. Second, during the American Revolution, the colonists objected that Parliament had deprived them of their right to trial by jury.

The Seventh Amendment guaranteeing the right to trial by jury in civil cases was passed by Congress without debate. Justice Joseph Story argued that the right to trial by jury in civil cases applied to all suits except suits of equity and admiralty. The Supreme Court articulated a more limited interpretation. The Court argued that the clause applies to the kinds of cases that existed under English common law when the amendment was adopted.

The Seventh Amendment does not apply to civil cases that are “suits at common law,” especially when “public” or governmental rights are at issue and there are no analogous historical cases with juries. Personal and property claims against the United States by Congress do not require juries.
In contrast to broad support for the right to trial by jury in the 18th century, modern jurists do not see the right to jury in civil trials as fundamental to the U.S. legal system. Therefore, the Right to Jury in Civil Cases Clause is not incorporated against the states; it applies only in federal courts. The only other clauses not incorporated against the states are the Second Amendment and the Grand Jury Clause. In federal court, parties can waive the right to a jury in civil trials. Unlike in 1791, jury trials for civil cases no longer require a unanimous verdict from a 12-person jury.

**Check Understanding**

Remind students that they learned about juries and trials in previous lessons. Ask students to make a list of what they know about both juries and trials from Article III and from the amendments. Compile their answers on the board. (Some items that should be included in the list of responses are the following: Those accused of crimes have the right to a speedy trial. Defendants have the right to a public trial, although in very rare circumstances portions of a trial can be closed. Both the amendments and Article III guarantee defendants facing criminal charges a right to a trial by jury. Juries are made up of members from the community. They are expected to be impartial and to consider only the facts when making their decision. Juries typically have between six and 12 members. Unanimous decisions are required in federal cases and when a jury has only six members.) Point out that none of the clauses covered in the last lesson mentions civil or common law cases.

**Active Reading**

Ask: How did Anti-Federalists interpret the absence of a guarantee for jury trials in civil cases? (Because the Constitution specifically protected jury trials for criminal cases but did not mention civil cases, the Anti-Federalists argued that juries in civil cases would be abolished.) What was the Federalists’ argument for not including a provision for juries in civil cases, and what was the problem with this argument? (The Federalists thought that Congress should determine the circumstances in which juries should be used in civil trials. They thought the matter was too complex to address in the Constitution. The problem with this argument was that several individual state constitutions had provisions for trial by jury in civil cases, and the colonists had condemned Parliament for depriving them of the right to trial by jury. Of the six ratifying conventions that proposed amendments to the Constitution, five recommended a provision for juries in civil cases.) According to the Supreme Court, when does the Right to Jury in Civil Cases Clause apply today? (The modern-day case must be similar to one that would have existed when the clause was written, or the rights in question in the modern case must be analogous to the ones that citizens enjoyed when the clause was developed. The right is not incorporated against the states.)
Active Reading

Point out the use of the word “analogized” in the final paragraph on page 359. Read the sentence containing the word. Ask: What other words does this sound like? (analogy, analogous) What do you think the word “analogized” means? (compared through the use of an analogy, used as a comparison to show parallels and similarities)

Reexamination Clause — Amendment VII

Essay by David F. Forte (pp. 361–363)

The Seventh Amendment’s Reexamination Clause prohibits reviewing courts from reexamining any fact tried by a jury in any manner other than according to the common law. Under common law, appellate courts could review judgments only on writ of error, which limited review to questions of law.

Because Article III, Section 2 granted the Supreme Court jurisdiction to review questions of law and of fact, and because there was no independent protection of the right to trial by jury in civil cases, some objected that the Constitution meant to eliminate juries for civil cases. The Reexamination Clause of the Seventh Amendment addressed those concerns.

Justice Joseph Story encapsulated the traditional understanding of the Reexamination Clause in Parsons v. Bedford (1830). He argued that reviewing courts may not grant a new trial based on a reexamination of facts that a jury had already considered at trial. Courts may order a new trial because of errors in the application of the law.

The interpretation of the Reexamination Clause has changed since it was first introduced. Modern legal procedures such as summary judgments and directed verdicts have raised questions about whether or not appellate courts should be permitted to review questions of fact and questions of law. For instance, the Supreme Court has reclassified punitive damages as a question of law as opposed to a question of fact, essentially giving reviewing courts more power when reexamining cases.

The purpose of the Reexamination Clause was to insulate jury findings from judicial reexamination. A string of recent cases has eroded the amendment’s protection. Decisions on cases involving damages classified as ordinary or compensable have also undermined the Reexamination Clause. In Gasperini v. Center for Humanities (1996), the Court rejected the common law standard and ruled that the reviewing court could reexamine an award granted by a jury to determine whether it was excessive. Though the Court has classified the examination of such jury verdicts as questions of law, Justice Antonin Scalia argued that it was a question of fact. Court decisions since Gasperini have given reviewing courts additional powers. For instance, in a 2000 case, the Court decided that a reviewing court could reexamine a case if there was no longer enough evidence for a jury’s verdict after certain flawed testimony was removed.
Before You Read

Explain to students the difference between questions of law and questions of fact. Questions of law involve interpreting what the law means: For instance, what kinds of behavior are considered legally negligent? Questions of fact involve determining what actually happened: For example, exactly when did a plaintiff arrive at his or her home to witness a crime?

Check Understanding

Under the Appellate Jurisdiction Clause in Article III, Section 2, the Supreme Court has appellate jurisdiction over questions of law and fact. Ask: Why did the Anti-Federalists object to this provision? (Because Article III, Section 2 granted the Supreme Court jurisdiction to review questions of law and of fact, and because there was no independent protection of the right to trial by jury in civil cases, some objected that the Constitution meant to eliminate juries for civil cases.) How did the Reexamination Clause of the Seventh Amendment address the Anti-Federalists’ concerns? (The Reexamination Clause insulates jury findings from judicial reexamination. Reviewing courts may not grant a new trial based on a reexamination of facts that a jury has already considered at trial, but courts may order a new trial because of errors in the application of the law.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 18, Part 2. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. As the Constitutional Convention was drawing to a close, noted that no provision had been made for the right to trial by jury in civil cases.
   a. Hugh Williamson
   b. Nathaniel Gorham
   c. George Mason
   d. Alexander Hamilton

2. The right to a trial by jury is not normally granted in cases that fall under ______ jurisdiction.
   a. federal
   b. civil
   c. admiralty
   d. state
3. The Reexamination Clause states that appellate courts can only review
   a. questions of law.
   b. presented evidence.
   c. questions of fact.
   d. provided testimony.

**Fill in the blank: Write the correct word or words in each blank.**

1. In current legal doctrine, juries decide questions of ____ \(\text{(fact)}\) Judges decide questions of ____ \(\text{(law)}\)

2. One of the purposes of the Seventh Amendment was to ensure that rulings made by juries were not subject to ____ \(\text{(reexamination)}\)

3. George Mason and ____ from Virginia thought that the Constitution would lead to the abolishment of the use of juries in civil cases. \(\text{(Richard Henry Lee)}\)

**Short Answer: Write out your answer to each question.**

1. The Seventh Amendment cured what omission from the text of the original Constitution? \(\text{(The Seventh Amendment grants the right to a trial by jury in civil cases.)}\)

2. The Seventh Amendment’s Reexamination Clause prohibits reviewing courts from reexamining what? \(\text{(any fact tried by a jury in any manner other than according to the common law)}\)

**True / False: Indicate whether each statement is true or false.**

1. The omission of a guarantee of civil juries occasioned the greatest opposition to the Constitution in the ratifying conventions. \(\text{(True)}\)

2. In addition to the fact that the Constitution did not mention the right to trial by jury in civil cases, Anti-Federalists were also concerned about the Appellate Jurisdiction Clause in Article III. \(\text{(True)}\)
Part 3: Amendment VIII

Cruel and Unusual Punishment — Amendment VIII

Essay by David F. Forte (pp. 363–366)

The Eighth Amendment protects against excessive bail, excessive fines, and the infliction of cruel and unusual punishment. The text of the amendment derives from the 1689 English Bill of Rights.

The purpose of the Excessive Bail Clause of the English Bill of Rights was to prevent judges from setting high bails to avoid releasing defendants. When the Framers adopted this clause, they changed the wording slightly to ensure that it would be legally enforceable. The purpose of bail is to ensure a defendant’s appearance at trial; therefore, the appropriate amount of bail would be determined on a case-by-case basis. To determine bail, the court would consider the nature of the offense and the past actions of the defendant. According to the Supreme Court, an excessive bail is bail “higher than is reasonably calculated” to ensure that the defendant appears at trial.

The Eighth Amendment suggests that bail is a right. American courts have recognized that a defendant has a right to bail in most situations but have deferred to legislative exceptions. In Britain, serious offenses did not qualify for bail. Colonial charters, the constitutions of individual states, the Northwest Ordinance of 1787, and the Judiciary Act of 1789 guaranteed a right to bail except in capital cases. The Supreme Court has ruled that certain individuals can be held without bail before trial according to the Bail Reform Act of 1984, including individuals arrested for serious crimes who could pose a danger to the community if released and those with alleged terrorist connections.

It is unclear whether the restrictions in the Eighth Amendment apply to Congress in addition to the judiciary. For instance, it is unresolved whether Congress can specify who qualifies for bail. The Supreme Court has not formally declared that the Eighth Amendment applies to the states, but it has stated that it assumes that the states’ legal systems already prohibit excessive bail.

The Eighth Amendment’s prohibition of excessive fines is also rooted in the English Bill of Rights of 1689, which included a provision to prevent judges from issuing large fines against enemies of the king and jailing the person for nonpayment. When the Eighth Amendment was drafted, most states already had protections against excessive fines in their constitutions. The Supreme Court found that neither the history of the clause nor the clause itself provided guidelines for determining what would constitute an “excessive” fine. Therefore, within the context of judicial deference to the legislature, the Court decided that an excessive fine was one “grossly disproportional to the gravity of a defendant’s offense.” The Court held that the clause forbids excessive civil forfeiture penalties but evaluates civil punitive damages under the Due Process Clause of the Fourteenth Amendment.
The types of punishments that violate the Cruel and Unusual Punishment Clause of the Eighth Amendment are a subject of significant debate. The categories of punishment subject to debate are punishments not proscribed by the legislature, torturous punishments, and disproportionate or excessive punishments. Many scholars argue that the ban on “cruel and unusual” punishment in the 1689 English Bill of Rights applied to punishments not authorized by Parliament. In colonial America, the clause was understood to apply to torturous punishments such as decapitation, drawing and quartering, and pillorying. Such punishments were unthinkable in America, as Justice Joseph Story opined.

Early Supreme Court rulings held torturous punishment, as defined at the time of the amendment’s ratification, to be prohibited. In 1954, though, Chief Justice Earl Warren rejected the original understanding of the clause and articulated a new standard for determining violations of the Eighth Amendment: “evolving standards of decency that mark the progress of a maturing society.” Since then, the Court’s jurisprudence on the Eighth Amendment has been inconsistent and incoherent.

In Furman v. Georgia (1972), the Court ruled that the death penalty could not be inflicted arbitrarily; consequently, states rewrote their laws to articulate standards for imposing the death penalty. Chief Justice Warren E. Burger rejected the argument that the clause banned arbitrary punishments, arguing that the Founders designed it to ban torturous punishments and punishments not prescribed by law. Though the Court ruled in Gregg v. Georgia (1976) that the death penalty itself did not violate the Eighth Amendment, it evaluated the penalty using Warren’s “evolving standard of decency” rather than the original meaning of the clause. The debate over the meaning and purpose of the amendment continues as the Court has evaluated a range of punishments and their potential violation of the Cruel and Unusual Punishment Clause.

**Active Reading**

Point out the use of the word “hortatory” in the first paragraph of the section on the Cruel and Unusual Punishment Clause. Read the sentence containing the word to students. Ask: What do you think the word “hortatory” means? (encouraging a certain action, urging a certain course)

**Active Reading**

Ask: What is the primary purpose of bail? (to ensure that a defendant will show up at trial after being released from custody) What two factors do courts typically consider when determining an appropriate amount for bail? (the nature of the crime and the past actions of the accused) What are the three types of punishments that may be covered by the Cruel and Unusual Punishment Clause of the Eighth Amendment? (punishments that are not advocated by the legislature, punishments that may be classified as torturous, and punishments that can be described as disproportionate or excessive)
Chief Justice Earl Warren articulated a new standard for evaluating the Eighth Amendment by looking to “evolving standards of decency.” Ask: Is it the job of judges to determine the standards of decency for a society, or is that more appropriately a function for the legislature? (Judges cannot make general rules of action; they resolve specific conflicts between particular parties in cases with a unique set of facts. The legislature does make general rules of action; it is not limited to a particular case. Moreover, the legislature is the branch of government closest to the people. Its members are directly accountable to the people and are closest to public opinion. Judges, by contrast, are far removed from the people.)

Check Understanding
Have students complete the following assessment to check their understanding of Lesson 18, Part 3. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.
1. In the American legal system, the primary purpose of bail is to ensure that a defendant
   a. does not commit more crimes.
   b. appears at trial.
   c. receives a just punishment.
   d. retains his freedom.

2. When drafting the Excessive Bail Clause, the word “shall” was substituted for the word “ought” to ensure that the clause would be
   a. enforceable.
   b. hortatory.
   c. unequivocal.
   d. original.

3. In both English and American practice, the level of bail is determined on what basis?
   a. how much money the courts need
   b. a preset amount determined by income
   c. the salaries of the jurors
   d. case by case

4. The Eighth Amendment does not protect against
   a. being tried twice for the same crime.
   b. excessive fines.
   c. excessive bail.
   d. cruel and unusual punishment.
Short Answer: Write out your answer to each question.

1. When determining bail, the court often takes what factors into account? (the character of the charged offense and the previous behavior of the defendant)

2. What are some possible categories at issue under the Cruel and Unusual Punishment Clause as detailed in The Heritage Guide to the Constitution on page 364?
   - Punishments not prescribed by the legislature
   - Torturous punishments
   - Disproportionate and excessive punishments

3. What was the standard that Earl Warren articulated for determining violations of the Eighth Amendment? (“evolving standards of decency that mark the progress of a maturing society”)

4. The text of the Eighth Amendment derives from what 1689 document? (the English Bill of Rights)
Lesson 19: Slavery and the Constitution

Three-fifths Clause
Article I, Section 2, Clause 3 ................................................................. 384

Slave Trade
Article I, Section 9, Clause 1 ................................................................. 385

Fugitive Slave Clause
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Prohibition on Amendment: Slave Trade
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Lesson 20: Voting and the Constitution

Suffrage: Race
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Suffrage: Age
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Lesson Objectives:
When you complete Lesson 19, you will be able to:

• Understand that the term “slave” or “slavery” is not in the Constitution.
• Explain the purpose of the Three-fifths Clause.
• Explain how counting slaves as full persons for the purpose of representation would benefit the South.
• Describe the limitations on Congress’s power in both the first and final drafts of the Slave Trade Clause.
• Explain how and why the Framers took great care in constructing the language of the Fugitive Slave Act.
• Explain the significance of the Prohibition on Amendment: Slave Trade Clause.
• Explain the meaning of the Thirteenth Amendment: Abolition of Slavery.
• Explain the significance of Section 2 of the Thirteenth Amendment.

Since America’s genesis, there has been intense debate about the existence of slavery in American history, precisely because it raises questions about this nation’s dedication to liberty and human equality. At the time of the American Founding, there were about half a million slaves in the United States, mostly in the five southernmost states where these individuals made up 40 percent of the population. Many of the American Founders—most notably, Thomas Jefferson, George Washington, and James Madison—owned slaves. However, many others—such as John Jay, Benjamin Franklin, Benjamin Rush, Alexander Hamilton, and John Adams—did not.

In its final form, the Constitution contains three key compromises on enumeration, the slave trade, and fugitive slaves. It is important to note that the word “slave” or “slavery” never appears in the Constitution. Indeed, the escaped slave turned abolitionist, Frederick Douglass, once commented, “Abolish slavery tomorrow, and not a sentence or syllable of the Constitution need be altered.” In the following lesson, you will see why Douglass steadfastly believed that the government created by the Constitution “was never, in its essence, anything but an anti-slavery government.”
Three-fifths Clause — Article I, Section 2, Clause 3

Essay by Erik M. Jensen (pp. 54–56)

The Three-fifths Clause is one of the most misunderstood clauses in the Constitution. The clause does not deny that blacks are full persons (in fact, free blacks were counted on par with whites for purposes of apportionment). Rather, it addresses whether and how slaves should be counted for the purpose of determining the number of representatives in Congress.

Though Southern slave owners asserted that slaves were held as property, Southern delegates at the Constitutional Convention wanted slaves to count as full persons for purposes of determining representation in Congress. Including slaves as part of the Southern population would give the South disproportionately greater representation in Congress and therefore more influence in forming the country’s laws. By contrast, Northern delegates favored omitting slaves entirely when determining representation and therefore denying Southern states the advantage in the national legislature. The compromise allowed three-fifths of the slave population to count toward determining representation.

However, a compromise for apportionment did not satisfy the South. To break the Convention deadlock, Gouverneur Morris suggested tying taxes to apportionment as a solution. While it was not in the South’s interest to count only a portion of the slave population toward apportionment of representatives, it was in the region’s best interest to count only a portion of the slave population towards a state’s tax liability.

Thus, even though slaves were property under the laws of the Southern states, the Constitution itself acknowledged that they were persons. By tying both representation and direct taxation to apportionment, the Framers removed any sectional benefit, and thus any proslavery taint, from the special counting rule. This compromise also protected the integrity of the census, since inflating the population numbers to gain more seats in Congress would increase a state’s tax liability.

Before You Read

Ask: What is a census? (counting of the people in the population for purposes of representation) Ask: Suppose government officials wanted to estimate the number of people living in a country. What are some ways that they could do this? (Answers will vary. Students may say that they could look at birth records, death records, or Social Security numbers or require people to complete a survey asking the number of persons in their household.) Ask: What is a compromise? (an agreement that involves both giving and taking concessions)
Before You Read

Explain that the Three-fifths Clause was originally called the Three-fifths Compromise. Ask: In what way was the Three-fifths Clause a compromise? (The clause was a compromise between the North and the South on apportionment of representatives and taxation. The North did not want slaves counted as full persons for purposes of representation because the South would have more representatives in the national legislature. While it was not in the South’s interest to count only a portion of the slave population toward apportionment of representatives, it was in the region’s best interest to count a portion of the slave population toward a state’s tax liability.)

Active Reading

Say: It is often asserted that the Three-fifths Clause is proof that the Founders did not consider blacks to be full persons. Applying what you read about the history of the Three-fifths Clause, explain why this assertion is incorrect. (The clause does not deny that blacks are people. Free blacks counted the same as free whites for purposes of representation. Even though slaves were property under the laws of the Southern states, the Constitution itself acknowledged that they were persons. The Three-fifths Clause addressed how the slave population would be counted for purposes of representation. The final compromise tied both representation and direct taxation to apportionment, thus removing any sectional benefit and any proslavery taint from the special counting rule.)

Slave Trade — Article I, Section 9, Clause 1

*Essay by Matthew Spalding (pp. 150–152)*

While the first debate at the Constitutional Convention concerning slavery focused on representation, the second debate focused on Congress's power to regulate or ban the slave trade. The Slave Trade Clause was the first independent restraint on Congress's powers. The first draft from the Committee of Detail permanently prohibited Congress from taxing exports, outlawing or taxing the slave trade, and passing navigational laws without a two-thirds majority in both houses of Congress. This draft divided the Southern delegates: Gouverneur Morris of Virginia denounced the slave trade as a nefarious institution; Georgia and South Carolina refused to support the Constitution without a safeguard for slavery.

The issue was referred to the Committee of Eleven. The committee recognized a congressional power over the slave trade but recommended that this power be restricted for 12 years. It also recommended a tax on slave importation. Southern delegates agreed to these recommendations, with the exception that Congress's...
power over the slave trade be restricted for 20 years until 1808. Thus, the final draft of the Slave Trade Clause temporarily restricted Congress’s commerce power.

Although protecting the slave trade was a major concession demanded by proslavery delegates, the final clause was not a permanent element of the constitutional structure. It was a temporary restriction of a delegated federal power. The restriction applied only to states existing at the time, not to new states or territories, and did not prevent individual states from outlawing slavery on their own.

**Before You Read**

Tell students that a Committee of Eleven consisted of one member from each state represented at the Constitutional Convention. Explain that a Committee of Eleven was consulted to settle disagreements, such as the disagreement caused by the Slave Trade Clause.

**Work in Pairs**

Read aloud this sentence on page 150: “George Mason of Virginia condemned the ‘infernal traffic’ and Luther Martin of Maryland saw the restriction of Congress’s power over the slave trade as ‘inconsistent with the principles of the Revolution and dishonorable.’” Pair up students and have them summarize both Mason’s and Martin’s position on the issue. (They both opposed slavery. Mason condemned it, and Martin saw limiting Congress’s power over slavery as dishonorable.)

**Active Reading**

Assign students to read the *Dred Scott v. Sanford* (1857) decision. Have them write 1–2 paragraphs summarizing the case. Ask: What did Chief Justice Roger B. Taney say about the Slave Trade Clause in *Dred Scott v. Sanford* in 1857? (Chief Justice Roger B. Taney pointed to the Slave Trade Clause and the Fugitive Slave Clause as evidence that slaves were not citizens but property under the Constitution.) How would a drafter of the Constitution who opposed slavery respond to Taney’s argument? (He would say that the Slave Trade Clause does not address citizenship and that the Constitution neither sanctions the institution of slavery nor considers slaves to be mere property.)

**Active Reading**

Point out the last two paragraphs of Spalding’s commentary. Note that the Constitution of 1787 does not use the words *slave* or *slavery*. Also note that the Framers used the word *person* rather than *property*. Ask: When did the slave trade officially end? (January 1, 1808, the first day that the Slave Trade Clause allowed such a law to go into effect)
Discussion Question

In what way was the Slave Trade Clause a major concession to slavery? In what way was it not? (Students may say that the Slave Trade Clause did not put an end to slavery; it acknowledged slavery and allowed a tax on slaves. On the other hand, after the time limit that limited Congress's power over the slave trade expired, Congress outlawed the trade. This means that Congress did have power over the trade, including the power to ban it.)

Fugitive Slave Clause — Article IV, Section 2, Clause 3

Essay by Matthew Spalding (pp. 275–276)

A model of circumlocution, the Fugitive Slave Clause comes the closest of the so-called Slave Clauses (Article I, Section 2, Clause 3; Article I, Section 9, Clause 1; and Article V) to recognizing slavery as a protected institution. The Fugitive Slave Clause was one of the most controversial clauses in the Constitution because it provided that escaped slaves would be returned to those who claimed ownership.

The Framers carefully drafted the clause to ensure that the Constitution did not give moral sanction to slavery. The final revision emphasized that slaves were held according to the laws of individual states and that slavery was not based on natural or common law. The language also implies that a slave owner's property did not extend to federal territories if Congress chose to prohibit slavery there. Indeed, according to the legal requirements of the clause, an escaped slave was no longer a slave upon entering a state that did not recognize slavery under its law.

Unlike other clauses in Article IV, which vest power either in Congress directly or in the United States, this clause is written in the passive voice, confers no power on the federal government, but limits state authority. In 1793, though, Congress passed legislation to enforce the clause. In Prigg v. Pennsylvania (1842), the Supreme Court held (in a decision written by Justice Joseph Story) that Congress had exercised powers that were necessary and proper to carry out the provision and that a state law that penalized the seizure of fugitive slaves was unconstitutional. However, Justice Story also concluded that the federal government could not compel state officials to enforce the act. Consequently, some states passed personal liberty laws forbidding state officials to enforce the act.

The Compromise of 1850 led to a new federal Fugitive Slave Act. As a result, the Supreme Court in Moore v. Illinois (1852) held that states could impose penalties on citizens for harboring fugitive slaves. In Dred Scott v. Sanford (1857), Chief Justice Taney pointed to this clause (and the Slave Trade clause) as evidence that slaves were property and not citizens, but neither of these clauses addressed citizenship. These clauses were accommodations to existing slavery interests in particular states.
Check Understanding

Have students work in groups to compare and contrast the language of the Fugitive Slave Clause with that of the Interstate Rendition Clause (Article IV, Section 2, Clause 2) on page 275. (Students should note that the language of the Interstate Rendition Clause is much harsher: It speaks of criminals fleeing justice and returning these criminals to the state that has jurisdiction over the crime. The Fugitive Slave Clause does not mention the word slave. It speaks of persons held in service according to state law and parties who claim that such labor is due. The Fugitive Slave Clause does not give moral sanction to slavery.)

Research It

Matthew Spalding mentions Frederick Douglass on page 276 of your book. Research the life of Frederick Douglass and how his opinions changed about the Constitution.

Discussion Question

Why do you think the Framers wanted to avoid the implication that the Constitution legally sanctioned the practice of slavery? (Slavery is contrary to the principles of America as articulated in the Declaration of Independence.)

Prohibition on Amendment: Slave Trade — Article V

Essay by Matthew Spalding (p. 287)

The Constitution names two clauses that may not be amended: equal suffrage in the Senate (discussed in Lesson 4) and the Slave Trade Clause. The latter forbids amendment of the Slave Trade Clause and the Direct Taxes Clause prior to 1808, the time for which the Slave Trade Clause remains in effect. The origin of this clause is John Rutledge's objection that states opposed to slavery would be able to alter the clauses dealing with slavery.

This prohibition on amendment points to the delicacy and precariousness of the compromises involved in these two clauses. Protecting the Slave Trade Clause revealed Southern concerns about both the strength of antislavery opinion and the difficulty of preventing a coalition of Northern and upper Southern states from amending the Constitution on this question. Shielding the Direct Taxes Clause both indirectly emphasized the “Three-fifths Compromise” (Article I, Section 2, Clause 3) about the apportionment of direct taxes and reflected the South's concern that the taxing powers could be used to undermine the institution of slavery.
Though the clause forbids alteration of the Direct Taxes and Slave Trade Clauses, the Fugitive Slave Clause is not protected from amendment, suggesting a broad consensus for that compromise.

**Active Reading**

Ask: In what way did the Prohibition on Amendment: Slave Trade protect the interests of the Southern states? (The clause let the slave trade continue until 1808.)

**Active Reading**

Ask: What happened in 1808 when the ban on prohibition regulating the slave trade expired? (The federal government ended the slave trade.)

**Discussion Question**

Since the Slave Trade Clause was already agreed upon, why do you think delegates passed the prohibition on amending the Slave Trade Clause? (Southerners would not support the Constitution unless there were additional impediments to prevent anti-slavery states from amending the Constitution to stop the slave trade. The prohibition on amendment reveals the precarious nature of the compromises on taxation and the slave trade. Southern states were concerned that a coalition of Northern states and upper Southern states would amend the Constitution to limit the slave trade or tax the trade in order to undermine slavery.)

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**Abolition of Slavery** — Amendment XIII

*Essay by Herman Belz (pp. 380–384)*

The text of the Thirteenth Amendment reflects its historic character as the culmination of a movement that began during the American Revolution. Eschewing originality, the authors of the amendment relied on the language of the Northwest Ordinance of 1787, sought to abolish slavery where it had been established for more than two centuries, and intended to keep slavery from being taken into national territory.

Proposed on January 31, 1865, and ratified on December 6, 1865, the Thirteenth Amendment was a positive guarantee of personal liberty, expressed in the negative form of a proscription of slavery or involuntary servitude. Viewed in historical context and in the tradition of American political thought, the amendment affirms the idea that liberty consists in the right of individuals to exercise, without interference, their natural rights. Moreover the amendment established a minimum national standard of equality: the guarantee of personal liberty for all persons in the United States.
By granting Congress the power to enforce the prohibition of slavery in the United States in Section 2, the amendment alters the relationship between the states and the federal government. For the most part, the Constitution regulates the activity of state governments or state officials. Under the Thirteenth Amendment, states no longer had the power to recognize or establish slavery, and their ability to regulate personal liberty and civil rights was curtailed. Significantly, the Thirteenth Amendment also regulated the behavior of private individuals, because a private person who keeps a slave violates the amendment.

To be sure, the scope of the amendment's enforcement power depends on the meaning of slavery and involuntary service. Specific definitions were not included in the amendment because slavery was well understood to mean one person holding another person as chattel and appropriating that person's labor through force rather than consent.

Most of the congressional debate focused on the effects of prohibiting slavery. In its most narrow interpretation, the Thirteenth Amendment affirmed an individual's right not to be held as the property of another individual. Beyond this limitation, states had the authority to regulate the civil rights of persons within their jurisdiction, and private individuals could discriminate in commercial and social interactions. Congressional authors of the amendment, however, argued that the prohibition of slavery also implied the conferral of certain basic civil rights, such as the right to labor, the right to sue, the right to enter contracts, and the right to marry. Yet the authors did not include language specifically protecting or granting civil rights to newly freed slaves.

Shortly after the ratification of the Thirteenth Amendment, Congress passed the Civil Rights Act of 1866 in response to the “black codes” that Southern states instituted to restrict the rights of blacks within their jurisdiction. The Civil Rights Act of 1866 declared that all persons born in the United States (except Indians not taxed) were citizens of the United States. The act also conferred civil rights on individuals, regardless of previous conditions of servitude, and authorized courts to protect persons whose rights were violated. Though many Members of Congress favored extending civil rights to blacks, lawmakers wanted to do so constitutionally.

The constitutionality of the Civil Rights Act was a matter of dispute. Some argued that Section 2 of the Fourteenth Amendment empowered Congress to address the treatment of black citizens in the South. Ultimately, as we discussed in Lesson 14, Congress proposed the Fourteenth Amendment to grant Congress the power to legislate civil-rights issues in the states.

Judicial construction of Section 1 of the Thirteenth Amendment has largely followed the original meaning of the amendment. The most serious judicial challenge involving the amendment has focused on labor arrangements in the post-Reconstruction South that intended to restrict the mobility of black citizens. In the early 20th century, the Supreme Court invalidated state laws restricting employment
and contract liberty as well as laws authorizing compulsory labor for indebtedness, declaring such arrangements to be involuntary servitude.

Concerning Section 2 of the amendment, the Supreme Court held in the Civil Rights Cases (1883) that Congress's power extended to badges and incidents of slavery, but the Court adopted a narrow interpretation of badges and incidents of slavery. In that case, for instance, the Court held that excluding black citizens from privately operated places of public accommodation was not a badge of slavery. In 1968, the Supreme Court expanded the definition of “badges and incidents of slavery” to include certain forms—but not all forms—of discrimination. The most recent cases involving the Thirteenth Amendment have relied on the narrow definition of involuntary servitude.

**Active Reading**

Ask: Does the Thirteenth Amendment mean anything outside the context of 19th century slavery? (Forms of involuntary servitude would be prohibited by the Thirteenth Amendment.)

**Active Reading**

Point out that the phrase “badges and incidents of slavery” is used several times in Belz’s commentary as it relates to the Civil Rights Cases (1883). Ask: What does this phrase mean? (Although the formalized institution of slavery may not exist, certain characteristics of slavery may remain such as compulsory service, prohibiting property ownership, curtailing the ability to make contracts, or prohibiting the right to serve as a witness in court.)

**Write About It**

Belz explains that the Framers modeled the language of the Thirteenth Amendment on the language of the Northwest Ordinance of 1787. Explain that the Northwest Ordinance guaranteed civil rights and liberties to individuals in the Northwest Territory, which extended from the Ohio River to the Mississippi River. Have students research the Northwest Ordinance of 1787 and write a paragraph about the purpose of the law and how its influence is evident on the Thirteenth Amendment.

**Active Reading**

Read aloud this sentence from Belz’s commentary on page 381: “The U.S. Constitution, for the most part, does not apply to individuals except when they act under color of law (e.g., the police officer who searches your house).” Ask: What do you think the phrase “color of law” means? Is there a difference between a police officer searching your house without a warrant or your per-
mission and a citizen searching your home without your permission? (Acting under the “color of law” means acting in an official capacity for the national, state, or local governments. If a private citizen searches my home, my constitutional rights have not been violated. However, if a police officer does the same thing improperly, it may violate my constitutional rights.)

Discussion Questions

1. Read Section 2 of the Thirteenth Amendment and then respond to the question: What made Section 2 controversial? (Students should note that the amendment altered the relationship of the states to the federal government. Section 2 gave Congress the power to enforce the Thirteenth Amendment. This was controversial because Congress would have the power (traditionally held by the states) to regulate individual behavior in some cases.)

2. How does guaranteeing individuals the right not to be held as a slave guarantee individuals other rights as well? (Answers will vary. However, students should note that free citizens have certain rights, such as the right to work, right to sue, and right to contract.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 19. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. According to the Fugitive Slave Clause, escaped slaves must be
   a. taken to the North.
   b. set free.
   c. sent to prison.
   d. returned to those claiming ownership.

2. Federal prohibition of the slave trade became effective on January 1,
   a. 1789
   b. 1800
   c. 1808
   d. 1860

3. The Slave Trade Clause restricted a tax on the import of slaves for ______ years.
   a. 8
   b. 12
   c. 20
   d. 25
4. The Thirteenth Amendment gives ______ the power to enforce the prohibition of slavery.
   a. States
   b. Regions
   c. Congress
   d. the President

5. The language in the Thirteenth Amendment was modeled after the
   a. Northwest Ordinance.
   b. Twelfth Amendment.
   c. Civil Rights Act.
   d. Civil Rights Cases.

Short answer: Write out your answer to each question.

1. What was the purpose of the Prohibition on Amendment: Slave Trade? (Southern delegates proposed the clause to ensure that neither the Slave Trade Clause nor the Direct Taxes Clause would be altered or amended.)

2. Why is the Three-fifths Clause not a pro-slavery clause? (If all slaves were counted toward apportioning representatives, then the South would have had a disproportionate influence in Congress and in crafting the nation’s laws.)

3. What did the first debate over slavery at the Constitutional Convention concern? (representation)

4. What did the second debate over slavery at the Constitutional Convention concern? (Southern delegates feared that an unrestricted congressional power to regulate commerce could be used against Southern commercial interests to restrict slavery.)

5. What does Belz cite as the primary aim of the Civil War? (to preserve the Union)

6. What was the purpose of the Thirteenth Amendment? (to abolish slavery)

7. How is the application of the Thirteenth Amendment different from the application of other amendments? (It applies to private individuals acting in their private capacities, not merely to the public actions of public actors.)
Fill in the blank: Write the correct word or words in each blank.
1. Congress passed a federal prohibition of the ________ that went into effect January 1, 1808. (slave trade)
2. By conferring power on Congress to enforce the prohibition of slavery throughout the United States, the Thirteenth Amendment altered the relationship between the states and the __________. (federal government)

True / False: Indicate whether each statement is true or false.
1. The Fugitive Slave Clause is one of the most controversial clauses in the U.S. Constitution. (True)
2. The word “slave” never appears in the Fugitive Slave Clause. (True)
3. In 1861, Congress proposed a constitutional amendment stating that the Constitution should never be amended to interfere with slavery in any state. (True)
4. In 1865, Congress proposed a constitutional amendment to abolish slavery. (True)
Lesson Objectives

When you complete Lesson 20, you will be able to:

- Discuss the various amendments of the Constitution that are related to the right to vote.
- Describe the purpose and history of the Fifteenth Amendment.
- Explain the Nineteenth Amendment and describe the strategies of the women’s suffrage movement.
- Summarize the history of poll taxes and explain the purpose of the Twenty-fourth Amendment.
- Outline the purpose of the Twenty-sixth Amendment and the impetus for its development.

Elections are an essential element of our constitutional republic. As the preceding lessons reveal, the Founders crafted unique processes for selecting members of the House of Representatives, the Senate, the Executive, and the judiciary. Under the Constitution of 1787, the House of Representatives was the only branch directly elected by the people, and the Constitution deferred to the states to establish qualifications for voters. The officers in other branches were selected by the people indirectly through state legislatures or other constitutional mechanisms.

In previous lessons, we have discussed several constitutional amendments that altered the election processes for specific institutions or their officers: The Twelfth Amendment added the Vice President to the ballot in the Electoral College; the Seventeenth Amendment enables the direct election of Senators; the Twenty-second Amendment limits the number of terms a President may serve. The following amendments, however, focus on the qualifications for voters themselves rather than on the institutions or officers elected to them.
**Suffrage: Race — Amendment XV**

*Essay by Earl Maltz (pp. 409–411)*

The Fifteenth Amendment was the last of three Reconstruction Amendments. Rati-
fied in 1870, it prohibits both the federal and state governments from restricting
an individual’s ability to vote because of his “race, color, or previous conditions of
servitude.” It also grants Congress the authority to pass legislation for the purpose
of enforcing this amendment.

The purpose of the Fifteenth Amendment was to require states to give blacks the
right to vote. Several years prior to the amendment, the Joint Committee on Re-
construction advocated the idea of suffrage for all races. Lacking northern support
and fearing a political backlash, the committee dropped the proposal. By 1869, the
situation had changed, and it became evident that a constitutional amendment was
necessary.

There was a deep divide over the language of the Fifteenth Amendment. At first,
the House of Representatives favored a version quite similar to the one ultimately
adopted. However, many Republicans thought that the language was too narrow
because states could easily prevent freed slaves from voting by introducing qualifi-
cations impossible to meet. To address this issue, the Senate added language pro-
hibiting discrimination on the basis of “nativity, property, education, or creed” for
purposes of voting or holding office. Finally, the House of Representatives and the
Senate drafted new versions of the amendment and ultimately passed the shortened
and simplified version that appears in the Constitution.

Because of the difficulty of agreeing on the precise language of the amendment, the
framers adopted a simple prohibition on discrimination on the basis of race, color,
and previous condition of servitude. There was a risk that a court could interpret the
amendment narrowly and thereby allow seemingly neutral statutes to limit suf-
frage. In fact, many states did pass just such seemingly neutral statutes (for instance,
making literacy tests a prerequisite for voting). Initially, the Supreme Court upheld
these statutes. More recently, however, it has invalidated such statutes as violations
of the Fourteenth and Fifteenth Amendments.

Under Section 2 of the amendment, Congress has the power to enforce the
Fifteenth Amendment, but the scope of this power is unclear. It is questionable
whether this clause gives Congress power to regulate the actions of private parties.
Supreme Court decisions are divided on this question. At first, the Court ruled that
Congress could not regulate purely private activity. Since 1941, however, the Court
has upheld expansive congressional power over non-governmental actors. Recent
decisions have upheld a variety of legislative measures designed to combat racial
discrimination.
Before you Read

Ask: Have you ever heard of the term “suffrage”? What do you think it means? (The term “suffrage” refers to the right to vote.) If freed blacks received the right to vote, do you think state governments would still have the ability to prevent these individuals from exercising that right? (Answers will vary. Sample answer: Governments could still restrict the ability of these individuals to exercise their voting rights. For example, many former slaves were illiterate; therefore, literacy tests as a prerequisite to register to vote would prevent voting.)

Make an Inference

Read the section at the top of page 410 regarding the Senate’s proposal for how the Fifteenth Amendment should be worded (begin with “responding to these and other concerns” and end with “hold elective office”). Ask: If this version of the Fifteenth Amendment had been adopted instead of the shorter one that appears in the Constitution, what can you infer about the effects of this amendment? (Answers will vary. Sample answer: The language might have prohibited states from passing seemingly neutral laws that restrict voting rights based on education, ability to pass a literacy test, or property ownership.)

Suffrage: Sex — Amendment XIX

Essay by Tiffany Jones (pp. 417–419)

The Nineteenth Amendment to the Constitution prohibits the federal government or state governments from denying individuals the right to vote on the basis of sex. It also grants Congress the power to impose this rule through legislation.

The Constitution introduced in 1787 was a gender-neutral document: It did not prohibit women from voting. The Framers gave individual states the power to determine who could participate in elections. All states granted men suffrage. New Jersey was the only state to grant both women and men suffrage. Because the Constitution did not prohibit women from voting, no constitutional amendment was technically necessary for women to exercise suffrage. This is evident in the variety of strategies that the women’s suffrage movement used to secure the right to vote.

The roots of the women’s suffrage movement can be traced to a meeting in Seneca Falls, New York, in 1848. During Reconstruction, however, the movement gained traction.

There were three main strategies to secure voting rights for women. The first involved the interpretation of the Fourteenth Amendment. Section 2 of that
amendment prohibited denying “male inhabitants” the right to vote, suggesting that the Constitution granted only men the right to vote. Proponents of women’s suffrage argued that the Citizenship Clause and the Privileges or Immunities Clause of the Fourteenth Amendment prevented states from denying women the right to vote in federal elections. In *Minor v. Happersett* (1874), the Supreme Court dismissed this argument.

The second strategy focused on convincing individual states to remove voting qualifications related to sex. These efforts were eventually quite successful. Wyoming entered the Union in 1890 with women’s suffrage, becoming the first state since New Jersey to allow women to participate in elections on an equal basis with men. By the time the Nineteenth Amendment was ratified, 30 states granted voting rights to women for members of the House, members of the Senate, or the President.

The third and final strategy involved amending the Constitution to prevent states from imposing sex-based voting qualifications. The first such amendment was proposed in 1869. In 1897, a California Senator proposed what would become the Nineteenth Amendment. The Amendment was ratified in 1920 with essentially the same wording as the Fifteenth Amendment.

There has been little litigation over the Nineteenth Amendment. The Supreme Court addressed the amendment directly in *Breedlove v. Suttles* (1937), a case in which Georgia law exempted women from a tax but required men to pay it upon registering to vote. The Court ruled that the amendment protected the right of both men and women to vote but did not limit a state’s authority to tax voters.

**Active Reading**

Ask: How was the Fourteenth Amendment both a setback and an opportunity for the women’s suffrage movement? (The second section of the Fourteenth Amendment contains the word “male.” The clause could be interpreted to mean that only men were granted voting rights, but proponents of women’s suffrage interpreted the Citizenship Clause and the Privileges or Immunities Clause of the amendment to mean that states could not prevent women from voting in federal elections.)

**Research It**

Have students research the women’s suffrage movement, using the “Suggestions for Further Research” on pages 418 and 419 or by conducting independent Internet research. Potential topics include the relationship of women’s suffrage to America’s founding principles, the loss of voting rights for women between 1777 and 1807, or the 1848 meeting in Seneca Falls, New York. Have students write a few paragraphs on their topic to share with the class.
Poll Taxes — Amendment XXIV

*Essay by David F. Forte (pp. 427–429)*

The Twenty-fourth Amendment prohibits poll taxes as a prerequisite to vote in elections for the President, presidential electors, and Members of Congress. It also grants Congress the power to enforce this amendment with appropriate legislation.

Poll taxes began in the 19th century, when many states had property requirements for voting. Those who did not own property could pay a poll tax to vote. By the time of the Civil War, many states had eliminated both property requirements and poll taxes for voting. Poll taxes resurfaced in the Southern states beginning in 1889 to circumvent the Fifteenth Amendment and to prevent blacks from voting. Poll taxes also burdened the poor in general (including poor whites) and women.

Beginning in 1939, legislation was introduced in each Congress to eliminate poll taxes. By the time the Twenty-fourth Amendment was ratified, only five states used poll taxes. However, poll taxes had survived legal challenges—for example, in *Breedlove v. Suttles* (1937). Therefore, Congress still found an amendment necessary to prevent voter disenfranchisement by means of poll taxes. Some argued that Congress could outlaw poll taxes through the enforcement powers of the Fourteenth and Fifteenth Amendments. Proponents of the Twenty-fourth Amendment argued that a specific poll-tax amendment would prevent voter disenfranchisement of the poor and would curb political corruption and fraud related to poll taxes. The final text of the Twenty-Fourth Amendment prohibited poll taxes in federal elections; it did not address state elections. Shortly after the ratification of the Twenty-fourth Amendment, Congress passed the Voting Rights Act of 1965, which made poll taxes in state elections problematic.

The Supreme Court interpreted the Twenty-fourth Amendment quite broadly in *Harman v. Forssenius* (1965). When ruling that a Virginia statute requiring citizens either to pay a poll tax or to file a certificate of residence to participate in federal elections was unconstitutional, the Court reasoned that the amendment prohibited not only denial, but also abridgement of the right to vote. Therefore, certain onerous procedural requirements that impede the exercise of the right to vote were held to violate the Twenty-Fourth Amendment.

The Supreme Court ruled in *Harper v. Virginia State Board of Elections* (1966) that poll taxes in state elections were unconstitutional because “any [state that] makes the affluence of the voter or payments of any fee an electoral standard” violates the Equal Protection Clause of the Fourteenth Amendment (a conclusion the framers of the Amendment did not intend). Justice John Marshall Harlan observed that such reasoning rendered the Twenty-fourth Amendment superfluous.
Check Understanding

Justice John Marshall Harlan stated that the logic employed by the Supreme Court during one case made the Twenty-fourth Amendment “virtually superfluous.” Ask: Can you explain in your own words what Justice Harlan meant by this? (Answers will vary. Sample answer: During one case, the Supreme Court ruled that under the Equal Protection Clause, citizens could not be charged any type of fee to vote in an election. Since a poll tax is a type of fee and fees were prohibited under the Equal Protection Clause, Justice Harlan reasoned that the Court’s decision meant the Twenty-fourth Amendment was an unnecessary addition to the Constitution.)

Write About It

Write the following prompt on the board: Congress is considering a law that would require individuals to sign a form verifying that they filed their federal income tax return before voting. Write a brief letter to your Congressman, advising him or her about the constitutionality of this law (not whether the law is or is not good policy). Make your argument about the Constitution’s text, not the Court’s probable interpretation of the law. Give students time to prepare their written responses and then ask for volunteers who are willing to share their answers with the class. (Answers will vary. Sample answer 1: I would advise my member of Congress that this law is unconstitutional because the Twenty-fourth Amendment forbids denying the right to vote for failing to pay any “poll tax or other tax.” Requiring individuals to verify that they filed their income taxes is tantamount to requiring individuals to pay a tax before voting. Sample answer 2: I would advise my member of Congress that the law was constitutional. Requiring people to verify that they filed their federal taxes is not the same as requiring people to pay a tax to vote. Requiring citizens to verify that they filed income tax returns is more similar to requiring citizens to verify their address.)

Suffrage: Age — Amendment XXVI

Essay by Robert Levy (pp. 431–433)

The Twenty-sixth Amendment establishes that U.S. citizens who are 18 years of age or older have the right to vote and that Congress can introduce legislation to enforce this requirement. Although it is often suggested that the Vietnam War draft prompted the creation of the Twenty-sixth Amendment, this was not the case. A Supreme Court case prompted the amendment. In Oregon v. Mitchell (1970), the Supreme Court ruled that Congress did not have the authority to lower the voting age for participation in local and state elections. Rather than establishing separate systems for voting in state and federal elections, states supported the Twenty-sixth Amendment,
which lowered the voting age to 18 for all elections. The Amendment was ratified rather quickly: 107 days after it was proposed.

The Twenty-sixth Amendment raised peripheral issues. For instance, state courts ruled that the amendment enables young voters to sign and vote for initiative petitions and that it prevents states from denying minors residency for the purposes of voting. However, states can set a minimum age of 21 for holding office without violating the amendment.

Active Reading

Point out the use of the word “impetus” in the first paragraph on page 432. Read the sentence containing the word and the one before it to students. Ask: What do you think the word “impetus” means? (stimulus, incentive, the driving force behind an event)

Check Understanding

Remind students that the Constitution has age qualifications for elected offices. Ask: What are the age and residency requirements for serving in the House, in the Senate, and as President? Why did the Founders set these different ages in the Constitution? Why did they specify certain numbers of years that individuals would have to live in the United States to be eligible for each of these offices? (Answers will vary. Students should know that members of the House must be 25 years of age and have lived in the United States for seven years, that members of the Senate must be 30 years of age and have lived in the United States for nine years, and that the President must be 35 years of age, be a natural born citizen, and have resided in the United States for the past 14 years. The age requirements were designed to correspond to the maturity and life experience necessary to carry out the duties of the offices properly. The residency requirements ensure that our leaders are attached to the country and understand the principles of the United States.)

Discussion Questions

1. How did the amendments discussed in this lesson change the voting process in the United States? (Under the Constitution of 1787, the states determined qualifications for voting, and only members of the House of Representatives were directly elected by the people. The Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments altered the original structure of the Constitution by limiting the power of the states to set qualifications for voting.)
2. In most states, incarcerated felons lose their right to vote. Based on what you have studied, does the Constitution prohibit this practice? (The Constitution allows voter disenfranchisement under the Fourteenth Amendment, which allows states to abridge the right to vote in cases of rebellion or other crimes.)

Check Understanding

Have students complete the following assessment to check their understanding of Lesson 20. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. Poll taxes of the Southern states adversely affected which group of people?
   a. blacks
   b. women
   c. the poor
   d. all of the above

2. When Congress ratified the Poll Tax Amendment, how many states retained a poll tax?
   a. five
   b. nine
   c. 20
   d. all of the Southern states

3. Requiring anyone to pay a poll tax in order to vote is forbidden by
   a. Amendment XXI.
   b. Amendment XXII.
   c. Amendment XXIII.
   d. Amendment XXIV.

4. Congress made black suffrage mandatory in the former Confederate states through the
   b. Civil Rights Act of 1866.
   c. Civil Liberties Act.
   d. Reconstruction Act of 1867.

5. The first mention of the word “male” in the Constitution appears in the
   a. Thirteenth Amendment.
   b. Fourteenth Amendment.
   c. Fifteenth Amendment.
   d. Sixteenth Amendment.
6. Which state had allowed women to participate in elections in the 1700s?
   a. Delaware
   b. New York
   c. Illinois
   d. New Jersey

7. The Twenty-sixth Amendment was developed mainly in response to the
   a. Vietnam War.
   d. case of Jolicoeur v. Mihaly.

**Fill in the blank: Write the correct word or words in each blank.**

1. The Fifteenth Amendment prohibited denying individuals the right to
   vote based on their color, race, or past condition of _____ (servitude)

2. The Nineteenth Amendment has virtually the same wording as the _____
   Amendment. (Fifteenth)

3. Although many states stopped using poll taxes by the mid-19th century,
   the practice became common again in the South following the _____.
   (Civil War)

**Short answer: Write out your answer to each question.**

1. The origin of the organized women’s suffrage movement has generally been
   traced to what gathering? (the 1848 gathering in Seneca Falls, New York)

2. The Fifteenth Amendment granted what? (The right to vote regardless
   of race, color, or previous condition of servitude)

3. Which Amendment grants the right to vote regardless of sex?
   (the Nineteenth Amendment)

4. Which word did not even appear in the Constitution until the Fourteenth
   Amendment was ratified in 1868? (male)
Appendix

The appendix is a collection of student worksheets. A worksheet for each of the Check Understanding exercises within the Teaching Companion is included in the appendix. Worksheets are numbered by Unit, Lesson, and Part.

Answers to each worksheet question are included within the text of the Teaching Companion.

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Worksheet 1-1

Check Understanding

Complete the following worksheet to check understanding about Unit 1, Lesson 1.

Multiple Choice: Circle the correct response.

1. When interpreting the Constitution, originalists take into account all of the following except
   a. the meaning of words during the time the Constitution was written.
   b. the philosophies of the delegates at the Constitutional Convention.
   c. how the laws of the Constitution should be changed to reflect modern society.
   d. how the words were interpreted during the revolutionary struggle.

2. Which of the following was not a rule of the Constitutional Convention?
   a. The proceedings were to be kept secret.
   b. All delegates must be present at each session.
   c. Voting was by state, and each state had one vote.
   d. Proper decorum was to be maintained at all times.

3. The plan of government used before the Constitution went into effect was
   a. Articles of Confederation
   b. Declaration of Independence
   c. Treaty of Paris
   d. none of the above

4. The president of the Constitutional Convention was
   b. Benjamin Franklin.
   c. Thomas Jefferson.
   d. Alexander Hamilton.

5. The plan of government that favored the large states was
   a. the New Jersey Plan.
   b. the Virginia Plan.
   c. the Northwest Ordinance.
   d. the Treaty of Paris.
6. The plan of government that favored the small states was
   a. the New Jersey Plan.
   b. the Virginia Plan.
   c. the Northwest Ordinance.
   d. the Treaty of Paris.

7. The decision to have two houses of Congress, with one house’s representation based on population and the other’s based on equal representation for each state, was called
   a. the Paterson Plan.
   b. the New Jersey Plan.
   c. the Virginia Plan.
   d. the Great Compromise.

8. The system of government in which power is divided between the central and state governments is called
   a. republican.
   b. federalism.
   c. monarchy.
   d. democratic.

9. The idea that the powers of government should be divided between and given to different branches is called
   a. checks and balances.
   b. separation of powers.
   c. federalism.
   d. implied powers.

10. When the power of one branch of government is blocked by the power of another branch of government, this is the concept of
    a. checks and balances.
    b. separation of powers.
    c. federalism.
    d. implied powers.

11. The dominant theory of constitutional interpretation is that of
    a. originalists.
    b. the Supreme Court.
    c. non-originalists.
    d. contemporary court decisions.

Fill in the blank: Write the correct word or words in each blank.

1. The delegates signed the Constitution on ________.
2. Using the original intention of the Framers as a guide for interpreting the Constitution is called an ________ perspective.
3. Originalism is in opposition to the concept that the Constitution is a ________ document that lacks any fixed meaning.
4. When determining the original meaning of the Constitution, originalists begin by examining ________.
5. The Constitution is strong in part because it complements the ________.

Short Answer: Write out your answer to each question.

1. What are the six reasons that David Forte gives to explain why originalism is championed?

2. What are the three auxiliary precautions that Matthew Spalding mentions are contained within the Constitution?

3. The United States government is divided into how many branches?
True / False: Indicate whether each statement is true or false.

1. (True/False) The Constitution means whatever the Supreme Court says it means.
2. (True/False) When originalists read the Constitution, they consider the historical context of when the text was created.
3. (True/False) The Constitution was written in 1787.
4. (True/False) The Articles of Confederation were problematic because the national government was too strong.
5. (True/False) The Constitution was written at a convention held in Philadelphia.
Worksheet 1-2.1
Check Understanding

Complete the following assessment to check understanding of Unit 1, Lesson 2, Part 1.

Multiple Choice: Circle the correct response.

1. According to the discussion of the Guarantee Clause, one of the key features of a republican government is that it does not have a
   a. Supreme Court.
   b. monarch.
   c. unicameral legislature.
   d. strong federal government.

2. To become the plan for government for the United States, the Constitution had to be ratified by
   a. all states.
   b. nine states.
   c. 11 states.
   d. 12 states.

3. The only state that did not participate in the Constitutional Convention was
   b. Virginia.
   c. New Hampshire.
   d. Rhode Island.

Fill in the blank: Write the correct word or words in each blank.

1. In Article IV, Section 4, the Guarantee Clause assures the states protection from ______ and also guarantees ______.
2. A pure democracy had no ______.
3. Where the signers subscribed their names, the states are listed in ______ order.
4. Unlike the Articles of Confederation, the Constitution established a strong ______ government to protect the citizens.
5. The Preamble stresses that ultimate political authority lies with the people, not the states, by starting with the phrase “____________.”
6. ________, the secretary of the Convention, signed to attest, or authenticate, the delegates’ signatures.

Short Answer: Write out your answer to each question.

1. Why did Patrick Henry object to the Preamble?
2. Who signed the Constitution to attest to the delegates’ signatures?
3. Who composed the Preamble?
4. What are the six purposes of the Constitution, as stated in the Preamble?
5. What was the purpose of the Emoluments Clause?
6. During the debates over ratification of the Constitution, what were the three criteria of republicanism under the Guarantee Clause?
7. Which was the ninth state to ratify the Constitution?
True / False: Indicate whether each statement is true or false.

1. (True/False) The prohibition on federal and state titles of nobility was designed to affirm and protect the republican character of the American government.
2. (True/False) The Preamble was placed in the Constitution as an afterthought.
3. (True/False) Article VII was the last and shortest of the Constitution’s articles.
4. (True/False) Article VII’s bold dismissal of the Articles of Confederation’s rule of unanimous approval emphasized the break from the Articles to a Constitution as supreme law of the land.
5. (True/False) The Emoluments Clause has been in court extensively.
6. (True/False) The Founders intended to create a pure democracy.
Worksheet 1-2.2
Check Understanding

Complete the following assessment to check understanding of Unit 1, Lesson 2, Part 2.

Fill in the blank: Write the correct word or words in each blank.
1. During the American Revolution, General George Washington required all officers to subscribe to an oath renouncing any allegiance to _______ and pledging their fidelity to the _________.

Short Answer. Write out your answer to the following questions.
1. What strategy did the Supremacy Clause utilize to deal with potential conflicts between the national and local governments?
2. What was the very first law passed by the first session of the House of Representatives?
3. The original, unamended Constitution contains how many explicit references to religion?
4. Why were the states in debt before the signing of the Constitution?
5. What did Edmund Randolph think about the new Congress assuming past debt?
6. What is the main purpose of the Supremacy Clause?
7. What does it mean when a federal law trumps a state law?
8. What is the main purpose of the Oaths Clause?
9. Give an example of someone who must swear to uphold the Constitution.
10. Why did the Framers of the Constitution support the ban on religious tests to hold office?
12. How did the states and the Continental Congress finance the War of Independence?

True / False: Indicate whether each statement is true or false.
1. (True/False) The Oaths Clause helps to fulfill the Framers’ plan to integrate the states into the electoral, policymaking, and executive functions of the federal union, subject to the limits of the Tenth Amendment.
Worksheet 2-3.1
Check Understanding

Complete the following assessment to check understanding of Unit 2, Lesson 3, Part 1.

**Multiple Choice: Circle the correct response.**

1. The House of Representatives and Senate make up the ________ branch of government.
   a. executive
   b. federal
   c. legislative
   d. judicial

2. Members of the House of Representatives must be at least ________ years of age.
   a. 18
   b. 21
   c. 25
   d. 35

3. Which of the following has the most power in the election of Senators and Representatives?
   a. the Supreme Court
   b. the House of Representatives
   c. the Senate
   d. the states

4. The Presiding officer in the House of Representatives is the
   a. President of the United States.
   b. Vice President.
   c. President Pro Tempore.
   d. Speaker.

5. Unless otherwise specified in the Constitution, the officers in the Senate and House are
   a. appointed by the President.
   b. appointed by the Civil Service Commission.
   c. chosen by drawing lots.
   d. elected by the members of each house.

6. A United States Representative is elected for a term of
   a. two years.
   b. four years.
   c. six years.
   d. life.

**Fill in the blank: Write the correct word or words in each blank.**

1. The Constitution specifically grants each state, no matter how small its population, ________________ in the House.

2. When considering qualifications for Representatives, the Framers considered and rejected ______, ______, and _______ qualifications.
Short Answer: Write out your answer to each question.

1. What are the three requirements to be a Representative?

2. What was the central question regarding the Enumeration Clause?

3. When does the House of Representatives elect its Speaker?

4. Does the Speaker of the House sit on any standing committees of the House?

5. What three issues dominated the Constitutional Convention’s debate over the makeup of the House of Representatives?

6. According to the Constitution, what qualifications are necessary for citizens to vote in elections for the House of Representatives?

True / False: Indicate whether each statement is true or false.

1. (True/False) Article I of the Constitution grants all legislative powers to Congress.

2. (True/False) The two-year term of office for the House was a compromise between those who preferred annual elections and those who wanted a longer, three-year-term.

3. (True/False) As a system of checks and balances, each House punishes members of the other House in instances of dis-orderly behavior.

4. (True/False) The Anti-Federalists did not believe that the country could grow and still remain republican.

5. (True/False) In 1929, Congress decided to cap the number of Representatives at 450.

6. (True/False) The House of Representatives has the freedom to choose its leadership without regard to the President or Senate.
Worksheet 2-3.2
Check Understanding

Have students complete the following assessment to check their understanding of Lesson 3, Part 2. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. Since ________, most Senate and House of Representatives proceedings have been made public.
   a. World War II
   b. the Revolutionary War
   c. the Civil War
   d. the War of 1812

2. Members of the House of Representatives may be expelled from office as long as at least ________ of Representatives concur.
   a. a quorum
   b. one-third
   c. a majority
   d. two-thirds

3. The houses of Congress are allowed to adjourn for more than three days or to move their location only if
   a. both houses consent to it.
   b. the President requires it.
   c. the Speaker proposes it.
   d. there is an emergency.

Fill in the blank: Write the correct word or words in each blank.

1. Privilege from Arrest does not cover criminal cases involving ________, felony, or breach of the peace.
2. The Twenty-seventh Amendment prevents a sitting Congress from giving itself a ________ to take effect during its term.
3. The Privilege from Arrest Clause prevents Members of Congress from being put under civil arrest, but this is valid only while Congress is ________.
4. Article I, Section 6 forbids federal ______ and ______ officers from simultaneously serving in Congress.
5. With respect to the conduct of the election of federal Senators and Representatives, the responsibility lay primarily with the ______ and secondarily with ______.
6. Under the British model, the ______ called Parliament to meet.

True / False: Indicate whether each statement is true or false.

1. (True/False) The Anti-Federalists strongly supported the election regulations that gave Congress the prerogative to make or alter election regulations.
2. (True/False) The Framers of the Constitution understood the Incompatibility Clause primarily as an anti-corruption device.
3. (True/False) By confirming each house’s power to set its own procedures, the Framers strengthened the independence of each branch of Congress against the other as well as against the executive and the judiciary.
4. (True/False) At the Constitutional Convention, the Framers readily agreed that the new national government would compensate Senators and Representatives from a federal treasury.
5. (True/False) It took nearly 200 years to successfully ratify the Congressional Compensation Amendment.
6. (True/False) Civil arrest is rarely practiced anymore, so the Privilege from Arrest Clause is virtually obsolete today.
7. (True/False) The Rules and Expulsion Clause provides the only constitutional mechanism by which a sitting Member of Congress can be removed from office before the end of his term.
Short Answer: Write out your answer to each question.

1. Why did the Framers of the Constitution include a Compensation Clause in the Constitution?

2. Where does the money come from to pay Senators and Representatives?

3. Where was the right of legislators to speak their minds with impunity acknowledged before the Speech and Debate Clause of our Constitution?

4. If the two houses cannot agree on a time of adjournment, who is designated to settle the dispute?

5. Why did the Framers write the Adjournment Clause such that neither house can adjourn for more than three days without the consent of the other?
Worksheet 2-3.3
Check Understanding

Complete the following assessment to check understanding of Lesson 3, Part 3.

Multiple Choice: Circle the correct response.

1. The responsibility for impeaching someone lies with
   a. the Senate.
   b. the Supreme Court.
   c. the House of Representatives.
   d. the President.

2. The responsibility for trying an impeached official lies with
   a. the Senate.
   b. the Supreme Court.
   c. the House of Representatives.
   d. the President.

Fill in the blank: Write the correct word or words in each blank.

1. There is no doubt that the Framers saw _______ as a part of the system of checks and balances to maintain the separation of _______ and the republican form of government.

2. Early on, the acquittal of Justice Samuel Chase set the standard that Supreme Court Justices should not be impeached on the ground of their _______ preferences.

Short Answer: Write out your answer to each question.

1. What was the original arrangement for electing the President and Vice President?

2. All bills for raising revenue must originate where?

3. How was the Origination Clause part of a critical compromise between the large and small states?

4. Who votes to impeach an officer?

True / False: Indicate whether each statement is true or false.

1. (True/False) The Senate is not allowed to originate bills for raising revenue, but the Senate can propose or concur with amendments on these (and other) bills.

2. (True/False) The Framers placed specific grounds of impeachment in the Constitution because they wanted to prevent impeachment from becoming a politicized offense as it had in England.
Worksheet 2-4.1
Check Understanding

Complete the following assessment to check understanding of Lesson 4, Part 1.

**Multiple Choice: Circle the correct response.**

1. A Senator’s total term of office is
   a. one year.
   b. two years.
   c. four years.
   d. six years.

2. The Sinecure and Incompatibility Clauses are designed to avoid
   a. amendments to certain rules.
   b. direct popular elections.
   c. impeachment trials in the Senate.
   d. corruption in Congress and impermissible blending of powers.

3. According to the Constitution, a Senator must be at least
   a. 25 years old and a citizen for seven years.
   b. 30 years old and a citizen for nine years.
   c. 35 years old and a natural born citizen.
   d. none of the above.

**Fill in the blank: Write the correct word or words in each blank.**

1. Under Article I, Senators are chosen by ________.
2. The ________ stands in as the Senate’s presiding officer if the Vice President is unavailable.
3. A Senator of the second class would expect to leave office after the ________ year.
4. The Connecticut Compromise designated that there would be ________ Senators per state.
5. Temporary Senate appointments to fill vacant seats are to be made by state ________.
6. A Senator’s salary is paid out of the ________.
7. The Constitution allows Congress “to compel the ________ of absent members.”
8. The Senate of the United States is composed of ________ Senators from each state.
9. Prior to the Seventeenth Amendment, if there was a sudden vacancy in the Senate, the ________ had the power to make a temporary appointment.
10. The Vice President of the United States also functions as ________ of the Senate.
11. Early in the Republic, the Vice President took seriously his constitutional duty of _________________.

**Short Answer: Write out your answer to each question.**

1. What is the term of office for a United States Senator?

2. When our Founding Fathers wrote the Constitution (specifically, Article I, Section 3, Clause 1), who chose the Senators from each state?
3. What are the qualifications for a Senator?

4. What does Amendment XVII discuss?

5. List a few of the qualities the Framers designed for the United States Senate.

**True / False: Indicate whether each statement is true or false.**

1. (True/False) During the 2000 election, the people of Missouri knowingly voted for a deceased Senator.
2. (True/False) The Framers of the Constitution perceived the Senate to be a more deliberative body, while the House would initiate most legislation.
3. (True/False) Directly after the Civil War, both houses of Congress occasionally denied individuals their seats if individuals could not swear that they had never been disloyal to the Union.
4. (True/False) The only responsibility assigned to the office of Vice President by the Constitutional Convention was to preside over the Senate and to cast tiebreaking votes.
5. (True/False) There have only been a few occasions when the Vice President has had to cast a tiebreaking vote as President of the Senate.
6. (True/False) The Constitution prohibits any amendment that would deny a state equal representation in the Senate.
Worksheet 2-4.2
Check Understanding

Complete the following assessment to check understanding of Lesson 4, Part 2. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. The ________ presides over presidential impeachment trials.
   a. Chief Justice
   b. Vice President
   c. majority leader
   d. President Pro Tempore

2. Impeached Presidents may be removed from office when at least ________ of Senators concur.
   a. one-third
   b. two-thirds
   c. a quorum
   d. a majority

Fill in the blank: Write the correct word or words in each blank.

1. Punishments from impeachment may include “removal from Office, and ____________ to hold and enjoy any Office...”

2. The ________ Amendment modified the method of electing a President and Vice President.

3. Treaty-making is a mixture of ________ and ________ power.

4. The Senate frequently approves treaties with ________.

Short answer: Write out the correct answer.

1. What was the original arrangement for electing the President and Vice President?

2. What is significant about the 1836 election in regard to the selection of the Vice President?

3. List some of the striking features of the Treaty Clause.
Worksheet 2-5.1
Check Understanding

Complete the following assessment to check understanding of Lesson 5, Part 1.

**Multiple Choice: Circle the correct response.**

1. Which of the following clauses gives Congress authority over the Treasury?
   a. Emoluments Clause
   b. Appropriations Clause
   c. Direct Taxes
   d. Bill of Attainder Clause

2. Which Founding Father argued for a very broad interpretation of the Spending Clause?
   a. James Madison
   b. Alexander Hamilton
   c. James Monroe
   d. George Washington

3. The Framers created the Borrowing Clause to empower Congress to borrow money
   a. in times of war.
   b. to expand the federal government.
   c. to give to the states.
   d. in times of famine.

4. Internal improvements have been justified as a viable national expenditure by using the
   a. Borrowing Clause.
   b. Commerce Among the States Clause.
   c. Spending Clause.
   d. Commerce with Foreign Nations Clause.

**Short Answer: Write out your answer to each question.**

1. For what two purposes does the Spending Clause permit the levying of taxes?

2. How did the Federalist Party want the Spending Clause to be read?

3. Every President adopted a more restrictive interpretation of the Spending Clause until what period in American history?

4. What ushered in the modern-day jurisprudence on the Spending Clause?

5. What were the three interpretations of the Spending Clause advanced in the years immediately following ratification of the Constitution?

6. What was one of the main reasons a Borrowing Clause was essential?

7. Which famous Federalist encouraged the chartering of the First Bank of the United States?

8. The Appropriations Clause is the cornerstone of what?
True / False: Indicate whether each of the following statements is true or false.

1. (True/False) In early Congresses, local projects such as schools for public education and local roads and canals were seen as things that would benefit the general public, and monetary appropriations were therefore made from the federal treasury.

2. (True/False) Some taxes will inevitably affect some areas more than others.

3. (True/False) Federalists and Republicans agreed on the need to maintain public credit and on how borrowing power should be implemented.
Worksheet 2-5.2
Check Understanding

Complete the following assessment to check understanding of Lesson 5, Part 2.

Multiple Choice: Circle the correct response.

1. National real-estate taxes were enacted when?
   a. during the Constitutional Convention
   b. in antebellum America
   c. after World War I
   d. after World War II

2. Direct taxes are generally understood to apply to which of the following?
   a. land only
   b. goods only
   c. capitation and land
   d. goods and services

Fill in the blank: Write the correct word or words in each blank.

1. The ________ prohibits taxation of goods exported between states or from states to foreign nations.
2. The __________ was created to prohibit Congress from favoring the ports of a particular state.

Short Answer: Write out your answer to each question.

1. What is the purpose of the Uniformity Clause?

2. What are “indirect taxes”?

3. What are “direct taxes”?

4. What two forms of taxation are subject to apportionment?

5. The Constitution divided governmental levies into what two mutually exclusive categories?

6. Why was the South opposed to an export tax?

7. What is the natural protection of indirect taxes?

8. What is the Sixteenth Amendment?
True / False: Indicate whether each statement is true or false.

1. (True/False) Congress enacted an unapportioned income tax during the Civil War.
2. (True/False) Despite heated opposition to the unapportioned income tax, the Sixteenth Amendment was passed by Congress with huge majorities.
3. (True/False) Some taxes will inevitably affect some areas more than others.
4. (True/False) Federalists and Republicans agreed on the need to maintain public credit and on how borrowing power should be implemented.
Worksheet 2-5.3
Check Understanding

Complete the following assessment to check understanding of Lesson 5, Part 3.

Short Answer: Write your answer to each question.

1. Who has power to regulate commerce with foreign nations?

2. Which clause in the 1787 Constitution has generated more court cases than any other?

3. What is the narrowest definition of “to regulate”?

4. What two key economic powers did the Constitution remove from the states?

5. The Commerce Clause grants Congress plenary power to regulate commerce between the United States and which three forms of sovereign entities?

6. Under the Articles of Confederation, who governed debtor-creditor relations?

7. Who has the exclusive power to coin money?

8. What are “greenbacks”?

9. What was the purpose in granting Congress the power to fix the standard of weights and measures?

10. Since the power to punish someone who is involved in producing counterfeit money is understood to be included in the Necessary and Proper Clause, for what three reasons would there need to be a separate delegated power to punish counterfeiters?

Matching: Match the term on the left with the correct definition on the right.

Fiat money  
Currency that is accepted as payment of a debt

Specie money  
Paper money not backed by gold or silver

Bills of credit  
A type of “fiat money,” not backed by gold or silver

Coin  
Money backed by gold or silver

Tender  
Interest-bearing government bond

Note  
Metal, frequently made of precious metal, used as legal currency in the United States

True / False: Indicate whether each statement is true or false.

1. (True/False) The Patents and Copyrights Clause was designed to provide a uniform standard for intellectual property.

2. (True/False) The Post Office Clause has generated no controversy.
Worksheet 2-6.1
Check Understanding

Complete the following assessment to check understanding of Lesson 6, Part 1.

**Short answer: Write out your answer to each question.**

1. Why weren’t the Framers of the Constitution concerned with defining piracy after creating the Define and Punish Clause?

2. What sorts of legal actions are triggered by the declaration of war?

3. List the congressionally declared wars in the history of the United States.

4. Against whom were offensive actions taken by the United States in 1802?

5. What was the significance of the offensive actions taken in 1802?

6. The 1856 Declaration of Paris prohibits what?

7. When was the last time the United States issued letters of marque and reprisal?

8. With regard to the allocation of war powers between the President and Congress, what do the Presidentialists maintain?

**True / False: Indicate whether each statement is true or false.**

1. (True/False) Although the Constitution authorizes Congress to “define” piracy, this proved unnecessary since there was already a well-defined understanding of “piracy” in international law.

2. (True/False) The Supreme Court has intervened on two occasions to stop a war that the President has started without congressional authorization.

3. (True/False) During the Revolution, captors could not claim lawful title to captured property until after a prize court had granted it.

4. (True/False) The United States maintained a large military establishment during peacetime for the first time in its history during the Cold War.
Worksheet 2-6.2
Check Understanding

Complete the following assessment to check understanding of Lesson 6, Part 2.

Short answer: Write out your answer to each question.

1. A soldier who commits a crime on a military base will most likely be tried in what type of court?

2. Why would Americans living during the time of the Revolution be apprehensive about a standing army?

3. In what two fundamental ways has the United States Army changed significantly since the constitutional period?

True / False: Indicate whether each statement is true or false.

1. (True/False) During the time of the Constitutional Convention, people feared a standing navy more than a standing army.

2. (True/False) The Military Regulations Clause establishes a military system that is separate from the ordinary jurisdiction of the civil courts.

3. (True/False) The Anti-Federalists preferred that states rather than the federal government have control of the militias.

4. (True/False) The Army Clause gave the President control of armies.

5. (True/False) The National Guard eventually replaced the uniformed militia.

6. (True/False) Since navies were just as much a tool of tyrants as were armies, the Framers debated whether or not the federal government should maintain a navy.
Worksheet 2-7.1
Check Understanding

Complete the following assessment to check understanding of Lesson 7, Part 1.

**Fill in the blank: Write the correct word or words in each blank.**

1. Although federal property can be found in every state, the largest concentrations are in the _____.
2. It is possible that the Framers intended the Property Clause to be broad enough at least to constitutionalize the provisions of the ________.
3. The _____ allows residents of the District of Columbia to participate in federal elections.
4. The ____________________________ gives Congress the power to regulate areas belonging to the national government. Such as military property.

**Short answer: Write out your answer to each question.**

1. How many electors does the District of Columbia have according to the Twenty-third Amendment?
2. What does the Enclave Clause allow Congress to establish?
3. What happened in June 1783 that reinforced the need for a district subject to Congress’s exclusive jurisdiction and separate from the territory and authority of any single state?
4. What does the Twenty-third Amendment do?
5. Federal enclave jurisdictions may apply to what?
6. Describe the “proprietary theory” of the Property Clause.
7. Describe the “police-power theory” of the Property Clause.
8. Describe the “protection theory” of the Property Clause.
**Worksheet 2-7.2**  
**Check Understanding**

Complete the following assessment to check understanding of Lesson 7, Part 2.

**Multiple Choice: Circle the correct response.**

1. Which of the following was not a key criterion of the Naturalization Act of 1795?
   a. good moral character  
   b. prohibition of discrimination on the basis of race, sex, or marital status  
   c. legal residence in the United States for five years  
   d. renunciation of hereditary titles

2. The Naturalization Clause transferred the power of naturalization to the  
   a. states.  
   b. courts.  
   c. Founding Fathers.  
   d. national government.

3. The Fourteenth Amendment was necessary to overturn what?  
   a. the Presidential Eligibility Clause  
   b. the *Dred Scott* decision  
   c. the Civil Rights Act  
   d. the Thirteenth Amendment

**True / False: Indicate whether each statement is true or false.**

1. (True/False) The American understanding of citizenship is indistinguishable from the European understanding of citizenship.

2. (True/False) According to the Declaration of Independence, “obstructing the Laws for the Naturalization of Foreigners” was one of the grievances that led the American colonists to break with Britain.

3. (True/False) In 1857, the *Dred Scott v. Sanford* decision held that blacks of African descent could be citizens of the United States.

4. (True/False) “Subject to the Jurisdiction” of the United States meant exclusive “allegiance” to the United States.

5. (True/False) Congress began to extend offers of citizenship to various Indian tribes in 1970.

**Short Answer: Write out your answer to each question.**

1. What are the key criteria for citizenship under the Naturalization Act of 1795?

2. What is the principle of *jus soli*?

3. What is the parliamentary rule of *jus sanguinis*?

4. What two requirements were set for United States citizens according to the Fourteenth Amendment?
Worksheet 2-7.3
Check Understanding

Complete the following assessment to check understanding of Lesson 7, Part 3.

Short Answer: Write out your answer to the following question.

1. The Framers crafted the Necessary and Proper Clause for what two great purposes?

2. What is one limitation of Congress’s powers under the Necessary and Proper Clause?

True / False: Indicate whether each statement is true or false.

1. (True/False) The Necessary and Proper Clause gives Congress the power to enact laws that are appropriate and needed to carry out its powers.

2. (True/False) The Necessary and Proper Clause is also referred to as the “sweeping clause” and the “elastic clause.”

3. (True/False) The Necessary and Proper Clause disregards the principle of separation of powers.
Worksheet 2-7.4
Check Understanding

Complete the following assessment to check understanding of Lesson 7, Part 4.

Fill in the blank: Write the correct word or words in each blank.
1. The number and variety of administrative agencies testify to the _____ of the federal government.
2. The nature and reach of administrative agency powers remains _________.

Short Answer: Write out your answer to each question.
1. Why did the Framers of the Constitution design a separation of powers?
2. How does Congress’s delegation of its legislative power affect accountability?
3. Free-standing administrative agencies fall into which two categories?
4. Why are “executive agencies” so called?
5. Why are “independent agencies” so called?

True / False: Indicate whether each statement is true or false.
1. (True/False) Separation of powers is fundamental to the idea of a limited government accountable to the people.
2. (True/False) Article I of the Constitution grants all legislative powers to Congress.
3. (True/False) Administrative agencies are created by the President.
4. (True/False) Administrative agencies vary enormously in the breadth and detail of their delegated authority.
5. (True/False) The substantive scope of administrative discretion (whether exercised by executive or independent agencies) has been well defined by the courts with little controversy.
6. (True/False) Administrative agencies exercise legislative, executive, and judicial powers.
Worksheet 2-8
Check Understanding

Complete the following assessment to check understanding of Lesson 8.

Multiple Choice: Circle the correct response.

1. A legislative act condemning a person to death without a trial is called
   a. a bill of attainder.
   b. an ex post facto law.
   c. a bill of pain.
   d. a bill of penalty.

2. A law that punishes someone for an action that was legal when the person committed it is called
   a. a bill of attainder.
   b. an ex post facto law.
   c. a before-the-fact law.
   d. a bill of penalty.

3. According to the discussion of the Presentment Clause, if the President does not read a bill within 10 days, the bill
   a. is automatically vetoed.
   b. must be returned to Congress.
   c. must be approved by Congress.
   d. automatically becomes law.

4. According to the discussion of the Presentment of Resolutions, a declaration of war is an example of a
   a. bill.
   b. joint resolution.
   c. concurrent resolution.
   d. simple resolution.

5. A pocket veto occurs if the President returns a bill to Congress
   a. that is not signed.
   b. when Congress is not in session.
   c. after 10 days.
   d. when Congress resubmits it.

6. Which of the following must be presented to the President?
   a. a bill
   b. a concurrent resolution expressing the sense of the Congress
   c. a constitutional amendment
   d. a resolution
**APPENDIX: WORKSHEETS**

**Fill in the blank: Write the correct word or words in each blank.**

1. It is unanimously agreed that the President may pocket a veto during a ______ adjournment.
2. The formal process by which the Congress sends legislation to the President for consideration is called ______.
3. While a bill requires presidential presentment, a ______ may or may not require presidential presentment.
4. According to the Presentment Clause, if the President vetoes a bill, the bill may still become law if two-thirds of the members of each house of Congress ______ the bill.
5. Today, when Presidents pocket a veto, they include a message declaring their objections. This message is called a ______.
6. The Presentment Clause is one of the most ______ provisions in the Constitution.
7. ______ is not counted in the 10-day period of the Presentment Clause.
8. The Framers were determined to deny the national legislature and states the power to issue bills of attainder after witnessing abuses by ______.
9. After the Convention, most Federalists believed the prohibition on ex post facto laws applied only to ______ statutes.

**Short Answer: Write out your answer to each question.**

1. How long does the President have to sign a bill after he receives it?

2. What is a “pocket veto”?

3. How do joint resolutions differ from bills? How are they similar?

4. What is a “concurrent resolution”?
Worksheet 3-9.1 & 9.2
Check Understanding

Complete the following assessment to check understanding of Lesson 9, Part 1 and Part 2.

Multiple Choice: Circle the correct response.

1. The President is the head of the
   a. Legislative branch.
   b. Executive branch.
   c. Judicial branch.
   d. None of the above.

2. The official behind the Vice President in the line of succession is the
   a. Majority leader.
   b. Speaker of the House.
   c. President.
   d. President Pro Tempore.

3. The Compensation Clause deals with the question of presidential
   a. Qualifications.
   b. Compensation.
   c. Terms in office.
   d. Voting.

4. Presidents must be at least ________ years old to take office.
   a. 25
   b. 30
   c. 35
   d. 40

5. Under normal circumstances, a President will stay in office for a term of ________ years.
   a. Two
   b. Four
   c. Five
   d. Six

6. By the 1950s, Vice Presidents had taken on more ________ duties.
   a. Executive
   b. Economic
   c. Judicial
   d. Congressional

Fill in the blank: Write the correct word or words in each blank.

1. The ________ Vesting Clause gives the President most of his powers.

2. Congress, not the President, has the executive authority to declare ________.

3. Members of the Constitutional Convention proposed term limits ranging from three years to ________ years.

4. One of the Vice President’s most important roles is to serve as President of the ________.

5. Anti-Federalists disagreed with the concept of having only one ________.
Short Answer: Write out your answer to the following question.

1. What are the age, citizenship, and residency requirements for the President?

True / False: Indicate whether each statement is true or false.

1. (True/False) The Constitution requires the President to form a Cabinet.
2. (True/False) The Constitution establishes a unitary executive.
3. (True/False) The President’s compensation ensures he will be independent from legislative control.
Worksheet 3-9.3
Check Understanding

Complete the following assessment to check understanding of Lesson 9, Part 3.

Multiple Choice: Circle the correct response.

1. The number of electors from each state is determined by
   a. Congress.
   b. The state’s legislature.
   c. The number of the state’s Representatives plus the number of the state’s Senators.
   d. The number of the state’s Representatives minus the number of the state’s Senators.

2. Electors are to meet in their home states to reduce the risk of
   a. corruption.
   b. miscounted votes.
   c. no majority vote.
   d. partisanship.

3. Who is forbidden from being an elector?
   a. Senators
   b. Representatives
   c. Officeholders in the federal government
   d. all of the above

4. The Framers allowed for some leeway in voting schedules primarily due to the threat of
   a. foreign intrigue
   b. warfare
   c. impeachment
   d. bad weather

6. In the case of tied votes, the ______ has the power to choose a President from the top candidates.
   a. Senate
   b. House of Representatives
   c. Speaker
   d. Supreme Court

Fill in the blank & True or False.

1. ______ has the power to choose a President if no candidate receives a majority of electoral votes

2. ______ has the power to choose a Vice President if no candidate receives a majority of electoral votes.

3. (True/False) After the Twelfth Amendment, electors cast one ballot for President and one ballot for Vice President.
Worksheet 3-9.4
Check Understanding

Complete the following assessment to check understanding of Lesson 9, Part 4.

Multiple Choice: Circle the correct response.
1. The first President to serve two terms in office was
   a. George Washington
   b. Harry Truman
   c. John Adams
   d. Andrew Johnson

Fill in the blank: Write the correct word or words in each blank.
1. ________ is the only constitutional way to remove a President.
2. There is no doubt that the Framers saw __________ as a part of the system of checks and balances to maintain the separation of powers and the republican form of government.
3. Early on, the acquittal of Justice Samuel Chase set the standard that Supreme Court Justices should not be impeached on the ground of their_____ preferences.
4. The responsibility to carry out impeachment proceedings with loyalty to the text of the Constitution remains that of the _____________.
5. A time when an official is still in office even after a new official has been elected is referred to as a ________ period.

Short Answer: Write out your answer to each question.
1. What does the Presidential Succession Clause do?

2. What does the Constitution give as grounds for impeachment?

3. According to Amendment XX, when do the President and Vice President’s terms of office end?

4. According to Amendment XXII, a person can be elected President for how many terms?

True / False: Indicate whether each statement is true or false.
1. (True/False) The President of the United States may pardon an individual who has been impeached.

2. (True/False) The Framers placed specific grounds for impeachment in the Constitution because they wanted to prevent impeachment from becoming a politicized offense, as it had been in England.
Worksheet 3-10.1
Check Understanding

Complete the following assessment to check understanding of Lesson 10, Part 1.

**Multiple Choice: Circle the correct response.**

1. If the President pardons an individual, the individual is  
   a. On parole  
   b. Forgiven and set free  
   c. Given a reduced sentence  
   d. Given a new trial

**Fill in the blank: Write the correct word or words in each blank.**

1. The President may issue a pardon for an offense against the country unless it involves ________.
2. According to the Constitution, Presidents are required to “take ________ that the Laws be faithfully executed.”
3. The executive power is vested in the _____ alone.
4. In the Presidential Oath Clause, the President pledges to “______, ______, and ______ the Constitution of the United States.”

**Short Answer: Write out your answer to each question.**

1. When can a pardon be issued?

2. Why can’t a pardon be issued before an offense has been committed?

3. What are the purposes of the pardon power?

**True / False: Indicate whether each statement is true or false.**

1. (True/False) The Framers wanted to maximize presidential responsibility for executive decisions.
2. (True/False) The Oath of Office Clause is one of several that employ the oath concept, but it’s the only clause that actually specifies language of an oath for a constitutional player.
3. (True/False) The pardon tool has not been a very powerful constitutional tool of the President.
4. (True/False) By leaving the advice structure entirely to the President’s discretion, the Framers actually increased the likelihood that the President will obtain useful advice from his principal officers.
5. (True/False) The Oath of Office Clause empowers the President.
Worksheet 3-10.2
Check Understanding

Complete the following assessment to check understanding of Lesson 10, Part 2.

Multiple Choice: Circle the correct response.

1. Who is commander in chief of the armed forces?
   a. Secretary of State
   b. Secretary of War
   c. President
   d. Vice President

2. The Treaty Clause divides an executive power between the President and the
   a. Senate.
   b. Secretary of State.
   c. Speaker of the House.
   d. Vice President.

3. The President commands the “sword” and Congress controls the
   a. “Officers.”
   b. “Shield.”
   c. “Purse.”
   d. “Treaties.”

4. Treaty-making is a mixture of
   a. Executive and legislative power
   b. Executive and judicial power
   c. Judicial and legislative power
   d. Administrative and judicial power

Fill in the blank: Write the correct word or words in each blank.

1. Congress and the President work together on treaties because treaties combine laws and ________.
2. Article II, Section 2, Clause 1 expressly designates the President as “____________of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”
3. Out of only five declarations of war in the history of our nation, the first did not take place until the ______.
4. The Framers were in agreement that when the states’ militias were needed to defend the country, the ________, not the governors, would be in charge.

Short Answer: Write out your answer to each question.

1. As commander in chief, does the President have the power to declare war?

2. Under the Articles of Confederation, who had the powers “of sending and receiving ambassadors”?

3. What is significant about the placement of the Commissions Clause?

4. In what ways did states limit executive power through their state constitutions?
True / False: Indicate whether each statement is true or false.

1. (True/False) Few constitutional issues have been so consistently and heatedly debated by legal scholars and politicians in recent years as the distribution of war powers between Congress and the President.

2. (True/False) Because Congress controls the federal “purse,” it is impossible for the President to engage in lengthy hostilities without the support of Congress.
Worksheet 3-10.3
Check Understanding

Complete the following assessment to check understanding of Lesson 10, Part 3.

Multiple Choice: Circle the correct response.

1. Most officers are considered:
   a. Principal officers.
   b. Inferior officers.

2. A recess appointment lasts until:
   a. The end of the year.
   b. The end of the “next Session” of the Senate.
   c. The appointee dies.
   d. 12 months has passed.

Fill in the blank: Write the correct word or words in each blank.

1. Debates among the Framers and subsequent practice confirm that the President has _____ power to nominate.
2. The appointment power is one of the powers of the ________.
3. A recess appointment lasts until the _____ of the “next Session” of the Senate.

Short Answer: Write out your answer to each question.

1. What was the Founders’ purpose in having presidential power of nomination and then congressional approval of the nominees?

2. The Appointments Clause divides constitutional officers into which two classes?

3. What are the three repositories of appointment power?

4. Why did the Framers adopt the Recess Appointments Clause?

True / False: Indicate whether each statement is true or false.

1. (True/False) There are very few specific reasons why a Senate may constitutionally refuse to confirm a nominee.
2. (True/False) Congress itself may not exercise the appointment power.
3. (True/False) Most government employees are subject to the Appointments Clause.
4. (True/False) The phrases “inferior officers” and “Heads of Departments” were not precisely defined in the Constitution.
Worksheet 3-10.4
Check Understanding

Complete the following assessment to check understanding of Lesson 10, Part 4.

Fill in the blank: Write the correct word or words in each blank.

1. Historically, annual messages focused primarily on __________ and introduced the reports and recommendations of department heads.
2. Active presidential involvement in pressing for legislation began with ______________.

Short Answer: Write out your answer to each question.

1. How does the State of the Union address in the 20th century differ from those given historically?
2. Although there was an expectation that the State of the Union message would be delivered in person, who thought that practice too royal and had his clerks read the message to Congress instead?

True / False: Indicate whether each statement is true or false.

1. (True/False) The President is not required to present information about the State of the Union to Congress.
2. (True/False) George Washington gave the first “Annual Message” in the Senate chamber in January 1790.
3. (True/False) Since the power to make laws is vested solely in the legislative branch, the President is not allowed to make recommendations that would affect the legislative process.
4. The President has the power to convene Congress in emergency situations.
5. The President has no power to adjourn Congress.
Worksheet 4-11.1
Check Understanding

Complete the following assessment to check understanding of Lesson 11, Part 1.

**Multiple Choice: Circle the correct response.**

1. The Judicial Vesting Clause is found in Article ______ of the Constitution.
   a. II
   b. III
   c. IV
   d. VI

2. In which case did Chief Justice John Marshall defend judicial review?
   a. *Dred Scott v. Sandford*
   b. *Lochner v. New York*
   c. *Marbury v. Madison*
   d. *Powell v. McCormack*

3. Which case invalidated the Missouri Compromise and attempted to transform judicial review into a vehicle by which judges could substitute their opinions for those of the political branches?
   a. *Dred Scott v. Sandford*
   b. *Lochner v. New York*
   c. *Marbury v. Madison*
   d. *Powell v. McCormack*

**Fill in the blank: Write the correct word or words in each blank.**

1. The federal judiciary consists of a Supreme Court and other, lower courts to be established by ________ .
2. Federal courts have three main powers: judicial review, _______, and equitable authority.
3. Alexander Hamilton defended judicial review because courts are bound to resolve conflicts in accordance with _____ , and the Constitution is the ________ .

**Short Answer: Write out your answer to each question.**

1. What is the judicial power?

2. What two novel Federalist ideas did the separation of powers incorporate?

3. The powers of federal courts can be divided most usefully into which three components?
Worksheet 4-11.2
Check Understanding

Complete the following assessment to check understanding of Lesson 11, Part 2.

Multiple Choice: Circle the correct response.

1. The largest category of judges contains career employees of the
   a. House of Representatives.
   b. executive branch.
   c. Supreme Court.
   d. legislative majority.

2. What is the current number of Supreme Court Justices?
   a. 5
   b. 6
   c. 9
   d. 12

3. Courts-martial are a part of the judicial branch that deals with trials
   a. against the government.
   b. in the military.
   c. related to taxes.
   d. in overseas territories.

4. In the Judiciary Act of 1801, the Federalist Congress reduced the number of justices sitting on the Supreme Court to five, hoping to prevent which incoming President from appointing a justice when the sixth sitting justice retired?
   a. Abraham Lincoln
   b. Franklin D. Roosevelt
   c. Theodore Roosevelt
   d. Thomas Jefferson

Fill in the blank: Write the correct word or words in each blank.

1. The first non–Article III court was the ________.
2. In the Judiciary Act of 1789, Congress set the number of Supreme Court Justices at ________.
3. Who was the first Chief Justice? __________
4. The delegates to the Constitutional Convention concluded that the judiciary was to be a ________ rather than a political body.
5. The Court of Federal Claims, the Tax Court, and the Court of Veterans Appeals are examples of non–________ courts.

True / False: Indicate whether each statement is true or false.

1. (True/False) Over the past century, the scope of inherent judicial powers has decreased due to the decrease in the amount and complexity of litigation.
2. (True/False) The Judiciary Act of 1789 confined the Supreme Court to questions of law rather than fact.
3. (True/False) As the nation expanded, so did the number of circuits and the number of Supreme Court justices to sit on them.
4. (True/False) The Constitution does not require a hierarchical judicial system.
Matching

1. Match the term on the left with the “power” on the right.
   - Legislative: administering the laws
   - Executive: applying laws to particular cases
   - Judicial: making laws
Worksheet 4-11.3
Check Understanding

Complete the following assessment to check understanding of Lesson 11, Part 3.

**Multiple Choice: Circle the correct response.**

1. Justices of the Supreme Court are appointed by
   a. the President.
   b. the Senate.
   c. the Attorney General.
   d. judges on the appellate courts.

2. Justices are appointed for a term of
   a. two years.
   b. four years.
   c. six years.
   d. life (on good behavior).

3. The ________ protects judges’ salaries and the independence of the judiciary.
   a. Judicial Power Clause
   b. Appointments Clause
   c. Compensation Clause
   d. Good Behavior Clause

4. COLAs most directly affect the ________ of the judiciary.
   a. caseloads
   b. salaries
   c. term limits
   d. appointments

**Fill in the blank: Write the correct word or words in each blank.**

1. The Good Behavior Clause is a constitutional contract that can be rescinded only through an act of ________.
2. The Judicial Compensation Clause states clearly and unambiguously that the compensation of federal judges cannot be ________ during their service.
3. Punishments from impeachment may include “removal from Office, and ____________ to hold and enjoy any Office of honor, Trust or Profit under the United States.”
4. The acquittal of Justice Samuel Chase set the standard that Supreme Court justices should not be impeached on the ground of their ________ preferences.
5. The responsibility to carry out impeachment proceedings with loyalty to the text of the Constitution remains in the hands of the ____________ and the ______.

**Short Answer: Write out your answer to each question.**

1. How are Supreme Court justices appointed?

2. What are the standards for impeachment of federal judges?

3. Why did the Framers choose to give federal judges tenure and salary guarantees?
True / False: Indicate whether each statement is true or false.

1. (True/False) Colonial judges were given protection under a good-behavior program in effect since the early 1700s.
2. (True/False) There are very few specific reasons why the Senate may constitutionally refuse to confirm a nominee.
Worksheet 4-12.1
Check Understanding

Complete the following assessment to check understanding of Lesson 12, Part 1.

Matching

Match the clause on the left with the appropriate example situation.

1. Judicial Power Clause: “All Cases, in Law and Equity, arising under this Constitution [or] the Laws of the United States”
   - Two private boats collide on the high seas, and three sailors are injured.

2. Treaties Clause: Treaties made under the authority of the Constitution or federal Law
   - A citizen of Arizona sues a citizen of New York.

3. Ambassadors Clause: “Cases affecting Ambassadors, other public ministers and Consuls”
   - The United States is sued for decreasing the value of a residential property near a recently constructed interstate highway.

4. Admiralty Clause: “To ... all Cases of admiralty and maritime jurisdiction”
   - A citizen of Oregon sues the state of Missouri.

5. Federal Party Clause: “Controversies to which the United States shall be a Party”
   - A man sues his city, claiming that the municipal ban on handguns violates his Second Amendment rights.

6. Interstate Disputes Clause: “Controversies between two or more states”
   - A suit arises between two citizens of Wyoming, both claiming lands on the border between Wyoming and Colorado. It is unclear in which state the lands fall.

7. Citizen–State Diversity Clause: “Controversies ... between a State and Citizens of another State ... and between a State ... and foreign States, Citizens or Subjects”
   - An American citizen sues following the Treaty of Paris because he will be unable to collect money owed to him by British subjects.

8. Diversity Clause: “Controversies...between Citizens of different states”
   - Virginia sues West Virginia regarding water rights.

9. Land Grant Jurisdiction Clause: “Controversies ... between Citizens of the same State claiming Lands under Grants of Different States”
   - An ambassador from another country is arrested in New York.

Multiple Choice: Circle the correct response.

1. The Eleventh Amendment says that citizens of one state
   a. can sue in federal court.
   b. can sue the United States.
   c. cannot sue another state in federal court.
   d. cannot sue other citizens.
2. Cases involving ambassadors are tried in
   a. U.S. District Court.
   b. the Senate.
   c. the Supreme Court.
   d. the House of Representatives.

3. When first created, federal statutes are ______ properly executed treaties.
   a. equal to
   b. preempted by
   c. less important than
   d. more important than

4. Maritime and admiralty issues deal with
   a. treason.
   b. ambassadors.
   c. the military.
   d. the sea.

**Fill in the blank: Write the correct word or words in each blank.**

1. The Eleventh Amendment overruled the Supreme Court’s decision in ______________.
2. From the beginning, the Framers intended the scope of the jurisdiction of federal judicial power to be ____.
3. A necessary element of Congress’s power to authorize jurisdiction over cases is that there must be a ______ question present somewhere in the case.
4. Without a waiver, sovereign immunity shields the federal government and its agencies from ____.
5. The Eleventh Amendment was ratified in ____.
6. The Diversity Clause protects litigants from facing bias in other ____.

**Short Answer: Write out your answer to each question.**

1. In 1845, breaking from English precedent, Congress extended admiralty jurisdiction to include what?

2. Today, what do legal questions surrounding the Federal Party Clause involve?

3. The movement to adopt a Constitution grew out of what?

4. Why did the Framers include the Land Grand Jurisdiction Clause, the Interstate Dispute Clause, and the Diversity Clause?

**True / False: Indicate whether each statement is true or false.**

1. (True/False) Throughout the Constitutional Convention, the Framers consistently expressed the desire that a national judiciary should have jurisdiction over legal issues arising from the nation’s international rights and obligations.

2. (True/False) The Supreme Court has never crafted prudential rules in its interpretation of treaties.

3. (True/False) During constitutional debates, even the Anti-Federalists agreed that admiralty questions should be lodged in the federal judiciary.

4. (True/False) The Constitution neither compels nor limits the Supreme Court in deciding what kinds of disputes between states it will hear.
Worksheet 4-12.2
Check Understanding

Complete the following assessment to check understanding of Lesson 12, Part 2.

**Multiple Choice: Circle the correct response.**

1. Between 1790 and 1900, the only suits between states that the Supreme Court heard on its original docket concerned
   a. civil rights issues.
   b. property issues.
   c. maritime disputes.
   d. boundary disputes.

2. The right of the Supreme Court to hear cases being appealed from a lower court is called
   a. original jurisdiction.
   b. appellate jurisdiction.
   c. judicial review.
   d. judicial power.

**Fill in the blank: Write the correct word or words in each blank.**

1. The Court explicitly declared in *Marbury v. Madison* (1803) that Congress ______ add to the Supreme Court’s original jurisdiction.

2. The Supreme Court appoints a ___________ to hold hearings, find facts, and collect testimony for cases the Court hears under its original jurisdiction.

3. Congress may not pass legislation to _____ a case already decided and finalized.

**Short Answer: Write out your answer to each question.**

1. Why were the Anti-Federalists opposed to the Appellate Jurisdiction Clause?

2. What appeased the Anti-Federalists who were concerned about the possibility of a second trial of those who were criminally charged?

3. From the beginning, the most important kinds of suits between states involved disputes over what?

**True / False: Indicate whether each statement is true or false.**

1. (True/False) The Double Jeopardy Clause of the Fifth Amendment was a result of Anti-Federalist concerns about the Appellate Jurisdiction Clause.

2. (True/False) There have been fewer than 200 state-versus-state original cases in the history of the Republic.

3. Congress determines what cases the Supreme Court may hear under its Appellate Jurisdiction.
Worksheet 4-13
Check Understanding

Complete the following assessment to check understanding of Lesson 13.

Multiple Choice: Circle the correct response.

1. Who was pardoned by the general amnesty of December 25, 1868?
   a. Suffragettes
   b. Confederates
   c. slaves
   d. Abraham Lincoln

2. The only crime defined in the Constitution is
   a. tax evasion.
   b. murder.
   c. corruption of blood.
   d. treason.

3. In the two successful prosecutions for treason at the state level, which defendant was executed?
   a. Thomas Dorr in Rhode Island in 1844
   b. John Brown in Virginia in 1859

Fill in the blank: Write the correct word or words in each blank.

1. The Writ of Habeus Corpus is one of the many imports from _______.
2. Participants in the Whiskey Rebellion were pardoned by President _________________.

Short Answer: Write out your answer to each question.

1. List a few of the ambiguities of the Habeas Corpus Clause.

2. In what three instances since the Civil War has Congress suspended the writ of habeas corpus?

3. What types of crimes are covered in the Interstate Rendition Clause?

4. What is exempted from the scope of the Interstate Rendition Clause?

5. How many citizens serve on a jury of one's peers?

6. What was “petit treason”?

7. What was “high treason”?

True / False: Indicate whether each statement is true or false.

1. (True/False) Federal courts may not compel state executives to extradite fugitives who have been properly demanded.
2. (True/False) Under the Constitution, the punishment for treason may not include the corruption of blood.
3. (True/False) The need for a trial by jury in criminal cases was one of the few subjects of agreement between Federalists and Anti-Federalists.
4. (True/False) In the nation’s early history, the jury not only applied the law to the facts it found, but also decided questions of law.
5. (True/False) If the prosecutor insists upon a jury trial, the court must grant it.
6. (True/False) Under common law, punishments for treason generally included drawing, hanging, beheading, and quartering.
Worksheet 5-14.1
Check Understanding

Complete the following assessment to check understanding of Lesson 14, Part 1.

**Fill in the Blank: Fill in each blank with the correct word or words.**

1. _____ opposed admitting new states to the Union on an equal footing with the original states.
2. The _____ outlined several natural rights of colonists, including the rights to life and liberty.
3. “Liberties” and “franchises” constituted the power of a governing unit to make _____.
4. “Immunities” were exceptions that the king granted from the force of the _____.
5. The _____ proposed the Privileges and Immunities Clause.

**Short Answer: Write out your answer to each question.**

1. Article IV of the Articles of Confederation sought to create what?
2. What is the essential purpose of the Full Faith and Credit Clause?
3. What were some practical effects of the guarantees of privileges and immunities to colonists in the New World?

**True / False: Indicate whether each statement is true or false.**

1. (True/False) The first sentence of the Full Faith and Credit Clause appeared almost verbatim in the Articles of Confederation.
2. (True/False) The Crown granted to the original colonists in the New World the legal rights of serfs and indentured servants.
3. (True/False) New states cannot be formed out of existing states.
4. All the Framers agreed that New States would be considered equal to the states already in the Union.
Worksheet 5-14.2
Check Understanding

Complete the following assessment to check understanding of Lesson 14, Part 2.

Multiple Choice: Circle the correct response.

1. The Obligation of Contracts Clause extended to the states a prohibition that was already in effect in the
   a. Northwest Territory
   b. Parliament
   c. state constitution of Virginia
   d. Articles of Confederation

2. Which court case first concluded that the imports and exports referred to in the Import–Export Clause referred only to foreign imports and exports?
   a. Woodruff v. Parham (1869)
   b. Brown v. Maryland (1827)
   c. Low v. Austin (1879)
   d. Michelin Tire Corp. v. Wages (1976)

3. The Compact Clause prohibits the states from engaging in which of the following?
   a. standing armies
   b. warfare
   c. state protectionism
   d. all of the above

Fill in the blank: Write the correct word or words in each blank.

1. The Import-Export Clause restricts the _____ power to tax commerce, thereby strengthening ________ Commerce power.

2. In the antebellum period, the Obligation of Contracts Clause was the only open-ended federal constitutional guarantee that applied to the ________.

3. The Framers were more concerned about _____ ex post facto laws than ________ ex post facto laws in the federal government.

Short Answer: Write out your answer to each question.

1. Why did the Framers deny states the ability to form treaties?

2. Why did the elimination of the states’ power to coin money cause controversy?

True / False: Indicate whether each statement is true or false.

1. (True/False) Adding a prohibition against ex post facto laws was an afterthought at the Constitutional Convention.

2. (True/False) The Compact Clause and the Import-Export Clause are qualified prohibitions on state activity.

3. (True/False) There are many ways to enter into international obligations.
**Worksheet 5-14.3a**  
**Check Understanding**

Read the Privileges or Immunities section in the text and complete the graphic organizer below. They may work independently or with a partner.

Theories Regarding the Original Meaning of the Privileges or Immunities Clause

<table>
<thead>
<tr>
<th>Theory #1</th>
<th>Supporting Points</th>
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Worksheet 5-14.3b
Check Understanding

Complete the following assessment to check understanding of Lesson 14, Part 3.

**Fill in the blank: Fill in each blank with the correct word or words.**

1. The abolition of slavery increased the _______ of former slave states in the House of Representatives.
2. One of the main motivations for the creation of the Civil Rights Act of 1866 was to ban the _____ introduced in Southern states.
3. After the Slaughter-House Cases of 1873 gutted __________, its protections were subsumed under the Equal Protection clause and the Due Process Clause.
4. With respect to the Due Process Clause of the Fourteenth Amendment, the Supreme Court has decided that some parts of the Bill of Rights are incorporated against the states under what is known as the _____.
5. Congress drafted the Fourteenth Amendment and sent it to the states for approval in _____; it was added to the Constitution in _____.
6. Because a citizen of the nation is a citizen of a state, the privileges and immunities of national citizenship necessarily include the privileges or immunities of __________.
7. Modern law interprets the Fifth and Fourteenth Amendments to impose the same substantive due process and procedural due process requirements on the _____ and _____ governments.

**Short Answer: Write out your answer to each question.**

1. Which President vetoed the Civil Rights Act of 1866?
2. What did the Civil Rights Act of 1875 mandate?
3. What was a central focus of the Thirty-ninth Congress?
4. The Supreme Court’s decision in the Slaughter-House Cases (1873) did what to the Privileges or Immunities Clause?
5. When it first appeared, what was the meaning of the phrase “due process of law”?

**True / False: Indicate whether each statement is true or false.**

1. (True/False) Most commentators agree that the intended scope of the Equal Protection Clause was applied to all actions by the government as a command to treat persons equally.
2. (True/False) The language of the Equal Protection Clause protects only Blacks.
3. (True/False) Although Amendment XIV, Section 2 allowed for disenfranchisement of persons who had engaged in the rebellion, none of them were denied the right to vote on those grounds.
4. (True/False) The only objection to the Debts Incurred During Rebellion Clause of the Fourteenth Amendment was by some slave owners who thought they should be compensated for the loss of slaves.
5. (True/False) There is no indication that state legislatures that ratified the Fourteenth Amendment would have understood Section 5 as a broad delegation of power to Congress to regulate private behavior.
Worksheet 6-15
Check Understanding

Complete the following assessment to check understanding of Lesson 15.

Multiple Choice: Circle the correct response.

1. The phrase *inclusio unius est exclusio alterius* roughly means that including one thing indicates that all others are
   a. prohibited.
   b. implied.
   c. included.
   d. excluded.

2. When arguing that a bill of rights was needed, Anti-Federalists pointed to prohibitions already in the Constitution, including the
   a. Privileges and Immunities Clause.
   b. writ of habeas corpus.
   c. Interstate Rendition Clause.
   d. right to obtain legal counsel.

3. The Supreme Court has held that state control of liquor is subject to federal power under which Clause?
   a. Alcoholic Beverages Clause
   b. Usurpation Clause
   c. Commerce Clause
   d. none of the above

4. The Bill of Rights consists of
   a. the first five amendments
   b. all of the amendments
   c. the first 10 amendments
   d. none of the amendments

5. Americans have unnamed rights guaranteed by the
   a. Second Amendment
   b. Sixth Amendment
   c. Seventh Amendment
   d. Ninth Amendment

6. The only amendment to be repealed is the
   a. Fifteenth Amendment
   b. Eighteenth Amendment
   c. Nineteenth Amendment
   d. Twentieth Amendment

7. The Federalists eventually agreed to pass the Bill of Rights
   a. at the Virginia Ratifying Convention.
   b. in the House of Representatives.
   c. in the First Congress.
   d. in the Supreme Court.
8. The event that convinced the Federalists that they needed to grant some authority to a national government that functioned independently of the states was the
a. drafting of the Articles of Confederation.
b. failure of the Articles of Confederation.
c. ratification of the Articles of Confederation.
d. repeal of the Articles of Confederation.

9. With respect to the Tenth Amendment, James Madison asserted in *The Federalist* No. 45 that the powers of the states were more _____ than those of the federal government.
   a. numerous
   b. narrow
   c. subjective
   d. definitive

**Fill in the blank: Write the correct word or words in each blank.**

1. James Madison drafted the ____________ to affirm that the states retained all powers not delegated to the federal government.

2. The Constitution created a novel system of mixed __________.

3. The Eighteenth Amendment was considered one of the _________ amendments passed and ratified in quick succession.

4. Prohibition was repealed in 1933 by the ______________________.

5. When the nation repealed Prohibition in 1933, it vested primary control over alcoholic beverages in the _____.

6. According to one interpretation, the Ninth Amendment was drafted to address concerns that the Supreme Court would interpret the __________________________ to increase the powers of Congress.

**Short Answer: Write out your answer to each question.**

1. From the time of its ratification until the New Deal, the Ninth Amendment was understood as a principle limiting what?

2. The Tenth Amendment expresses which principle that undergirds the entire plan of the original Constitution?

3. During the ratifying conventions, many Anti-Federalists demanded what?

4. When combined with the import taxes, the income tax in the early 1900s freed the government from dependence on a tax on what?

5. In which two ways can an amendment to the Constitution be proposed?

6. In which two ways can a proposed amendment be ratified?

**True / False: Indicate whether each statement is true or false.**

1. (True/False) State legislatures, rather than Congress, usually initiate the amendment process.

2. (True/False) Despite the Twenty-first Amendment, the federal government has gradually eroded states’ rights of control over alcoholic beverages.

3. (True/False) The Eighteenth Amendment was considered one of the Progressive amendments, along with the Sixteenth, Seventeenth, and Nineteenth Amendments.

4. (True/False) The Tenth Amendment states that the federal government possesses only those powers specifically granted to it.
Worksheet 6-16.1
Check Understanding

Complete the following assessment to check understanding of Lesson 16, Part 1.

**Multiple Choice: Circle the correct response.**

1. Freedom of religion is guaranteed by the
   a. First Amendment.
   b. Second Amendment.
   c. Third Amendment.
   d. Ninth Amendment.

2. The First Amendment does not guarantee
   a. Freedom of speech.
   b. Freedom of petition.
   c. Freedom from unreasonable searches.
   d. Freedom of assembly.

3. The Freedom of Speech Clause can be applied only to restrict the actions of
   a. private employers.
   b. churches.
   c. property owners.
   d. government officials.

4. _____ argued that the freedom of the press guarantee did not stop authorities from laying charges after publications had been released.
   a. James Madison
   b. John Marshall
   c. Thomas Jefferson
   d. John Adams

5. The first colony to officially grant its citizens the right to petition was
   a. Delaware.
   b. Pennsylvania.
   c. Vermont.
   d. Massachusetts.

**Fill in the blank: Write the correct word or words in each blank.**

1. According to the exceptions to freedom of speech protection, commercial advertising that is _________ is not protected.
2. The law passed by Congress in the late 1700s that made it a crime to defame Congress, the President, or the government was the _____.

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Short Answer: Write out your answer to each question.

1. In *Everson v. Board of Education of Ewing* (1947), the Supreme Court focused on which phrase from Thomas Jefferson’s letter to the Danbury Baptists?

2. Since *Everson v. Board of Education of Ewing* (1947), the Supreme Court has developed what three different and conflicting views regarding the Establishment of Religion Clause?

3. What is the small set of rather narrow exceptions to the modern legal doctrine of free speech protection?

4. In 1840, the House had a “gag rule” against petitions about what subject?

5. The right to petition, along with the right to assemble peaceably, became less important as what happened?

True / False: Indicate whether each statement is true or false.

1. (True/False) Under modern Supreme Court jurisprudence, the right to petition and the right of peaceable assembly have been almost completely collapsed into freedom of speech.

2. (True/False) Even before the incorporation of the religion clauses and without intervention by the federal courts, religious freedom and tolerance had spread throughout the United States.
Worksheet 6-16.2
Check Understanding

Complete the following assessment to check understanding of Lesson 16, Part 2.

Multiple Choice: Circle the correct response.

1. Anti-Federalists wanted the militia to be controlled by
   a. the federal government.
   b. the Founders.
   c. the President.
   d. state governments.

2. Militias are different from armies mainly because people belonging to militias are not
   a. professional soldiers.
   b. loyal to one nation.
   c. citizens of a nation.
   d. supervised by officers.

3. After the Second Amendment was adopted, the traditional militia
   a. grew more powerful as the federal military weakened.
   b. came into disuse as the federal military grew.
   c. was disarmed by federal authorities.
   d. was forced to join the federal military.

Fill in the blank: Write the correct word or words in each blank.

1. The Founding generation mistrusted standing _____.
2. ____________ argued that having the militia under federal control would prevent states from being able to defend themselves against federal oppression.
3. ____________ argued that the American people could respond to military force if necessary because, unlike Europeans, they were armed.
Worksheet 6-17.1
Check Understanding

Complete the following assessment to check understanding of Lesson 17, Part 1.

Multiple Choice: Circle the correct response.

1. The British quartered soldiers in America
   a. during conflicts with the French and Indians.
   b. because legislative authority was unclear.
   c. because there were no army bases.
   d. All of the above.

2. How many of the original 13 states banned the private quartering of soldiers?
   a. 0
   b. 6
   c. 9
   d. 13

Fill in the blank: Write the correct word or words in each blank.

1. The Third Amendment reflects an effort to balance ________ with the potential need for wartime ________.

True / False: Indicate whether each statement is true or false.

1. (True/False) The Third Amendment is one of the most frequently debated and frequently challenged in the Supreme Court.
2. (True/False) The most significant episodes of conflict over quartering concerned the British quartering of soldiers in private homes to punish the people of Boston.
Worksheet 6-17.2
Check Understanding

Complete the following assessment to check understanding of Lesson 17, Part 2.

Multiple Choice: Circle the correct response.

1. The government critic _____ had both his papers and those of his friends seized during a search.
   a. Carrington
   b. Wood
   c. Entick
   d. Wilkes

2. The individuals James Otis defended in the court case involving “writs of assistance” were accused of
   a. smuggling.
   b. trespassing.
   c. stealing.
   d. treason.

3. The warrant used in the Writs of Assistance Case did not meet the requirement in the Warrant Clause regarding
   a. the things to be seized.
   b. probable cause.
   c. oath or affirmation.
   d. the place to be searched.

Fill in the blank: Write the correct word or words in each blank.

1. Although the warrant seems the police officer’s foe today, at the time of the Founding, it was the constable’s _____, a legal defense against any subsequent tortuous claim.
2. The phrasing of the Warrant Clause limits warrants but does not _____ their use.
3. The _____ rule is the primary means of enforcing the Searches and Seizures Clause.
4. When a warrant is granted, any resulting search is considered _____ under the law.
5. Seizing belongings in an individual’s possession when an arrest is made and creating a record of them once they are brought back to the police station is known as an _____ search.
6. Generally, police need a warrant to search a home or office or to conduct a _____ to record sounds.

Short Answer: Write out your answer to each question.

1. What is the set of basic requirements for search warrants?
2. What were the three notable 18th century cases that influenced the Framers’ drafting of the Fourth Amendment?
3. What are the two interpretations of the original meaning of the Searches and Seizures Clause?

True / False: Indicate whether the statement is true or false.

1. (True/False) The Warrant Clause specifies when warrants are required.
Worksheet 6-17.3
Check Understanding

Complete the following assessment to check understanding of Lesson 17, Part 3.

Multiple Choice: Circle the correct response.

1. Most modern court cases related to the Takings Clause involve regulations that reduce a property’s _____.
   a. economic use
   b. functional use
   c. value
   d. dimensions

2. Typically, a federal grand jury contains _____ members.
   a. 20
   b. 21
   c. 22
   d. 23

3. Amendment V guarantees all of the following except
   a. that no one can be forced to give a confession of guilt.
   b. that no one will be put in double jeopardy.
   c. that no one’s property will be taken for public use without fair payment.
   d. that excessive bail will not be required.

4. Double jeopardy is
   a. being tried twice for the same crime.
   b. being asked to pay two kinds of taxes.
   c. being jailed twice for the same crime.
   d. being tried for two crimes at the same time.

Fill in the blank: Write the correct word or words in each blank.

1. According to _____, the phrases “due process of law” and “law of the land” have practically the same meaning.
2. After the Fifth Amendment was ratified, the power to decide how military offenses should be handled was given to _____.
3. According to the Double Jeopardy Clause, an individual cannot be prosecuted again for the same crime after a guilty verdict or an _____.
4. Testimony provided by a witness cannot be used to prosecute that witness if the individual is granted transactional _____.

Short Answer: Write out your answer to each question.

1. Grand juries have historically served what two functions?
2. Current double jeopardy jurisprudence falls under what five basic headings?
3. What are the two potential sources of the federal government’s eminent domain power?
4. Why did the Founders add the Grand Jury Requirement Clause to the Fifth Amendment?
5. A typical federal grand jury consists of how many citizens from the community?
6. What are the three protections of individual rights embodied in the Double Jeopardy Clause?
True / False: Indicate whether each statement is true or false.

1. (True/False) The Supreme Court has ruled that states must use grand juries.
2. (True/False) All state constitutions drafted prior to the Bill of Rights contained a double-jeopardy provision.
3. (True/False) Five states proposed language for the Takings Clause.
4. (True/False) Grand juries began as an effort to decrease the king’s power.
5. (True/False) In early America, it was common for individuals to represent themselves in Court.
Worksheet 6-18.1
Check Understanding

Complete the following assessment to check understanding of Lesson 18, Part 1.

**Multiple Choice: Circle the correct response.**

1. Which right is not protected under the Sixth Amendment?
   a. the right to a speedy trial
   b. the right to a jury trial
   c. the right to a grand jury
   d. the right to a public trial

2. The Arraignment Clause enables a defendant to know
   a. legal sufficiency analysis.
   b. trial by jury.
   c. the charges against him.
   d. the prosecution’s witnesses.

3. According to Sixth Amendment jurisprudence, an individual has the right to legal counsel
   a. once an indictment is issued.
   b. once an investigation begins.
   c. once a trial date is set.
   d. once a jury is selected.

4. The right to obtain counsel is assured by the
   a. Second Amendment.
   b. Sixth Amendment.
   c. Seventh Amendment.
   d. Ninth Amendment.

**Fill in the blank: Write the correct word or words in each blank.**

1. Closing a criminal trial may violate a defendant’s Sixth Amendment rights as well as the freedom of the press, which is protected by the _____ Amendment.

2. In the vast majority of felony convictions, the defendant waives the right to a jury trial by pleading _____.

3. In 12th century England, the accusatorial system had to specify charges against a defendant, but the _____ system did not.

4. Under the Confrontation Clause, any testimony provided by prosecution witnesses in court is subject to _____.

5. With respect to the Right-to-Counsel Clause, the Supreme Court has ruled that no charges that may result in _____ may be considered petty.

6. The right of the accused to be informed of the charges against him traces its origin at least as far back as _____ century England.

7. In 1938, the Supreme Court held that the Sixth Amendment required court-appointed counsel for defendants who are too poor to afford ____________. The Sixth Amendment, however, applied only in _____ cases.
Short Answer: Write out your answer to each question.

1. In the Confrontation Clause, the verb “confront” has been understood to mean what?

2. Applying the basic principles of confrontation and cross-examination has proven to be especially difficult in which two circumstances?

3. By guaranteeing the right to counsel, the Founders specifically rejected what English practice?

True / False: Indicate whether each statement is true or false.

1. (True/False) The public-trial right in the Sixth Amendment is deeply rooted in Anglo–American history and tradition.

2. (True/False) The Supreme Court has ruled that non-unanimous verdicts are permissible in federal courts but not in state courts.

3. (True/False) The constitutional requirement that anyone accused of a crime must be “informed of the nature and cause of the accusation” has become internalized by the judicial system and is interwoven into the fabric of daily procedure.

4. (True/False) Today, nearly half of the convictions in felony cases tried are the products of trials before judges sitting without juries.

5. (True/False) The Compulsory Process Clause was an essential part of the right of an accused to present a defense.

6. (True/False) Petty offenses have always been adjudicated with counsel from the time of the Founding to this day.
Worksheet 6-18.2
Check Understanding

Complete the following assessment to check understanding of Lesson 18, Part 2.

Multiple Choice: Circle the correct response.

1. As the Constitutional Convention was drawing to a close, ____ noted that no provision had been made for the right to trial by jury in civil cases.
   a. Hugh Williamson
   b. Nathanial Gorham
   c. George Mason
   d. Alexander Hamilton

2. The right to a trial by jury is not normally granted in cases that fall under ____ jurisdiction.
   a. federal
   b. civil
   c. admiral
   d. state

3. The Reexamination Clause states that appellate courts can only review only
   a. questions of law.
   b. presented evidence.
   c. questions of fact.
   d. provided testimony.

Fill in the blank: Write the correct word or words in each blank.

1. In current legal doctrine, juries decide questions of ____. Judges decide questions of ___.

2. One of the purposes of the Seventh Amendment was to ensure that rulings made by juries were not subject to ____.

3. George Mason and ____ from Virginia thought that the Constitution would lead to the abolishment of the use of juries in civil cases.

Short Answer: Write out your answer to each question.

1. The Seventh Amendment cured what omission from the text of the original Constitution?

2. The Seventh Amendment’s Reexamination Clause prohibits reviewing courts from reexamining what?

True / False: Indicate whether each statement is true or false.

1. (True/False) The omission of a guarantee of civil juries occasioned the greatest opposition to the Constitution in the ratifying conventions.

2. (True/False) In addition to the fact that the Constitution did not mention the right to trial by jury in civil cases, Anti-Federalists were also concerned about the Appellate Jurisdiction Clause in Article III.
Worksheet 6-18.3
Check Understanding

Complete the following assessment to check understanding of Lesson 18, Part 3.

**Multiple Choice: Circle the correct response.**

1. In the American legal system, the primary purpose of bail is to ensure that a defendant
   a. does not commit more crimes.
   b. appears at trial.
   c. receives a just punishment.
   d. retains his freedom.

2. When drafting the Excessive Bail Clause, the word “shall” was substituted for the word “ought” to ensure that the clause would be
   a. enforceable.
   b. hortatory.
   c. unequivocal.
   d. original.

3. In both English and American practice, the level of bail is determined on what basis?
   a. how much money the courts need
   b. a preset amount determined by income
   c. the salaries of the jurors
   d. case by case

4. The Eighth Amendment does not protect against
   a. being tried twice for the same crime.
   b. excessive fines.
   c. excessive bail.
   d. cruel and unusual punishment.

**Short Answer: Write out your answer to each question.**

1. When determining bail, the court often takes what factors into account?

2. What are some possible categories at issue under the Cruel and Unusual Punishment Clause as detailed in *The Heritage Guide to the Constitution* on page 364?

3. What was the standard that Earl Warren articulated for determining violations of the Eighth Amendment?

4. The text of the Eighth Amendment derives from what 1689 document?
Worksheet 7-19
Check Understanding

Complete the following assessment to check understanding of Lesson 19.

Multiple Choice: Circle the correct response.

1. According to the Fugitive Slave Clause, escaped slaves must be
   a. Taken to the North.
   b. Set free.
   c. Sent to prison.
   d. Returned to their owners.

2. Federal prohibition of the slave trade became effective on January 1,
   a. 1789.
   b. 1800.
   c. 1808.
   d. 1860.

3. The Slave Trade Clause restricted a tax on the import of slaves for _____ years.
   a. 8
   b. 12
   c. 20
   d. 25

4. The Thirteenth Amendment gives ______ the power to enforce the prohibition of slavery.
   a. States
   b. Regions
   c. Congress
   d. the President

5. The language in the Thirteenth Amendment was modeled after the
   a. Northwest Ordinance.
   b. Twelfth Amendment.
   c. Civil Rights Act.
   d. Civil Rights Cases.

Short Answer: Write out your answer to each question.

1. What was the purpose of the Prohibition on Amendment: Slave Trade?

2. Why is the Three-fifths Clause not a pro-slavery clause?

3. What did the first debate over slavery at the Constitutional Convention concern?

4. What did the second debate over slavery at the Constitutional Convention concern?

5. What does Belz cite as the primary aim of the Civil War?
6. What was the purpose of the Thirteenth Amendment?

7. How is the application of the Thirteenth Amendment different from the application of other amendments?

**Fill in the blank: Write the correct word or words in each blank.**

1. Congress passed a federal prohibition of the ________ that went into effect January 1, 1808.
2. By conferring power on Congress to enforce the prohibition of slavery throughout the United States, the Thirteenth Amendment altered the relationship between the states and the __________.

**True / False: Indicate whether each statement is true or false.**

1. (True/False) The Fugitive Slave Clause is one of the most controversial clauses in the U.S. Constitution.
2. (True/False) word “slave” never appears in the Fugitive Slave Clause.
3. (True/False) In 1861, Congress proposed a constitutional amendment stating that the Constitution should never be amended to interfere with slavery in any state.
4. (True/False) In 1865, Congress proposed a constitutional amendment to abolish slavery.
Worksheet 7-20
Check Understanding

Complete the following assessment to check understanding of Lesson 20.

Multiple Choice: Circle the correct response.

1. Poll taxes of the Southern states adversely affected which group of people?
   a. blacks
   b. women
   c. the poor
   d. all of the above

2. When Congress ratified the Poll Tax Amendment, how many states retained a poll tax?
   a. five
   b. nine
   c. 20
   d. all of the Southern states

3. Requiring anyone to pay a poll tax in order to vote is forbidden by
   a. Amendment XXI.
   b. Amendment XXII.
   c. Amendment XXIII.
   d. Amendment XXIV.

4. Congress made black suffrage mandatory in the former Confederate states through the
   b. Civil Rights Act of 1866.
   c. Civil Liberties Act.
   d. Reconstruction Act of 1867.

5. The first mention of the word “male” in the Constitution appears in the
   a. Thirteenth Amendment.
   b. Fourteenth Amendment.
   c. Fifteenth Amendment.
   d. Sixteenth Amendment.

6. Which state had allowed women to participate in elections in the 1700s?
   a. Delaware
   b. New York
   c. Illinois
   d. New Jersey

7. The Twenty-sixth Amendment was developed mainly in response to the
   a. Vietnam War.
   d. case of Jolicoeur v. Mihaly.
Fill in the blank: Write the correct word or words in each blank.

1. The Fifteenth Amendment prohibited denying individuals the right to vote based on their color, race, or past condition of _____.
2. The Nineteenth Amendment has virtually the same wording as the _____ Amendment.
3. Although many states stopped using poll taxes by the mid-19th century, the practice became common again in the South following the _____.

Short Answer: Write out your answer to each question.

1. The origin of the organized women’s suffrage movement has generally been traced to what gathering?

2. The Fifteenth Amendment granted what?

3. Which Amendment grants the right to vote regardless of sex?

4. Which word did not even appear in the Constitution until the Fourteenth Amendment was ratified in 1868?