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

Part 2: Congressional Rules and Procedures

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
## Unit 2

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Congressional Compensation</td>
<td>57</td>
</tr>
<tr>
<td>Privilege from Arrest</td>
<td>58</td>
</tr>
<tr>
<td>Speech and Debate Clause</td>
<td>58</td>
</tr>
<tr>
<td>Sinecure Clause</td>
<td>59</td>
</tr>
<tr>
<td>Incompatibility Clause</td>
<td>60</td>
</tr>
<tr>
<td>Meetings of Congress Clause</td>
<td>61</td>
</tr>
<tr>
<td>House Journal</td>
<td>62</td>
</tr>
<tr>
<td>Adjournment</td>
<td>63</td>
</tr>
</tbody>
</table>

### Part 3: Sole Powers of the House of Representatives

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Impeachment</td>
<td>66</td>
</tr>
<tr>
<td>Origination Clause</td>
<td>67</td>
</tr>
<tr>
<td>The House as a Tiebreaker in Presidential Elections</td>
<td>68</td>
</tr>
</tbody>
</table>

## Lesson 4: The Senate

### Part 1: The Senate and Its Members

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Senate</td>
<td>72</td>
</tr>
<tr>
<td>Equal Suffrage in the Senate</td>
<td>73</td>
</tr>
<tr>
<td>Qualifications for Senators</td>
<td>74</td>
</tr>
<tr>
<td>Senatorial Classes and Vacancies Clause</td>
<td>75</td>
</tr>
<tr>
<td>Popular Election of Senators</td>
<td>76</td>
</tr>
</tbody>
</table>
Vacancies in the Senate
Amendment XVII, Clause 1 ................................................................. 77

Vice President as Presiding Officer
Article I, Section 3, Clause 4 .............................................................. 78

President Pro Tempore
Article I, Section 3, Clause 5 .............................................................. 78

Procedures and Rules
Article I, Sections 4–6 ................................................................. 79

Part 2: Sole Powers of the Senate

Trial of Impeachment
Article I, Section 3, Clause 6 .............................................................. 83

Punishment for Impeachment
Article I, Section 3, Clause 7 .............................................................. 84

The Senate as Tiebreaker for Electing the Vice President
Article II, Section 1, Clauses 2 and 3, and Amendment XII ................ 85

The Senate’s Advice and Consent in Treaties and Appointments
Article II, Section 2, Clause 2 .............................................................. 86

Lesson 5: Congress’s Economic Powers

Part 1: Spending and Borrowing

Spending Clause
Article I, Section 8, Clause 1 .............................................................. 90

Borrowing Clauses
Article I, Section 8, Clause 2 .............................................................. 91

Appropriations Clause
Article I, Section 9, Clause 7 .............................................................. 93

Part 2: Powers and Limits of Taxation

Uniformity Clause
Article I, Section 8, Clause 1 .............................................................. 98

Direct Taxes
Article I, Section 9, Clause 4 .............................................................. 99

Income Tax
Amendment XVI .............................................................................. 100

Export Taxation Clause
Article I, Section 9, Clause 5 .............................................................. 101

Port Preference Clause
Article I, Section 9, Clause 6 .............................................................. 102
Part 3: Creating a Commercial Republic

Commerce with Foreign Nations
Article I, Section 8, Clause 3 ................................................................. 105

Commerce Among the States
Article I, Section 8, Clause 3 ................................................................. 106

Commerce with the Indian Tribes
Article I, Section 8, Clause 3 ................................................................. 108

Bankruptcy Clause
Article I, Section 8, Clause 4 ................................................................. 109

Coinage Clause
Article I, Section 8, Clause 5 ................................................................. 110

Weights and Measures
Article I, Section 8, Clause 5 ................................................................. 111

Counterfeiting
Article I, Section 8, Clause 6 ................................................................. 112

Post Office
Article I, Section 8, Clause 7 ................................................................. 113

Patent and Copyright Clause
Article I, Section 8, Clause 8 ................................................................. 114

Lesson 6: Congress’s War Powers

Part 1: Piracy and War

Define and Punish Clause
Article I, Section 8, Clause 10 .............................................................. 118

Declare War Clause
Article I, Section 8, Clause 11 .............................................................. 119

Marque and Reprisal
Article I, Section 8, Clause 11 .............................................................. 120

Captures Clause
Article I, Section 8, Clause 11 .............................................................. 121
Lesson 7: Congress’s Territorial Powers, Implied Powers, Citizenship, and the Bureaucracy

Part 1: Congress’s Territorial Powers: District of Columbia, Military Installations, and Property

Enclave Clause
Article I, Section 8, Clause 17.................................................................134

Elector for the District of Columbia
Amendment XXIII..................................................................................136

Military Installations
Article I, Section 8, Clause 17................................................................137

Property Clause
Article IV, Section 3, Clause 2.................................................................138

Claims
Article IV, Section 3, Clause 2................................................................140

Part 2: Naturalization and Citizenship

Naturalization
Article I, Section 8, Clause 4.................................................................143

Citizenship
Amendment XIV, Section 1.................................................................144
### Unit 2

#### Part 3: The Necessary and Proper Clause

The Necessary and Proper Clause  
Article I, Section 8, Clause 18..................................................................................................................149

#### Part 4: Congress and the Fourth Branch of Government

Delegation of Legislative Power  
Article I, Section 1 ..................................................................................................................................152

What Is the Administrative State?  
A Note on Administrative Agencies ........................................................................................................153

### Lesson 8: Lawmaking and the Rule of Law

Presentment Clause  
Article I, Section 7, Clause 2......................................................................................................................158

Pocket Veto  
Article I, Section 7, Clause 3......................................................................................................................160

Presentment of Resolution  
Article I, Section 7, Clause 3......................................................................................................................161

Bill of Attainder  
Article I, Section 9, Clause 3......................................................................................................................162

Ex Post Facto Clause  
Article I, Section 9, Clause 3......................................................................................................................164
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

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

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.
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

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**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.)

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**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 denouncement, 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.)

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 that 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.
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.

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**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.

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.)

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.)
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
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)
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
Unit 2

**Vacancies in the Senate**
Amendment XVII, Clause 1

**Vice President as Presiding Officer**
Article I, Section 3, Clause 4

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

**Procedures and Rules**
Article I, Sections 4–6

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**Senate** — Article 1, Section 3, Clause 1

*Essay by Ralph Rossum (pp. 62–63)*

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.

Before You Read

Ask: What does the word “prohibition” mean? (to stop or deny) What does the word “amendment” mean? (a change) What do you think a “prohibition on amendment” is? (a way of stopping people from making a change)

Write About It

Rossum references Madison’s comments on the federal system in The Federalist No. 39. Have students read The Federalist No. 39 and summarize the distinction that Madison makes between a federal and a national system.

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

*Essay by Ronald Pestratto (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 Pestratto writes that these qualifications were agreed upon with little debate and have faced few challenges since their approval.

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.)

**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)*

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**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)

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**The Senate as Tiebreaker for Electing the Vice President** — 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 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.)

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**Unit 2**

**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.)

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**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)
Unit 2

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.
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 *Pollack*, 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.)
Unit 2

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)

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 to 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

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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 thorough 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.)

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**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.

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**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.

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**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.)

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**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.

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**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.

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**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.)
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.)

6. The 1856 Declaration of Paris prohibits what? (Privateering)

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)
Part 2:
Creating, Supporting, and Regulating the Military

Army Clause
Article I, Section 8, Clause 12

Navy Clause
Article I, Section 8, Clause 13

Military Regulations
Article I, Section 8, Clause 14

Militia Clause
Article I, Section 8, Clause 15

Organizing the Militia
Article I, Section 8, Clause 16

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.)
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

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 “proprietorial” 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.

**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.
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
   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
Unit 2

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

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**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.

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**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
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 reinsuring it 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)
Unit 2

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 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 “Yea”s and “Nay”s 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.)
Unit 2

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.
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 2