UNIT 3

Governing in the Constitution

45–50-minute classes | 12–16 classes

UNIT PREVIEW

Structure

Why Teach Governing in the Constitution

It is common for traditional American government classes to teach the "nuts and bolts" of government. While this class seeks a deeper and more meaningful understanding than the mere mechanics of government, students do need to know how lawmaking works in the United States. In the twenty-first century, however, there are effectively two sets of "nuts and bolts." Unit 6, on "Institutions and Policy," deals with the way government functions today after the changes the progressive movement has brought to federal and state institutions. This unit, "Governing in the Constitution," is reserved for a study of the Framers' original design and intentions for the government they established through the Constitution. It is important for students to understand how and why the Framers formed the three branches and how they were intended to operate just as they will later study the ways in which progressives departed from this arrangement. This unit also covers the added safeguards to freedom in the first ten amendments to the Constitution: The Bill of Rights.

What Teachers Should Consider

After treating of the main principles that the framers brought to bear on the Constitution, it passes next to examine the actual text of the Constitution. The different articles lay out the structure, selection, and powers of each branch of the federal government. It is here that students come to see how the principles of the Constitution informed the way that the federal government is structured and how it functions.

The chief goal behind every clause to the Constitution is to allow the people to govern but to do so justly, that is, without violating the rights of the minority. The importance of representation, therefore, underlies every consideration. Students should be asked to identify this principle as it functions within each branch of the government and how certain requirements of the Constitution seek to foster good representation.

At the same time, the Constitution limits the power of each branch and official. In the event that good representatives gain power—but given the nature of human beings with respect to power—the Constitution sets guardrails for how much power a branch can accumulate and how that power is wielded. Ultimately, every government decision comes back to the will of the people through elections.

In addition to making these connections between principles and practice, students must learn the simple facts of how the federal government is composed and how it functions. This information is necessary to being a well-informed citizen. Fortunately, students' background knowledge in the principles of the Constitution lend such straightforward study an additional degree of understanding and appreciation. The facts of governing through the Constitution are significant because they were carefully determined, the product of reflective thought and experience. Their historical success, moreover, is a testimony to how well conceived they turned out to be.

Finally, the addition of the Bill of Rights is worthy of careful study on the part of students. Contentious at the time of the ratification debates, the Bill of Rights has proven to be a bulwark against government violations of rights. Students should examine them closely and tie their inclusion both to historical situations which the framers had recently experienced and to the principles of the Declaration of Independence.

How Teachers Can Learn More

TEXTS

The U.S. Constitution: A Reader, ed. Hillsdale College Politics Faculty	Chapters 4–6
The Federalist, Alexander Hamilton, James Madison, and John Jay	
The Anti-Federalist	
American Government and Politics, Joseph Bessette and John Pitney	Chapters 2, 3, and 15

ONLINE COURSES | Online.Hillsdale.edu

Introduction to the Constitution
Constitution 101
The Federalist Papers
Civil Rights in American History

Primary Sources Studied in This Unit

The U.S. Constitution
The Federalist, Nos. 55, 57, 62, 63, 70, 78, and 84
Essay 11, Brutus
Marbury v. Madison
McCulloch v. Maryland
The Bill of Rights

LESSON PLANS, ASSIGNMENTS, AND FORMATIVE QUIZ

Lesson 1 — The Congress in the Constitution

4-5 classes

Lesson Objective

Students learn how the Constitution structures the federal legislature to ensure that the will of the people is both expressed as well as refined and enlarged by the people's representatives to effect good government.

Online Courses for Teachers | Online.Hillsdale.edu

The Federalist Papers	Lecture 6
Congress	Lectures 1 and 2

Primary Sources

Students are to read or, if they have previously read, review the following primary source(s). While reading, students should annotate these sources. For particularly challenging texts or if the class is offered earlier in high school, the teacher may wish to provide students with guided reading questions to assist with comprehension, clarity, and direction. Using their annotations and any guided reading questions, students should come to class prepared to participate in a seminar conversation on each text.

The U.S. Constitution, Articles I and IV
The Federalist, Nos. 55, 57, 62, 63

Terms and Topics

legislature	Congress
legislative power	bicameralism
Virginia Plan	House of Representatives
New Jersey Plan	Senate
Great Compromise	term
bill	refine and enlarge

Questions for the American Mind

- Which purposes and powers does Congress have?
- How does the Constitution place and structure the legislative power in the Congress?
- What is bicameralism, and what are its advantages?
- What are the similarities and differences between the structure of the House of Representatives and the Senate?
- What are the chief characteristics of the House of Representatives, and why?
- What are the chief characteristics of the Senate, and why?
- How does the design of the legislature provide stability?

- How does representation itself and the differences between the House of Representatives and the Senate combine to refine and enlarge the will of the people?
- Questions from the U.S. Civics Test:
    - Question 18: What part of the federal government writes laws?
    - Question 19: What are the two parts of the U.S. Congress?
    - Question 20: Name one power of the U.S. Congress.
    - Question 21: How many U.S. senators are there?
    - Question 22: How long is a term for a U.S. senator?
    - Question 24: How many voting members are in the House of Representatives?
    - Question 25: How long is a term for a member of the House of Representatives?
    - Question 26: Why do U.S. representatives serve shorter terms than U.S. senators?
    - Question 27: How many senators does each state have?
    - Question 28: Why does each state have two senators?
    - Question 31: Who does a U.S. senator represent?
    - Question 32: Who elects U.S. senators?
    - Question 33: Who does a member of the House of Representatives represent?
    - Question 34: Who elects members of the House of Representatives?
    - Question 35: Some states have more representatives than other states. Why?

KEYS TO THE LESSON

The United States Congress, composed of the House Representatives and the Senate, was intended by the Framers to be the embodiment of representative self-government. Hence it is listed first among the three equal branches of government. Its bicameral structure satisfied both large and small states and has proven to be a bulwark against the accumulation of power and against momentary passions that sweep through the country while carrying out government's core function of making law. While representation in and of itself seeks to elevate the will of the majority through relatively talented and mindful Representatives, the further refinement and broadening of legislation through the Senate brings an additional safeguard. Prudent and effective legislation supported by a broad legislative consensus was the goal the Framers had in mind when forming the Congress. For all of these reasons, over much of American history, the Congress has operated as the core representative branch—and thus the heart—of American constitutional government.

Teachers might best plan and teach the Congress in the Constitution with emphasis on the following approaches:

- Throughout this lesson, have students consider how the Constitution repeatedly structures the government to refine and enlarge public opinion so as to reflect their consent through the rule of law.
- Help students to understand the very meaningful words *legislative*, *executive*, *judicial*, and *power*. All four words are not merely conventions but are full of significance. In fact, they are true to the very nature of the rule of law. They connote the act of lawmaking, the act of enforcing the law made, and the act of determining whether the law has been violated, either by an individual against a specific law, or by a law itself against the Supreme Law of the Land, the Constitution.
- Clarify for students that under the Constitution the United States is not a democracy but rather a republic. The main distinction is that in a pure democracy, everyone votes on actually making

every law, and the only factor to consider in enacting a law is 51 percent of the people. In a republic, the people elect certain of the fellow citizens to represent their views and interests in deliberating and making decisions. The deliberations and voting record of representatives should not only reflect the opinions of the people they represent but also their settled concerns and common good as understood by the representative. How well they have represented the opinions and good of their constituents is determined by election of those being represented. Other terms relevant to these distinctions are *direct democracy* versus *representative democracy*.

- Ask students why the Constitution begins by describing the legislative power and legislative branch. The reason is Congress is most connected with the people at large. Lawmaking is the chief governing act, and in a democratic republic, it is the representatives of the people who do the lawmaking. Students should understand how very different the locus of lawmaking and power is today when one considers the present executive, judiciary, and bureaucracy.
- Have students discuss and understand the purpose of each legislative power granted to Congress. Students should be able to connect each of these powers with the purposes of the Constitution as outlined in the Preamble. The structure, character, and operation of Congress are designed in the way most fitting to the function of lawmaking, that is, to exercise the power of making law on behalf of (or as representatives of) the people. Make clear that the legislative power is vested uniquely in the legislative branch, not in the federal government as a whole or in another branch.
- Note also how the Constitution limits the number and kind of legislative powers to those "herein granted." There are other implied legislative powers, such as under things "necessary and proper" to carry out is granted powers, but the Constitution intended to limit significantly the scope of what the Congress could do with its lawmaking power.
- Spend some time considering the *necessary and proper clause*. Although this clause could be mistaken as a way for the Congress to do whatever it wants, this clause only enables the Congress to carry out its enumerated powers. The Founders wanted to create an energetic yet limited government, and enumerating the powers of the legislature (even with the necessary and proper clause) restricted the scope of the federal government overall, leaving most of the general powers of government to the state governments or undelegated to remain with the people themselves. They wanted each separate branch of the government, which together make up the federal government, to do only the things specified by the Constitution—but to do them well.
- Explain the ways in which the House of Representatives is meant to be a purer or more direct expression of popular opinion while the Senate is meant to be more reflective and refining of the people's will.
- Read with students the relevant essays of the *Federalist* on the House of Representatives. *Federalist* 55 explains the appropriateness of the quantity of representatives that the Constitution had originally set, while *Federalist* 57 speaks to the quality required of such representatives and the ways in which the Constitution seeks to ensure such individuals are more likely to be elected.
- Read with students the relevant essays of the *Federalist* on the Senate. *Federalist* 62 and 63 explain how the Senate is structured and chosen, and how these features provide stability and wisdom to the legislature, as well as strengthen federalism and the importance of states in the federal government structure. It is worth noting how the 17th Amendment in 1913 altered this arrangement and changed the role played by the Senate.

Strengthening Understanding: Post-Lesson Assignments

Assignment 1: Explain the overall powers of Congress and why Congress, as opposed to other branches, has these powers (2–3 paragraphs).

Assignment 2: Explain the differences between the House of Representatives and the Senate and the reasons for the distinctions (2–3 paragraphs).

Lesson 2 — The Presidency in the Constitution

2–3 classes

Lesson Objective

Students learn how the Constitution arranges the executive power in the presidency and the purposes and powers of the office.

Online Courses for Teachers | Online.Hillsdale.edu

The Federalist Papers	Lecture 7
The Presidency and the Constitution	Lectures 2 and 3

Primary Sources

Students are to read or, if they have previously read, review the following primary source(s). While reading, students should annotate these sources. For particularly challenging texts or if the class is offered earlier in high school, the teacher may wish to provide students with guided reading questions to assist with comprehension, clarity, and direction. Using their annotations and any guided reading questions, students should come to class prepared to participate in a seminar conversation on each text.

The U.S. Constitution, Article II
The Federalist, No. 70

Terms and Topics

executive power	veto power
presidency	impeachment
Electoral College	cabinet
term	Commander-in-Chief

Questions for the American Mind

- What purposes and powers does the presidency have?
- How does the Constitution place and structure the executive power in the presidency?
- What are the chief characteristics of the presidency, and why?
- How does the presidency ensure energy in the executive?
- What is the importance of the executive power being unitive?
- What is the Electoral College, how did it originally work, and what is its purpose?
- Questions from the U.S. Civics Test:
    - Question 17: The President of the United States is in charge of which branch of government?
    - Question 36: The President of the United States is elected for how many years?
    - Question 37: The President of the United States can serve only two terms. Why?
    - Question 40: If the president can no longer serve, who becomes president?

- Question 41: Name one power of the president.
- Question 42: Who is Command in Chief of the U.S. military?
- Question 43: Who signs bills to become laws?
- Question 44: Who vetoes bills?
- Question 45: Who appoints federal judges?
- Question 46: The executive branch has many parts. Name one.
- Question 47: What does the President's cabinet do?
- Question 48: What are two Cabinet-level positions?
- Question 49: Why is the Electoral College important?

KEYS TO THE LESSON

The office of president demonstrated some of the most significant changes the Framers put into the Constitution, compared to the Articles of Confederation. The Framers saw the need of a stronger executive, especially in the area of representing the United States on the world stage and in providing for the nation's security and carrying out its foreign policy. The president's first responsibility, however, was simply to enforce the laws passed by Congress. This job required cooperation with Congress to pass laws but then the restraint to act under the laws that Congress had passed. The presidency has since then taken on a sort of aura and power all its own, but students should understand that the original intention for the office was to execute laws passed by Congress, uphold the rule of law, and defend the Constitution.

Teachers might best plan and teach the Presidency in the Constitution with emphasis on the following approaches:

- Share with students that the office of the president was crafted by the Framers with both hindsight and foresight. On one hand, they had learned that the legitimate concern of the Articles of Confederation to prevent executive tyranny resulted in a weak if non-existent executive with no independent power to enforce the laws or conduct foreign policy. The Constitution defined the proper ground by creating the president vested with the executive power to enforce the law and administer the affairs of government at home and abroad while also preventing and checking executive tyranny. On the other hand, the Founders created the office with the knowledge that George Washington—who had already relinquished his military authority as general—would assuredly be the first president to exercise these powers and in doing so set precedents for the future. They were confident he would do so with vigor but also with prudence and justice for the sake of establishing the Constitution.
- Note for students that the president's executive power in Article II is a general grant of power, not "herein granted" or enumerated as in Article I. While Congress has great powers to control and influence the means of the president, especially through its control of the budget, the presidency is designed to embody the executive power of government, primarily enforcing all the laws enacted by Congress but also maintaining the rule of law, seeing to the nation's security, and conducting the nation's foreign policy. Make clear that the executive power is vested uniquely in the president, not in the federal government as a whole or in any other branch.
- Explain the circumstances under which the president can exercise the powers of Commander-in-Chief. Students should be aware that, as the most popular branch, only Congress has the power to declare war, while the president has the power to carry out that declaration and otherwise direct the armed forces in circumstances of military necessity. Emphasize for students how a unique

trait of the American armed forces is that they are under civilian control, in particular a civilian, elected president, checked by Congress (and a Supreme Court), subservient to the Constitution and the rule of law.

- Read aloud and discussion with students the president's unique oath of office, found in Article II, Section 1, Clause 8: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."
- Clarify with students how the Electoral College works and why the Founders decided on this process for choosing the president. The first original reason was to provide a way for the people's representatives in the states to check against a tyrannical or fraudulent choice of the president, a purpose which most states abandoned when they enacted laws tying a state's choice of electors to the state's popular vote and then usually requiring those electors to be faithful to the state's popular vote. The second reason was to ensure that presidential candidates would have to pay attention to the interests and opinions of all the states and their populations. This prevented regional and encourage national candidates, and forced presidential candidates to address the concerns not merely of large population centers like cities but also of rural and more remote populations. Together with the equal representation among states in the Senate, the Electoral College has discouraged majority tyranny in favor of a broader and more settled national consensus.
- Read with students *Federalist* 70 and examine Publius's arguments for the presidency and the necessity of an energetic executive, especially the unity (one person) that is necessary for "decision, activity, secrecy, and dispatch" in executive actions.

Strengthening Understanding: Post-Lesson Assignment

Assignment: Explain the overall powers of the presidency and why the presidency, as opposed to other branches, has these powers (2–3 paragraphs).

Name_____ Date_____

Unit 3 — Formative Quiz

Covering Lessons 1–2
10–15 minutes

DIRECTIONS: Answer each question in at least one complete sentence.

1. What is bicameralism, and what are its advantages?

2. What are the chief characteristics of the House of Representatives, and why?

3. What are the chief characteristics of the Senate, and why?

4. What are the chief characteristics of the presidency, and why?

5. What is the Electoral College, how did it originally work, and what is its purpose?

Lesson 3 — The Judiciary in the Constitution

2–3 classes

Lesson Objective

Students learn about the judicial power in the Constitution and about the Supreme Court's power of judicial review.

Online Courses for Teachers | Online.Hillsdale.edu

The Federalist Papers	Lecture 8
The U.S. Supreme Court	Lecture 1

Primary Sources

Students are to read or, if they have previously read, review the following primary source(s). While reading, students should annotate these sources. For particularly challenging texts or if the class is offered earlier in high school, the teacher may wish to provide students with guided reading questions to assist with comprehension, clarity, and direction. Using their annotations and any guided reading questions, students should come to class prepared to participate in a seminar conversation on each text.

The U.S. Constitution, Article III
The Federalist, No. 78
Essay 11, Brutus
Marbury v. Madison
McCulloch v. Maryland

Terms and Topics

judicial power
Supreme Court
coequality of branches
Judiciary Act of 1789
appellate courts
jurisdiction
original jurisdiction
appellate jurisdiction
judicial review

Questions for the American Mind

- Which purposes and powers does the Supreme Court have?
- How does the Constitution place and structure the judicial power in the Supreme Court?
- What are the chief characteristics of the Supreme Court, and why?
- What is judicial review? How was the power first claimed and asserted?
- What were the arguments for and against the Supreme Court?
- Who has the power to establish "lesser courts"?
- Questions from the U.S. Civics Test:
    - Question 2: What is the supreme law of the land?

- Question 13: What is the rule of law?
- Question 50: What is one part of the judicial branch?
- Question 51: What does the judicial branch do?
- Question 52: What is the highest court in the United States?
- Question 53: How many seats are on the Supreme Court?
- Question 54: How many Supreme Court justices are usually needed to decide a case?
- Question 55: How long do Supreme Court justices serve?
- Question 56: Supreme Court justices serve for life. Why?

KEYS TO THE LESSON

In many respects, the Supreme Court was not given much consideration by the founding generation. They certainly never envisioned the tremendous power the Court has acquired today. The relatively minimal amount of detail and deliberation concerning the judiciary may have been the result of the rather straightforward nature of the judicial power: to use reason to judge whether or not a law has been violated in particular cases. The keys to exercising such a power, which has historic origins, depended on the wisdom of the judge as well as their understanding of the law. The requirement that the more deliberative Senate would have to consent to an elected president's appointment of federal judges acted as a check against judicial tyranny. A key innovation the Framers brought to the judiciary was making it separate from the lawmaking or law-enforcing parts of the government and independent by lifetime appointment. The coequality of the judiciary was also an important element in enacting the separation of powers to ensure that justice would be effectively served. Most important was that the judiciary would be the constant guard of the Constitution and the rule of law.

Teachers might best plan and teach the Judiciary in the Constitution with emphasis on the following approaches:

- Explain that the judicial power is vested by Article III in the Supreme Court and in such inferior Courts as Congress creates by law. The judicial power (and the judiciary's function) is to decide (or adjudicate) the "cases and controversies" that come before the courts according to the jurisdiction assigned by the Constitution or by Congress.
- Point out that the key to understanding the role of the judiciary in upholding the rule of law is that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof" is "the supreme Law of the Land"(Article VI). This means not only that all laws consistent with the Constitution must be followed but also that the Constitution is above ordinary laws.
- Explain that while lower court decision may be appealed, the decisions of the Supreme Court in particular cases before it are final. While the precedents of the Supreme Court (the doctrine of *stare decisis*) are important for instructing lower courts and predicting how the Supreme Court might decide similar cases in the future, the precedent of a particular case is neither final nor absolute. Significant cases (such as *Dred Scott v. Sandford* in 1857 and *Plessy v. Ferguson* in 1896) have been overturned years later despite the Court's earlier decisions.
- Read with students *Federalist* 78. Consider how Publius explains and defends the judicial power and the principle of judicial review—the authority of the courts to declare a law unconstitutional. It is important to note what Publius considered the role of the judge to be: not a legislator who

makes laws but rather an impartial judge in a particular case who will uphold and apply the law fairly. In carrying out the judicial power, the judge must also support and defend the Constitution, which means that in making their decisions they are obligated to side with the Constitution if a law is inconsistent with the "supreme Law of the Land." The judge must therefore interpret the laws and the Constitution. In doing so they should look at the intentions of Congress in making the laws, and to the courts' own precedents, but most important they should abide by the original meaning of the Constitution as the intent expressed by the American people.

- Explain that while judicial review is rightly understood as a crucial element implied in the Constitution's grant of judicial power, this does not mean that the Supreme Court has either the only or the final say over the Constitution and its meaning. Each branch of government is responsible to the Constitution as the source and extent of their authority, and are obligated to uphold it in carrying out their constitutional duties. This means Congress should consider the constitutionality of the laws it passes (and repeal those it considers unconstitutional), presidents should veto bills that they believe are unconstitutional and execute laws only in a constitutional manner, and that courts should strike down laws that are inconsistent with the Constitution. Nevertheless, when the three branches are at odds about the Constitution, the sovereign people have the final say as to the meaning of the Constitution by electing legislators who will make different laws, presidents who will appoint different judges, or by amending the Constitution itself. No singular branch has a monopoly on what the Constitution means.
- Share with students excerpts from the anti-Federalist writer Brutus and the Supreme Court decisions Marbury v. Madison and McCulloch v. Maryland in which the idea of judicial review is debated and asserted. As explained above, note how the argument for judicial review asserted by the Supreme Court in Marbury v. Madison is distinct from judicial absolutism or judicial finality.
- Note for students how Congress began to establish lesser courts, per the Constitution, with the Judiciary Act of 1789. Students should be generally familiar with lower courts established throughout American history, their jurisdictions, and the general workings of lawsuits, trials, etc. Some of these elements to the judiciary will be revisited in Unit 8 on "Late 20th Century Government and Politics," but since the Constitution lets Congress determine much of the structure and operation of the judiciary, it is best to teach about the institutions of the judicial branch in this lesson instead of a separate lesson in Unit 6 on "Institutions and Policy." Referencing Chapter 15 of American Government and Politics may be helpful.

Strengthening Understanding: Post-Lesson Assignment

Assignment: Explain the overall structure and powers of the Supreme Court and lesser courts, and why the judiciary, as opposed to other branches, has these powers (2-3 paragraphs).

Lesson 4 — The Bill of Rights

2–3 classes

Lesson Objective

Students learn about the arguments for and against a Bill of Rights, what each of the first ten amendments to the Constitution protects, and why each was included and written the way it was.

Online Courses for Teachers | Online.Hillsdale.edu

The Federalist Papers	Lecture 9
Civil Rights in American History	Lecture 2

Primary Sources

Students are to read or, if they have previously read, review the following primary source(s). While reading, students should annotate these sources. For particularly challenging texts or if the class is offered earlier in high school, the teacher may wish to provide students with guided reading questions to assist with comprehension, clarity, and direction. Using their annotations and any guided reading questions, students should come to class prepared to participate in a seminar conversation on each text.

The U.S. Constitution, Articles V-VII
The Bill of Rights
The Federalist, No. 84

Terms and Topics

Bill of Rights
freedom of religion
free exercise
establishment clause
freedom of speech
freedom of the press
right to assembly
right to bear arms
due process

Questions for the American Mind

- What were the arguments for and against a Bill of Rights?
- What do each of the following amendments in the Bill of Rights guarantee and why: 1st, 2nd, 4th, 5th, 9th, and 10th?
- What is the origin of the rights protected in the Bill of Rights?
- Where does the phrase "separation of church and state" come from? Does it have any legal authority?
- Why does the 2nd Amendment make it evident that the Founders found it necessary to guarantee to private citizens the right to possess tools used for their self-defense?
- What is due process? Why is it such an important legal guarantor of freedom?
- Questions from the U.S. Civics Test:

- Question 5: How are changes made to the U.S. Constitution?
- Question 7: How many amendments does the U.S. Constitution have?
- Question 60: What is the purpose of the 10th Amendment?
- Question 65: What are three rights of everyone living in the United States?

KEYS TO THE LESSON

The genius of the Bill of Rights was in the recognition that while future changes would produce new debates on government power, there nevertheless were fundamental rights not subject to change. Some sort of absolute prohibition that makes clear what is nonnegotiable seemed prudent. It is important to note that the list of rights guaranteed by the Constitution did not indicate a view by the framers that rights came from the government. Rather, these rights were recognized as fundamentals which no government created or may violate. What is somewhat remarkable about this list of rights is how universal they are now considered. That is in many respects owing to their articulation and inclusion by the framers in America.

Teachers might best plan and teach the Bill of Rights with emphasis on the following approaches:

- Before looking at the Bill of Rights itself, read with students Articles V-VII of the Constitution. Students should be familiar with what these Articles, particularly concerning the amendment process and the status of the Constitution in the American constitutional system of law. Remind them that the Bill of Rights are ten amendments to the Constitution but do not replace or redefine the main Constitution as the main bulwark of liberty.
- Teach students about the Anti-Federalists' concerns with the Constitution, the arguments for and against a Bill of Rights, and how the Federalists ultimately convinced key states to support the Constitution by guaranteeing to add a Bill of Rights if it was ratified. Of special note is the argument in *Federalist* 84 that a Bill of Rights was not needed and would be potentially dangerous as it may be interpreted as implying powers that government had not been granted concerning other rights that were not listed.
- Lead students through a complete reading of the Bill of Rights. Pause frequently to ask students questions on the various parts of the text. Sometimes the Bill of Rights comes across as special rights that the government has given to the people (and, therefore, may conceivably take away). This is not the case. These are fundamental rights recognized and protected by the Constitution. The people may point to and claim these rights when government threatens them.
- Help students understand how the rights found in the Bill of Rights are related to the preservation of life, liberty, property, or the pursuit of happiness, or how they answer some of the grievances in the Declaration of Independence or problems discovered under the Articles of Confederation. Spend time especially considering the 1st, 2nd, 4th, 5th, 9th, and 10th Amendments and the following guarantees:
    - Religious Liberty: When the Founders wrote that "Congress shall make no law respecting an establishment of religion," they were not at all against religion playing a significant public role in society. But they did not want to establish an official church and creed, because they feared this would become a threat to "the free exercise of religion," which was also protected in the First Amendment. They wanted to encourage and protect religious belief and exercise from a government that was either hostile to religion in general or to a specific religion, as was the case in other countries where church and state were not officially separated. The Founders emphatically believed that religion was

necessary to promote morality, to shape civil society, and to form virtuous, responsible, wise, and caring citizens. They believed that government should encourage and support religion in general. But they did not think the government should endorse or fund one single, official church or do anything to obstruct the people from exercising their religious faith.

- Freedom of Speech: It is essential for any free society to have freedom of speech for citizens to hold government accountable and to discuss and debate ideas. Freedom of speech helps society to flourish by promoting the sharing of ideas, innovations, scientific thought, and virtue. The Founders also wanted to keep politicians and the government accountable to the people by allowing for the free expression of ideas in support of or critical of elected officials' choices and character. Freedom of the Press applies freedom of speech to printed speech as well.
- Freedom of Assembly and to Petition. Any group of citizens can gather without the government's permission as long as their activities are peaceful. Similarly, citizens have the right to make their interests known to the government, including to specific branches of the government and specific elected members of the government.
- The Right of Self-Defense: The right to bear arms reflects two essential principles: 1) individuals have a natural right to protect and defend their own lives, families, and property against the tyrannical actions of another person; and 2) citizens may protect their own lives, families, and properties against the tyrannical actions of the government itself. The right to bear arms protects citizens' ability and right to counter any attempt at oppression by the government.
- Due Process: Due process is the legal process that every person under the rule of law is due as a matter of equal justice. It establishes that any deprivations of a person's natural rights to life, liberty, and property must be accompanied by a legal process in which the law was already a law at the time of being violated and in which the opportunity to defend one's innocence is afforded. Innocence is presumed until evidence is judged in a fair trial to prove guilt. All are equal before the law and are guaranteed the same fair and impartial justice and the equal protection of the law. The right of the criminally accused to a jury of their peers (meaning fellow citizens) is also an important and long established element of due process. This ensures that the government's executives and judges are held accountable to public opinion and that those judging whether a law was broken are those who could one day have that same judgment applied to them, thus ensuring a fair trial and verdict.

- Explain that the Founders did not believe the Bill of Rights encompassed all the rights of men in society. While some of the rights in the Bill of Rights are natural rights, others are generally civil rights (rights existing in law) intended to preserve certain natural rights, particularly from the misapplication of government power. Many of these rights, moreover, require prudential judgment to determine if they have been violated in a particular instance. There are certainly other natural and civil rights retained by the people that might not be listed in the Constitution. Note that the 9th Amendment suggests and guarantees just that.
- Discuss how the 10th Amendment was written to affirm that any other powers that are not delegated to the government by the Constitution are reserved to the States or to the people. By this amendment, the Constitution recognizes that key powers remain with the States, which have the general authority over the safety and well-being of their state citizens. It also means (especially when read in conjunction with the 9th Amendment) that the ultimate sovereign are the people,

who are endowed with all rights and (as a result) are the only ones who can delegate any power to government.

Strengthening Understanding: Post-Lesson Assignment

Assignment: Explain the meaning and importance of the freedom of religion, the freedom of speech, the right to bear arms, due process, and the 10th Amendment (3–4 paragraphs).

APPENDIX A

Study Guide

Test

Writing Assignment

Study Guide — Governing in the Constitution Test

Unit 3

Test on _____

Terms and Topics

Explain each of the following and the context in which it was discussed during this unit's lessons.

legislature
legislative power
Virginia Plan
New Jersey Plan
Great Compromise
Congress
bicameralism
House of Representatives
Senate
term
refine and enlarge
bill
executive power
presidency
Electoral College
veto power
impeachment
cabinet
Commander-in-Chief
judicial power
Supreme Court
coequality of branches
Judiciary Act of 1789
appellate courts
jurisdiction
original jurisdiction
appellate jurisdiction
judicial review
Bill of Rights
freedom of religion
free exercise
establishment clause
freedom of speech
freedom of the press
right to assembly
right to bear arms
due process

Primary Sources

Explain the main arguments in each of the following sources and their significance to our understanding of the how governing was originally intended to function in the Constitution.

The U.S. Constitution, Article I
Federalist 57
Federalist 62
Federalist 63
The U.S. Constitution, Article II
Federalist 70
The U.S. Constitution, Article III
Federalist 78
Marbury v. Madison
1st Amendment
2nd Amendment
4th Amendment
5th Amendment
9th Amendment
10th Amendment

Questions for the American Mind

Based on notes from lessons and seminar conversations, answer each of the following.

Lesson 1 | The Congress in the Constitution

- ☐ What purposes and powers does Congress have?
- ☐ How does the Constitution place and structure the legislative power in the Congress?
- ☐ What is bicameralism, and what are its advantages?
- ☐ What are the similarities and differences in the structure of the House of Representatives and the Senate?
- ☐ What are the chief characteristics of the House of Representatives, and why?
- ☐ What are the chief characteristics of the Senate, and why?
- ☐ How does the design of the legislature provide stability?
- ☐ How does representation itself and the differences between the House of Representatives and the Senate combine to refine and enlarge the will of the people?

Lesson 2 | The Presidency in the Constitution

- ☐ What purposes and powers does the presidency have?
- ☐ How does the Constitution place and structure the executive power in the presidency?
- ☐ What are the chief characteristics of the presidency, and why?
- ☐ How does the presidency ensure energy in the executive?
- ☐ What is the importance of the executive power being unitive?
- ☐ What is the Electoral College, how did it originally work, and what is its purpose?

Lesson 3 | The Judiciary in the Constitution

- ☐ Which purposes and powers does the Supreme Court have?
- ☐ How does the Constitution place and structure the judicial power in the Supreme Court?
- ☐ What are the chief characteristics of the Supreme Court, and why?
- ☐ What is judicial review? How was the power first claimed and asserted?
- ☐ What were the arguments for and against the Supreme Court?
- ☐ Who has the power to establish "lesser courts"?

Lesson 4 | The Bill of Rights

- ☐ What were the arguments for and against a Bill of Rights?
- ☐ What do each of the following amendments in the Bill of Rights guarantee, and why: 1st, 2nd, 4th, 5th, 9th, and 10th?
- ☐ What is the origin of the rights protected in the Bill of Rights?
- ☐ Where does the phrase "separation of church and state" come from? Does it have any legal authority?
- ☐ Why does the 2nd Amendment make it evident that the Founders found it necessary to guarantee to private citizen the right to possess tools used for their self-defense?
- ☐ What is due process? Why is it such an important legal guarantor of freedom?

Name_____ Date_____

Test — Governing in the Constitution

Unit 3

TERMS AND TOPICS

Explain each of the following and the context in which it was discussed during this unit's lessons.

1. legislative power

2. Great Compromise

3. bicameralism

4. refine and enlarge

5. executive power

6. Electoral College

7. impeachment

8. cabinet

9. judicial power

10. coequality of branches

11. judicial review

12. Bill of Rights

13. free exercise

14. right to assembly

15. due process

Primary Sources

Explain the main arguments in each of the following sources and their significance to our understanding of the how governing was originally intended to function in the Constitution.

16. *Federalist* 62

17. The U.S. Constitution, Article II

18. *Marbury v. Madison*

19. 1st Amendment

20. 2nd Amendment

21. 10th Amendment

Questions for the American Mind

Answer each of the following. Complete sentences are not necessary, but correct spelling and writing should be employed, and responses must fully answer each question.

22. Why did the Anti-Federalists prefer smaller, simpler, more local, and more democratic government?

23. What purposes and powers does Congress have?

24. What are the similarities and differences between the structure of the House of Representatives and the Senate?

25. What are the chief characteristics of the House of Representatives, and why?

26. How does representation itself and the differences between the House of Representatives and the Senate combine to refine and enlarge the will of the people?

27. How does the presidency ensure energy in the executive?

28. What is the importance of the executive power being unitive?

29. What is the Electoral College, how did it originally work, and what is its purpose?

30. What were the arguments for and against the Supreme Court?

31. What purposes and powers does the Supreme Court have?

32. What are the chief characteristics of the Supreme Court, and why?

33. What is the origin of the rights protected in the Bill of Rights?

34. Where does the phrase "separation of church and state" come from? Does it have any legal authority?

35. What is due process? Why is it such an important legal guarantor of freedom?

Writing Assignment — Governing in the Constitution

Unit 3

Due on _____

DIRECTIONS

Citing primary sources and conversations from class in your argument, write a 500–800-word essay answering the question…

> Across all three branches of the federal government, what are the most important designs that the Constitution puts in place to ensure the very best governance, i.e., governance that will be effective at protecting natural rights, representing the majority, and avoiding tyranny?

APPENDIX B

Primary Sources

The American People

James Madison

Alexander Hamilton

Brutus

John Marshall

THE PEOPLE OF THE UNITED STATES OF AMERICA

The Constitution

LAW

March 4, 1789
United States of America

BACKGROUND

Delegates to the Constitutional Convention drafted and the states ratified this Constitution, forming the second national government for the United States of America.

ANNOTATIONS

NOTES & QUESTIONS

Preamble

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected,

---

"The Constitution of the United States of America," in *The U.S. Constitution: A Reader* (Hillsdale, MI: Hillsdale College Press, 2012), 47-66.

be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

ANNOTATIONS **NOTES & QUESTIONS**

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall choose their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall

likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

ANNOTATIONS **NOTES & QUESTIONS**

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

ANNOTATIONS **NOTES & QUESTIONS**

Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and

the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice-President chosen for the same Term, be elected as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately choose by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner choose the President. But in choosing the President, the Votes shall be taken by States, the Representation from each State having one Vote; a quorum for

this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall choose from them by Ballot the Vice President.

The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of

the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good

ANNOTATIONS **NOTES & QUESTIONS**

Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ANNOTATIONS NOTES & QUESTIONS

Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labor in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labor, but shall be delivered up on Claim of the Party to whom such Service or Labor may be due.

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ANNOTATIONS NOTES & QUESTIONS

Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ANNOTATIONS NOTES & QUESTIONS

Article VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth In witness whereof We have hereunto subscribed our Names.

George Washington—

President and deputy from Virginia

Delaware

George Read, Gunning Bedford, Jr., John Dickinson, Richard Bassett, Jacob Broom

Maryland

James McHenry, Daniel of St. Thomas Jenifer, Daniel Carroll

Virginia

John Blair, James Madison, Jr.

North Carolina

William Blount, Richard Dobbs Spaight, Hugh Williamson

South Carolina

John Rutledge, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler

ANNOTATIONS **NOTES & QUESTIONS**

Georgia

William Few, Abraham Baldwin

New Hampshire

John Langdon, Nicholas Gilman

Massachusetts

Nathaniel Gorham, Rufus King

Connecticut

William Samuel Johnson, Roger Sherman

New York

Alexander Hamilton

New Jersey

William Livingston, David Brearley, William Paterson, Jonathan Dayton

Pennsylvania

Benjamin Franklin, Thomas Mifflin, Robert Morris, George Clymer, Thomas FitzSimmons, Jared Ingersoll, James Wilson, Gouverneur Morris

Attest William Jackson Secretary

ANNOTATIONS NOTES & QUESTIONS

Amendments to the Constitution of the United States of America

Amendment I

Ratified December 15, 1791

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

Amendment II

Ratified December 15, 1791

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

Amendment III

Ratified December 15, 1791

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

Amendment IV

Ratified December 15, 1791

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

Amendment V

Ratified December 15, 1791

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

Amendment VI

Ratified December 15, 1791

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

Amendment VII

Ratified December 15, 1791

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Ratified December 15, 1791

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

Amendment IX

Ratified December 15, 1791

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

Amendment X

Ratified December 15, 1791

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

Amendment XI

Ratified February 7, 1795

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII

Ratified June 15, 1804

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all per-

sons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII

Ratified December 6, 1865

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

Ratified July 9, 1868

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV

Ratified February 3, 1870

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XVI

Ratified February 3, 1913

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII

Ratified April 8, 1913

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII

Ratified January 16, 1919

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XIX

Ratified August 18, 1920

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XX

Ratified January 23, 1933

Section 1. The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3rd day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI

Ratified December 5, 1933

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII

Ratified February 27, 1951

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII

Ratified March 29, 1961

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV

Ratified January 23, 1964

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV

Ratified February 10, 1967

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI

Ratified July 1, 1971

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXVII

Ratified May 7, 1992

No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened.

PUBLIUS (JAMES MADISON)

Federalist No. 55

ESSAY

February 13, 1788
The Independent Journal | New York City, New York

BACKGROUND

Publius (James Madison) argues for the proposed Constitution by showing how the number of representatives for the House is appropriate considering the rate of growth of the population at the time.

GUIDING QUESTIONS

1. Is there a straight-forward answer to the question of how many representatives the U.S. House should have? Why or why not?

2. Is having more representatives necessarily better? Why or why not?

3. What are some of the checks imposed on representatives?

4. How does Madison portray human nature here?

5. Is virtue important for a republican form of government? Why?

"Federalist 55," in *The U.S. Constitution: A Reader*, ed. Hillsdale College Politics Faculty (Hillsdale, MI: Hillsdale College Press, 2012), 319-23.

ANNOTATIONS NOTES & QUESTIONS

The Total Number Of The House Of Representatives

The number of which the house of representatives is to consist, forms another, and a very interesting point of view, under which this branch of the federal legislature may be contemplated. Scarce any article indeed in the whole constitution, seems to be rendered more worthy of attention, by the weight of character, and the apparent force of argument, with which it has been assailed. The charges exhibited against it are, first, that so small a number of representatives will be an unsafe depository of the public interests; secondly, that they will not possess a proper knowledge of the local circumstances of their numerous constituents; thirdly, that they will be taken from that class of citizens which will sympathize least with the feelings of the mass of the people, and be most likely to aim at a permanent elevation of the few, on the depression of the many; fourthly, that defective as the number will be in the first instance, it will be more and more disproportionate, by the increase of the people, and the obstacles which will prevent a correspondent increase of the representatives.

In general it may be remarked on this subject, that no political problem is less susceptible of a precise solution, than that which relates to the number most convenient for a representative legislature: nor is there any point on which the policy of the several states is more at variance; whether we compare their legislative assemblies directly with each other, or consider the proportions which they respectively bear to the number of their constituents. Passing over the difference between the smallest and largest states, as Delaware, whose most numerous branch consists of twenty-one representatives, and Massachusetts, where it amounts to between three and four hundred; a very considerable difference is observable among states nearly equal in population. The number of representatives in Pennsylvania is not more than one-fifth of that in the state last mentioned. New York, whose population is to that of South Carolina as six to five, has little more than one-third of the number of representatives. As great a disparity prevails between the states of Georgia and Delaware or Rhode Island. In Pennsylvania, the representatives do not bear a greater proportion to their constituents, than of one for every four or five thousand. In Rhode Island, they bear a proportion of at least one for every thousand. And according to the constitution of Georgia,

ANNOTATIONS **NOTES & QUESTIONS**

the proportion may be carried to one for every ten electors; and must unavoidably far exceed the proportion in any of the other states.

Another general remark to be made is that the ratio between the representatives and the people, ought not to be the same, where the latter are very numerous, as where they are very few. Were the representatives in Virginia to be regulated by the standard in Rhode Island, they would, at this time, amount to between four and five hundred; and twenty or thirty years hence, to a thousand. On the other hand, the ratio of Pennsylvania, if applied to the state of Delaware, would reduce the representative assembly of the latter to seven or eight members. Nothing can be more fallacious, than to found our political calculations on arithmetical principles. Sixty or seventy men may be more properly trusted with a given degree of power, than six or seven. But it does not follow, that six or seven hundred would be proportionably a better depository. And if we carry on the supposition to six or seven thousand, the whole reasoning ought to be reversed. The truth is, that in all cases, a certain number at least seems to be necessary to secure the benefits of free consultation and discussion; and to guard against too easy a combination for improper purposes: as on the other hand, the number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude. In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the sceptre from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.

It is necessary also to recollect here, the observations which were applied to the case of biennial elections. For the same reason that the limited powers of the congress, and the control of the state legislatures, justify less frequent elections than the public safety might otherwise require; the members of the congress need be less numerous than if they possessed the whole power of legislation, and were under no other than the ordinary restraints of other legislative bodies.

With these general ideas in our minds, let us weigh the objections which have been stated against the number of members proposed for the house of representatives. It is said, in the first place, that so small a number cannot be safely trusted with so much power.

ANNOTATIONS **NOTES & QUESTIONS**

The number of which this branch of the legislature is to consist, at the outset of the government, will be sixty-five. Within three years a census is to be taken, when the number may be augmented to one for every thirty thousand inhabitants; and within every successive period of ten years, the census is to be renewed, and augmentations may continue to be made under the above limitation. It will not be thought an extravagant conjecture, that the first census will, at the rate of one for every thirty thousand, raise the number of representatives to at least one hundred. Estimating the negroes in the proportion of three-fifths, it can scarcely be doubted, that the population of the United States will, by that time, if it does not already, amount to three millions. At the expiration of twenty-five years, according to the computed rate of increase, the number of representatives will amount to two hundred; and of fifty years, to four hundred. This is a number, which I presume will put an end to all fears arising from the smallness of the body. I take for granted here, what I shall, in answering the fourth objection, hereafter show, that the number of representatives will be augmented, from time to time, in the manner provided by the constitution. On a contrary supposition, I should admit the objection to have very great weight indeed.

The true question to be decided, then, is whether the smallness of the number, as a temporary regulation, be dangerous to the public liberty? Whether sixty-five members for a few years, and a hundred, or two hundred, for a few more, be a safe depository for a limited and well-guarded power of legislating for the United States? I must own that I could not give a negative answer to this question, without first obliterating every impression which I have received, with regard to the present genius of the people of America, the spirit which actuates the state legislatures, and the principles which are incorporated with the political character of every class of citizens. I am unable to conceive, that the people of America, in their present temper, or under any circumstances which can speedily happen, will choose, and every second year repeat the choice, of sixty-five or a hundred men, who would be disposed to form and pursue a scheme of tyranny or treachery. I am unable to conceive, that the state legislatures, which must feel so many motives to watch, and which possess so many means of counteracting the federal legislature, would fail either to detect or to defeat a conspiracy of the latter against the liberties of their common constituents. I am equally

ANNOTATIONS **NOTES & QUESTIONS**

unable to conceive, that there are at this time, or can be in any short time in the United States, any sixty-five or a hundred men, capable of recommending themselves to the choice of the people at large, who would either desire or dare, within the short space of two years, to betray the solemn trust committed to them. What change of circumstances, time, and a fuller population of our country, may produce, requires a prophetic spirit to declare, which makes no part of my pretensions. But judging from the circumstances now before us, and from the probable state of them within a moderate period of time, I must pronounce, that the liberties of America cannot be unsafe, in the number of hands proposed by the federal constitution.

From what quarter can the danger proceed? Are we afraid of foreign gold? If foreign gold could so easily corrupt our federal rulers, and enable them to ensnare and betray their constituents, how has it happened that we are at this time a free and independent nation? The congress which conducted us through the revolution, were a less numerous body than their successors will be: they were not chosen by, nor responsible to, their fellow citizens at large: though appointed from year to year, and recallable at pleasure, they were generally continued for three years; and prior to the ratification of the federal articles, for a still longer term: they held their consultations always under the veil of secrecy: they had the sole transaction of our affairs with foreign nations: through the whole course of the war, they had the fate of their country more in their hands, than it is to be hoped will ever be the case with our future representatives; and from the greatness of the prize at stake, and the eagerness of the party which lost it, it may well be supposed, that the use of other means than force would not have been scrupled: yet we know by happy experience, that the public trust was not betrayed; nor has the purity of our public councils in this particular ever suffered, even from the whispers of calumny.

Is the danger apprehended from the other branches of the federal government? But where are the means to be found by the president or the senate, or both? Their emoluments of office, it is to be presumed, will not, and without a previous corruption of the house of representatives cannot, more than suffice for very different purposes: their private fortunes, as they must all be American citizens, cannot possibly be sources of danger. The only means

ANNOTATIONS **NOTES & QUESTIONS**

then which they can possess, will be in the dispensation of appointments. Is it here that suspicion rests her charge? Sometimes we are told, that this fund of corruption is to be exhausted by the president, in subduing the virtue of the senate. Now, the fidelity of the other house is to be the victim. The improbability of such a mercenary and perfidious combination of the several members of government, standing on as different foundations as republican principles will well admit, and at the same time accountable to the society over which they are placed, ought alone to quiet this apprehension. But fortunately, the constitution has provided a still further safeguard. The members of the congress are rendered ineligible to any civil offices, that may be created, or of which the emoluments may be increased, during the term of their election. No offices therefore can be dealt out to the existing members, but such as may become vacant by ordinary casualties; and to suppose that these would be sufficient to purchase the guardians of the people, selected by the people themselves, is to renounce every rule by which events ought to be calculated, and to substitute an indiscriminate and unbounded jealousy, with which all reasoning must be vain. The sincere friends of liberty, who give themselves up to the extravagancies of this passion, are not aware of the injury they do their own cause. As there is a degree of depravity in mankind, which requires a certain degree of circumspection and distrust: so there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us, faithful likenesses of the human character, the inference would be, that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.

Publius

PUBLIUS (JAMES MADISON)

Federalist No. 57

ESSAY

February 19, 1788
The New-York Packet | New York City, New York

BACKGROUND

Publius (James Madison) argues for the proposed Constitution by defending the House of Representatives against the criticism that it would become the rule of the few above the many.

GUIDING QUESTIONS

1. What ought to be the aim of every political constitution?
2. In what way is the federal House of Representatives the most popular branch of government?
3. What has always been deemed one of the strongest bonds by which a society can connect the people and the rulers together?
4. What examples does Madison give to justify his claim that size will not adversely affect the choice of representatives?

"Federalist 57," in *The U.S. Constitution: A Reader*, ed. Hillsdale College Politics Faculty (Hillsdale, MI: Hillsdale College Press, 2012), 325-29.

ANNOTATIONS NOTES & QUESTIONS

The Alleged Tendency of the New Plan to Elevate the Few at the Expense of the Many Considered in Connection with Representation

The *third* charge against the house of representatives is, that it will be taken from that class of citizens which will have least sympathy with the mass of the people; and be most likely to aim at an ambitious sacrifice of the many, to the aggrandizement of the few.

Of all the objections which have been framed against the federal constitution, this is perhaps the most extraordinary. Whilst the objection itself is levelled against a pretended oligarchy, the principle of it strikes at the very root of republican government.

The aim of every political constitution is, or ought to be, first, to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust. The elective mode of obtaining rulers, is the characteristic policy of republican government. The means relied on in this form of government for preventing their degeneracy, are numerous and various. The most effectual one, is such a limitation of the term of appointments, as will maintain a proper responsibility to the people.

Let me now ask, what circumstance there is in the constitution of the house of representatives, that violates the principles of republican government; or favours the elevation of the few, on the ruins of the many? Let me ask, whether every circumstance is not, on the contrary, strictly conformable to these principles; and scrupulously impartial to the rights and pretensions of every class and description of citizens?

Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States. They are to be the same who exercise the right in every state of electing the correspondent branch of the legislature of the state.

ANNOTATIONS **NOTES & QUESTIONS**

Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession, is permitted to fetter the judgment, or disappoint the inclination of the people.

If we consider the situation of the men on whom the free suffrages of their fellow citizens may confer the representative trust, we shall find it involving every security which can be devised or desired for their fidelity to their constituents.

In the first place, as they will have been distinguished by the preference of their fellow citizens, we are to presume that, in general, they will be somewhat distinguished also by those qualities which entitle them to it, and which promise a sincere and scrupulous regard to the nature of their engagements.

In the second place, they will enter into the public service under circumstances which cannot fail to produce a temporary affection at least to their constituents. There is in every breast a sensibility to marks of honour, of favour, of esteem, and of confidence, which, apart from all considerations of interest, is some pledge for grateful and benevolent returns. Ingratitude is a common topic of declamation against human nature; and it must be confessed, that instances of it are but too frequent and flagrant, both in public and in private life. But the universal and extreme indignation which it inspires, is itself a proof of the energy and prevalence of the contrary sentiment.

In the third place, those ties which bind the representative to his constituents, are strengthened by motives of a more selfish nature. His pride and vanity attach him to a form of government which favours his pretensions, and gives him a share in its honours and distinctions. Whatever hopes or projects might be entertained by a few aspiring characters, it must generally happen, that a great proportion of the men deriving their advancement from their influence with the people, would have more to hope from a preservation of their favour, than from innovations in the government subversive of the authority of the people.

ANNOTATIONS **NOTES & QUESTIONS**

All these securities, however, would be found very insufficient without the restraint of frequent elections. Hence, in the fourth place, the house of representatives is so constituted, as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there for ever to remain, unless a faithful discharge of their trust shall have established their title to a renewal of it.

I will add, as a fifth circumstance in the situation of the house of representatives, restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interest, and sympathy of sentiments, of which few governments have furnished examples; but without which every government degenerates into tyranny. If it be asked, what is to restrain the house of representatives from making legal discriminations in favour of themselves, and a particular class of the society? I answer, the genius of the whole system; the nature of just and constitutional laws; and, above all, the vigilant and manly spirit which actuates the people of America; a spirit which nourishes freedom, and in return is nourished by it.

If this spirit shall ever be so far debased, as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate any thing but liberty.

Such will be the relation between the house of representatives and their constituents. Duty, gratitude, interest, ambition itself, are the chords by which they will be bound to fidelity and sympathy with the great mass of the people. It is possible that these may all be insufficient to control the caprice and wickedness of men. But are they not all that government will admit, and that human prudence can devise? Are they not the genuine, and the characteristic means, by which republican government provides for the liberty and happiness of the people? Are they not the identical means on which every state government in the

ANNOTATIONS **NOTES & QUESTIONS**

union relies for the attainment of these important ends? What then are we to understand by the objection which this paper has combatted? What are we to say to the men who profess the most flaming zeal for republican government, yet boldly impeach the fundamental principle of it; who pretend to be champions for the right and the capacity of the people to choose their own rulers, yet maintain that they will prefer those only who will immediately and infallibly betray the trust committed to them?

Were the objection to be read by one who had not seen the mode prescribed by the constitution for the choice of representatives, he could suppose nothing less, than that some unreasonable qualification of property was annexed to the right of suffrage; or that the right of eligibility was limited to persons of particular families or fortunes; or at least, that the mode prescribed by the state constitutions was, in some respect or other, very grossly departed from. We have seen how far such a supposition would err, as to the two first points. Nor would it, in fact, be less erroneous as to the last. The only difference discoverable between the two cases is, that each representative ofthe United States will be elected by five or six thousand citizens; whilst, in the individual states, the election ofa representative is left to about as many hundred. Will it be pretended, that this difference is sufficient to justify an attachment to the state governments, and an abhorrence to the federal government? If this be the point on which the objection turns, it deserves to be examined.

Is it supported by *reason*? This cannot be said, without maintaining, that five or six thousand citizens are less capable of choosing a fit representative, or more liable to be corrupted by an unfit one, than five or six hundred. Reason, on the contrary, assures us that, as in so great a number, a fit representative would be most likely to be found; so the choice would be less likely to be diverted from him, by the intrigues of the ambitious, or the bribes of the rich.

Is the *consequence* from this doctrine admissible? If we say that five or six hundred citizens are as many as can jointly exercise their right of suffrage, must we not deprive the people of the immediate choice of their public servants in every instance, where the administration

ANNOTATIONS **NOTES & QUESTIONS**

of the government does not require as many of them as will amount to one for that number of citizens?

Is the doctrine warranted *by facts*? It was shown in the last paper, that the real representation in the British house of commons, very little exceeds the proportion of one for every thirty thousand inhabitants. Besides a variety of powerful causes, not existing here, and which favour in that country the pretensions o frank and wealth, no person is eligible as a representative of a county, unless he possess real estate of the clear value of six hundred pounds sterling per year; nor of a city or borough, unless he possess a like estate of half that annual value. To this qualification, on the part of the county representatives, is added another on the part of the county electors, which restrains the right of suffrage to persons having a freehold estate of the annual value of more than twenty pounds sterling, according to the present rate of money. Notwithstanding these unfavourable circumstances, and notwithstanding some very unequal laws in the British code, it cannot be said, that the representatives of the nation have elevated the few, on the ruins of the many.

But we need not resort to foreign experience on this subject. Our own is explicit and decisive. The districts in New Hampshire, in which the senators are chosen immediately by the people, are nearly as large as will be necessary for her representatives in the congress. Those of Massachusetts are larger than will be necessary for that purpose. And those of New York still more so. In the last state, the members of assembly, for the cities and counties of New York and Albany, are elected by very nearly as many voters as will be entitled to a representative in the congress, calculating on the number of sixty-five representatives only. It makes no difference that, in these senatorial districts and counties, a number of representatives are voted for by each elector at the same time. If the same electors, at the same time, are capable of choosing four or five representatives, they cannot be incapable of choosing one. Pennsylvania is an additional example. Some of her counties, which elect her state representatives, are almost as large as her districts will be by which her federal representatives will be elected. The city of Philadelphia is supposed to contain between fifty and sixty thousand souls. It will, therefore, form nearly two districts for the choice of federal representatives. It forms, however, but one county, in which every elector votes for each of its

ANNOTATIONS **NOTES & QUESTIONS**

representatives in the state legislature. And what may appear to be still more directly to our purpose, the whole city actually elects a *single member* for the executive council. This is the case in all the other counties of the state.

Are not these facts the most satisfactory proofs of the fallacy, which has been employed against the branch of the federal government under consideration? Has it appeared on trial, that the senators of New Hampshire, Massachusetts, and New York; or the executive council of Pennsylvania; or the members of the assembly in the two last states, have betrayed any peculiar disposition to sacrifice the many to the few; or are in any respect less worthy of their places, than the representatives and magistrates appointed in other states, by very small divisions of the people?

But there are cases of a stronger complexion than any which I have yet quoted. One branch of the legislature of Connecticut is so constituted, that each member of it is elected by the whole state. So is the governor of that state, of Massachusetts, and of this state, and the president of New Hampshire. I leave every man to decide, whether the result of any one of these experiments can be said to countenance a suspicion, that a diffusive mode of choosing representatives of the people, tends to elevate traitors, and to undermine the public liberty.

PUBLIUS (JAMES MADISON)

Federalist No. 62

ESSAY

February 27, 1788
The Independent Journal | New York City, New York

BACKGROUND

Publius (James Madison) argues for the proposed Constitution by introducing the Senate and explaining how it is structured.

GUIDING QUESTIONS

1. What are the qualifications for senators?
2. The Senate exhibits what principle of representation?
3. Why is having a second branch in the legislature a good thing?
4. How does a Senate provide stability to government?

"Federalist 62," in *The U.S. Constitution: A Reader*, ed. Hillsdale College Politics Faculty (Hillsdale, MI: Hillsdale College Press, 2012), 331-36.

ANNOTATIONS NOTES & QUESTIONS

The Senate

Having examined the constitution of the House of Representatives, and answered such of the objections against it as seemed to merit notice, I enter next on the examination of the Senate.

The heads into which this member of the government may be considered are: I. The qualification of senators; II. The appointment of them by the State legislatures; III. The equality of representation in the Senate; IV. The number of senators, and the term for which they are to be elected; V. The powers vested in the Senate.

I. The qualifications proposed for senators, as distinguished from those of representatives, consist in a more advanced age and a longer period of citizenship. A senator must be thirty years of age at least; as a representative must be twenty-five. And the former must have been a citizen nine years; as seven years are required for the latter. The propriety of these distinctions is explained by the nature of the senatorial trust, which, requiring greater extent of information and stability of character, requires at the same time that the senator should have reached a period of life most likely to supply these advantages; and which, participating immediately in transactions with foreign nations, ought to be exercised by none who are not thoroughly weaned from the prepossessions and habits incident to foreign birth and education. The term of nine years appears to be a prudent mediocrity between a total exclusion of adopted citizens, whose merits and talents may claim a share in the public confidence, and an indiscriminate and hasty admission of them, which might create a channel for foreign influence on the national councils.

II. It is equally unnecessary to dilate on the appointment of senators by the State legislatures. Among the various modes which might have been devised for constituting this branch of the government, that which has been proposed by the convention is probably the most congenial with the public opinion. It is recommended by the double advantage of favoring a select appointment, and of giving to the State governments such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems.

ANNOTATIONS **NOTES & QUESTIONS**

III. The equality of representation in the Senate is another point, which, being evidently the result of compromise between the opposite pretensions of the large and the small States, does not call for much discussion. If indeed it be right, that among a people thoroughly incorporated into one nation, every district ought to have a PROPORTIONAL share in the government, and that among independent and sovereign States, bound together by a simple league, the parties, however unequal in size, ought to have an EQUAL share in the common councils, it does not appear to be without some reason that in a compound republic, partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation. But it is superfluous to try, by the standard of theory, a part of the Constitution which is allowed on all hands to be the result, not of theory, but "of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable." A common government, with powers equal to its objects, is called for by the voice, and still more loudly by the political situation, of America. A government founded on principles more consonant to the wishes of the larger States, is not likely to be obtained from the smaller States. The only option, then, for the former, lies between the proposed government and a government still more objectionable. Under this alternative, the advice of prudence must be to embrace the lesser evil; and, instead of indulging a fruitless anticipation of the possible mischiefs which may ensue, to contemplate rather the advantageous consequences which may qualify the sacrifice.

In this spirit it may be remarked, that the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small States; since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the States into one simple republic.

Another advantage accruing from this ingredient in the constitution of the Senate is, the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence, first, of a majority of the people, and

ANNOTATIONS **NOTES & QUESTIONS**

then, of a majority of the States. It must be acknowledged that this complicated check on legislation may in some instances be injurious as well as beneficial; and that the peculiar defense which it involves in favor of the smaller States, would be more rational, if any interests common to them, and distinct from those of the other States, would otherwise be exposed to peculiar danger. But as the larger States will always be able, by their power over the supplies, to defeat unreasonable exertions of this prerogative of the lesser States, and as the faculty and excess of law-making seem to be the diseases to which our governments are most liable, it is not impossible that this part of the Constitution may be more convenient in practice than it appears to many in contemplation.

IV. The number of senators, and the duration of their appointment, come next to be considered. In order to form an accurate judgment on both of these points, it will be proper to inquire into the purposes which are to be answered by a senate; and in order to ascertain these, it will be necessary to review the inconveniences which a republic must suffer from the want of such an institution.

First. It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents, and prove unfaithful to their important trust. In this point of view, a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient. This is a precaution founded on such clear principles, and now so well understood in the United States, that it would be more than superfluous to enlarge on it. I will barely remark, that as the improbability of sinister combinations will be in proportion to the dissimilarity in the genius of the two bodies, it must be politic to distinguish them from each other by every circumstance which will consist with a due harmony in all proper measures, and with the genuine principles of republican government.

ANNOTATIONS **NOTES & QUESTIONS**

Second. The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions. Examples on this subject might be cited without number; and from proceedings within the United States, as well as from the history of other nations. But a position that will not be contradicted, need not be proved. All that need be remarked is, that a body which is to correct this infirmity ought itself to be free from it, and consequently ought to be less numerous. It ought, moreover, to possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration.

Third. Another defect to be supplied by a senate lies in a want of due acquaintance with the objects and principles of legislation. It is not possible that an assembly of men called for the most part from pursuits of a private nature, continued in appointment for a short time, and led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs, and the comprehensive interests of their country, should, if left wholly to themselves, escape a variety of important errors in the exercise of their legislative trust. It may be affirmed, on the best grounds, that no small share of the present embarrassments of America is to be charged on the blunders of our governments; and that these have proceeded from the heads rather than the hearts of most of the authors of them. What indeed are all the repealing, explaining, and amending laws, which fill and disgrace our voluminous codes, but so many monuments of deficient wisdom; so many impeachments exhibited by each succeeding against each preceding session; so many admonitions to the people, of the value of those aids which may be expected from a well-constituted senate?

A good government implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained. Some governments are deficient in both these qualities; most governments are deficient in the first. I scruple not to assert, that in American governments too little attention has been paid to the last. The federal Constitution avoids this error; and what merits particular notice, it provides for the last in a mode which increases the security for the first.

ANNOTATIONS **NOTES & QUESTIONS**

Fourth. The mutability in the public councils arising from a rapid succession of new members, however qualified they may be, points out, in the strongest manner, the necessity of some stable institution in the government. Every new election in the States is found to change one half of the representatives. From this change of men must proceed a change of opinions; and from a change of opinions, a change of measures. But a continual change even of good measures is inconsistent with every rule of prudence and every prospect of success. The remark is verified in private life, and becomes more just, as well as more important, in national transactions.

To trace the mischievous effects of a mutable government would fill a volume. I will hint a few only, each of which will be perceived to be a source of innumerable others.

In the first place, it forfeits the respect and confidence of other nations, and all the advantages connected with national character. An individual who is observed to be inconstant to his plans, or perhaps to carry on his affairs without any plan at all, is marked at once, by all prudent people, as a speedy victim to his own unsteadiness and folly. His more friendly neighbors may pity him, but all will decline to connect their fortunes with his; and not a few will seize the opportunity of making their fortunes out of his. One nation is to another what one individual is to another; with this melancholy distinction perhaps, that the former, with fewer of the benevolent emotions than the latter, are under fewer restraints also from taking undue advantage from the indiscretions of each other. Every nation, consequently, whose affairs betray a want of wisdom and stability, may calculate on every loss which can be sustained from the more systematic policy of their wiser neighbors. But the best instruction on this subject is unhappily conveyed to America by the example of her own situation. She finds that she is held in no respect by her friends; that she is the derision of her enemies; and that she is a prey to every nation which has an interest in speculating on her fluctuating councils and embarrassed affairs.

The internal effects of a mutable policy are still more calamitous. It poisons the blessing of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that

ANNOTATIONS **NOTES & QUESTIONS**

they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?

Another effect of public instability is the unreasonable advantage it gives to the sagacious, the enterprising, and the moneyed few over the industrious and uniformed mass of the people. Every new regulation concerning commerce or revenue, or in any way affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow-citizens. This is a state of things in which it may be said with some truth that laws are made for the FEW, not for the MANY.

In another point of view, great injury results from an unstable government. The want of confidence in the public councils damps every useful undertaking, the success and profit of which may depend on a continuance of existing arrangements. What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed? What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment, when he can have no assurance that his preparatory labors and advances will not render him a victim to an inconstant government? In a word, no great improvement or laudable enterprise can go forward which requires the auspices of a steady system of national policy.

But the most deplorable effect of all is that diminution of attachment and reverence which steals into the hearts of the people, towards a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable, without possessing a certain portion of order and stability.

PUBLIUS (JAMES MADISON)

Federalist No. 63

ESSAY

March 1, 1788
The Independent Journal | New York City, New York

BACKGROUND

Publius (James Madison) argues for the proposed Constitution by continuing the discussion of the Senate.

GUIDING QUESTIONS

1. How does a Senate provide a due sense of national character?
2. How does a Senate provide responsibility in government?
3. What is the chief difference between ancient republics and American republics?
4. What must happen to the Senate before it can become tyrannical?

"Federalist 63," in *The U.S. Constitution: A Reader*, ed. Hillsdale College Politics Faculty (Hillsdale, MI: Hillsdale College Press, 2012), 337-43.

ANNOTATIONS **NOTES & QUESTIONS**

A *fifth* desideratum, illustrating the utility of a senate, is the want of a due sense of national character. Without a select and stable member of the government, the esteem of foreign powers will not only be forfeited by an unenlightened and variable policy, proceeding from the causes already mentioned, but the national councils will not possess that sensibility to the opinion of the world, which is perhaps not less necessary in order to merit, than it is to obtain, its respect and confidence.

An attention to the judgment of other nations is important to every government for two reasons: the one is, that, independently of the merits of any particular plan or measure, it is desirable, on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy; the second is, that in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed. What has not America lost by her want of character with foreign nations; and how many errors and follies would she not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiased part of mankind?

Yet however requisite a sense of national character may be, it is evident that it can never be sufficiently possessed by a numerous and changeable body. It can only be found in a number so small that a sensible degree of the praise and blame of public measures may be the portion of each individual; or in an assembly so durably invested with public trust, that the pride and consequence of its members may be sensibly incorporated with the reputation and prosperity of the community. The half-yearly representatives of Rhode Island would probably have been little affected in their deliberations on the iniquitous measures of that State, by arguments drawn from the light in which such measures would be viewed by foreign nations, or even by the sister States; whilst it can scarcely be doubted that if the concurrence of a select and stable body had been necessary, a regard to national character alone would have prevented the calamities under which that misguided people is now laboring.

ANNOTATIONS **NOTES & QUESTIONS**

I add, as a *sixth* defect the want, in some important cases, of a due responsibility in the government to the people, arising from that frequency of elections which in other cases produces this responsibility. This remark will, perhaps, appear not only new, but paradoxical. It must nevertheless be acknowledged, when explained, to be as undeniable as it is important.

Responsibility, in order to be reasonable, must be limited to objects within the power of the responsible party, and in order to be effectual, must relate to operations of that power, of which a ready and proper judgment can be formed by the constituents. The objects of government may be divided into two general classes: the one depending on measures which have singly an immediate and sensible operation; the other depending on a succession of well-chosen and well-connected measures, which have a gradual and perhaps unobserved operation. The importance of the latter description to the collective and permanent welfare of every country, needs no explanation. And yet it is evident that an assembly elected for so short a term as to be unable to provide more than one or two links in a chain of measures, on which the general welfare may essentially depend, ought not to be answerable for the final result, any more than a steward or tenant, engaged for one year, could be justly made to answer for places or improvements which could not be accomplished in less than half a dozen years. Nor is it possible for the people to estimate the SHARE of influence which their annual assemblies may respectively have on events resulting from the mixed transactions of several years. It is sufficiently difficult to preserve a personal responsibility in the members of a NUMEROUS body, for such acts of the body as have an immediate, detached, and palpable operation on its constituents.

The proper remedy for this defect must be an additional body in the legislative department, which, having sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects.

Thus far I have considered the circumstances which point out the necessity of a well-constructed Senate only as they relate to the representatives of the people. To a people as little

ANNOTATIONS **NOTES & QUESTIONS**

blinded by prejudice or corrupted by flattery as those whom I address, I shall not scruple to add, that such an institution may be sometimes necessary as a defense to the people against their own temporary errors and delusions. As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers; so there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind? What bitter anguish would not the people of Athens have often escaped if their government had contained so provident a safeguard against the tyranny of their own passions? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens the hemlock on one day and statues on the next.

It may be suggested, that a people spread over an extensive region cannot, like the crowded inhabitants of a small district, be subject to the infection of violent passions, or to the danger of combining in pursuit of unjust measures. I am far from denying that this is a distinction of peculiar importance. I have, on the contrary, endeavored in a former paper to show, that it is one of the principal recommendations of a confederated republic. At the same time, this advantage ought not to be considered as superseding the use of auxiliary precautions. It may even be remarked, that the same extended situation, which will exempt the people of America from some of the dangers incident to lesser republics, will expose them to the inconveniency of remaining for a longer time under the influence of those misrepresentations which the combined industry of interested men may succeed in distributing among them.

It adds no small weight to all these considerations, to recollect that history informs us of no long-lived republic which had not a senate. Sparta, Rome, and Carthage are, in fact, the only states to whom that character can be applied. In each of the two first there was a senate

ANNOTATIONS **NOTES & QUESTIONS**

for life. The constitution of the senate in the last is less known. Circumstantial evidence makes it probable that it was not different in this particular from the two others. It is at least certain, that it had some quality or other which rendered it an anchor against popular fluctuations; and that a smaller council, drawn out of the senate, was appointed not only for life, but filled up vacancies itself. These examples, though as unfit for the imitation, as they are repugnant to the genius, of America, are, notwithstanding, when compared with the fugitive and turbulent existence of other ancient republics, very instructive proofs of the necessity of some institution that will blend stability with liberty. I am not unaware of the circumstances which distinguish the American from other popular governments, as well ancient as modern; and which render extreme circumspection necessary, in reasoning from the one case to the other. But after allowing due weight to this consideration, it may still be maintained, that there are many points of similitude which render these examples not unworthy of our attention. Many of the defects, as we have seen, which can only be supplied by a senatorial institution, are common to a numerous assembly frequently elected by the people, and to the people themselves. There are others peculiar to the former, which require the control of such an institution. The people can never wilfully betray their own interests; but they may possibly be betrayed by the representatives of the people; and the danger will be evidently greater where the whole legislative trust is lodged in the hands of one body of men, than where the concurrence of separate and dissimilar bodies is required in every public act.

The difference most relied on, between the American and other republics, consists in the principle of representation; which is the pivot on which the former move, and which is supposed to have been unknown to the latter, or at least to the ancient part of them. The use which has been made of this difference, in reasonings contained in former papers, will have shown that I am disposed neither to deny its existence nor to undervalue its importance. I feel the less restraint, therefore, in observing, that the position concerning the ignorance of the ancient governments on the subject of representation, is by no means precisely true in the latitude commonly given to it. Without entering into a disquisition which here would be misplaced, I will refer to a few known facts, in support of what I advance.

ANNOTATIONS **NOTES & QUESTIONS**

In the most pure democracies of Greece, many of the executive functions were performed, not by the people themselves, but by officers elected by the people, and REPRESENTING the people in their EXECUTIVE capacity.

Prior to the reform of Solon, Athens was governed by nine Archons, annually ELECTED BY THE PEOPLE AT LARGE. The degree of power delegated to them seems to be left in great obscurity. Subsequent to that period, we find an assembly, first of four, and afterwards of six hundred members, annually ELECTED BY THE PEOPLE; and PARTIALLY representing them in their LEGISLATIVE capacity, since they were not only associated with the people in the function of making laws, but had the exclusive right of originating legislative propositions to the people. The senate of Carthage, also, whatever might be its power, or the duration of its appointment, appears to have been ELECTIVE by the suffrages of the people. Similar instances might be traced in most, if not all the popular governments of antiquity.

Lastly, in Sparta we meet with the Ephori, and in Rome with the Tribunes; two bodies, small indeed in numbers, but annually ELECTED BY THE WHOLE BODY OF THE PEOPLE, and considered as the REPRESENTATIVES of the people, almost in their PLENIPOTENTIARY capacity. The Cosmi of Crete were also annually ELECTED BY THE PEOPLE, and have been considered by some authors as an institution analogous to those of Sparta and Rome, with this difference only, that in the election of that representative body the right of suffrage was communicated to a part only of the people.

From these facts, to which many others might be added, it is clear that the principle of representation was neither unknown to the ancients nor wholly overlooked in their political constitutions. The true distinction between these and the American governments, lies IN THE TOTAL EXCLUSION OF THE PEOPLE, IN THEIR COLLECTIVE CAPACITY, from any share in the LATTER, and not in the TOTAL EXCLUSION OF THE REPRESENTATIVES OF THE PEOPLE from the administration of the FORMER. The distinction, however, thus qualified, must be admitted to leave a most advantageous superiority in favor of the United States. But to insure to this advantage its full effect, we must be careful

ANNOTATIONS **NOTES & QUESTIONS**

not to separate it from the other advantage, of an extensive territory. For it cannot be believed, that any form of representative government could have succeeded within the narrow limits occupied by the democracies of Greece.

In answer to all these arguments, suggested by reason, illustrated by examples, and enforced by our own experience, the jealous adversary of the Constitution will probably content himself with repeating, that a senate appointed not immediately by the people, and for the term of six years, must gradually acquire a dangerous pre-eminence in the government, and finally transform it into a tyrannical aristocracy.

To this general answer, the general reply ought to be sufficient, that liberty may be endangered by the abuses of liberty as well as by the abuses of power; that there are numerous instances of the former as well as of the latter; and that the former, rather than the latter, are apparently most to be apprehended by the United States. But a more particular reply may be given.

Before such a revolution can be effected, the Senate, it is to be observed, must in the first place corrupt itself; must next corrupt the State legislatures; must then corrupt the House of Representatives; and must finally corrupt the people at large. It is evident that the Senate must be first corrupted before it can attempt an establishment of tyranny. Without corrupting the State legislatures, it cannot prosecute the attempt, because the periodical change of members would otherwise regenerate the whole body. Without exerting the means of corruption with equal success on the House of Representatives, the opposition of that coequal branch of the government would inevitably defeat the attempt; and without corrupting the people themselves, a succession of new representatives would speedily restore all things to their pristine order. Is there any man who can seriously persuade himself that the proposed Senate can, by any possible means within the compass of human address, arrive at the object of a lawless ambition, through all these obstructions?

If reason condemns the suspicion, the same sentence is pronounced by experience. The constitution of Maryland furnishes the most apposite example. The Senate of that State is elected, as the federal Senate will be, indirectly by the people, and for a term less by one

ANNOTATIONS NOTES & QUESTIONS

year only than the federal Senate. It is distinguished, also, by the remarkable prerogative of filling up its own vacancies within the term of its appointment, and, at the same time, is not under the control of any such rotation as is provided for the federal Senate. There are some other lesser distinctions, which would expose the former to colorable objections, that do not lie against the latter. If the federal Senate, therefore, really contained the danger which has been so loudly proclaimed, some symptoms at least of a like danger ought by this time to have been betrayed by the Senate of Maryland, but no such symptoms have appeared. On the contrary, the jealousies at first entertained by men of the same description with those who view with terror the correspondent part of the federal Constitution, have been gradually extinguished by the progress of the experiment; and the Maryland constitution is daily deriving, from the salutary operation of this part of it, a reputation in which it will probably not be rivalled by that of any State in the Union.

But if any thing could silence the jealousies on this subject, it ought to be the British example. The Senate there instead of being elected for a term of six years, and of being unconfined to particular families or fortunes, is an hereditary assembly of opulent nobles. The House of Representatives, instead of being elected for two years, and by the whole body of the people, is elected for seven years, and, in very great proportion, by a very small proportion of the people. Here, unquestionably, ought to be seen in full display the aristocratic usurpations and tyranny which are at some future period to be exemplified in the United States. Unfortunately, however, for the anti-federal argument, the British history informs us that this hereditary assembly has not been able to defend itself against the continual encroachments of the House of Representatives; and that it no sooner lost the support of the monarch, than it was actually crushed by the weight of the popular branch.

As far as antiquity can instruct us on this subject, its examples support the reasoning which we have employed. In Sparta, the Ephori, the annual representatives of the people, were found an overmatch for the senate for life, continually gained on its authority and finally drew all power into their own hands. The Tribunes of Rome, who were the representatives of the people, prevailed, it is well known, in almost every contest with the senate for life, and in the end gained the most complete triumph over it. The fact is the more remarkable,

ANNOTATIONS **NOTES & QUESTIONS**

as unanimity was required in every act of the Tribunes, even after their number was augmented to ten. It proves the irresistible force possessed by that branch of a free government, which has the people on its side. To these examples might be added that of Carthage, whose senate, according to the testimony of Polybius, instead of drawing all power into its vortex, had, at the commencement of the second Punic War, lost almost the whole of its original portion.

Besides the conclusive evidence resulting from this assemblage of facts, that the federal Senate will never be able to transform itself, by gradual usurpations, into an independent and aristocratic body, we are warranted in believing, that if such a revolution should ever happen from causes which the foresight of man cannot guard against, the House of Representatives, with the people on their side, will at all times be able to bring back the Constitution to its primitive form and principles. Against the force of the immediate representatives of the people, nothing will be able to maintain even the constitutional authority of the Senate, but such a display of enlightened policy, and attachment to the public good, as will divide with that branch of the legislature the affections and support of the entire body of the people themselves.

PUBLIUS (ALEXANDER HAMILTON)

Federalist No. 70

ESSAY

March 15, 1788
The New-York Packet | New York City, New York

BACKGROUND

Publius (Alexander Hamilton) argues for the proposed Constitution by explaining how an energetic executive is compatible with republican government.

GUIDING QUESTIONS

1. What does Hamilton say is a leading character in the definition of good government?
2. What kind of executive is conducive to energy?
3. What is one of the weightiest objections to a plural executive?
4. What are the two greatest securities of which a plural executive deprives people?
5. From what does the idea of a plural executive originate?

"Federalist 70," in *The U.S. Constitution: A Reader*, ed. Hillsdale College Politics Faculty (Hillsdale, MI: Hillsdale College Press, 2012), 345-51.

ANNOTATIONS **NOTES & QUESTIONS**

There is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government. The enlightened well-wishers to this species of government must at least hope that the supposition is destitute of foundation; since they can never admit its truth, without at the same time admitting the condemnation of their own principles. Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman story, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of Dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.

There can be no need, however, to multiply arguments or examples on this head. A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.

Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic Executive, it will only remain to inquire, what are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety in the republican sense? And how far does this combination characterize the plan which has been reported by the convention?

The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.

The ingredients which constitute safety in the republican sense are, first, a due dependence on the people, secondly, a due responsibility.

ANNOTATIONS **NOTES & QUESTIONS**

Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justice of their views, have declared in favor of a single Executive and a numerous legislature. They have with great propriety, considered energy as the most necessary qualification of the former, and have regarded this as most applicable to power in a single hand, while they have, with equal propriety, considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests.

That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.

This unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and co-operation of others, in the capacity of counsellors to him. Of the first, the two Consuls of Rome may serve as an example; of the last, we shall find examples in the constitutions of several of the States. New York and New Jersey, if I recollect right, are the only States which have intrusted the executive authority wholly to single men. Both these methods of destroying the unity of the Executive have their partisans; but the votaries of an executive council are the most numerous. They are both liable, if not to equal, to similar objections, and may in most lights be examined in conjunction.

The experience of other nations will afford little instruction on this head. As far, however, as it teaches any thing, it teaches us not to be enamoured of plurality in the Executive. We have seen that the Achaeans, on an experiment of two Praetors, were induced to abolish one. The Roman history records many instances of mischiefs to the republic from the dissensions between the Consuls, and between the military Tribunes, who were at times substituted for the Consuls. But it gives us no specimens of any peculiar advantages derived to the state from the circumstance of the plurality of those magistrates. That the dissensions between them were not more frequent or more fatal, is a matter of astonishment, until we

ANNOTATIONS **NOTES & QUESTIONS**

advert to the singular position in which the republic was almost continually placed, and to the prudent policy pointed out by the circumstances of the state, and pursued by the Consuls, of making a division of the government between them. The patricians engaged in a perpetual struggle with the plebeians for the preservation of their ancient authorities and dignities; the Consuls, who were generally chosen out of the former body, were commonly united by the personal interest they had in the defense of the privileges of their order. In addition to this motive of union, after the arms of the republic had considerably expanded the bounds of its empire, it became an established custom with the Consuls to divide the administration between themselves by lot one of them remaining at Rome to govern the city and its environs, the other taking the command in the more distant provinces. This expedient must, no doubt, have had great influence in preventing those collisions and rivalships which might otherwise have embroiled the peace of the republic.

But quitting the dim light of historical research, attaching ourselves purely to the dictates of reason and good sense, we shall discover much greater cause to reject than to approve the idea of plurality in the Executive, under any modification whatever.

Wherever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion. If it be a public trust or office, in which they are clothed with equal dignity and authority, there is peculiar danger of personal emulation and even animosity. From either, and especially from all these causes, the most bitter dissensions are apt to spring. Whenever these happen, they lessen the respectability, weaken the authority, and distract the plans and operation of those whom they divide. If they should unfortunately assail the supreme executive magistracy of a country, consisting of a plurality of persons, they might impede or frustrate the most important measures of the government, in the most critical emergencies of the state. And what is still worse, they might split the community into the most violent and irreconcilable factions, adhering differently to the different individuals who composed the magistracy.

ANNOTATIONS **NOTES & QUESTIONS**

Men often oppose a thing, merely because they have had no agency in planning it, or because it may have been planned by those whom they dislike. But if they have been consulted, and have happened to disapprove, opposition then becomes, in their estimation, an indispensable duty of self-love. They seem to think themselves bound in honor, and by all the motives of personal infallibility, to defeat the success of what has been resolved upon contrary to their sentiments. Men of upright, benevolent tempers have too many opportunities of remarking, with horror, to what desperate lengths this disposition is sometimes carried, and how often the great interests of society are sacrificed to the vanity, to the conceit, and to the obstinacy of individuals, who have credit enough to make their passions and their caprices interesting to mankind. Perhaps the question now before the public may, in its consequences, afford melancholy proofs of the effects of this despicable frailty, or rather detestable vice, in the human character.

Upon the principles of a free government, inconveniences from the source just mentioned must necessarily be submitted to in the formation of the legislature; but it is unnecessary, and therefore unwise, to introduce them into the constitution of the Executive. It is here too that they may be most pernicious. In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority. When a resolution too is once taken, the opposition must be at an end. That resolution is a law, and resistance to it punishable. But no favorable circumstances palliate or atone for the disadvantages of dissension in the executive department. Here, they are pure and unmixed. There is no point at which they cease to operate. They serve to embarrass and weaken the execution of the plan or measure to which they relate, from the first step to the final conclusion of it. They constantly counteract those qualities in the Executive which are the most necessary ingredients in its composition, vigor and expedition, and this without any counterbalancing good. In the conduct of war, in which the energy of the Executive is the bulwark of the national security, every thing would be to be apprehended from its plurality.

ANNOTATIONS **NOTES & QUESTIONS**

It must be confessed that these observations apply with principal weight to the first case supposed that is, to a plurality of magistrates of equal dignity and authority a scheme, the advocates for which are not likely to form a numerous sect; but they apply, though not with equal, yet with considerable weight to the project of a council, whose concurrence is made constitutionally necessary to the operations of the ostensible Executive. An artful cabal in that council would be able to distract and to enervate the whole system of administration. If no such cabal should exist, the mere diversity of views and opinions would alone be sufficient to tincture the exercise of the executive authority with a spirit of habitual feebleness and dilatoriness.

But one of the weightiest objections to a plurality in the Executive, and which lies as much against the last as the first plan, is, that it tends to conceal faults and destroy responsibility.

Responsibility is of two kinds to censure and to punishment. The first is the more important of the two, especially in an elective office. Man, in public trust, will much oftener act in such a manner as to render him unworthy of being any longer trusted, than in such a manner as to make him obnoxious to legal punishment. But the multiplication of the Executive adds to the difficulty of detection in either case. It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that, where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.

“I was overruled by my council. The council were so divided in their opinions that it was impossible to obtain any better resolution on the point." These and similar pretexts are constantly at hand, whether true or false. And who is there that will either take the trouble

ANNOTATIONS **NOTES & QUESTIONS**

or incur the odium, of a strict scrutiny into the secret springs of the transaction? Should there be found a citizen zealous enough to undertake the unpromising task, if there happen to be collusion between the parties concerned, how easy it is to clothe the circumstances with so much ambiguity, as to render it uncertain what was the precise conduct of any of those parties?

In the single instance in which the governor of this State is coupled with a council that is, in the appointment to offices, we have seen the mischiefs of it in the view now under consideration. Scandalous appointments to important offices have been made. Some cases, indeed, have been so flagrant that ALL PARTIES have agreed in the impropriety of the thing. When inquiry has been made, the blame has been laid by the governor on the members of the council, who, on their part, have charged it upon his nomination; while the people remain altogether at a loss to determine, by whose influence their interests have been committed to hands so unqualified and so manifestly improper. In tenderness to individuals, I forbear to descend to particulars.

It is evident from these considerations, that the plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, first, the restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and, secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it.

In England, the king is a perpetual magistrate; and it is a maxim which has obtained for the sake of the public peace, that he is unaccountable for his administration, and his person sacred. Nothing, therefore, can be wiser in that kingdom, than to annex to the king a constitutional council, who may be responsible to the nation for the advice they give. Without this, there would be no responsibility whatever in the executive department an idea inadmissible in a free government. But even there the king is not bound by the resolutions of his council, though they are answerable for the advice they give. He is the absolute master

ANNOTATIONS NOTES & QUESTIONS

of his own conduct in the exercise of his office, and may observe or disregard the counsel given to him at his sole discretion.

But in a republic, where every magistrate ought to be personally responsible for his behavior in office the reason which in the British Constitution dictates the propriety of a council, not only ceases to apply, but turns against the institution. In the monarchy of Great Britain, it furnishes a substitute for the prohibited responsibility of the chief magistrate, which serves in some degree as a hostage to the national justice for his good behavior. In the American republic, it would serve to destroy, or would greatly diminish, the intended and necessary responsibility of the Chief Magistrate himself.

The idea of a council to the Executive, which has so generally obtained in the State constitutions, has been derived from that maxim of republican jealousy which considers power as safer in the hands of a number of men than of a single man. If the maxim should be admitted to be applicable to the case, I should contend that the advantage on that side would not counterbalance the numerous disadvantages on the opposite side. But I do not think the rule at all applicable to the executive power. I clearly concur in opinion, in this particular, with a writer whom the celebrated Junius pronounces to be ``deep, solid, and ingenious,'' that ``the executive power is more easily confined when it is ONE'; that it is far more safe there should be a single object for the jealousy and watchfulness of the people; and, in a word, that all multiplication of the Executive is rather dangerous than friendly to liberty.

A little consideration will satisfy us, that the species of security sought for in the multiplication of the Executive, is attainable. Numbers must be so great as to render combination difficult, or they are rather a source of danger than of security. The united credit and influence of several individuals must be more formidable to liberty, than the credit and influence of either of them separately. When power, therefore, is placed in the hands of so small a number of men, as to admit of their interests and views being easily combined in a common enterprise, by an artful leader, it becomes more liable to abuse, and more dangerous when abused, than if it be lodged in the hands of one man; who, from the very circumstance of

ANNOTATIONS NOTES & QUESTIONS

his being alone, will be more narrowly watched and more readily suspected, and who cannot unite so great a mass of influence as when he is associated with others. The Decemvirs of Rome, whose name denotes their number3, were more to be dreaded in their usurpation than any ONE of them would have been. No person would think of proposing an Executive much more numerous than that body; from six to a dozen have been suggested for the number of the council. The extreme of these numbers, is not too great for an easy combination; and from such a combination America would have more to fear, than from the ambition of any single individual. A council to a magistrate, who is himself responsible for what he does, are generally nothing better than a clog upon his good intentions, are often the instruments and accomplices of his bad and are almost always a cloak to his faults.

I forbear to dwell upon the subject of expense; though it be evident that if the council should be numerous enough to answer the principal end aimed at by the institution, the salaries of the members, who must be drawn from their homes to reside at the seat of government, would form an item in the catalogue of public expenditures too serious to be incurred for an object of equivocal utility. I will only add that, prior to the appearance of the Constitution, I rarely met with an intelligent man from any of the States, who did not admit, as the result of experience, that the UNITY of the executive of this State was one of the best of the distinguishing features of our constitution.

PUBLIUS (ALEXANDER HAMILTON)

Federalist No. 78

ESSAY

May 28, 1788
New York City, New York

BACKGROUND

Publius (Alexander Hamilton) argues for the proposed Constitution by explaining how the federal judiciary works.

GUIDING QUESTIONS

1. How long are judges to hold office?
2. Why is the judicial branch the least dangerous of the three?
3. Why must the judiciary be independent?
4. Why must judges possess permanent appointments?
5. How does Hamilton define a limited Constitution?

"Federalist 78," in *The U.S. Constitution: A Reader*, ed. Hillsdale College Politics Faculty (Hillsdale, MI: Hillsdale College Press, 2012), 379-85.

ANNOTATIONS **NOTES & QUESTIONS**

We proceed now to an examination of the judiciary department of the proposed government.

In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged, as the propriety of the institution in the abstract is not disputed; the only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points, therefore, our observations shall be confined.

The manner of constituting it seems to embrace these several objects: 1st. The mode of appointing the judges. 2d. The tenure by which they are to hold their places. 3d. The partition of the judiciary authority between different courts, and their relations to each other.

First. As to the mode of appointing the judges; this is the same with that of appointing the officers of the Union in general, and has been so fully discussed in the two last numbers, that nothing can be said here which would not be useless repetition.

Second. As to the tenure by which the judges are to hold their places; this chiefly concerns their duration in office; the provisions for their support; the precautions for their responsibility.

According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices DURING GOOD BEHAVIOR; which is conformable to the most approved of the State constitutions and among the rest, to that of this State. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection, which disorders their imaginations and judgments. The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

ANNOTATIONS NOTES & QUESTIONS

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power1; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."2 And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

ANNOTATIONS **NOTES & QUESTIONS**

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.

ANNOTATIONS **NOTES & QUESTIONS**

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an EQUAL authority, that which was the last indication of its will should have the preference.

ANNOTATIONS **NOTES & QUESTIONS**

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies, in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it incon-

ANNOTATIONS **NOTES & QUESTIONS**

sistent with their happiness, yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every

man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

There is yet a further and a weightier reason for the permanency of the judicial offices, which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit character; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the

ANNOTATIONS **NOTES & QUESTIONS**

bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed, that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established GOOD BEHAVIOR as the tenure of their judicial offices, in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably defective, if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

BRUTUS

Essay XI

ESSAY EXCERPT

January 31, 1788
New-York Journal, and Weekly Register | New York City, New York

BACKGROUND

The anonymous Brutus penned this article criticizing the proposed Constitution, focusing on the power of the independent judiciary.

GUIDING QUESTIONS

1. Why will the opinions of the Supreme Court have the force of law, according to Brutus?
2. How will the independent judiciary affect the powers and rights of the state governments?
3. Why does Brutus expect the federal judiciary to try to extend its authority and power?

Anonymous, "Essays, of Brutus, XI," 31 January 1788, in *The Complete Anti-Federalist*, Vol. 2, ed. Herbert J. Storing (Chicago: University of Chicago Press, 1981), 417–22.

ANNOTATIONS **NOTES & QUESTIONS**

The nature and extent of the judicial power of the United States, proposed to be granted by this constitution, claims our particular attention.

Much has been said and written upon the subject of this new system on both sides, but I have not met with any writer, who has discussed the judicial powers with any degree of accuracy. And yet it is obvious, that we can form but very imperfect ideas of the manner in which this government will work, or the effect it will have in changing the internal police and mode of distributing justice at present subsisting in the respective states, without a thorough investigation of the powers of the judiciary and of the manner in which they will operate. This government is a complete system, not only for making, but for executing laws. And the courts of law, which will be constituted by it, are not only to decide upon the constitution and the laws made in pursuance of it, but by officers subordinate to them to execute all their decisions. The real effect of this system of government, will therefore be brought home to the feelings of the people, through the medium of the judicial power. It is, moreover, of great importance, to examine with care the nature and extent of the judicial power, because those who are to be vested with it, are to be placed in a situation altogether unprecedented in a free country. They are to be rendered totally independent, both of the people and the legislature, both with respect to their offices and salaries. No errors they may commit can be corrected by any power above them, if any such power there be, nor can they be removed from office for making ever so many erroneous adjudications.

The only causes for which they can be displaced, is, conviction of treason, bribery, and high crimes and misdemeanors.

This part of the plan is so modeled, as to authorize the courts, not only to carry into execution the powers expressly given, but where these are wanting or ambiguously expressed, to supply what is wanting by their own decisions.

That we may be enabled to form a just opinion on this subject, I shall, in considering it,

1st. Examine the nature and extent of the judicial powers—and

ANNOTATIONS **NOTES & QUESTIONS**

2d. Inquire, whether the courts who are to exercise them, are so constituted as to afford reasonable ground of confidence, that they will exercise them for the general good....

In article 3d, section 2d, it is said, "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, etc."...

This article…vests the judicial with a power to resolve all questions that may arise on any case on the construction of the constitution, either in law or in equity.

1st. They are authorized to determine all questions that may arise upon the meaning of the constitution in law. This article vests the courts with authority to give the constitution a legal construction, or to explain it according to the rules laid down for construing a law.—These rules give a certain degree of latitude of explanation. According to this mode of construction, the courts are to give such meaning to the constitution as comports best with the common, and generally received acceptation of the words in which it is expressed, regarding their ordinary and popular use, rather than their grammatical propriety. Where words are dubious, they will be explained by the context....

2d. The judicial are not only to decide questions arising upon the meaning of the constitution in law, but also in equity.

By this they are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter....

From these remarks, the authority and business of the courts of law, under this clause, may be understood.

They will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court, whatever they may be, will

ANNOTATIONS **NOTES & QUESTIONS**

have the force of law; because there is no power provided in the constitution, that can correct their errors, or control their adjudications. From this court there is no appeal. And I conceive the legislature themselves, cannot set aside a judgment of this court, because they are authorized by the constitution to decide in the last resort. The legislature must be controlled by the constitution, and not the constitution by them. They have therefore no more right to set aside any judgment pronounced upon the construction of the constitution, than they have to take from the president, the chief command of the army and navy, and commit it to some other person. The reason is plain; the judicial and executive derive their authority from the same source, that the legislature do theirs; and therefore in all cases, where the constitution does not make the one responsible to, or controllable by the other, they are altogether independent of each other.

The judicial power will operate to affect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution:—I mean, an entire subversion of the legislative, executive and judicial powers of the individual states. Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of the state jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted.

That the judicial power of the United States, will lean strongly in favor of the general government, and will give such an explanation to the constitution, as will favor an extension of its jurisdiction, is very evident from a variety of considerations.

1st. The constitution itself strongly countenances such a mode of construction. Most of the articles in this system, which convey powers of any considerable importance, are conceived in general and indefinite terms, which are either equivocal, ambiguous, or which require long definitions to unfold the extent of their meaning. The two most important powers committed to any government, those of raising money, and of raising and keeping up troops, have already been considered, and shown to be unlimited by any thing but the discretion of the legislature. The clause which vests the power to pass all laws which are proper

ANNOTATIONS **NOTES & QUESTIONS**

and necessary, to carry the powers given into execution, it has been shown, leaves the legislature at liberty, to do every thing, which in their judgment is best. It is said, I know, that this clause confers no power on the legislature, which they would not have had without it—though I believe this is not the fact, yet, admitting it to be, it implies that the constitution is not to receive an explanation strictly, according to its letter; but more power is implied than is expressed. And this clause, if it is to be considered, as explanatory of the extent of the powers given, rather than giving a new power, is to be understood as declaring, that in construing any of the articles conveying power, the spirit, intent and design of the clause, should be attended to, as well as the words in their common acceptation.

This constitution gives sufficient color for adopting an equitable construction, if we consider the great end and design it professedly has in view—these appear from its preamble to be, "to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and posterity." The design of this system is here expressed, and it is proper to give such a meaning to the various parts, as will best promote the accomplishment of the end; this idea suggests itself naturally upon reading the preamble, and will countenance the court in giving the several articles such a sense, as will the most effectually promote the ends the constitution had in view—how this manner of explaining the constitution will operate in practice, shall be the subject of future inquiry.

2d. Not only will the constitution justify the courts in inclining to this mode of explaining it, but they will be interested in using this latitude of interpretation. Every body of men invested with office are tenacious of power; they feel interested, and hence it has become a kind of maxim, to hand down their offices, with all its rights and privileges, unimpaired to their successors; the same principle will influence them to extend their power, and increase their rights; this of itself will operate strongly upon the courts to give such a meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own authority. Every extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the courts; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise. I

ANNOTATIONS **NOTES & QUESTIONS**

add, it is highly probable the emolument of the judges will be increased, with the increase of the business they will have to transact and its importance. From these considerations the judges will be interested to extend the powers of the courts, and to construe the constitution as much as possible, in such a way as to favor it; and that they will do it, appears probable.

3d. Because they will have precedent to plead, to justify them in it. It is well known, that the courts in England, have by their own authority, extended their jurisdiction far beyond the limits set them in their original institution, and by the laws of the land....

When the courts will have a precedent before them of a court which extended its jurisdiction in opposition to an act of the legislature, is it not to be expected that they will extend theirs, especially when there is nothing in the constitution expressly against it? and they are authorized to construe its meaning, and are not under any control?

This power in the judicial, will enable them to mold the government, into almost any shape they please....

CHIEF JUSTICE JOHN MARSHALL

William Marbury v. James Madison, Secretary of State of the United States

U.S. SUPREME COURT MAJORITY OPINION EXCERPT

February 24, 1803
Supreme Court | Washington, D.C.

BACKGROUND

The Supreme Court issued its ruling after William Marbury sued then-Secretary of State James Madison over his appointment to a government office.

GUIDING QUESTIONS

1. What is Marbury seeking?
2. What authority does the Supreme Court have, according to Marshall's discussion of the judicial power of the United States?
3. What is a writ of mandamus?
4. What kind of law is the Constitution?
5. According to Marshall, what is the essence of judicial duty?

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

ANNOTATIONS **NOTES & QUESTIONS**

Mr. Chief Justice Marshall delivered the Opinion of the Court:

...1st. Has the applicant a right to the commission he demands?

2nd. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3rd. If they do afford him a remedy, is it a mandamus issuing from this court?...

It is...the opinion of the Court,

1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the county of Washington, in the District of Columbia; and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2nd. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3rd. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for; and,

2nd. The power of this court.

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court....

ANNOTATIONS **NOTES & QUESTIONS**

The act to establish the judicial courts of the United States authorizes the Supreme Court "to issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The Secretary of State, being a person holding an office under the authority of the United States, is precisely within the letter of the description, and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and, consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the Supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the Supreme Court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is

ANNOTATIONS **NOTES & QUESTIONS**

mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance....

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

ANNOTATIONS **NOTES & QUESTIONS**

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and, is consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though

ANNOTATIONS **NOTES & QUESTIONS**

it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But

ANNOTATIONS **NOTES & QUESTIONS**

the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares "that no bill of attainder or ex post facto law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

ANNOTATIONS **NOTES & QUESTIONS**

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!...

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

CHIEF JUSTICE JOHN MARSHALL

James McCulloch v. the State of Maryland, John James

U.S. SUPREME COURT MAJORITY OPINION EXCERPT

March 6, 1819
Supreme Court | Washington, D.C.

BACKGROUND

The Supreme Court issued its ruling in a case involving the constitutionality of the national bank and a tax which the state of Maryland imposed on the bank.

GUIDING QUESTIONS

1. What was the nature of the Maryland law at issue in this case?
2. From where does the Constitution derive its authority?
3. What does it mean to say that the U.S. government is one of "enumerated powers"?
4. What does the Necessary and Proper Clause add to the idea of enumerated powers?
5. How does Marshall interpret the word "necessary"?
6. What "means" are appropriate and constitutional for executing an act of the national legislature?
7. Why does Marshall deem the Maryland tax to be contrary to the Constitution?
8. What is the extent of a state's sovereignty with respect to the Constitution?

McCulloch v. Maryland, 17 U.S. 316 (1819).

ANNOTATIONS **NOTES & QUESTIONS**

Chief Justice MARSHALL delivered the opinion of the court…

. . . [Maryland] denies the obligation of a law enacted by the legislature of the Union, and [McCulloch], on his part, contests the validity of an act which has been passed by the legislature of that state. . . . No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps, of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty.

The first question made in the cause is—has Congress power to incorporate a bank? It has been truly said, that this can scarcely be considered as an open question entirely unprejudiced by the former proceedings of the Nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the Judicial Department, in cases of peculiar delicacy, as a law of undoubted obligation. . . .

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the Constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the General Government, it has been said, are delegated by the States, who alone are truly sovereign, and must be exercised in subordination to the States, who alone possess supreme dominion. It would be difficult to sustain this proposition. The convention which framed the Constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation or pretensions to it. It was reported to the then existing Congress of the United States with a request that it might "be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted, and by the convention, by Congress, and by the State legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which

ANNOTATIONS **NOTES & QUESTIONS**

they can act safely, effectively and wisely, on such a subject—by assembling in convention. It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people, and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity." The assent of the States in their sovereign capacity is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it, and their act was final. It required not the affirmance, and could not be negatived, by the State Governments. The Constitution, when thus adopted, was of complete obligation, and bound the State sovereignties. . . .

. . . The Government of the Union then . . . is, emphatically and truly, a Government of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This Government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise so long as our system shall exist. In discussing these questions, the conflicting powers of the General and State governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

ANNOTATIONS **NOTES & QUESTIONS**

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the Government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the Government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it by saying [in Article VI, section 2], "this Constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures and the officers of the executive and judicial departments of the States shall take the oath of fidelity to it. The Government of the United States, then, though limited in its powers, is supreme, and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers, and which requires that everything granted shall be expressly and minutely described. Even the Tenth Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people," thus leaving the question whether the particular power which may become the subject of contest has been delegated to the one Government, or prohibited to the other, to depend on a fair construction of the whole instrument. . . . A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature

ANNOTATIONS **NOTES & QUESTIONS**

of the objects themselves. That this idea was entertained by the framers of the American Constitution is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations found in the 9th section of the 1st article introduced? It is also in some degree warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a *Constitution* we are expounding.

Although, among the enumerated powers of Government, we do not find the word "bank" or "incorporation," we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. . . . [A] government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the Nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the Nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. . . . The exigencies of the Nation may require that the treasure raised in the north should be transported to the south that raised in the east, conveyed to the west, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise, by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential, to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied that the powers given to the Government imply the ordinary means of execution. That, for example, of raising revenue and applying it to national purposes is

ANNOTATIONS **NOTES & QUESTIONS**

admitted to imply the power of conveying money from place to place as the exigencies of the Nation may require, and of employing the usual means of conveyance. But it is denied that the Government has its choice of means, or that it may employ the most convenient means if, to employ them, it be necessary to erect a corporation. On what foundation does this argument rest? On this alone: the power of creating a corporation is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever is a sovereign power, and if the Government of the Union is restrained from creating a corporation as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty, if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of congress to pass other laws for the accomplishment of the same objects. The government which has a right to do an act and has imposed on it the duty of performing that act must, according to the dictates of reason, be allowed to select the means, and those who contend that it may not select any appropriate means that one particular mode of effecting the object is excepted take upon themselves the burden of establishing that exception. . . .

But the Constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the Government to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department thereof." . . .

But the argument [against the Bank] on which most reliance is placed is drawn from that peculiar language of this clause. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the Government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers to such as are indispensable, and without which the power

ANNOTATIONS **NOTES & QUESTIONS**

would be nugatory. That it excludes the choice of means, and leaves to Congress in each case that only which is most direct and simple.

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity so strong that one thing to which another may be termed necessary cannot exist without that other? We think it does not. If reference be had to its use in the common affairs of the world or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language that no word conveys to the mind in all situations one single definite idea, and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in a their [sic] rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison, and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. The comment on the word is well illustrated by the passage cited at the bar from the 10th section of the 1st article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the General Government without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses, and, in its

construction, the subject, the context, the intention of the person using them are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a Nation essentially depends. It must have been the intention of those who gave these powers to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. To have prescribed the means by which Government should, in all future time, execute its powers would have been to change entirely the character of the instrument and give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. . . .

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland is founded on the intention of the convention as manifested in the whole clause. To waste time and argument in proving that, without it, Congress might carry its powers into execution would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove that in the absence of this clause, Congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the Government, were in themselves Constitutional. This clause, as construed by the state of Maryland, would abridge, and almost annihilate, this useful and necessary right of the legislature to select its means. That this could not be intended is, we should think, had it not been already controverted, too apparent for controversy.

ANNOTATIONS **NOTES & QUESTIONS**

We think so for the following reasons: 1st. The clause is placed among the powers of Congress, not among the limitations on those powers. 2d. Its terms purport to enlarge, not to diminish, the powers vested in the Government. It purports to be an additional power, not a restriction on those already granted. . . .

The result of the most careful and attentive consideration bestowed upon this clause is that, if it does not enlarge, it cannot be construed to restrain, the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the Constitutional powers of the Government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional. . . .

After the most deliberate consideration, it is the unanimous and decided opinion of this Court that the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land. . . .

It being the opinion of the Court that the act incorporating the bank is constitutional, and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire:

Whether the State of Maryland may, without violating the Constitution, tax that branch?

ANNOTATIONS **NOTES & QUESTIONS**

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the Government of the Union; that it is to be concurrently exercised by the two Governments—are truths which have never been denied. But such is the paramount character of the Constitution that . . . if it may restrain a State from the exercise of its taxing power on imports and exports[,] the same paramount character would seem to restrain, as it certainly may restrain, a State from such other exercise of this power as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law absolutely repugnant to another as entirely repeals that other as if express terms of repeal were used.

On this ground, the counsel for the bank place its claim to be exempted from the power of a State to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds. This great principle is that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve; 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve; 3d. That, where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme. . . .

That the power of taxing [the Bank] by the States may be exercised so as to destroy it is too obvious to be denied. . . .

The argument on the part of the State of Maryland is not that the States may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the Constitution leaves them this right, in the confidence that they will not abuse it. . . .

ANNOTATIONS **NOTES & QUESTIONS**

The sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission, but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a Government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a State by the extent of sovereignty which the people of a single State possess and can confer on its Government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the Government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States and safe for the Union. . . .

If we apply the principle for which the State of Maryland contends, to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the Government, and of prostrating it at the foot of the States. The American people have declared their Constitution and the laws made in pursuance thereof to be supreme, but this principle would transfer the supremacy, in fact, to the States.

If the States may tax one instrument, employed by the Government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the Government to an excess which would defeat all the ends of Government. This was not intended by the American people. They did not design to make their government dependent on the states. . . .

ANNOTATIONS **NOTES & QUESTIONS**

It has also been insisted that, as the power of taxation in the General and State Governments is acknowledged to be concurrent, every argument which would sustain the right of the General Government to tax banks chartered by the States, will equally sustain the right of the States to tax banks chartered by the general government.

But the two cases are not on the same reason. The people of all the States have created the General Government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents, and these taxes must be uniform. But when a State taxes the operations of the government of the United States, it acts upon institutions created not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a Government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a Government declared to be supreme, and those of a Government which, when in opposition to those laws, is not supreme.

But if the full application of this argument could be admitted, it might bring into question the right of Congress to tax the State banks, and could not prove the rights of the States to tax the Bank of the United States.

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

We are unanimously of opinion that the law passed by the Legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void. . . .

First Congress

Proposed Amendments to the Constitution

Join Resolution Excerpt

September 25, 1789
Federal Hall | City of New-York, New York

Bill of Rights

Background

As part of a compromise to secure the ratification of the Constitution, Federalists introduced in the first Congress a Bill of Rights as twelve amendments to the new Constitution. Below are the ten amendments that were ultimately ratified.

Annotations

Notes & Questions

Amendment I

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

Amendment II

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

Amendment III

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

"The Constitution of the United States of America," in *The U.S. Constitution: A Reader* (Hillsdale, MI: Hillsdale College Press, 2012), 58-60.

ANNOTATIONS NOTES & QUESTIONS

Amendment IV

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

Amendment V

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

Amendment VI

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

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

ANNOTATIONS

NOTES & QUESTIONS

Amendment VIII

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

Amendment IX

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

Amendment X

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

PUBLIUS (ALEXANDER HAMILTON)

Federalist No. 84

ESSAY EXCERPT

July 16, 1788
New York City, New York

BACKGROUND

Publius (Alexander Hamilton) argues for the proposed Constitution by explaining Publius's objections to a Bill of Rights.

GUIDING QUESTIONS

1. What is the cornerstone of republican government, according to Hamilton?
2. Why does Hamilton think a bill of rights would be unnecessary and dangerous?
3. In what way is the Constitution itself a bill of rights?

"Federalist 84," in *The U.S. Constitution: A Reader*, ed. Hillsdale College Politics Faculty (Hillsdale, MI: Hillsdale College Press, 2012), 293-97.

ANNOTATIONS **NOTES & QUESTIONS**

In the course of the foregoing review of the Constitution, I have taken notice of, and endeavored to answer most of the objections which have appeared against it. There, however, remain a few which either did not fall naturally under any particular head or were forgotten in their proper places. These shall now be discussed; but as the subject has been drawn into great length, I shall so far consult brevity as to comprise all my observations on these miscellaneous points in a single paper.

The most considerable of the remaining objections is that the plan of the convention contains no bill of rights. Among other answers given to this, it has been upon different occasions remarked that the constitutions of several of the States are in a similar predicament. I add that New York is of the number. And yet the opposers of the new system, in this State, who profess an unlimited admiration for its constitution, are among the most intemperate partisans of a bill of rights. To justify their zeal in this matter, they allege two things: one is that, though the constitution of New York has no bill of rights prefixed to it, yet it contains, in the body of it, various provisions in favor of particular privileges and rights, which, in substance amount to the same thing; the other is, that the Constitution adopts, in their full extent, the common and statute law of Great Britain, by which many other rights, not expressed in it, are equally secured.

To the first I answer, that the Constitution proposed by the convention contains, as well as the constitution of this State, a number of such provisions.

Independent of those which relate to the structure of the government, we find the following: Article 1, section 3, clause 7 "Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law." Section 9, of the same article, clause 2 "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Clause 3 "No bill of attainder or ex-post-facto law shall be passed." Clause 7 "No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under

ANNOTATIONS NOTES & QUESTIONS

them, shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state." Article 3, section 2, clause 3 "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." Section 3, of the same article "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." And clause 3, of the same section "The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."

It may well be a question, whether these are not, upon the whole, of equal importance with any which are to be found in the constitution of this State. The establishment of the writ of habeas corpus, the prohibition of ex-post-facto laws, and of TITLES OF NOBILITY, TO WHICH WE HAVE NO CORRESPONDING PROVISION IN OUR CONSTITUTION, are perhaps greater securities to liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone,[1] in reference to the latter, are well worthy of recital: "To bereave a man of life, Usays he,e or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore A MORE DANGEROUS ENGINE of arbitrary government." And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the habeas-corpus act, which in one place he calls "the BULWARK of the British Constitution.

ANNOTATIONS **NOTES & QUESTIONS**

Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the corner-stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people.

To the second that is, to the pretended establishment of the common and state law by the Constitution, I answer, that they are expressly made subject "to such alterations and provisions as the legislature shall from time to time make concerning the same." They are therefore at any moment liable to repeal by the ordinary legislative power, and of course have no constitutional sanction. The only use of the declaration was to recognize the ancient law and to remove doubts which might have been occasioned by the Revolution. This consequently can be considered as no part of a declaration of rights, which under our constitutions must be intended as limitations of the power of the government itself.

It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was MAGNA CHARTA, obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the PETITION OF RIGHT assented to by Charles I., in the beginning of his reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations. "WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ORDAIN and ESTABLISH this Constitution for the United States of America." Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.

ANNOTATIONS **NOTES & QUESTIONS**

But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns. If, therefore, the loud clamors against the plan of the convention, on this score, are well founded, no epithets of reprobation will be too strong for the constitution of this State. But the truth is, that both of them contain all which, in relation to their objects, is reasonably to be desired.

I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.

On the subject of the liberty of the press, as much as has been said, I cannot forbear adding a remark or two: in the first place, I observe, that there is not a syllable concerning it in the constitution of this State; in the next, I contend, that whatever has been said about it in that of any other State, amounts to nothing. What signifies a declaration, that "the liberty of the press shall be inviolably preserved"? What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in

ANNOTATIONS **NOTES & QUESTIONS**

any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.[3] And here, after all, as is intimated upon another occasion, must we seek for the only solid basis of all our rights.

There remains but one other view of this matter to conclude the point. The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS. The several bills of rights in Great Britain form its Constitution, and conversely the constitution of each State is its bill of rights. And the proposed Constitution, if adopted, will be the bill of rights of the Union. Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the plan of the convention; comprehending various precautions for the public security, which are not to be found in any of the State constitutions. Is another object of a bill of rights to define certain immunities and modes of proceeding, which are relative to personal and private concerns? This we have seen has also been attended to, in a variety of cases, in the same plan. Adverting therefore to the substantial meaning of a bill of rights, it is absurd to allege that it is not to be found in the work of the convention. It may be said that it does not go far enough, though it will not be easy to make this appear; but it can with no propriety be contended that there is no such thing. It certainly must be immaterial what mode is observed as to the order of declaring the rights of the citizens, if they are to be found in any part of the instrument which establishes the government. And hence it must be apparent, that much of what has been said on this subject rests merely on verbal and nominal distinctions, entirely foreign from the substance of the thing….