PRESERVING THE BILL OF RIGHTS

A program of the Bill of Rights Institute
200 N. Glebe Road, Suite 200
Arlington, VA 22203

Founded in September 1999, the Bill of Rights Institute seeks to educate young people about the words and ideas of America’s Founders, the liberties guaranteed in our Founding documents, and how our Founding principles continue to affect and shape a free society. The Bill of Rights Institute is an educational non-profit organization, classified by the Internal Revenue Service as a 501(c)(3) organization, a public charity. With an annual operating budget of over $3.3 million, the Institute is grateful to be supported by 3,000 individual, corporate, and foundation donors.
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ACKNOWLEDGEMENTS

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The Bill of Rights and the FOUNDERS

Provides an introduction and overview of the Bill of Rights, including the Founders’ understanding of the “rights of Englishmen,” British law, and natural rights philosophy. This unit also examines the Federalist and Anti-Federalist debate about a bill of rights.
Today, most Americans think of the Bill of Rights as an integral part of the Constitution and political system. The delegates at the Constitutional Convention disagreed sharply about whether a bill of rights was necessary at all and, if desirable, what one should include. The Founders’ debate featured references to English law and history, as well as to America’s unique colonial experience. Led by James Madison, the Founders eventually crafted a bill of rights touching on nearly every aspect of civil society: religion, expression, security, property, and equitable administration of justice. Even after more than 200 years, the amendments they drafted influence the lives of Americans every day.

UNIT OBJECTIVES

Students will:

- Analyze relationships among historical statements of rights and their modern applications.
- Analyze the debates surrounding the addition of a bill of rights to the Constitution.
- Evaluate Federalist and Anti-Federalist arguments, both in their historical context and with respect to their significance today.

SYNOPSIS OF LESSONS

Lesson 1: What Are the Origins of the Bill of Rights?

Students explore important English and colonial documents that influenced the writing of the Bill of Rights, including Magna Carta, the Petition of Right, the English Declaration of Rights, and the Virginia Declaration of Rights.

Students will identify their own beliefs about individual rights and how those rights affect their everyday lives.

Lesson 2: Why A Bill of Rights? What Impact Does It Have?

Students explore the debate over the Bill of Rights, including Federalist and Anti-Federalist positions. The lesson also begins to explore the impact the Bill of Rights has had since 1791, laying a foundation for the future.

CONSTITUTIONAL PRINCIPLES

- Individual responsibility
- Limited government
- Majority rule/ minority rights
- Natural rights

FOUNDERS’ QUOTES

“All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate which would be oppression.”

–THOMAS JEFFERSON

“Government should be formed to secure and to enlarge the exercise of the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind.”

–JAMES WILSON

KEY TERMS

Anti-Federalists
Federalists
John Locke
Magna Carta
Natural rights
Ratify
LESSON OVERVIEW

The Founders saw themselves as heirs to a legacy of freedom stretching back at least to the Magna Carta. Events and philosophies from British and colonial history shaped the Founders’ ideas about natural rights as well as the “rights of Englishmen.” These rights affect all of our daily lives in a free society.

LESSON OBJECTIVES

Students will:

- Understand the ideas of the “rights of Englishmen” and natural rights. Identify similarities between historical statements of their rights and their current applications.
- Consider personal responsibilities and methods to protect individual rights. Understand how the colonial experience affected the development of the Bill of Rights.
- Analyze how the history behind English rights and the concept of natural rights influenced the American Revolution and the notion of just government.
- Evaluate the significance of individual rights in their daily lives.

CONSTITUTIONAL PRINCIPLES

- Liberty
- Limited Government
- Majority Rule/Minority Rights
- Natural Rights

MATERIALS

- Handout A: Background Essay – The Origins of the Bill of Rights
- Handout B: Rights Attitude Inventory
- Handout C: Foundations of Our Rights
- Handout D: Founding Documents and Philosophies

RECOMMENDED TIME

One 50-minute class period.

STANDARDS

- NCHS (5-12): Era III, Standards 1A, 1B, 3A, 3B
- CCE (9-12): IIA1, IID1, VB1, VD1
- NCSS: Strands 6 and 10
- Common Core (Grades 9-12): RI.4, RI.8, RI.9, RH.4
LESSON PLAN

Background/Homework 10 minutes the day before

A. Have students skim Handout A: Background Essay - The Origins of the Bill of Rights and use highlighters or colored pencils to color code the essay:
   - Information about documents written in England: yellow
   - Information about documents written in America: green
   - Violations of rights in the American colonies: red

B. Have students write a one or two sentence reaction to the Handout A: What does the essay make you wonder about the “rights of Englishmen”?

Warm-Up 10-15 minutes

Distribute Handout B: Rights Attitude Inventory. Ask students to rank the rights listed from most to least important. Remind the students that the rights listed in the Bill of Rights were not ranked by the Founders. Then, as a class, ask students to share their answers. Keep a tally on the board of which rights the class ranked as “1” or most important, as well as “10” or least important.

Activity 20-30 minutes

A. Divide class into pairs to fill in Handout C: Foundations of Our Rights.

B. Display Handout C to provide guidance. Ask for student volunteers to suggest responses to fill in the checks on the chart.

C. Distribute Handout D: Founding Documents and Philosophies. Student pairs should discuss and answer the questions on Handout C. See the appendix for John Locke’s Second Treatise, the Declaration of Independence and the Articles of Confederation.

D. Bring the class back together and go over Handout D as a large group.

E. Have the class discuss this quote from James Madison’s Federalist No. 51 (1788). Point out to students that the quote illustrates that the Founders themselves were very concerned about the proper balance between security and liberty.

“The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.” –James Madison, Federalist No. 51
Ask them to consider: How can liberty be abused? What constitutional principles can be found in *Federalist No. 51*? Given this discussion, how should government be structured to best protect liberty?

**Homework/Extensions**

A. Have students compare and contrast the *Magna Carta*, the *Declaration of Rights*, the *Massachusetts Body of Liberties*, and the *Declaration of Independence*. Have students write a short essay answering these questions:
   - What are the similarities and differences among the documents?
   - How do these documents protect citizens’ rights?

B. Have students research the constitution of one of the original thirteen colonies. They should create a presentation explaining how the original constitution of the colony compares to the U.S. Constitution and the U.S. Bill of Rights.
   - Based on their research, was the colony’s constitution used as a guide for the U.S. Constitution or did the U.S. Constitution help guide the colony’s constitution?
   - How is the colony’s constitution similar to the U.S. Constitution? How is it different?
   - What similarities did the colony’s constitution have to the *Magna Carta*, the Petition of Right, or the Declaration of Rights?
The Origins of the Bill of Rights

BACKGROUND ESSAY

Many American colonists felt betrayed by the British government as their rights were taken away. The colonists were forced to allow British soldiers to stay in their homes; they were taxed by the British government without being represented in Parliament; and they had their own weapons taken away. They also saw restrictions put on speech and the press and were not even allowed to gather together freely. Ironically, the colonists’ ideas about “essential rights” originated in their British background. Now it was the British government that challenged those principles.

What Is the Magna Carta?

These rights were part of a centuries-old heritage. In fact, much of American colonial law was based on the rights of Englishmen. The oldest document in the British and American heritage of rights, the Magna Carta, was written in 1215, and it includes the statement that the rights it lists are “ancient.”

This heritage is alive in America today. More than half the amendments in the Bill of Rights have roots in the Magna Carta. A group of barons forced England’s King John to agree to preserve the freedom of the Church and to hear petitions from the barons (First Amendment). He also agreed to remove foreign armies from England (Third Amendment); not to seize land to pay for debts (Fourth Amendment); not to take life or liberty without due process or repayment (Fifth Amendment). He swore not to delay court proceedings or punish without hearing from witnesses (Sixth Amendment), as well as to repay unjust fines and not to issue extreme punishments (Eighth Amendment). The Founders believed that these rights were natural and that all citizens had them.

In 1215, King John of England signs the Magna Carta, acknowledging the “natural rights” of all Englishmen.
How Were Rights Protected and Expanded?

Through the centuries, Magna Carta freedoms found their way into English common law. Englishmen were fiercely protective of these rights when the King tried to withdraw them. In the 17th century, King Charles I disbanded Parliament and said he would rule England on his own. House of Commons member Sir Edward Coke presented a list of complaints. This list came to be called the Petition of Right, which helped establish the principle that the King was not above the law. Charles’s abuses of the law included violation of due process (Fifth Amendment); unjust taking of property or imprisonment (Fourth and Fifth Amendments); denying the right to trial by fellow Englishmen (Sixth Amendment); and unjust punishments or fines (Eighth Amendment). Although Charles first agreed to stop breaking the law, he soon went back on his word. He was beheaded in 1649.

Prince William of Orange and his wife Mary were invited to the throne by Parliament in the 1688 Glorious Revolution. As a condition of their rule, William and Mary accepted the Declaration of Rights and the Toleration Act in 1689. The Toleration Act expanded freedom of religion. It granted Protestants who did not attend the Church of England the right to freely exercise their faith (First Amendment). The Declaration also included: the right to assemble peacefully and to petition (First Amendment); the right to keep arms (Second Amendment); protections of property and liberty (Fourth and Fifth Amendments); rights of the accused (Sixth Amendment); and rights of criminals (Eighth Amendment).

What Was the Purpose of Government?

Forty years after Charles’s execution and just after the Declaration of Rights, John Locke wrote Two Treatises of Civil Government (1690). Locke argued that men are by nature free and equal and that they own their “persons [bodies] and possessions.” He said people must “unite into a community for their comfortable, safe, peaceable living” in order to defend their rights. Locke believed that a government’s purpose is to protect individual natural rights such as life, liberty, and property. Therefore, people must have the right to dissolve a government that is not protecting them.

And so it was in the thirteen colonies. When the British ignored English laws in the American colonies, the colonists were armed with a tradition justifying their demand that those laws be followed.

What Did the Colonial Experience Teach the Founders?

The colonists brought their rights as Englishmen to the earliest American colonies. Massachusetts adopted the “Body of Liberties” in 1641. The document included protection for free
speech and petition (First Amendment), just compensation for property taken for public use (Fifth Amendment), protection from double jeopardy (Fifth Amendment), right to trial by jury and counsel (Sixth Amendment), and protection from cruel punishments and excessive bail (Eighth Amendment).

Between 1763 and 1776, the British government began to limit freedoms especially relating to taxation without representation. The colonists’ resolve was tested. For example, the 1765 Quartering Act demanded colonists give British troops shelter (Third Amendment). The 1774 Coercive Acts included: restricting the rights of free speech, press, and assembly (First Amendment); confiscating of colonists’ weapons (Second Amendment); lifting protections of property (Fourth and Fifth Amendments); prosecuting colonial activists in English courts, or holding them without trial (Sixth Amendment).

The colonists responded to these acts with protest and eventually revolution. The colonists later addressed these issues in the United States Bill of Rights.

**How Did History Repeat Itself?**

The conflict reached a breaking point in 1776. As Locke had written, the people had the right to dissolve a government that was not protecting their rights. Americans realized they needed self-government and issued a Declaration of Independence. Locke had listed life, liberty, and property as natural rights, while Thomas Jefferson substituted “life, liberty, and the pursuit of happiness.” The Declaration of Independence went on to list ways the British had violated the rights of Englishmen.

The colonists then had to begin creating their own government. They threw out the colonial charters and
wrote new constitutions. Seven colonies included a Declaration of Rights. The most important of these, historians agree, was Virginia’s. The Virginia Declaration of Rights, written by George Mason, protected the press, exercise of religion, arms, property, the accused, and criminals. James Madison later used it as a model when he wrote the United States Bill of Rights.

After the Revolution, the states united under the Articles of Confederation from March 1781 to June 1788. The Articles proved to be an inadequate system of government. To replace it, the Founders in 1787 drafted a new document: the Constitution of the United States of America. This document created a central government.

Why Add a Bill of Rights?

There were some Americans who feared the central government was too strong under the Constitution alone. They believed that a separate listing of rights was needed to protect individual rights and states’ powers. A compromise eased the debate. The new Constitution was ratified in 1789 and two years later amended to include what Madison said “might be called a bill of rights.”

The Founders inherited a tradition of rights that they cherished. They created the American system of government with great care to ensure future generations would enjoy all the “blessings of liberty.” In the end, it is not the governments who are sovereign, but the people.

Comprehension Questions

1. Name at least three ways in which the Declaration of Rights and Toleration Act limited the power of British kings.
2. As a result of his violation of the rights of Englishmen, what happened to King Charles I?
3. What is the fundamental reason why, according to Locke, government’s main purpose must be to protect the rights of individuals?
4. Name at least three ways in which the British violated the “traditional rights of Englishmen” in their North American colonies.
5. What document established the first attempt of the former American colonies to organize a united government?
Rights Attitude Inventory

**Directions:** Number the following rights in the order of their importance in your opinion from 1 to 10—with 1 being most important. In other words, place a 10 next to the right you could give up most easily, and a 1 next to the right you cannot imagine living without.

- _____ Freedom of speech
- _____ Freedom of religion
- _____ Right to a jury trial
- _____ Freedom of the press
- _____ Freedom from cruel and unusual punishments
- _____ Right to keep and bear arms
- _____ Right to control your own property
- _____ Freedom of assembly
- _____ Freedom from quartering troops in your home
- _____ Freedom from unreasonable search and seizures

1. Work with your group to develop categories and organize these rights by topics. Discuss and compare your category headings to those of another group.

2. How do the principles of limited government and individual rights reinforce each other?
Foundations of Our Rights

**Directions:** Fill in the chart, placing check marks to show which specific rights were guaranteed by each document. Then fill in the chart below with the purpose of each document.

### RIGHTS IN THE BILL OF RIGHTS (1791)

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<tr>
<th></th>
<th>FIRST</th>
<th>SECOND</th>
<th>THIRD</th>
<th>FOURTH</th>
<th>FIFTH</th>
<th>SIXTH</th>
<th>EIGHTH</th>
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<tr>
<td></td>
<td>Religion, speech, press,</td>
<td>Keep and bear arms</td>
<td>Freedom from quartering troops</td>
<td>Search and seizure rights</td>
<td>Due process rights</td>
<td>Fair trial rights</td>
<td>Freedom from cruel and unusual fines and punishment</td>
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<td>Magna Carta</td>
<td>(1215)</td>
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<tr>
<td>Petition of Right</td>
<td>(1628)</td>
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<tr>
<td>Mass. Body of Liberties</td>
<td>(1641)</td>
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<td></td>
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<tr>
<td>Right violated in colonies?</td>
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### DOCUMENT | PURPOSE

- **Two Treatises of Civil Government (1690)**
- **Declaration of Independence (1776)**
- **United States Constitution (1787)**
1. What does the Declaration of Independence have in common with Locke’s *Two Treatises of Civil Government*?

2. How are these two documents different?

3. How does the Constitution differ from the Articles of Confederation?

4. Why do you think some specific rights appear more often than others in the documents?

5. At the start of class, we discussed which rights the class believed were most important. Which right do you think is most important to your parents? Why? Discuss this question with a parent and report his or her answers back to the class.
Why a Bill of Rights? What Impact Does it Have?

LESSON OVERVIEW
The debate over the Bill of Rights at the Founding was not an argument over whether rights exist, but about how best to protect those rights. The Founders disagreed about whether a bill of rights was necessary and whether it would be effective. Later generations continue to face the challenges of safeguarding individual rights.

LESSON OBJECTIVES
Students will:
- Explain the arguments of the Federalists and Anti-Federalists regarding a bill of rights.
- Identify continuing controversies regarding appropriate powers of government versus individual rights.
- With respect to civic participation, analyze the ongoing implications of Federalist and Anti-Federalist positions.
- Participate in civil discourse concerning the Bill of Rights.

CONSTITUTIONAL PRINCIPLES
- Liberty
- Limited Government
- Majority Rule/Minority Rights
- Natural Rights

MATERIALS
- Handout A: Background Essay - Why a Bill of Rights? What Impact Does it Have?
- Handout B: Understanding Positions of Federalists and Anti-Federalists
- Handout C: Federalists and Anti-Federalists Venn Diagram
- Handout D: Classifying Quotes
- Founders’ Quote Posters

RECOMMENDED TIME
One 50-minute class period.

STANDARDS
- NCHS (5-12): Era III, Standards 3A, 3B
- CCE (9-12): IIIA1
- NCSS: Strands 6 and 10
- Common Core (Grades 9-12): RI.4, RI.8, RI.9, RH.4
LESSON PLAN

Background/Homework 10 minutes the day before

A. Assign Handout A: Background Essay - Why a Bill of Rights? What Impact Does it Have? for students to read prior to class time. Along with the essay, give students Handout B: Understanding Positions of Federalists and Anti-Federalists to fill in as they read.

B. Before class, print Founders’ Quote Posters, laminate them, and tape them up around the room.

Warm-Up 10-15 minutes

A. Divide students into pairs or trios and ask them to share their Handout B chart responses and compare their answers.

B. Have each group identify which argument they feel is strongest for each heading—Federalists and Anti-Federalists.

Activity 20-30 minutes

A. Give each group a copy of Handout C: Federalists and Anti-Federalists Venn Diagram, instructing them to complete the Venn diagram using key words to record the positions of the Federalists and Anti-Federalists.

B. Go over the Venn diagrams as a class, and answer any questions.

C. Have pairs of students walk around the room to read and discuss each of the Founders’ Quote Posters. Have each pair, using a copy of Handout D: Classifying Quotes, decide and record whether each quote represents Federalist or Anti-Federalist beliefs. Students may move from poster to poster in any order.

D. After everyone has finished, discuss each quotation as a class.

E. Wrap up by asking students about a time when they either experienced their own rights being abridged or witnessed this happen to someone else. What was, or should be, the reaction of other individuals to abridgment of rights? What was, or should be, the government’s role in protecting everyone’s rights?
**Homework/Extensions**

A. Have students read excerpts from the Federalist Papers and the Anti-Federalist Papers. Have students write a paper comparing and contrasting the Federalist and Anti-Federalist papers.

B. Have students research the history of one of the protections of the Bill of Rights and share it in an oral presentation to the class.
   - Where did these rights originate – are they natural rights or from common law?
   - Why did the Founders include these rights in the Bill of Rights?
   - How has the interpretation of these rights changed over time?
Why a Bill of Rights?  
What Impact Does it Have?

BACKGROUND ESSAY

All have heard the saying, “Great minds think alike.” When many great minds of the colonies gathered to create a new government, two rarely thought exactly alike. The Bill of Rights was created through the kind of debate and exchange of ideas that it protects to this day.

The Declaration of Independence states that the purpose of government is to protect our basic natural or inalienable rights. This was one principle on which all the Founders did agree. But if they created a great system to protect rights, why did they disagree about a bill of rights?

Who Were the Federalists and Anti-Federalists?

The Constitutional Convention was divided into two groups – the Federalists and the Anti-Federalists. Both the Federalists and Anti-Federalists wanted to have checks on the power of the government, but they differed on the manner in which to prevent the government from taking power from the people. The Anti-Federalists supported amending the Articles of Confederation, while the Federalists sought to create an entirely new Constitution with a central government. The Federalists wanted to limit the amount of power held by the states. The Federalists believed that the Constitution would create a central government that would be balanced in separate branches and checked by the state governments in order to keep it from growing too powerful. Many Anti-Federalists were concerned that putting too much power in any concentrated central government would inevitably diminish citizens’ rights. They believed that the power should remain in the state governments because the states could be more responsive to the needs of their citizens.

During the ratification of the Constitution, two groups formed during the discussion over a bill of rights.

James Madison
Federalists strongly supported the Constitution as it was written and did not think a bill of rights was needed. Anti-Federalists believed that a bill of rights was necessary to prevent the central government from threatening states’ authority and oppressing citizens.

Leading Federalists were Alexander Hamilton from New York and James Madison from Virginia. They believed a bill of rights was not needed because the Constitution itself limited the government’s powers. They also feared that creating a list of rights might lead to other dangers, such as implying powers that had not been granted to the government. It would be impossible to list every right. Federalists did not want certain rights to be ignored or violated just because they were not listed.

Leading Anti-Federalists were George Mason and Patrick Henry of Virginia. Anti-Federalists wanted to protect against a powerful central government taking away the freedoms they had fought a revolution to preserve. They believed a bill of rights needed to be added to the Constitution so that citizens would be protected against the government infringing upon rights. George Mason had written a similar document to protect the rights of Virginians called the Virginia Declaration of Rights. Some of the language in this document was used to develop the amendments used in the United States Bill of Rights.

Why Did Madison Change His Mind?

The Constitutional Convention ended in late 1787, but the debate went on. Nine states ratified (approved) the Constitution by the summer of 1788. However, New York, Virginia, and Massachusetts submitted long lists of proposed amendments to guarantee rights. It became clear the people wanted a bill of rights.

Madison sought the advice of Thomas Jefferson, John Adams, George Mason, and President George Washington. They all expressed support for a bill of rights. Mason (the author of Virginia’s Declaration of Rights) suggested using state bills of rights as a guide. Madison agreed to add a bill of rights to discourage the attempt to call a second Constitutional Convention, and he used Mason’s Virginia Declaration of Rights in drafting it. Madison offered his proposed changes to Articles I and III of the Constitution on June 8, 1789. He initially made additions and changes to the original text of the Constitution. Some Anti-Federalist Congressmen, led by Roger Sherman, objected, arguing that Congress did not have the power to change the original form of the Constitution that had been ratified by the states. They decided the Amendments would be added as a separate list.

The House of Representatives debated through the summer. On August 24, 1789, the House sent a list of seventeen amendments to the
Senate. The Senate approved twelve. Those twelve were sent to the states for ratification, but only ten were ratified. On December 15, 1791, Virginia’s state convention became the last state needed to ratify the ten amendments that protected individual and states’ rights. The Bill of Rights now joined the Constitution as the governing document of the United States.

What Is the Impact of the Bill of Rights?

The Bill of Rights limited only actions taken by the federal government against people. The Founders assumed citizens would be protected against state governments by their home states’ constitutions. For this reason, the Bill of Rights did not strongly affect Americans’ lives until the Fourteenth Amendment was passed in 1868. The Fourteenth Amendment prohibits the states from violating people’s life, liberty, or property without due process.

Beginning in the 1920s, the Supreme Court began to apply the Bill of Rights to the states to fulfill the Fourteenth Amendment’s guarantee of “liberty.” Gradually, one issue at a time, the Supreme Court has interpreted most of the provisions of the Bill of Rights to apply as limits on state and local governments through the due process clause of the Fourteenth Amendment.

In the twentieth century, the role of the federal government shifted. As a result of the federal government’s expanded role, its size, purpose, and significance have changed. The change also affected the national view of the Bill of Rights. The document that had rarely affected Americans’ lives prior to the 1920s now took center stage in American society, politics, and conversation.

The Bill of Rights began with debate over its very existence. Perhaps it is fitting that it still brings about questions and controversy today.

Comprehension Questions

1. Why did Federalists think a bill of rights was unnecessary and could even be dangerous?

2. Why did James Madison change his mind about adding a bill of rights to the Constitution?

3. Why did the Bill of Rights not strongly affect citizens’ lives until after the 1920s?
**Understanding Positions of Federalists and Anti-Federalists**

**Directions:** As you read the background essay, fill in the chart below with positions of Federalists and Anti-Federalists.

<table>
<thead>
<tr>
<th>FEDERALISTS (ALEXANDER HAMILTON, JAMES MADISON)</th>
<th>ANTI-FEDERALISTS (GEORGE MASON, PATRICK HENRY)</th>
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Federalists and Anti-Federalists Venn Diagram

Directions: Fill in the diagram with the positions of Federalists, Anti-Federalists, and the points on which both groups agreed.

- **FEDERALISTS** (ALEXANDER HAMILTON, JAMES MADISON)
- **ANTI-FEDERALISTS** (GEORGE MASON, PATRICK HENRY)
- **BOTH FEDERALISTS AND ANTI-FEDERALISTS**
Directions: Read each quote and decide whether it represents Federalist or Anti-Federalist views.

1. “I do not conceive we can exist long as a nation without having...a power which will pervade the whole Union…”
   - Federalist
   - Anti-Federalist

2. “The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient.”
   - Federalist
   - Anti-Federalist

3. “The laws of the general government being paramount to the laws and constitutions of the several states, the Declarations of Rights in the separate states are no security.”
   - Federalist
   - Anti-Federalist

4. “...State Legislatures have no security for the powers now presumed to remain to them, or the People for their Rights.”
   - Federalist
   - Anti-Federalist

5. “There is no Declaration of any kind for preserving the Liberty of the Press, the Trial by Jury in civil Causes; nor against the Danger of standing Armies in time of Peace…”
   - Federalist
   - Anti-Federalist

6. “Repeated violations of these parchment barriers have been committed by overbearing majorities in every State.”
   - Federalist
   - Anti-Federalist
“I do not conceive we can exist long as a nation without having lodged somewhere a power, which will pervade the whole union in as energetic a manner as the authority of the state governments extends over the several states.”
“The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient.”
“The laws of the general government being paramount to the laws and constitutions of the several states, the Declarations of Rights in the separate states are no security.”
“State legislatures have no security for the powers now presumed to remain to them, or the people for their rights.”
“There is no Declaration of any kind for preserving the Liberty of the Press, the Trial by Jury in civil Causes; nor against the Danger of standing Armies in time of Peace.”
“Repeated violations of these parchment barriers have been committed by overbearing majorities in every State.”
The Bill of Rights and RELIGION

Explores the First Amendment’s Establishment Clause and Free Exercise Clause, including studies of the Founders’ understanding of both. The unit explores the constitutionality of government action relating to religion as well as the relationship between the government and religious institutions. The unit also investigates instances where “free exercise” and “establishment” might conflict.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; of 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.

—FIRST AMENDMENT
The Bill of Rights and RELIGION

Religion has always been a central part of life in the United States. Before independence, early colonists came to the New World fleeing religious persecution in Europe and seeking the freedom to exercise their religion as they saw fit. Through the First Amendment, the Founders protected individuals and state governments from federal interference in religious matters—but whether they intended an absolute separation between church and state, and what religious liberty means for individuals and institutions today remain controversial legal and constitutional issues.

UNIT OBJECTIVES
Students will:

- Explain the historical origins of religious liberty in America
- Analyze religious practices in their schools
- Apply the principles of the Establishment Clause and the Free Exercise Clause
- Evaluate the constitutional reasoning behind Establishment and Free Exercise cases
- Assess current controversies and their implications for religious liberty
- Appreciate the enduring legacy of the Founders’ commitment to religious liberty

SYNOPSIS OF LESSONS

Lesson 1: The Establishment Clause – How Separate Are Church and State?

Students examine the Founders’ reasons for protecting religious liberty through the First Amendment, as well as the constitutional significance of the Establishment Clause.

Lesson 2: What Is the Significance of the Free Exercise Clause?

Students examine the Free Exercise clause and explore how individual rights of conscience have been both preserved and curtailed throughout American history.

CONSTITUTIONAL PRINCIPLES

- Liberty
- Natural rights

FOUNDERS’ QUOTES

“No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief, but that all men shall be free to profess, and by argument to maintain, their opinions in matters of Religion.”

—THOMAS JEFFERSON

KEY TERMS

Coercion test
Endorsement test
Establishment clause
Free exercise clause
General law test
Lemon test
“Picket fence” approach
Separation of church and state
Voucher system
“Wall of separation” principle
The Establishment Clause — How Separate Are Church and State?

LESSON OVERVIEW

Individuals from a variety of religious traditions came together to form the United States. To ensure that the national government respected freedom of belief, freedom of conscience, and freedom of religious practice, the First Amendment prohibited the federal government from either establishing a national church or interfering with existing state religions. Since then, the Supreme Court has created various “tests” to determine if government practices violate the Establishment Clause of the First Amendment. However, these “tests” have not been consistently applied, creating controversy about how to best understand the meaning of the Establishment Clause.

LESSON OBJECTIVES

Students will:

- Explain the historical origins of religious liberty in America
- Analyze the Founders’ understanding of the relationship between church and state
- Analyze religious practices in their schools
- Apply the principles of the Establishment Clause
- Evaluate and assess the constitutional reasoning behind Establishment cases
- Appreciate the enduring legacy of the Founders’ commitment to religious liberty

CONSTITUTIONAL PRINCIPLES

- Liberty
- Natural rights

MATERIALS

- Handout A: Background Essay - The Establishment Clause: How Separate Are Church and State?
- Handout B: Religion at My School
- Handout C: Interpreting the Establishment Clause
- Establishment Clause Scenarios

RECOMMENDED TIME

One 50-minute class period.

STANDARDS

- NCHS (5-12): Era III, Standards 3B, 3C; Era IX, Standards 1B, 4C; Era X, Standard 2C
- CCE (9-12): IIA1
- NCSS: Strands 1, 2, 5, 6, and 10
- Common Core (9-12): RI.4, RI.8, RI.9, RH.1, RH.4, RH.9
LES SON PLAN

Background/Homework 10 minutes the day before

A. Have students read Handout A: Background Essay - The Establishment Clause: How Separate Are Church and State? Encourage students to think about the “Critical Thinking” questions at the end of the essay.

B. Ask students to complete Handout B: Religion at My School. If time allows, brainstorm other examples of religious practices at their school.

Warm-Up 10-15 minutes

A. Briefly review with the students the key points and/or the Critical Thinking questions from Handout A.

B. Display the possible examples of religion in public schools from Handout B: Religion at My School.

C. Ask for a show of hands (or use a response system) to count the number of students who checked each example. Ask students to share any additional examples.

D. Briefly discuss the topic of “Religion at My School” by asking the following questions:
   1. Does religion affect our school a little? Somewhat? A great deal?
   2. Are you comfortable or uncomfortable with the role of religion in our school? Does it matter?
   3. Do the examples (if there are any) of religion in our school violate the Establishment Clause?
   4. If you attend a religious or homeschool, what do you know about the experiences of your public school friends?

Activity 20-30 minutes

A. Divide the class into pairs. Ask for volunteers to read (with expression) each of the scenarios from Establishment Clause Scenarios.

B. After each scenario is read, ask the class: Is this law or rule establishing a religion?
   1. Give students a minute or two (working in pairs) to complete the graphic organizer, Handout C: Interpreting the Establishment Clause.
B. Once all scenarios have been reviewed, discuss the following questions:

1. What were the differences and similarities between the constitutional viewpoints of the Founders, the Supreme Court, and you in deciding whether or not these situations violated the Establishment Clause? What might be the reasons for those differences?

2. If the First Amendment creates a “wall of separation” between church and state, what type of religious expression—if any—is constitutionally permitted in public settings?

3. If the First Amendment creates a “picket fence” separating church and state, what types of religious expression might be permitted?

4. In your opinion, what is the best “test” for determining whether or not a law violates the Establishment Clause? Why?

Homework and Extension Options

A. Have students write a 2-3 paragraph first-person narrative based upon one of the individuals from the Establishment Clause Scenarios. The narrative should present the individual’s constitutional justification for his/her position under the Establishment Clause.

B. Have students use “textspeak” and create a 140-character “Tweet” summarizing the significance of the Establishment Clause.

C. Have each student research one of the cases referenced in the essay and create one Powerpoint (or Keypoint or Prezi) slide containing

   1. The name of the case
   2. The constitutional significance of the case
   3. A graphic to illustrate the case

D. Ask for volunteers to combine all the slides into a class presentation about the Establishment Clause.

E. Have each student research what, if anything, individual Founders said about the role of religion in public life and then share their research with the class.
How would you feel if all your classmates, no matter what faith, had to begin every day with a reading from the Koran? Once you graduate, can you imagine having to sign a statement that you believe in God in order to vote? Even though Americans now consider “freedom of religion” as essential to daily life, we need to ask ourselves what freedom of religion means.

What Did the Founders Intend?

Many early colonists left England so they could practice their own faith freely. But most colonies did not extend this freedom to all settlers, and soon religious discrimination began in many of the colonies. Some states only allowed Protestants to hold public office, but this was rarely enforced.

All of the Founders believed in God (or at least in “Providence”) or practiced some form of Christianity. They agreed, however, that the federal government and religious institutions should be kept separate. The Founders wished to keep the national government from interfering in both individual as well as state religious freedom. Many of the Founders believed that religious belief would help strengthen and support republican government. Therefore, most states established official, state-sponsored, and tax-supported religions.

A few of the Founders believed that only Protestants should be government officials, but the majority wanted opportunities open to all people of good character. Article VI of the Constitution states that there should be “no religious test” for holding federal office. When the First Amendment was added to the Constitution, there was little controversy about the protections it provided for religious liberty.

None of the Founders believed in the complete and total separation of religion and government. The famous phrase, “separation of church and state” is not found in either the Constitution or the Bill of Rights. It comes from an 1802 letter by President Thomas Jefferson to the Danbury Baptist Association in Connecticut. He described the First Amendment as building “a wall of separation between church and state.” In the twentieth century, this phrase became one of the “tests” for whether or not legislation violated the First Amendment. Some scholars think that Jefferson’s “wall” is meant as a separation between the federal government on one side and churches at the state/local level on the other side. Jefferson did not mean a separation between all levels of government and all individual religious practices.
What Does the Establishment Clause Protect?

The beginning of the First Amendment reads: “Congress shall make no law respecting an establishment of religion...” This is referred to as the Establishment Clause and originally served two purposes: It banned a national church and kept the government out of existing state churches. Individuals were protected from a national government imposing a specific set of religious beliefs. The Establishment Clause keeps the government from establishing an official religion or giving preference to a specific religion.

During the 18th and 19th centuries, there were few questions about the meaning of the Establishment Clause, since it applied only to the actions of the federal government. However, as more and more constitutional principles became applicable to state and local governments (as a result of the Fourteenth Amendment), more questions about the Establishment Clause were raised. Today, the Clause is understood to protect Americans against any law, policy, or regulation from any level of government (or government official) that could lead to an establishment of religion, though what an establishment means is a matter of continuing disagreement. Some argue that the Establishment Clause means that the government should not endorse any religion, while others believe that the government can support religions as long as all religions are treated equally.

How Has the Supreme Court Interpreted the Establishment Clause?

The first important Supreme Court case involving the Establishment Clause came in 1947. The case was Everson v. Board of Education. A New Jersey school district was using public money to pay for Catholic school students’ costs of getting to and from school. The Court voted 5-4 that the policy was constitutional since it applied to both public and private schools. Since the policy was beneficial to the children in the school district and it did not benefit just one specific religion, the policy passed constitutional review.

In the 20th century, Supreme Court devised a series of “tests” to determine Establishment Clause violations.
In *Everson v. Board of Education*, Justice Hugo Black cited Jefferson’s “wall of separation” principle. In *Lemon v. Kurtzman* (1971), the Court developed the “Lemon Test” and held that a law does not violate the Establishment Clause if: 1) it has a non-religious purpose; 2) its principal effect neither aids nor hurts a religion; and 3) government and religion are not overly mixed. In the 1984 case of *Lynch v. Donnelly*, the Court created the “Endorsement Test”: government cannot endorse or even appear to endorse any one religion. Finally, in *Lee v. Weisman* (1992), the Court announced the “Coercion Test”: a government practice that forces a person to participate in a religious ceremony (in this case, rabbi-led prayer at a middle school graduation) is unconstitutional. None of these “tests” have been applied to any cases since 1997, creating considerable uncertainty as to exactly how the Court currently determines violations of the Establishment Clause.

**Can There Be Religion in Public Schools?**

Since local, state, and federal governments fund public schools, many Establishment Clause cases center on the question: to what extent can religion and public schools mix? In most cases, the Court has answered, “Very little.”

The Court ruled that all school-sponsored prayer is unlawful in *Engel v. Vitale* in 1962. A year later, the Court struck down a Pennsylvania law that said each school day must begin with a Bible reading (*Abington School District v. Schempp*, 1963). In 1980, the Court overturned state laws that forced teachers to display the Ten Commandments in their classrooms (*Stone v. Graham*). Setting aside a minute for “voluntary prayer” was also struck down (*Wallace v. Jaffree*, 1985). In 2000, the Court struck down a Texas policy of letting high school students vote on whether or not a prayer should be read at sporting events (*Santa Fe Independent School District v. Doe*, 2000).

The Court places fewer limits on voluntary student religious groups. Public high schools must give religious clubs the same right to use facilities as other groups (*Board of Education of Westside Community Schools v. Mergens*, 1990). In 2001, the Court
held that an elementary school violated a religious club’s free speech rights when it did not allow the group to meet on school grounds after classes, even though it allowed all non-religious groups to do so (Good News Club v. Milford Central School).

Can Public Money Go to Religious Schools?

Can tax money, which everyone pays, go to schools that are funded by religious and other private groups? In the first case dealing with this issue (Mitchell v. Helms, 2000), the Court allowed the government to pay for computer equipment for public, private, and religious schools. In Zelman v. Harris (2002), the Court held that a voucher system (parents are given a fixed amount of public money and then are able to pay for a religious or public school of their choice) does not violate the Establishment Clause because the voucher system has a non-religious purpose: the better education of children. However, several state courts have since found that voucher programs violate parts of their constitutions.

Can the Government Use Religious Symbols?

When, if ever, may the government use religious symbols? The Court has ruled that states may open lawmaking sessions with a prayer (Marsh v. Chambers, 1983). The Court has issued contradictory rulings about religious displays on public property. In Lynch v. Donnelly (1984), the Court ruled that communities can celebrate Christmas with a “sufficiently secular” public nativity display. However, in County v. Greater Pittsburgh ACLU (1989), the Court said that a display with a Christmas tree and a menorah was constitutional.

In 2004, the Supreme Court heard the case of Elk Grove Unified School District v. Newdow. The issue was whether a mandatory recitation in public schools of the Pledge of Allegiance, which contains the phrase “under God,” was an unconstitutional endorsement of religion. The Court did not rule on this specific issue, determining that, since he did not have custody of his daughter, Mr. Newdow did not have the right to bring the case on her behalf. The case was reheard by a lower federal court, and that court ruled 2-1 that reciting the pledge was not a violation of the Establishment Clause.

The Ten Commandments are considered by many to be an important part of our legal heritage. Others see them as primarily religious rules. On June 27, 2005, the Court issued two seemingly-contradictory decisions about the Ten Commandments. In Van Orden v. Perry (2005), the Court ruled that a 6-foot monument displaying the Ten Commandments—and placed with other monuments on the grounds of the Texas State Capitol—did not have a religious purpose and therefore the monument did not violate the Establishment Clause. In McCreary County v. ACLU (2005),
the Court ruled that large framed copies of the Ten Commandments in Kentucky courthouses did violate the Establishment Clause.

Erecting a cross on public lands has also been reviewed by the Court. In *Salazar v. Buono* (2010), the Court ruled that a large cross erected on public land and intended to honor the dead of World War I was permissible since it was primarily a patriotic symbol. Yet, in 2012, the Court—by refusing to hear a case—let stand a ruling that another cross as part of another war memorial did violate the Establishment Clause.

**Does Anyone Besides the Supreme Court Make Decisions About the Separation of Church and State?**

While many controversies about the Establishment Clause are brought to the Supreme Court, its decision is not always the last word on the subject. Local government and school districts work out policies that meet their community's expectation of religious liberty.

The Office of Faith-Based and Neighborhood Partnerships, a part of the Executive Branch, works with religious organizations to provide social services in local communities. Some scholars think that the Establishment Clause creates a picket fence—not a wall—between religion and government, and that there is some room for each to influence the other. This relationship will continue to be a topic of great debate.

**Critical Thinking Questions**

1. What did the Founders believe the Establishment Clause would prohibit? What would it permit?

2. What are the various “tests” created by the Supreme Court to determine if laws or policies violate the Establishment Clause?

3. In your opinion, which of the Supreme Court decisions referenced in the Background Essay make the most constitutional sense? The least constitutional sense?

4. When you have children, would you support a voucher system allowing you to direct tax-payer money to whichever school you chose for your child? Why or why not?

5. Which metaphor best describes the Founders’ view of the Establishment Clause: a) the clause provides a “wall of separation” between church and state; or b) the clause provides a “picket fence” between church and state? Why does it matter which image you apply when thinking about these issues?
Religion at My School

Directions: Place a check mark before each example of religion in your school. Then, based upon your responses, write a short paragraph explaining how religion does or does not affect the daily life of your school.

_____ Students recite the Pledge of Allegiance.
_____ Prayers are said by students before athletic events or assemblies.
_____ There is a Bible and a Koran in the school library.
_____ Students and teachers sometimes discuss religion in class.
_____ Religious leaders visit the school and/or speak to classes.
_____ Student religious groups meet on school property after school hours.
_____ Students wear religious symbols such as crosses or headscarves while at school.
_____ Teachers wear religious symbols such as crosses or headscarves while at school.
_____ Classes about the history of religion are offered.
_____ The Ten Commandments are posted in the school.
_____ Official school holidays include Christmas, Yom Kippur, and Ramadan.
_____ Other

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Interpreting the Establishment Clause

**Directions:** When you hear each of the scenarios, think about the question “Is this law or rule establishing a religion?” Confer with your partner, and answer the question in three ways:

- How would the Founders answer this question and why?
- How would the Supreme Court answer this question and why?
- How would you answer this question and why?

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<th>SUPREME COURT</th>
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Establishment Clause Scenarios

1. I am your history teacher, and before we begin class, we will have our daily two-minutes of silence. I encourage each of you to take advantage of this time to prepare yourself for the day ahead.

2. I am your gym teacher, and before we begin class, we will have our daily two-minutes of silence. I encourage each of you to take advantage of this time to prepare yourself for the day ahead. Since I am Muslim, I will be using this time to pray.

3. I am your chemistry teacher, and before we begin class, we will have our daily two-minutes of silence. I encourage each of you to take advantage of this time to prepare yourself for the day ahead. Since I am an atheist, I will not be using this time to pray.

4. I am the valedictorian of your class this year, and I plan to speak about my personal relationship with Jesus in my graduation speech. School officials have not reviewed what I plan to say.

5. I run a program that provides meals and job counseling for unemployed and homeless people. The funding comes from the state government and the program is run out of my Jewish synagogue. Participants are asked to perform basic chores around the building and must attend a short prayer service at the end of each workday.

6. I am principal of your high school, and I have posted a copy of the Ten Commandments in the school office. No one has to read them, but they are there for all to see.

7. As superintendent of your school district, I require that all students recite the Pledge of Allegiance each day.

8. As a member of the School Board, I support a proposal to eliminate any schoolwide holiday that has a religious significance, such as Christmas, Easter, Yom Kippur, or Ramadan.

9. I am your classmate and also a devout Christian. I invite all of you to meet me at the flagpole next Wednesday morning before school for prayer, scripture-reading, and singing.

10. As a member of the School Board, I support a proposal which would give each school a total of ten schoolwide holidays having any religious significance. It will be up to each principal to decide how those ten days should be divided.

11. I am the director of the school choir, and have selected Ave Maria (Hail Mary), a well-known classical piece of music, for inclusion in our December concert.
What Is the Significance of the Free Exercise Clause?

LESSON OVERVIEW
One of Americans’ most cherished freedoms is the free exercise of religion. In a nation where people of many faiths live side-by-side, the First Amendment’s free exercise clause protects individuals from government interference in the practicing of their faith. The government cannot target laws at specific religious practices or place undue burdens on its citizens’ worship. But what happens when an individual’s exercise of religion breaks the law? Or when a government policy forces an individual or institution to choose between following the law and following his/her own conscience? What limitations, if any, can government place on the natural right to believe?

LESSON OBJECTIVES
Students will:
- Explain the significance of the Free Exercise clause
- Compare/contrast the Founders’ views about the free practice of religion
- Assess various Free Exercise conflicts
- Appreciate on-going challenges to religious liberty

CONSTITUTIONAL PRINCIPLES
- Liberty
- Natural rights

MATERIALS
- Handout A: Free Exercise Anticipation Guide
- Handout B: Background Essay - What Is the Significance of the Free Exercise Clause?
- Handout C: Ten Commandments on Public Property Scenario
- Handout D: Restrictions on the Free Exercise of Religion

RECOMMENDED TIME
One 50-minute class period.

STANDARDS
- NCHS (5-12): Era III, Standards 3B, 3C; Era IX, Standards 1B, 4C; Era X, Standard 2C
- CCE (9-12): IIA1
- NCSS: Strands 1, 2, 5, 6, and 10
- Common Core (9-12): RI.4, RI.8, RI.9, RH.1, RH.4, RH.9
Background/Homework

A. Have students complete the first column of Handout A: Free Exercise Anticipation Guide to determine if they believe the scenarios listed are constitutional or unconstitutional.

B. Have students read Handout B: Background Essay - What Is the Significance of the Free Exercise Clause? Encourage students to think about the “Critical Thinking” questions at the end of the essay.

Warm-Up

C. Have students complete the third column on Handout A: Free Exercise Anticipation Guide.
   1. Discuss whether the students’ opinions matched the Supreme Court opinions.

D. Have students complete Handout C: Ten Commandments on Public Property Scenario.
   1. Hold a large group discussion about the case in the scenario. Have students support their answers with information about the case.
      a. What did the majority opinion state?
      b. What did the dissent state?
      c. Did Kentucky violate the Establishment Clause?

Activity

A. Distribute Handout D: Restrictions on the Free Exercise of Religion. Give students 4-5 minutes to complete the ratings individually, and then another 4-5 minutes to share with a partner.

B. Reconvene the entire class (or use a response system) to determine which situations were most often considered least/most restrictive of religious liberty.

C. Once all situations have been reviewed, discuss the following questions:
   1. Was it easier/harder to rank some situations over others? Why?
   2. On the “close calls,” what factors did you use to determine your ranking? What factors would the Founders have used? The Supreme Court?
   3. Is the Supreme Court the only institution that can resolve conflicts over free exercise? If so, why? If not, who else (or what else) can?
**Homework/Extensions**

A. Have students choose one of the cases discussed in Handout B and create a modified Briefing Sheet for the case that includes the following:

1. Title of the Case
2. Constitutional question raised by the law being challenged
3. Arguments in favor of the law
4. Arguments in favor of the individual claiming a violation of the right of free exercise
5. How the Court decided the case
6. How you would decide the case and why

B. Have students survey their friends/family about their attitudes toward freedom of religion.

C. Divide the class into seven groups, and have each student view one section of the online Library of Congress exhibit, Religion and the Founding of the American Republic ([http://www.loc.gov/exhibits/religion/](http://www.loc.gov/exhibits/religion/))

1. Students could each select/print one graphic from the exhibit and write their own explanatory captions. Everyone’s graphic could be posted around the classroom.

D. Students could research parts of the world where the free exercise of religion is limited or non-existent (e.g., parts of the Islamic world; communities in Europe where Sharia prevails; Communist nations such as North Korea) and present their research to the class.

E. Have students research free exercise issues related to the Affordable Care Act or any of the other contemporary questions raised in the last paragraph of the Handout B. Their research should focus on how they personally will be affected by the answers to the questions.

F. Have students visit [http://privacy.teachingbillofrights.org](http://privacy.teachingbillofrights.org) to learn more by exploring a timeline tracing Supreme Court cases and government policies, watching videos, and reading background essays about privacy, due process, and rule of law.
Free Exercise Anticipation Guide

Congress shall make no law respecting an establishment of a religion or prohibiting the free exercise thereof...

**Directions:** Before reading Handout B, read each scenario in the middle of the chart below. Fill in whether you think what the scenario describes is constitutional or unconstitutional.

**Read Handout B.** Complete the third column of the chart by determining if your answer in the first column was supported by the Supreme Court, the explanation the Court made in the case, and whether or not you agree with the ruling.

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<td>Two people were arrested after they walked through a Roman Catholic neighborhood and asked two men they met on the street to listen to an anti-Catholic message.</td>
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<td>A person was fired for using peyote, an illegal drug, as part of a Native American religious service. The state refused to pay welfare benefits to the person who lost his job.</td>
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<td>Several cities banned a religious group from using animal sacrifice as a part of their prayer ritual.</td>
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<td>The state fined members of the Amish religion who refused to send their teenage children to school.</td>
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Jesse Cantwell, his father, and his brother walked through a Catholic neighborhood in New Haven, Connecticut. They were Jehovah’s Witnesses and carried religious pamphlets, books, and records. They also had a small record player that played an anti-Catholic message called “Enemies.” Jesse Cantwell stopped two men on the street, and the men agreed to listen to the record. The two men were Catholic and reacted angrily when they heard it. The Cantwells were later arrested for solicitation without a permit and for causing a breach of the peace. This led to the landmark decision Cantwell v. Connecticut (1940).

Why is Cantwell an Important Case?

In Cantwell, the Supreme Court looked at the First Amendment. It states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .” The Supreme Court clearly recognized, as did the Founders, that “the [First] Amendment embraces two concepts: the freedom to believe and the freedom to act.” The government can never tell anyone which religion to believe in or not believe in. Freedom of belief is a natural right.

The Court held that Cantwell could not be barred from giving out his materials because they were religious in nature. General rules for solicitation were valid, but restrictions on religion were not. Since local laws allowed government officials to decide what causes should be called “religious,” the law violated the First Amendment. Cantwell is an important case because the Court affirmed an absolute freedom of belief.

What Are Most Free Exercise Cases About?

Many free exercise cases involve people who feel they have been treated unfairly for practicing their religion. Some religions do not permit work on the Sabbath day. The Supreme Court has ruled that states cannot deny unemployment benefits to citizens for turning down a job because it would require work on the Sabbath (Sherbert v. Verner, 1963). In 1985, however, the Court concluded that the First Amendment permitted private employers to fire employees who refused to work on their Sabbath day (Thornton v. Calder, Inc., 1985).

In a famous case (Employment Division v. Smith, 1990), a person was fired for using peyote, an illegal drug.
The drugs were used as part of a Native American religious service. The Court ruled that the state government did not have to pay unemployment benefits to the individual who lost his job. The state could turn down benefits to people who lost their jobs because of illegal activity.

Recently, a university student was denied a state scholarship because he planned to study theology. In *Locke v. Davey* (2004), the Supreme Court ruled 7-2 that he was treated fairly since the Free Exercise clause did not require the government to fund religious studies. (The two dissenting Justices concluded that Davey had been singled out for his religious beliefs and therefore had been treated unfairly.)

**Are Laws About Religious Practices Unconstitutional?**

Laws that single out one religion or person are always unconstitutional. Laws that apply to all religions in general are usually constitutional. In *Braunfeld v. Brown* (1961), the Court approved of a Pennsylvania law that said stores must close on Sundays. Orthodox Jews, whose Sabbath is Saturday, claimed the law was unfair to them since their religion required them to also close their stores on Sundays. The Court held the law did not target Jews specifically as a group. Therefore, the law was constitutional.

On the other hand, the Court struck down a Tennessee law that did not allow clergy members to hold public office. In that case (*McDaniel v. Paty*, 1975), the law singled out people because of their religious line of work.

In 1993, the Court applied the “general law” test to laws passed by four Florida cities. The cities banned animal sacrifice (*Church of the Lukumi Babalu Aye v. City of Hialeah*). The Court said that these laws actually targeted the Santeria religion, which uses animal sacrifice in prayer. Since they targeted a specific religious group, the laws were unconstitutional.

**What About Exceptions within General Laws?**

Sometimes, general laws affect religious beliefs and practices. The courts then ask whether or not a reasonable exception can be made. A famous 1972 ruling (*Wisconsin v. Yoder*), concluded that Amish teens could be excused from mandatory school attendance laws since their religion says they must live apart from the world and worldly influence.

During the 1980’s the Court ruled that the Amish must pay Social Security taxes (*United States v. Lee*, 1982). The Air Force could ban Jewish head coverings called yarmulkes (*Goldman v. Weinberger*, 1986). However, the government must stay out of hiring and firing decisions within a religious organization (*Hosanna-Tabor v. EEOC*, 2012).

The Affordable Care Act of 2012 (health-care legislation) raises many questions about religious exceptions. The Act requires all “non-religious employers” to pay for employee insurance policies. Most of these policies
provide coverage for birth control as well as abortion-inducing drugs. Soon after the law was passed, 40 organizations challenged the Act. These organizations say that the government cannot define what is—or is not—a religious employer. These groups also claim that paying for these services would violate their religious beliefs.

People of many different faiths live side by side in our free society. Free Exercise cases raise important questions about how the government can treat everyone fairly, yet respect everyone’s right to freely exercise their religion. Can churches make their own decisions about the kinds of weddings they conduct? Can military chaplains preach about their concept of sin? Can university organizations limit membership to those who share their belief system? The Supreme Court answered this last question in Christian Legal Society v. Martinez (2010)—and the Court said no. These and similar questions continue to raise controversy.

Critical Thinking Questions

1. Can the government restrict freedom of belief? Why or why not?
2. What are most free exercise controversies about? Give 2-3 specific examples.
3. How does the Court determine whether or not exceptions can be made to general laws that have an impact on free exercise of religion?
4. Applying what you have learned about the Free Exercise clause, how should Americans answer the questions raised in the last paragraph of Handout B?
5. Are there any situations where the rights of individuals to freely practice their religion might be in conflict? If so, what constitutional or legal guidelines might help resolve the conflict?
Ten Commandments on Public Property Scenario
STONE V. GRAHAM (1980)

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...

Background:
In 1980, a statute was passed by the Kentucky legislature and subsequently funded by a group of private donors. The statute mandated that each elementary school classroom display a plaque with the Ten Commandments. The plaque would also include this message: “the secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.” Sydell Stone and group of parents challenged the Kentucky state law that mandated the posting of the Ten Commandments in public school classrooms because it violated the Establishment Clause of the First Amendment.

Question:
Did the Kentucky Law violate the First Amendment’s Establishment Clause?

Supreme Court Majority Opinion:
The Supreme Court ruled that this policy did violate the Establishment Clause of the First Amendment. The opinion stated that the Ten Commandments had “no secular legislative purpose...The pre-eminent purpose for posting the Ten Commandments...is plainly religious in nature.” The opinion argued that if the Ten Commandments were to be taught in a historical capacity as part of a school’s curriculum, it would be within the law.

Supreme Court Dissent:
The dissenting opinion by Justice Rehnquist held that states should be able to determine what they considered secular (non-religious). Rehnquist argued that if the state legislature and the state courts both found the posting to be secular then it should be respected by higher courts. Rehnquist stated that the “Ten Commandments have had a significant impact on the development of the legal codes of the Western World,” and, therefore, posting them in a public building did not violate the Establishment Clause.
Task:
Write a response to this case and answer the following question:
In reviewing the majority and dissenting opinions, do you believe that the Establishment Clause was violated in this case? Why or why not?

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Restrictions on the Free Exercise of Religion

Directions: Rank each of the following, giving “1” to the situation which describes the least restriction on the free exercise of religion, all way up to “10”, the situation which describes the most restriction on free exercise. Be prepared to defend your choices, especially where rankings are close to each other. You should refer to the various cases in Handout A to find support for your analysis.

A. Public employees may not display religious symbols (crosses, menorahs, etc.) in their personal workspace.

1  2  3  4  5  6  7  8  9  10

B. Christian Scientist parents are required to seek medical treatment for their children, even though they believe that prayer—not medicine—will heal people.

1  2  3  4  5  6  7  8  9  10

C. A member of the Old Order of Amish, who does not accept Social Security benefits for religious reasons, must still pay social security taxes.

1  2  3  4  5  6  7  8  9  10

D. Members of the Navy are prohibited from wearing any head covering indoors.

1  2  3  4  5  6  7  8  9  10

E. All witnesses in court, regardless of their religious affiliation, must swear an oath on either the Bible or the Constitution before testifying at trial.

1  2  3  4  5  6  7  8  9  10
F. New members of Congress may use any sacred book—Bible, Koran, Bhagavad Gita, etc.—when being sworn into office.

G. Members of a club promoting atheism at a public university must open membership to students who believe in God and attend church.

H. All persons applying for a drivers’ license must remove any head-covering or scarf for their photo.

I. All private organizations (including religious organizations) must pay for employee insurance programs providing birth control services and abortions.

J. All priests and ministers must conduct marriage ceremonies for anyone who asks them to do so.
The Bill of Rights and FREE SPEECH

Focuses on First Amendment protection of free speech, free assembly, and petition of government. The unit also examines the evolution of the definitions of protected expression in speech, petition, assembly, art, demonstration, and other forms.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; of 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.

—FIRST AMENDMENT
The right of free speech is vital to the principle of self-government. America’s Founders recognized the necessity of vigorous public debate to republicanism, and enshrined the right to speak freely in the Bill of Rights for this purpose. It protects a wide range of speech, including speech to which we might object; this is when the First Amendment’s importance becomes most obvious. Understanding the operation of the First Amendment in both their school and in the wider context of society both fosters students’ appreciation of their rights, and prepares them for responsible and effective participation in their school, community, and nation.

UNIT OBJECTIVES

Students will:

- Explain the reasons why free speech is essential to self-government and promotes a peaceful and stable society.
- Articulate the importance/meaning of the First Amendment.
- Understand the distinctions between free speech and speech that is not free.
- Evaluate whether certain actions should be protected by the First Amendment.
- Understand Supreme Court applications of First Amendment protections regarding “expressive conduct.”
- Critically analyze free speech issues concerning schools, and the proper balance between First Amendment protections and legitimate educational/disciplinary concerns.
- Understand the history and tradition of the rights to petition and assembly.
- Identify ways in which Americans petition the government, past and present.

SYNOPSIS OF LESSONS

Lesson 1: Why is Free Speech Essential to Self-Government?
Students explore the Founders’ reasons for safeguarding freedom of speech, protected and unprotected speech, and the ways that expression affects their daily lives.

Lesson 2: How Has Speech Been Both Limited and Expanded, and How Does it Apply to You and Your School?
Students explore the evolution of limitations on and expansions of free speech since the Founding and the impact free speech has on individuals and schools.
Why is Free Speech Essential to Self-Government?

LESSON OVERVIEW
The right of free speech is vital to the principle of self-government. America’s Founders recognized the necessity of vigorous public debate to republicanism, and enshrined the right to speak freely in the Bill of Rights for this purpose. It protects a wide range of speech, including speech we might find disagreeable; this is when the First Amendment’s importance becomes most obvious. While the First Amendment’s primary purpose was to protect political speech, its protections do have limits: political speech can be restricted only in extreme circumstances, such as when public safety or national security is demonstrably threatened.

LESSON OBJECTIVES
Students will:
- Explain the reasons why free speech is essential to self-government and promotes a peaceful and stable society.
- Articulate the importance/meaning of the First Amendment.
- Understand the distinctions between protected and unprotected speech.
- Evaluate the ways free speech is important in their own lives.
- Appreciate the First Amendment’s protection of free speech.

CONSTITUTIONAL PRINCIPLES
- Civil Discourse
- Individual Responsibility
- Liberty
- Natural Rights

MATERIALS
- Handout A: Background Essay—Why is Free Speech Essential to Self-Government?
- Handout B: Speech Poster
- Handout C: Speech Scenarios

RECOMMENDED TIME
One 50-minute class period.

STANDARDS
- NCHS (5-12): Era III, Standard 3C
- CCE (9-12): IIA2, IIC1
- NCSS: Strands 1, 4, and 10
- Common Core: RI.4, RI.9, SL.1, SL.2, SL.4, SL.5, RH.7
LESSON PLAN

Background/Homework 15 minutes the day before
A. Have students read Handout A: Background Essay—Why is Free Speech Essential to Self-Government?
B. After reading, students should answer the questions at the end of Handout A.

Warm-Up 5 minutes
A. Have students briefly share ways they express their opinions regarding issues in your school, or political issues of the state/country. As students share, reinforce the concept that while the First Amendment protects a variety of speech, it is political speech (or speech about candidates, laws, legal issues, and other political matters) that warrants the most protection.

Activity I 20 minutes
A. Divide students into pairs. Once paired, explain to students that they are acting as a small public relations firm, circa 1791, but with modern technology at their disposal, if available. They have been hired by James Madison to “sell” his proposed amendment to protect speech to both Congress and the States so that it may be ratified.
B. Distribute Handout B: Speech Poster (if no computer/smartphone access; see below for online/smartphone options in lieu of using Handout A).
1. Instruct students to create a motivational poster that sells the amendment. They should first brainstorm good graphical and catch-phrase options that capture the essence of the First Amendment, its intent, or its importance. If using the following technology-based options, instruct students on the way you wish for them to be able to share their poster (see sharing options below).
2. Online option: If classroom has computers with internet access and printing/projection. Students can print, email, or share their poster via Facebook/Twitter from the website, and can utilize Google Images to find graphics they wish to incorporate into their poster.
http://www.freepostermaker.com
3. Smartphone options (all are free apps that students can very quickly install and use). Students can email or share their poster via Facebook/Twitter from the app. Students can use their smartphone’s browser to find images they wish to use via Google Images, saving a particular image to their phone, and incorporating it into their poster via the app.
   a. iPhone: iMotivate (via App Store)
   b. Android: Motivator Maker (via Google Play)
   c. BlackBerry: Motivational Generator (via BlackBerry App World)
C. Have a variety of student pairs share their motivational poster with the class. In sharing, they should briefly explain why they chose the graphic and motivational phrase they used in their poster, and what it illustrates about the importance of the First Amendment, if not obvious. Sharing options if using technology in lieu of Handout B:

1. If using www.freepostermaker.com, have students print their poster (easiest/quickest) and email it to you to project for them, or have them share it to Facebook/Twitter, letting them log in and project from their account if your school’s web filters allow.

2. If using smartphones, have students either email their poster to you from the app they’re using and project it for them (easiest/quickest), or have them share it to Facebook/Twitter, letting them log in and project from their account if your school’s web filters allow.

**Activity II**

20 minutes

A. Designate—either verbally or with small signs—one wall of your classroom as YES/PROTECTED, the opposite wall as NO/NOT PROTECTED, and the space in the middle of the two walls as NOT SURE.

B. Explain to students that you will read a series of speech scenarios (do not yet give students Handout C; you will do so at the end of the group activity). After each scenario is entirely read, students will move to the wall indicating whether they believe the speech in the scenario is PROTECTED or NOT PROTECTED by the First Amendment.

1. Students who are not sure of a particular scenario can move to the middle. Explain to students that once they have chosen a position, they will have 30 seconds to confer with the other students at their position and decide WHY the speech is protected or not (all three positions, if applicable, will need to do this as well). Tell them that you will call on a student at each station to speak for the group and share the justification for their position.

C. If possible, start the entire class in the middle (NOT SURE) position. Read Scenario 1 of Handout C: Speech Scenarios aloud. Let students move to their chosen position. After they’ve settled, give them 30 seconds to confer and formulate their justification. When the 30 seconds is up, ask students in the middle, if applicable, for their justification; then do the same for the INCORRECT side, if applicable (consult the Answer Key for correct answers); finally, ask the CORRECT side for their justification. Discuss the scenario as a group and clarify any questions/issues. When discussion/clarification for Scenario 1 has ended, announce the correct answer but not the rationale (they will do this individually in E, below).


D. When all 6 Scenarios have been completed, have students return to their desks and distribute Handout C: Speech Scenarios to students. Have them complete Handout C.
E. Wrap up by discussing with the class the importance of the First Amendment, and how it encourages a free society.

1. Respond to the following statement: “I disapprove of what you say, but I will defend to the death your right to say it.” (Attributed to French Philosopher Voltaire, 1694-1778.) Is the defense of free speech a duty of citizenship? In what ways do you defend it, both for yourself and on behalf of others?

2. What might a variety of aspects of society look like if speech were not protected? (Consider art/movies/music, etc.)
   a. Suggested responses: Students are likely to say that defending free speech is a duty of all citizens. Some students may give examples of how they’ve defended speech in both exercising it themselves and in standing up on behalf of others who speak their minds (in class, other contexts, etc). Others may not have concrete examples to share, but may express the importance of protecting it. Regarding other aspects of society, students may suggest that the number or quality of movies or song lyrics may dwindle without freedom of speech. Students may say that the government would likely censor many of the things we see and hear without speech protection.

Homework/Extensions

A. Have students use a newspaper or internet resources to find three examples of individuals or groups exercising their right to free speech. Have them write a paragraph explaining each person or group’s message and the way their exercise of free expression enables them to persuade others of their cause.

B. Have students interview a family member, teacher or friend and report on their attitudes regarding the First Amendment’s protection of speech. Questions to consider asking: How important is the right of free speech to you? In what ways have you spoken your mind? Do you feel the First Amendment provides too much protection for speech, not enough, or is just right? Why?

C. Give students the following quote from the mayor of New York regarding anti-Vietnam War protests at Columbia University in 1969:

   1. “We cannot rest content with the charge from Washington that this peaceful protest is unpatriotic...The fact is that this dissent is the highest form of patriotism.”

   2. Have students write a brief essay in reaction to the quote. Questions to consider: Do you agree with the mayor when he says that “dissent is the highest form of patriotism”? Why or why not? Why is it a citizen’s right, even a duty, to question or criticize the government? What examples of dissent do you see in society today?

D. Have students create a theme-based collage, either on posterboard or electronically, illustrating a variety of images of individuals or groups “speaking”. The theme of their collage should focus on one of the two topics of the lesson they just completed: importance and intent of the First Amendment; protected vs. unprotected speech. (This is essentially an expansion/extension of Activity I; they should incorporate the motivational poster they made into their collage.)
Why is Free Speech Essential to Self-Government?

BACKGROUND ESSAY

Are words and ideas, and the variety of ways we express them, really that important to self-government? For Americans of all walks of life, the answer has forever been a very simple one: yes.

Do you ever disagree with those in authority: your teacher, the governor, or the president? If you voice your opinions peacefully, will you be silenced and punished by the government? No, because the First Amendment protects freedom of speech. Individuals must also be responsible when using speech. For instance, it is unlawful to yell “fire” in a crowded area if there is no fire.

Why Does the Bill of Rights Protect Speech?

“A man has a property in his opinions and the free communication of them,” (James Madison, 1792). To James Madison, Father of the Constitution, man not only owned his thoughts, but owned the right to express them as well. This right—so vital to the very concepts of liberty and self-government—is protected in the Bill of Rights because the British had long censored political debate, and the Founders knew how powerful speech could be.

Madison envisioned a society in which citizens vigorously and fully participate in discussions about political topics. Such discussion not only promotes self-government through participation, but acts as a “safety valve” for society. If not for free and open speech, people might resort to violence. Free speech also fosters an energetic and creative society, and can act as a further “check” on the power of government as citizens are left free to criticize it. Madison felt that everyone should be guaranteed this right, no matter how unpopular one’s views may be.

How Does Free Speech Promote a More Peaceful and Self-Governing Society?

The First Amendment protects four ways for citizens to participate in the public exchange of ideas. These are the rights to free speech, assembly, petition, and press. These four freedoms promote the foundation of a free and peaceful nation.

The freedom of Americans to express their opinions provides for a more stable society. Groups—even unpopular ones—have a chance to air their views and persuade their fellow citizens. In return, their views are open to challenge in a fair manner. This dialogue serves as a “vent” for those who might
hold extreme views, lessening the chance that they turn to violence as recourse for going unanswered. The danger of tyranny—an individual or small group seizing control of government and forcing their beliefs on others—is diminished when citizens feel like they’ve had a fair hearing, even if they fail to convince their fellow citizens.

Self-government is not possible when speech is stifled. If citizens cannot challenge their government and leaders, the chances increase that government will not serve the people. Sharing ideas and taking part in the political process gives citizens the chance to tell officials how they wish the government to act. People can hold elected officials accountable through publicly questioning their activities and joining together with others to demand a better, more honest government that acts in the best interests of the people. Along with the right to free speech, the First Amendment’s protection of a free press enlightens citizens to abuses of power and allows them to right such wrongs at the ballot box. These crucial rights serve as the first line of defense in the preservation of self-government.

Does the First Amendment Protect All Speech?

While the First Amendment provides very broad protections of speech, it does not necessarily protect every type of speech in which citizens wish to engage, and the Supreme Court has worked to shed light on the meaning of the freedom of speech—and its boundaries—over the past century.

In Brandenburg v. Ohio (1969), the Supreme Court drew one such boundary of First Amendment protection. In this case Brandenburg, a Ku Klux Klan leader, was seen on film giving a speech that the State of Ohio claimed violated its law against advocating violence. In his speech, he alluded to what he called “revengeance,” but ultimately he called for a July 4th march in the nation’s capital. The Supreme Court ruled that Brandenburg’s speech was indeed protected by the First Amendment, but in doing so drew a limit with regard to free speech. While Brandenburg might have encouraged unlawful action, he did not do so in a way that incited people to “imminent lawless action,” or immediate illegal behavior. If he had, his speech would not, the Court ruled, have been protected speech.

There are other boundaries as well. The First Amendment does not protect
speech that intentionally spreads falsehood about someone’s character, such as libel or slander. It does not protect speech that maliciously puts others in harm’s way, such as speech that is likely to start a riot, incite a panic, or otherwise threaten public safety. The government may outlaw certain types of obscenity and put into place “decency” standards that limit the things said or done on public airwaves during certain viewing/listening times, all without being in violation of the First Amendment. Speech that poses a national security concern, such as publicly revealing troop movements, can also be limited. Finally, all speech may be subject to reasonable time, place and manner restrictions, so long as such restrictions are applied to all individuals or groups, regardless of their particular message.

The Constitution and You.

Other types of speech are highly contested throughout the nation. For instance, some people believe that “hate speech” (speech against a specific group) should not be protected by the First Amendment. But others argue that all speech, no matter how offensive, should remain protected, because prosecuting what some call “hate speech” may end up limiting the right to express negative views and, therefore, could limit citizens’ right to free speech.

The First Amendment was designed by the Founders to protect YOUR ability to participate in self-government and live in peace with those who think differently from you. While our Founders ultimately meant to protect political speech, the scope of the First Amendment has evolved over the years. It now encompasses the variety of ways you “express” yourself, including ways beyond spoken or written words. The freedom of speech is one of the first and most important ways you participate in your society, and it is key to living a life of liberty.

Comprehension and Critical Thinking Questions:

1. What did James Madison believe people “owned” as a natural right, and why is such a right protected in the Bill of Rights?

2. How does the right to free speech help to create a more peaceful and stable society?

3. How does the right to free speech foster a self-governing society?

4. What types of speech, if any, does the First Amendment NOT protect?

5. In what ways is the right to free speech important in YOUR daily life? (2-3 sentences)
Speech Poster
**Speech Scenarios**

**Directions:** After the group activity has ended, complete the following chart for each speech scenario. Your answer in the “Protect Speech?” column can be simply “YES” or “NO.” Your answer in the “Reasoning?” column should provide a one-to-two sentence explanation of why the example contained in that speech scenario is protected or not protected, based on information provided in both the Background Essay and the class activity/discussion. How would the Founders answer this question and why?

<table>
<thead>
<tr>
<th>SCENARIO</th>
<th>PROTECTED SPEECH?</th>
<th>REASONING?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. A group who opposes the president meets in front of the White House and gives speeches calling him a liar and an idiot. They also pass out voter registration forms, encouraging people to vote for someone new next fall.</td>
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<td>2. A man organizes a protest outside of a multi-national corporation’s headquarters to protest its use of child-labor in another country. During his speech, he tells the gathered protestors to throw rocks and bottles at the company’s building.</td>
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<tr>
<td>3. An anti-government organization hands out literature at a local festival. The literature states the group’s mission is to change the structure of American society, and specifically states its eventual goal is the overthrow of the government.</td>
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<td></td>
</tr>
<tr>
<td>SCENARIO</td>
<td>PROTECTED SPEECH?</td>
<td>REASONING?</td>
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<tr>
<td>4. A small group of students, upset about their school’s new dress code policy, intentionally wear clothes to the lunchroom that violate it. They try to convince passing students to join their cause and hand out a small pamphlet summarizing what they believe to be the unfairness of the new school policy.</td>
<td></td>
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<td>5. Eventually, the students get angry that no one’s paying attention to them or their message. One of the students calls a bomb threat in to the school. He’s hoping the students and staff in the cafeteria will be forced to listen to them while they’re all in lock-down.</td>
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<td></td>
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<tr>
<td>6. A young man wears a jacket into a courthouse with the phrase “[Expletive] the Draft. Stop the War” on the back. He is arrested for disturbing the peace through offensive conduct.</td>
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</tbody>
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Lesson Overview
The interpretation of the word “speech” has evolved from the vision of it intended by the Founders. It now encompasses a wide array of “expressive activities,” some of which are quite controversial in the minds of many Americans. The Supreme Court, along with changes in society and technology, have fostered this evolution, and the First Amendment’s protections are in some ways broader than ever. Student speech in public schools, though, poses unique questions which often revolve around the balance of young peoples’ rights with the responsibility of schools to ensure learning, order and discipline. Understanding the operation of the First Amendment in their schools and in the wider context of society both fosters student appreciation of their rights, and prepares them for responsible and effective participation in their schools, communities, and nation.

Lesson Objectives
Students will:
- Understand the conditions under which government and public schools may restrict speech.
- Evaluate whether certain actions should be protected by the First Amendment.
- Understand Supreme Court applications of First Amendment protections regarding “expressive conduct.”
- Critically analyze free speech issues concerning schools, and the proper balance between First Amendment protections and legitimate educational/disciplinary concerns.
- Appreciate the importance of the freedom of speech in preserving a free and open society.

Constitutional Principles
- Civil Discourse
- Individual Responsibility
- Liberty
- Natural Rights

Materials
- Handout A: Background Essay - How Has Speech Been Both Limited and Expanded, and How Does it Apply to You and Your School?
- Handout B: What Do I Believe About the Freedom of Expression?
- Handout C: Student Code of Conduct
- Handout D: Schools and the Marketplace of Ideas—4 Scenarios
- Handout E: Speech by Matthew Fraser (Optional)

Recommended Time
One 50-minute class period.

Standards
- NCHS (5-12): Era III, Standard 3C
- CCE (9-12): IIA2, IIC1
- NCSS: Strands 1, 4, and 10
- Common Core: RI.4, RI.9, SL.1, SL.2, SL.4, SL.5, RH.7
**Background/Homework**

15 minutes the day before

A. Have students read **Handout A: Background Essay - How Has Speech Been Both Limited and Expanded, and How Does it Apply to You and Your School?**

B. After reading, students should answer the questions at the end of **Handout A**.

**Warm-Up**

10-15 minutes

A. Distribute **Handout B: What Do I Believe About the Freedom of Expression?**, and put students into pairs. Read the directions aloud, encouraging students to both briefly discuss and write a brief explanation for any particular statement(s) in which they feel they need to clarify or qualify their belief.

B. After 5-7 minutes, or after all students have finished, direct students to return to their desks. Begin discussing each statement one-by-one. Elicit individual responses and thoughts, perhaps asking student pairs to explain their conversations on particular statements. Note both similarities and differences of opinion throughout the room.

C. Close by asking students to share their answers to, and/or to reconsider, the quotation posed in Question 5 of the Comprehension and Critical Thinking questions in **Handout A**.

**Activity**

30-35 minutes

A. Put students into groups of 4, and distribute **Handout C: Student Code of Conduct** to the members of each group. Explain to students that it is an excerpt from a real high school’s Student Code of Conduct booklet (you may find it useful to locate a similar excerpt from your own school’s code of conduct for later comparison/analysis/discussion).

1. Have them complete the questions on **Handout C**, analyzing the code of conduct in light of the protections of the First Amendment.

B. After 10 minutes, or after all students/groups have finished **Handout B**, bring the class together, keeping students in their groups. Discuss student answers to Question 4 of **Handout C**. If time allows, ask students if they were surprised by anything in the Student Code of Conduct.

C. Distribute **Handout D: Schools and the Marketplace of Ideas—4 Scenarios**. Have groups read each scenario in order, discussing and answering the questions below each scenario. Students should utilize **Handout C** as they work through the scenarios, referencing both the Code of Conduct and the First Amendment in their answers.
D. After students have finished all scenarios, conduct a discussion with the whole class, keeping students in their groups. Begin discussing student answers to Scenario 1. Center the bulk of discussion on Question 3, asking students to summarize their arguments and their opinion as to whether the Supreme Court would agree with them. After groups have discussed their arguments/opinions, read the answer to Question 3 of Scenario 1 from Answer Key: Handout C, summarizing how the Supreme Court either has ruled, or would be likely to rule, and the reasons why. Continue process for Scenarios 2-4.

Wrap-up 5-10 minutes

Discuss the following questions:

1. How does the First Amendment foster a free society in which citizens can speak their minds?

2. Do the freedoms of the First Amendment require a certain amount of responsibility on the part of citizens? How so, or in what ways?

Homework and Extension Options

A. Have students select one of the Student Speech Scenarios from Handout D and extend their classroom analysis of it in a 2-3 paragraph response.

1. Questions for students to address: Based on your in-class work with the scenario you chose and the class discussion about it, write a paragraph summary of your opinion as to whether the student speech should have been protected by the First Amendment. In responding, give specific reasons as to why you believe the First Amendment does or does not apply.

2. Pretend for a moment that you are the school principal. Would your opinion change? Why or why not? How about if you were a concerned parent? A concerned classmate? In arguing a different perspective, be sure to give specific reasons that address the balance between the protections of the First Amendment and the need to maintain order and discipline.

B. Have students choose an organization that frequently employs either non-verbal, symbolic speech, or controversial/offensive methods, to get its message across. For example: PETA, Greenpeace, the NRA, Right to Life groups, the Westboro Baptist Church, the “Occupy” movement. Ask students to evaluate the group’s use of expressive activities. Questions to consider:

1. How effective are their tactics in persuading others to their point of view? Does it matter how effective they are?

2. Is this what Justice Oliver Wendell Holmes had in mind when he called for a “marketplace of ideas”? Why or why not?
C. Have students research one of the following Supreme Court cases, discussed in the expansion of speech theme of the background essay:


2. Students should create a class presentation (PowerPoint, Prezi, or posterboard) detailing the facts of the case, the interpretation/application of the First Amendment by the Supreme Court, and why the case and its ruling are important/relevant to expression in America today. Students should also include a statement of opinion as to whether they agree with the Supreme Court’s ruling and the application/interpretation of the First Amendment. Instruct students to utilize http://www.oyez.org as a good starting point for their research.

3. Have students keep a week-long journal or blog detailing speech and expression in your school. Students should note the variety of ways students express themselves in both verbal and non-verbal forms. They should also note the context of the expression (i.e. classroom expression, hallway or other assembled expression, student government, school-sponsored activities, dress, etc.) and any restrictions on speech that they see or believe are occurring.

4. After a week, students should review their journal and write a one-page essay assessing the state of the First Amendment in your school, incorporating examples from their journal (students should turn in their journal along with their essay). Pose the following question as the organizing principle of their journal and essay: Do you believe the First Amendment is alive and well, and being honored and protected, in our school?

D. Anti-bullying legislation/policies, and their university kin, in the form of “speech codes,” have raised new areas of potential conflict regarding student speech rights and its balance with the safety and rights of others on campus. Events such as school shootings, and the growth of “cyber-bullying” through digital platforms such as texts or social media websites, have pushed this issue to the fore over the past decade. Have students research and prepare a one-page report on your state’s anti-bullying law(s), or your school’s anti-bullying policies as expressed in your student Code of Conduct. Students should address the following:

- How does the law or policy define bullying? Do you agree with the definition?
- In what ways does the law or policy protect student speech? In what ways does it limit it?
- Do you believe this law or policy upholds the protections and principles of the First Amendment? If so, why? If not, why not?
How Has Speech Been Both Limited and Expanded, and How Does it Apply to You and Your School?

BACKGROUND ESSAY

Does the First Amendment Create a “Marketplace of Ideas?”

While the Founders intended for the First Amendment to grant its utmost protection to political speech, its words do not actually place such a qualifier on its protections.

Over the years, speech has come to be one of the most important parts of what Supreme Court Justice Oliver Wendell Holmes called the “marketplace of ideas.” This metaphor has come to symbolize the belief that freedom of speech must be allowed as far as possible, and citizens must be free to choose which voices to listen to. In the words of Justice Anthony Kennedy, “the First Amendment confirms the freedom to think for ourselves.”

Does the Marketplace Require That All Speech Be Allowed?

Free speech has never been considered an unlimited right. It does not, for example, protect yelling “FIRE!” in a crowded theater if there is no fire, starting a stampede for the door. It also does not protect “fighting words,” or words that, when spoken, incite an immediate breach of peace, according to Chaplinsky v. New Hampshire (1942).

In determining the limits of the First Amendment, the Supreme Court often must weigh the government’s claimed interest in restricting speech against the individual’s right to express himself. Government can pass laws that restrict speech if the law:

- is clearly defined
- limits only unprotected speech (including sedition and defamation)
- limits speech as little as possible
- limits speech for reasons other than just its content

An important case in defining the limits of the First Amendment is Schenck v. United States (1919). In this case, Charles Schenck was handing out pamphlets urging people to petition the government to repeal the World War I draft law. He was arrested and charged with attempting to cause disobedience in the military and getting in the way of recruitment.

The Supreme Court unanimously agreed that the First Amendment did not protect Schenck’s actions. The country’s interest in fighting World War I was more important than Schenck’s right to free speech. Schenck’s actions, the Court concluded, presented a “clear and present danger” to the country.
How has the “Marketplace” Analogy Helped to Expand Speech into Expression?

Since Schenck, the Courts have broadened the definition of speech. First Amendment protections are now applied to a wide range of expressive activities that are “akin to pure speech.”

In Miller v. California (1973), the Supreme Court ruled that materials that some Americans might find to be “obscene” are protected by the First Amendment if the materials have “serious literary, artistic, political or scientific value.” The ruling in Miller was expanded even further in Jenkins v. Georgia (1973), which said that citizen juries did not have “unbridled discretion” to determine what qualified as obscene. The internet has further broadened the “marketplace” in this area of the First Amendment. Indecent photos can be legally posted online (Reno v. ACLU, 1997). The Supreme Court even ruled that computer-generated child pornography, where no real children are harmed in its production, is protected free speech (Ashcroft v. Free Speech Coalition, 2002).

The spending of money to advocate political causes, or to help candidates get elected, is considered speech in Buckley v. Valeo (1976). This was expanded even further in 2010 with Citizens United v. F.E.C. Citizens United ruled that individuals assembled into corporations and groups, so-called “special interests,” are also protected by the First Amendment. This has proven a very controversial ruling, but it was re-affirmed by the Supreme Court in 2012 (Western Tradition Partnership, Inc. v. Attorney General of Montana).

An equally controversial form of speech is symbolic speech, or conveying a message through action. Ruling that “one man’s vulgarity is another’s lyric,” the wearing of clothing that contains an offensive message is protected through Cohen v. California (1971). The Court upheld the burning of a U.S. flag as a method of expression in Texas v. Johnson (1989). This concept was extended in Virginia v. Black (2003), which ruled that cross-burning was protected speech, so long as it was not meant as a form of direct intimidation.

How Does the Marketplace Apply to You and Your School?

Schools have long been considered a “special place” by the Supreme Court. While you do have constitutional protections at school, the Court has drawn a fine line between your rights and the abilities of school officials to preserve the unique mission of the place.

The Supreme Court applied the principles of expression in West Virginia v. Barnette (1943). In this case a group of Jehovah’s Witnesses refused to participate in reciting the Pledge of Allegiance, remaining seated and silent. Their silence was not “speech,” but it was no doubt a form of expression, they argued. The Supreme Court agreed, and upheld a student’s right to express himself through non-participation.
Writing for the Majority, Justice Robert Jackson wrote: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

The most famous case of student speech in school came with *Tinker v. Des Moines* (1969). In *Tinker*, the Supreme Court ruled that the wearing of black armbands to protest the Vietnam War was protected by the First Amendment. In ruling that “students … [do not] shed their…rights to freedom of speech or expression at the schoolhouse gate,” the Supreme Court found that schools could not restrict the expressive rights of students unless it could show that a “substantial disruption” would occur as a result of the expression.

The Court has refined its ruling in *Tinker* in the years since 1969. In *Bethel School District No. 403 v. Fraser* (1986), the Court ruled that a student’s speech nominating a classmate to student government containing “vulgar and offensive” language was not protected expression. The Court found that the First Amendment did not require school officials to allow such speech. In doing so, the Supreme Court drew a line between the type of political speech protected in *Tinker* with other forms of speech that schools are free to prohibit.

Along the same lines, in 2002, 18-year old Joseph Frederick hung a banner reading “Bong Hits 4 Jesus” across the street from the school during a school-sponsored, outside event. His banner was taken down by the school principal, and Frederick was suspended. Citing the school’s interest in preventing students from advocating illegal drug use, the Supreme Court ruled that Frederick’s speech was not protected in *Morse v. Frederick* (2007). While the speech might have contained something of a political message, the Court ruled that the special mission
of the school in protecting students from dangerous behavior outweighed Frederick’s right to express himself.

In short, you DO have the right to express yourself in school. That right, however, is not unlimited and your school may take reasonable steps to limit it in ways that might not be acceptable in general society. School administrators have fairly broad discretion to limit or punish student speech that either violates school rules, or might otherwise interfere with appropriate educational or disciplinary objectives, such as student safety and classroom learning.

Comprehension and Critical Thinking Questions:

1. What is the “marketplace of ideas,” and how does this concept broaden the liberty contained in the First Amendment?

2. What are the conditions under which government can pass laws that restrict speech?

3. What types of “expressive activities” have come to be protected by the First Amendment?

4. In what ways has the Supreme Court applied the First Amendment differently in schools and other public institutions than in private institutions?

5. Respond to the following statement concerning the First Amendment: “[I]f freedom of speech means anything, it means a willingness to stand and let people say things with which we disagree, and which do [bother] us considerably.” (2-3 sentences)
What Do I Believe About the Freedom of Expression?

**Directions:** With your partner, consider and discuss the following statements concerning your beliefs about what freedom means, and what expression should be protected by the First Amendment. You and your partner DO NOT need to be of the same opinion, and can certainly have a different response to any of the statements below. It is, however, important and helpful to discuss each of the statements one by one. Answer by checking either AGREE, DISAGREE or MAYBE. If you feel you need to state a reason or an explanation for any of your positions, you may do so on the EXPLANATION line under each statement.

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<tr>
<th>I BELIEVE...</th>
<th>AGREE</th>
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<td>1. ...that the protections of the First Amendment are some of most important ways we maintain a free society of self-governing citizens.</td>
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<td>2. ...the First Amendment should protect the widest possible range of ways people choose express themselves.</td>
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<td>3. ...that there are times when government can reasonably limit what people say, or the ways in which they express themselves.</td>
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<td>4. ...that things that some, even many, find obscene or indecent should be protected by the First Amendment.</td>
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<td>EXPLANATION:</td>
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<td>5. ...that sexually explicit material, including pornography, should be protected expression.</td>
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<td>6. ...that the things I say or do online should be as protected by the First Amendment as the things I say or do in “real life.”</td>
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<td>EXPLANATION:</td>
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<td>7. ...that strong anti-bullying laws or policies are important, even if it restricts what people say or do online, or in school.</td>
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<td>EXPLANATION:</td>
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<td>8. ...that burning an American flag, or a cross, as a method of protest should be protected expression.</td>
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<td>EXPLANATION:</td>
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<td>9. ...that the message someone is trying to communicate always deserves protection, even if they do it in ways that are very offensive to others.</td>
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<td>EXPLANATION:</td>
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Student Code of Conduct

Directions: The following excerpts are taken from a real school’s Student Code of Conduct booklet. Your school’s Code of Conduct may differ, but it is likely to contain similar language. Carefully read the excerpts, then answer the questions below.

Student Rights

“There is an urgent and growing need for school administrators to provide strong leadership in the area of [individual] rights. [Individual] rights accrue to all people simply because they are human. One’s [individuality] cannot be denied because of temporary status as a student; nor should students be denied the opportunity to learn about, and practice, [individual] rights behavior in the school setting.”

“Of equal importance is the right of school authorities, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. The difference between the freedoms expected by the students and the necessary restrictions of their actions in the rules set down by the school to maintain good order can be bridged by appropriate conduct on the part of both.”

Freedom of Expression

“Students have the right to assemble and express themselves by speaking, writing, distributing, wearing or displaying symbols of ethnic, cultural, or political values such as buttons, badges, emblems, and armbands; or through any mode of dress or grooming style; or through any other medium or form of expression. The principal, or designee, however, may regulate expression, provided the regulation is based on legitimate educational concerns, there is a factual basis for believing a specific form of expression by a specific student is causing or will cause substantial disruption of school activities or the expression constitutes a health or safety hazard. Students shall also have the right to refrain from expressing themselves in these student originated activities.”
1. Referring back to **Handout A**, which Supreme Court cases regarding schools and the First Amendment are reflected in this Code of Conduct?

2. According to the Code of Conduct, in what ways, and for what reasons, may students express themselves in school?

3. According to the Code of Conduct, for what reasons may school administrators “regulate expression?”

4. The First Amendment reads, in part: “shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble, and to petition the Government...” To what extent do you believe that this Code of Conduct is faithful to the protections of the First Amendment? If you went to this school, do you believe you’d be very free to express yourself? Somewhat free? Not very free?
Schools and the Marketplace of Ideas—4 Scenarios

Directions: Read and discuss each of the following scenarios. As you work through each scenario, you will want to refer to the First Amendment as well as Handout B: Student Conduct Code and the ways in which you answered the questions. Apply your interpretation/understanding of both documents as you formulate your answers to the questions about your scenario from your perspective as a student.

SCENARIO 1

Wars always spark the political passions of Americans. World War II, for example, was very popular, while the war in Vietnam during the 1960s and 1970s was not. The Vietnam War was particularly controversial for young Americans coming of age, as its draft left many students nearing the age of 18 uncertain about their future.

Siblings John and Mary Beth belonged to a pacifist family and believed all wars are wrong. They decided they would have their say as part of a larger, community protest of the Vietnam War. Together with a friend, John and Mary Beth agreed to wear plain black armbands to school to mourn the dead and quietly express their opposition to the war. Amid rumors of the planned protest, their school district’s Board of Education implemented a policy banning the wearing of armbands in school and threatened suspension for any students who violated it.

The three students continued forward with their plans and deliberately wore their armbands to school in spite of the policy. They remained quiet and orderly during their protest, but refused to remove their armbands when told to do so by the principal. Some students made hostile statements to the trio, but no one threatened them or committed any violence. School principals suspended all three students, arguing that their protest and its message might cause trouble in school due to disagreements about the Vietnam War.
SCENARIO 2

Since the Supreme Court’s decision in Roe v. Wade (1973) legalized abortion across the United States, the issue has provoked fierce public debate on both sides. The sharp moral, religious and individual rights questions involved in such a sensitive topic have, at times, tipped the debate into violence.

In 1984, President Ronald Reagan proclaimed the third Sunday of each January to be a national “Sanctity of Human Life Day.” The day has become an important one for those on the pro-life side of the debate, and is marked by expressions of protest against the Supreme Court’s Roe v. Wade decision. Citizens on the pro-choice side engage in similar activity annually, typically coinciding with the anniversary of Roe.

In 2002, a small group of girls at a suburban high school chose to participate in the “Sanctity of Human Life Day.” Days before, the girls gathered to make shirts that communicated their message. One of the girls suggested that the front of shirt display the text “It’s a life, not a ‘choice,’” and that the back of the shirt contain an image of an aborted fetus. The group agreed, and located a graphic online image to communicate their message. They made their shirts, and wore them to school. The girls quietly entered the building as normal, and went to their first class. Several students immediately complained to the teacher, and the teacher asked them to change, saying the class could not continue with such a disruptive message. The girls refused and were sent to the office where the principal suspended them for again refusing to change.
SCENARIO 3

One of the primary missions underpinning education in America has always been to prepare students for citizenship in a republic. The principles of liberty and responsibility are essential in maintaining a free society, and the American experiment cannot long survive if younger generations do not have plenty of opportunities to both learn and actively practice these virtues.

One common way schools meet this mission is through student government. Student government is meant to give students both a voice in how their school operates, and practical experience in voting, representation, and other republican principles, such as the art of compromise.

In 1983, Matthew, a Washington state high school student, gave a speech endorsing a classmate’s election to student government. He gave this speech in a school-day assembly with approximately 600 students, teachers, and staff in the audience. The speech referred to the candidate in ways that were full of obvious sexual innuendo. Prior to giving it publicly, Matthew discussed the contents of his speech with two teachers, who both advised him not to give it. They cautioned him that it was inappropriate, and that he might face “severe consequences” if he delivered it. As Matthew spoke at the assembly, some students in the crowd responded with graphic gestures that mimicked the sexual activities alluded to in the speech. Other yelled and cheered, and a counselor observed that plenty of other students appeared embarrassed and uncomfortable. The morning after his speech, Matthew was called into the principal’s office. After admitting that he intentionally wrote the speech to include sexual innuendo, Matthew was suspended for three days for giving an obscene and offensive speech.
SCENARIO 4

Immigration has always been a defining feature of the American experiment. Our nation was founded on principles that welcome all who wish to live in freedom, and immigrants have made their way to America by the millions since the earliest days of our republic. It has not been without its challenges, however, as people of different religions, cultures and languages have sometimes clashed throughout our history.

In recent decades, a major source of immigration to America’s western and southwestern states has come from Mexico. In many cities of this region, Cinco de Mayo is a cause for celebration. Similar to other cultural holidays honored in America, Cinco de Mayo is a day for those of Mexican descent to celebrate their heritage and pride.

In 2010, students of Mexican descent at a largely Hispanic California high school wore emblems, clothing and the colors of the Mexican flag to school in celebration of Cinco de Mayo. Five Caucasian students responded, on the same day, by wearing shirts displaying the American flag. Citing past Cinco de Mayo clashes between Mexican American and Caucasian students, the principal told the students with the American flag shirts to either turn them inside out, or be sent home. All five of the students admitted to the principal that they had already encountered hostility from other students, and acknowledged they might be in danger. Nonetheless, two students refused the principal’s order and were sent home for the day, though they were not actually suspended. Similar demands were not made to students wearing the Mexican flag or its colors.
**Directions:** After reading your scenario, answer these questions.

**SCENARIO QUESTIONS**

1. What form(s) of expression is/are involved in this scenario? Does the expression appear to be protected in both the First Amendment AND the Student Code of Conduct?

2. Plot the expression on the following continuum, based on your opinion of it from a student perspective:

   ![Continuum](Least Disruptive | Most Disruptive)

   Are school officials justified in limiting the expression, or the method by which it was expressed?

3. Pretend you are a team of lawyers representing the students in front of the Supreme Court. Summarize your thoughts/answers to Questions 1 & 2. What arguments would you make on behalf of the students and their speech, making the claim that it is protected by the First Amendment? Do you think the Supreme Court would agree with you?

4. Pretend you are a team of lawyers opposing the students in front of the Supreme Court. Summarize your thoughts/answers to Questions 1 and 2. What arguments would you make on behalf of the school administration, making the claim that the student speech is NOT protected by the First Amendment? Do you think the Supreme Court would agree with you?
Speech by Matthew Fraser

TEACHER DIRECTIONS: The following is a transcript of Matthew Fraser’s actual speech in support of a classmate’s election to student government (retrieved from: http://law2.umkc.edu/faculty/projects/ftrials/conlaw/fraserspeech.html). This transcript, the impetus for Bethel v. Fraser (1986), is provided for context regarding Scenario 3 of Handout C, and can be optionally distributed, at your discretion, for further classroom discussion.

April 26, 1983:

“I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most...of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

Jeff is a man who will go to the very end—even the climax, for each and every one of you.

So vote for Jeff for A. S. B. vice-president—he’ll never come between you and the best our high school can be.”
First Amendment freedoms like press, assembly, and petition are essential to self-government. The Founders saw these freedoms as a bulwark of free, republican government and a means of assuring justice in government.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; of 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.

—FIRST AMENDMENT
The entire American Founding era showed how important the freedoms of press, petition, and assembly were to self-government. The Founders believed these freedoms were infringed upon by the British government leading to the writing of the Declaration of Independence and the American Revolution. Freedom of the press was especially important for revolutionary leaders to get the word out to citizens about these infringements, and to gain support for the separation from England.

The Founders knew that the power of an individual's voice is amplified when he can freely come together with citizens of like mind and they can speak as one. Individuals in the United States have organized, demonstrated, petitioned, and protested in a variety of ways and on a variety of topics since our very beginnings. These rights, however, are not unlimited and must find balance with the equal rights of others.

### UNIT OBJECTIVES

Students will:

- Understand that a free press empowers citizens to seek out multiple points of view on issues and make informed choices.
- Understand that a free press empowers citizens to make informed decisions about candidates for public office.
- Understand that a free press is essential for self-government.
- Understand the history and tradition of the rights of petition and assembly.
- Identify ways in which Americans petition the government, past and present.

### SYNOPSIS OF LESSONS

#### Lesson 1: Why Does a Free Press Matter?

Students examine the history of press freedom and, by seeking out information on constitutional issues from multiple sources, begin to understand ways a free press makes self-government possible.

#### Lesson 2: Why Are the Rights to Assembly and Petition Important to Liberty?

Students explore these rights and their importance to self-government.

### CONSTITUTIONAL PRINCIPLES

- Civil Discourse
- Individual Responsibility
- Liberty

### FOUNDERS’ QUOTES

“The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.”

–THOMAS JEFFERSON, 1787

### KEY TERMS

Libel
Sedition Act of 1798

### FREEDOMS OF THE PRESS, ASSEMBLY, AND PETITION
Why Does a Free Press Matter?

LESSON OVERVIEW
Students examine the history and importance of press freedom and, by seeking out information on constitutional issues from multiple sources, begin to understand ways a free press makes self-government possible.

LESSON OBJECTIVES
Students will understand:
- A free press is essential for self-government.
- A free press empowers citizens to seek out multiple points of view on issues and make informed choices.
- A free press empowers citizens to make informed decisions about candidates for public office.

CONSTITUTIONAL PRINCIPLES
- Civil Discourse
- Individual Responsibility
- Liberty

MATERIALS
- Handout A: Background Essay - Why Does a Free Press Matter?
- Handout B: A Free Press and the Candidates
- Handout C: Letter from a Friend

RECOMMENDED TIME
Two 50-minute class periods.

STANDARDS
- NCHS (5-12): Era III, Standards 1A, 1B, 3A, 3B
- CCE (9-12): IIA1, IID1, VB1, VD1
- NCSS: Strands 2, 6, and 10
- Common Core (9-12): RI.8, RI.9
**BACKGROUND/HOMWORK**

20 minutes the day before

Have students read the Handout A: Background Essay - Why Does a Free Press Matter? and answer the critical thinking questions.

**WARM-UP**

10 minutes

A. Brainstorm key issues in a current or upcoming national election. Keep a list on the board as ideas are generated.

B. For each issue, write at least one question about candidates to determine their approach to the issue. Encourage students to focus their questions on the constitutional role (Senator, House Member, President, etc). If needed, review the Constitution. For example:

1. What is [candidate's] approach to policy-making?
2. What would be the criteria [candidate] would use to appoint or approve Supreme Court justices (Senate/President)?
3. What does [candidate] believe should be the federal government's approach to the economy?
4. How did [candidate] conduct himself when he or she was a in a different role in government?
5. Decide on the best questions, and have students write them down in the left-hand column of Handout B: A Free Press and the Candidates.

C. Note: For this part of the activity, students should all work with the same set of questions.

**ACTIVITY 1**

70 minutes – including time for independent research

A. Assign half the class to one major candidate and the other half to the other major candidate for a specific race.

B. Within each half, have students work in pairs to research answers to the questions using only one type of source. For example, one pair would work to answer the questions using ONLY the candidates’ websites. Another pair would answer them using ONLY blogs, and so on. Variation: assign left-of center blogs to one pair, and right-of center blogs to another pair.

C. After students have had time to do adequate research, reconvene the class. Read the first question aloud, and have one pair of students who used only the candidate’s website share what they learned.

D. Ask the remaining students if anyone learned anything else or anything different by using any of the other news media sources. Have additional pairs share what they learned until all questions and sources have been covered.
E. Alternate activity: Have students work individually or in pairs to research answers to a single question from all of the sources. For example, have a pair find out the answer to “Where do you stand on the use of drone surveillance of American citizens?” using the candidate’s website, a mainstream media source, a left- and right-of center blog, and by calling or writing to the candidate’s office. Then have them answer the question, “How would you summarize the differences in the information you received from these various sources?”

Wrap-Up 20 minutes

A. As a class, discuss the following questions as a large group.
   1. What does it mean for a candidate to be “vetted” before an election?
   2. What is the role of a free press in vetting candidates?
   3. Who else participates in vetting candidates?
   4. Why is it important to seek out multiple points of view on candidates for public office?
   5. How would our lives be different if the only information citizens could access from candidates came from the candidates’ campaigns?

B. Point out to students how an election is just one event, and that American citizenship requires that they remain informed on political issues. It is critical that citizens are free to publish their ideas and read the ideas of others in order for self-government to succeed. Discuss the following questions as a large group.
   1. How would our lives be different if the only information citizens could access from candidates – and other matters of public concern – came from official, state-run media?
   2. How would our lives be different if the only available information about government came from state-run media?
   3. Can people govern themselves without press freedom?

Homework/Extensions

A. Have students imagine they are explaining press freedom to a friend living in another country where independent news is censored and only state-run media is allowed to exist. They should complete the activity on Handout B: Letter from a Friend.

B. Have students do research to understand what political life is like in nations which do not have a free press. Students may begin their research at Reporters Without Borders or Freedom House. Questions students should consider:
   1. What are some differences between a free press and state-run media?
   2. Should journalists be exempt from having to testify about the identity of their sources in criminal cases where information is illegally leaked?
   3. There is a fundamental right to speak freely and publish one’s sentiments. Is there a corresponding right to receive information? How, if at all, are these concepts different?
First Amendment freedoms such as press, petition, and assembly are rights essential to self-government. The Founders saw press freedom as a bulwark of free, republican government and a means of assuring justice in government.

**What Is The History of Press Freedom?**

Press freedom is a traditional right, though its practical definition has changed over time. William Blackstone noted in *Commentaries on English Law* (1765-70): “The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication.” Others, like the Enlightenment philosophers of the early 1700s, saw the printed word as a way to fight the abuse of power by making offenses known to a wide audience.

Nearly all of the American colonies protected the freedom of the press. At the time, freedom of the press was understood to mean that government could not censor the publication of material in advance, known as “prior restraint.” Governments could, and did, punish people for what they wrote after the fact. The *Virginia Declaration of Rights* 1776 states, “the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.” James Madison echoed the *Virginia Declaration* during the debate over the Bill of Rights in the House of Representatives, saying, “The people shall not be deprived of their right to speak, or write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.”

The Founders also valued newspapers themselves, because they helped support an informed citizenry. Thomas Jefferson wrote in 1787, “The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.” Newspapers were a means of informing the public in a society dedicated to self-government. The First Amendment, protecting the press from interference from Congress, was ratified in 1791.

The meaning of the First Amendment would become contested when the Federalist Congress passed the Sedition Act of 1798. The Act stated: “If any person shall write, print, utter or publish
... with intent to defame [the President or any member of Congress] ... into contempt or disrepute ... [he] shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.” President John Adams, also a Federalist, claimed the law was not politically-motivated and was needed to avoid war with France. However, all 25 people arrested for breaking the law were members of the opposing political party. Madison and Jefferson each authored criticisms of Congress for passing the law (the Virginia and Kentucky Resolutions, respectively) charging that it violated the First Amendment.

Though some states supported the law, public opposition to the Sedition Acts was so great that many Federalists, including President Adams, were turned out of office, and Thomas Jefferson, head of the Republicans, was elected president in 1800. The Republican-controlled Congress allowed the law to expire. The Supreme Court was never asked to rule on its constitutionality. If it had, a primary defense of the Sedition Act would likely have been that it was not a prior restraint. Citizens were free to publish their thoughts. They were not, however, protected from criminal punishment after the fact. This traditional understanding of press freedom—no prior restraints—may explain the fact that some of the same officials who voted in Congress to approve the First Amendment also voted to approve the Sedition Act.

A Free Press and State Governments

The First Amendment served to protect the press from federal government censorship. State governments, however, routinely censored newspapers. For example, some Southern states censored abolitionist newspapers, and pro-slavery newspapers were censored in some Northern ones (as well as by President Lincoln) before and during the Civil War. Regulation of the press by state governments continued until 1931 when the Supreme Court applied the First Amendment’s protection of press freedom to the states.

Press freedom is a traditional right, though its practical definition has changed over time.
The case of Near v. Minnesota (1931) involved a state policy that required newspapers to get official approval before publication. Publishers had to show “good motives and justifiable ends” for what they were about to print. If they could not, the paper would be censored. The Court held that this kind of prior restraint on the publication was “the essence of censorship” and the heart of what the First Amendment was designed to prevent. The Court also held that except in very narrow circumstances neither federal nor state governments could stop the publication of materials in advance.

The narrow requirements to justify prior restraints mean that broad claims of national security are not enough for government to stop publication in advance. In the case of New York Times v. U.S. (1971), the federal government attempted to prevent The New York Times and The Washington Post from publishing excerpts from the Pentagon Papers. The Pentagon Papers were illegally-leaked, classified documents that revealed U.S. government misconduct during the Vietnam War. The Nixon Administration claimed that making them public would be dangerous to national security.

The Supreme Court found the prior restraint unconstitutional: “The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment… In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. Only a free and unrestrained press can effectively expose deception in government. In revealing the workings of government that led to the Vietnam War, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.”

In this case, the Supreme Court emphasized that a key reason for the First Amendment was to ensure citizens could keep government accountable to the people. Since there was no specific threat to national security, the government failed to meet the “heavy burden of showing justification for the enforcement of such a [prior] restraint.”

**What About Libel?**

Like all individual rights, freedom of the press has limits defined by the equal rights of others. One example is libel – written or printed speech that is false and harms someone’s reputation. The legal definition of libel has changed over time, as has the broader definition of press freedom.

Truth was not a defense for libel. In the case of People v. Croswell (1804), Harry Croswell was convicted of libel for printing a story critical of President Thomas Jefferson in his newspaper. Alexander Hamilton represented Croswell on appeal and argued that truth should be a defense for libel. Croswell’s conviction was upheld, but the case led New York
to change its law to permit truth as a defense. Though not decided by the Supreme Court, People v. Croswell was a landmark case because Hamilton’s arguments led New York to break from English tradition and the Sedition Act of 1798 in the definition of libel, resulting in greater press freedom for individuals.

In 1960, the Civil Rights Movement was gaining strength. Civil rights leaders ran a full-page ad in the New York Times to raise funds to help civil rights leaders, including Martin Luther King, Jr. Sixty well-known Americans signed it. The ad described what it called “an unprecedented wave of terror” of police brutality against peaceful demonstrators in Montgomery, Alabama. What it described was mostly accurate, but some of the charges in the ad were not true. For example, the ad said that police “ringed” a college campus where protestors were, but this charge was exaggerated. The ad also contained the false statement: “When the entire student body protested to state authorities by refusing to reregister, their dining hall was padlocked in an attempt to starve them into submission.”

L.B. Sullivan was one of three people in charge of police in Montgomery. He sued the New York Times for libel. The ad did not mention Sullivan’s name, but Sullivan claimed that the ad implied his responsibility for the actions of the police and that the ad damaged his reputation in the community. In the Alabama court, Sullivan won his case and the New York Times was ordered to pay $500,000 in damages.

The Times appealed the decision to the U.S. Supreme Court in Sullivan v. New York Times (1963). The newspaper argued that it had no intention of hurting L.B. Sullivan. The newspaper had no reason to believe that the advertisement included false statements, so it did not check their accuracy. The Times argued that if a newspaper had to check the accuracy of every criticism of every public official a free press would be severely limited.

In a unanimous decision, the Supreme Court ruled in favor of the New York Times. In order to prove libel, a “public official” must know that the newspaper acted with “actual malice” – that is, with knowledge that it was false or with reckless disregard for the truth. The Court asserted America’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” Free and open debate about the conduct of public officials, the Court reasoned, was more important than occasional, honest factual errors that might hurt or damage officials’ reputations.

The result of the Sullivan decision is that, generally speaking, it is very difficult for public officials to win in court if they accuse a publisher of libel. The Court ruled in 1987 that public officials cannot sue for emotional distress in libel cases unless the publication contained a false statement made with “actual malice.”
Press Freedom Today

The information age and the rise of the security state have ushered in an expansion of press freedom, as well as new threats to it. On the one hand, the Internet has enabled citizens to publish their ideas and share them with a wide audience in ways that were never possible before. Prior restraints are much harder for government to impose when news can be posted online. Video sites like YouTube enable citizens to report on government action instantaneously. On the other hand, there have been numerous incidents where citizens recording police action have had their cameras confiscated and faced prosecution for disturbing the peace or aiding the escape of a prisoner. American companies such as Google must also decide whether to disable certain search terms or otherwise assist oppressive governments in censoring the information people in their countries can access online.

In a time when anyone with a keyboard, a camera, and an internet connection can be a journalist, it is all the more critical that citizens are aware of the importance of press freedom, and their own role in keeping government within its constitutional limits.

Critical Thinking Questions

1. Historically, how has press freedom been understood?
2. The Sedition Act of 1798 seems blatantly unconstitutional to modern readers. What arguments might have been made in favor of its constitutionality in 1798?
3. Summarize the Court’s ruling in New York Times v. U.S. Do you agree with the Court’s reasoning?
4. What trade-offs does the Court identify in its ruling in New York Times v. Sullivan? Would you have come to the same conclusion if you had been deciding the case?
5. What do you think is the greatest threat to press freedom today? What can citizens do to ensure our free press endures?
Directions: Find out the answer to each question in the left column using the different sources listed. Write what you learn in the appropriate box.

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<th>QUESTION ABOUT PRESIDENTIAL CANDIDATE</th>
<th>INFORMATION FROM THE CANDIDATE’S WEBSITE</th>
<th>INFORMATION FROM A MAINSTREAM MEDIA OUTLET</th>
<th>INFORMATION FROM A BLOGGER</th>
<th>INFORMATION FROM SPEAKING/WRITING DIRECTLY TO A CANDIDATE</th>
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Directions: Imagine you’ve received the following letter from a friend in another country. Your friend has never traveled outside of his country (he is not legally allowed) but you and some other mutual friends have described to him what life is like in the U.S. around election time. How would you respond to his concern? Write a letter back to him in the space below.

Letter from your friend:
From what I’ve been told, elections in the U.S.A. are crazy. I’ve heard the term “media circus.” You have something like 500 channels on television and all those websites – how do you know what you should watch? How do you know who’s lying and who’s telling the truth? In a way, I’m relieved that we only have our official media. It’s much easier. I know what the correct point of view is, and it’s not so confusing. Plus we are all more unified – all that arguing among citizens causes division, which is bad for society.

Your response to your friend:
_____________________________________________________________________________
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Why Are the Rights to Petition and Assembly Important to Liberty?

**LESSON OVERVIEW**
Have you ever walked through a busy part of your city or town and seen a small group of citizens gathering signatures on a petition, or assembled in protest? Has a petition to change a school policy ever circulated through your school’s hallways? If so, you’ve witnessed the power of the First Amendment in action. The Founders knew that an individual’s voice is at its most powerful when he can freely come together with citizens of like mind and speak as one. People in the United States have organized, demonstrated, petitioned and protested in a variety of ways and on a variety of topics, many controversial, since our very beginnings. These rights, however, are not unlimited and must find balance with the rights and safety of others.

**LESSON OBJECTIVES**
Students will understand:

- Understand the history and tradition of the rights to petition and assembly.
- Identify ways in which Americans petition the government, past and present.
- Understand limitations on the right to petition and assembly.
- Create a petition pertaining to a social or political issue they care about.
- Appreciate the importance of the protections of assembly and petition to a free society.

**CONSTITUTIONAL PRINCIPLES**

- Civil Discourse
- Individual Responsibility
- Liberty
- Natural Rights

**MATERIALS**

- Handout A: Background Essay—Where Did the Rights to Petition and Assembly Come From, and How Do Americans Exercise Them?
- Handout B: Assembly and Petition True/False Challenge.
- Handout C: A Petition.
- Cut-Out: Assembly and Petition True/False Challenge

**RECOMMENDED TIME**
One 50-minute class period.

**STANDARDS**

- NCHS (5-12): Era III, Standard 3C
- CCE (9-12): IIA2, IIC1
- NCSS: Strands 1, 4, and 10
- Common Core: RI.4, RI.9, SL.1, SL.2, SL.4, SL.5, RH.7
LESSON PLAN

Background/Homework 15 minutes the day before
A. Have students read Handout A: Background Essay - Where Did the Rights to Petition and Assembly Come From, and How Do Americans Exercise Them?
B. After reading, students should answer the questions at the end of Handout A.

Warm-Up 5 minutes
Conduct a large group discussion on the following questions:
1. What does it mean to “assemble”? What is a “petition”?
2. What happens in a society when individuals cannot meet to discuss political ideas, or express their views to society and government leaders?
3. What types of petition and assembly have you seen in your school? Community?

Activity I 15-20 Minutes
A. Prior to the start of class, cut out the numbered cards of Cut Out: Assembly and Petition True/False Challenge, and create 10 stations around your classroom.
B. Distribute Handout B: Assembly and Petition True/False Challenge. Explain to students that they will travel from station-to-station in small groups, determining whether each station’s numbered statement, corresponding to the numbered statements on their handout, is either true or false. Instruct them to only complete the true/false line on their handout at each station during this portion of the activity.
C. Position groups of 2-3 students at each station, having students bring Handout B and a pen/pencil with them. Start station rotation, giving 30 seconds for students to determine whether the first station’s statement is true or false. Continue rotation at 30 second intervals until all 10 stations have been visited by all groups.
D. Return students to their desks. With both Handout B and the Answer Key in front of you, review statement 1, asking for a show of hands as to whether students believe it is a true or false statement. Then, read the answer for statement 1 from the Answer Key. Have students complete the “Reason, if applicable” portion of Handout B for statement 1, briefly summarizing the answer after you’ve read it.
E. Continue process for statements 2-10, clarifying and discussing any questions or commentary regarding the answers as you go through them. Emphasize, where applicable, that the First Amendment limits only the government’s ability to regulate assembly and petition, and that individuals and private businesses do not have to let people assemble or petition on their property.
F. Wrap-up by asking students if any of the answers surprised them.
**Activity II**

A. Divide the class into groups of 4. Distribute **Handout C: A Petition**.

B. Tell students that their group will create a petition on a social or political issue that matters to them. Read the directions of **Handout C** aloud, clarifying expectations and questions. Then, have students begin their group assignment, completing **Handout C**. Tell students they will only have 10-15 minutes for this portion of the activity.

C. After 10-15 minutes, call the class together, but keep students in their groups. Have a member of each group read their completed **Handout C** to the whole class. As each group presents, write the topic of their petition on the board.

D. After all groups have presented, review the petition topics you’ve written on the board. Tell students they’re going to choose a class petition. Have students vote, narrowing it down to one petition that garners the most support amongst the class.

**Wrap-Up**

Choose one of the following options:

A. Conduct a whole-class discussion on the following questions: Do you find it easier or more difficult to communicate your ideas by yourself, or together with others? Why was it important to allow everyone’s petition an equal voice in class? What does this tell you about the importance of assembly and petition to both liberty and self-government?

B. Use a teacher-created, free account on [http://www.gopetition.com/](http://www.gopetition.com/) or [http://www.ipetitions.com/](http://www.ipetitions.com/). Post the selected class petition online, checking on it over the next few days to see if it’s received any outside support. You should create this account prior to the lesson.

1. After posting it, browse through a few petitions that have been posted on the website by other citizens (if choosing this option, you should preview and select a few petitions ahead of time, controlling for appropriate content).

2. After reviewing a few other petitions, ask students the following questions: In what ways are the website and its petitions similar to what the Founders envisioned when they protected the right to petition in the First Amendment? In what ways is it different? How does this website, and the petitions on it, give citizens a voice in government?

**Homework and Extension Options**

A. Have students reflect on the class petition activity with a 2-3 paragraph response. Students should consider the following questions:

1. If you supported the petition chosen by the class, what about it appealed to you? Were students who did not agree with you required to sign it? What does this tell you about liberty and self-government, for both those who opposed it and those who supported it?

   If you did not support the petition, why not? Are you free to begin a petition of your own in opposition to it? What does this tell you about liberty and self-government, for both those
who opposed it and those who supported it?

2. Assume for a moment you support the class petition (even if you did not). What methods would you use to gather citizen support for it? Would you assemble with others? If so, what would that look like? If not, what would you do to convince government to listen to you and your ideas?

3. Why are the rights to petition and assembly important to maintaining a free society?

B. Using local media (your city’s major newspaper/its website, local news stations/their websites), have students find a story or news article about a recent assembly or protest in your state capitol, or other prominent government building.

Have students write a short summary and opinion of the protest that includes the following information:

1. When/where/why the assembly or protest took place.

2. The message of the protestors, and the ways in which they communicated their message.

3. A brief explanation of why the assembly is protected by the First Amendment. Conversely, if the assembly was broken up by police, a brief explanation of why it might have been broken up, or otherwise not protected by the First Amendment.

C. Have students research the guidelines for petitioning their school board. Facilitate the class’s selection of an issue of importance to them (or, if the class petition that was chosen in Activity II pertains to an issue in your school/district, help the class refine it for use). Then, guide students through the process of initiating the petition with the school board, gathering signatures, and filing the petition.


1. Have each group prepare a PowerPoint or Prezi presentation summarizing the facts of the case they were assigned, the ruling of the Supreme Court with regard to the First Amendment, and an explanation of why/how the case and ruling is important to us today. (Students can utilize http://www.oyez.org as an accurate research tool.) Students can either simply turn in their presentations to you, or present to the class.
Where Did the Rights to Petition and Assembly Come From, and How Do Americans Exercise Them?

BACKGROUND ESSAY

What is the History of the Rights to Petition and Assemble?

Have you ever walked through a busy part of your city or town and seen a small group of citizens gathering signatures on a petition, or assembled in protest? Has a petition to change a school policy ever circulated through your school’s hallways? If so, you’ve witnessed the power of the First Amendment in action.

Of all of the protections contained in the First Amendment, the rights to petition and assemble are perhaps the oldest. In early English history, it was common for citizens to be punished for criticizing the government, as the King had absolute power. The Magna Carta (1215) began the process of placing limitations on his power and became the foundation for certain rights that would develop over time. One of the clauses contained in the Magna Carta allowed for groups of twenty-five barons to meet for the purpose of petitioning the king on behalf of their particular county. This right, however, was not absolute. Anyone signing a petition containing more than twenty names could be found guilty of “tumultuous petitioning,” or creating widespread unrest among the people. The English Bill of Rights (1689) would finally expand this protection to all people, and lifted the centuries old ban on “tumultuous petitioning.” It reads: “[It is the right of the subjects to petition the king, and all…prosecutions for such petitioning are illegal.”

As Englishmen, the people of revolutionary-era America could exercise these rights as well, and they did. When Parliament began taxing nearly all materials printed in America with the Stamp Act (1765), Americans were outraged. Colonies assembled in the Stamp Act Congress that same year, sending petitions and protests to the king and Parliament. The long tradition of protest continued as British treatment of colonial America worsened, culminating with the Olive Branch Petition of 1775. This last attempt to convince the king to address American complaints was met by a sharp response. King George declared the American colonies in rebellion. The Declaration of Independence (1776) charged the king with ignoring those petitions: “In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.”

The Declaration of Independence reinforced the importance of petition and assembly to liberty and self-
government. As the Founders built a republic that sought to preserve our tradition of freedom, these two rights would come to be enshrined among the five protections of the First Amendment.

How Have Americans Petitioned the Government, and in What Ways Does Government Respond?

Americans have vigorously exercised their right to petition the government since the earliest days of the republic, petitioning on wide range of subjects. When the American Anti-Slavery Society began a petition drive in 1834, Americans responded with more than 130,000 petitions to Congress in one year alone. Congress reacted by implementing a “gag rule”, automatically ignoring all slavery-related petitions. While the gag-rule remained in place for eight years, Americans pressed on, calling for Congress to end the terrible institution.

In the early twentieth century, citizen petitions were important in prompting states and Congress to address the abuses of child labor. Petitions even helped to convince Congress to enact prohibition, through the efforts of the Women’s Christian Temperance Union. Civil Rights activists such as Martin Luther King, Jr. continued this tradition. In 1963, King called for a March on Washington, and over 200,000 Americans responded, flooding the National Mall. Their form of petition, a show of force demanding that Congress act to expand civil and political rights for all, pressured the government to pass the Civil Rights Act just 11 months later.

Americans today petition the government in all sorts of ways. We write letters, organize petition drives, sign online petitions and send emails. We can even petition through Facebook and Twitter. Indeed, technology makes petitioning the government easier than ever. Commercials calling on citizens to “contact your Member of Congress and Senators” or “contact the White House” can sometimes result in millions of phone calls and emails flooding switchboards and servers.

So, is government required to respond to our petitions? No, but in many ways, it does. The judicial branch accepts a form of petition that uses the legal process to right a wrong. Congress can address citizen grievances expressed through petition by changing a bad law, and the executive branch can do the same by directing government agencies to change the ways they enforce our many laws. Finally, many state constitutions allow citizens, through petition, to bypass the legislature by putting an issue on the ballot so that the public can decide on the issue.

What Does the Right to Assembly Protect, and What Are its Limits?

The right to assemble is integral to the rights of both speech and petition. The Founders knew the power of assembly to provide strength in numbers for the expression of citizen viewpoints ultimately bolstered self-government.
The right to assemble, however, is not unlimited. Citizens may not, for example, assemble on private property without the permission of the property owner. The Supreme Court has also consistently ruled that all levels of government may pass reasonable laws regarding the time, place and manner of assemblies. Such laws always pose interesting questions regarding the protections of the First Amendment.

In 1977, the American Nazi Party announced its intention to march through the Village of Skokie, Illinois, a largely Jewish community in suburban Chicago. Two weeks after the Nazis applied for a permit to march, the Skokie Board of Commissioners passed an ordinance requiring marchers to post a $350,000 insurance bond. The Board later passed an ordinance banning distribution of printed materials that promote hatred of groups of people, or marching in military style uniforms. The Nazi group argued that these three laws were unconstitutional violations of the First Amendment. The case eventually went to the Supreme Court, which ruled that the Nazi Party could not be prohibited from peacefully assembling and marching because of the content of their message (National Socialist Party of America v. Village of Skokie, 1977).

In short, you cannot be prevented from assembling simply because others disagree with you or find your ideas offensive. There are other times, however, when a time, place or manner law has
been found by the Supreme Court to be a perfectly reasonable restriction of assembly rights. In 1992, a Florida court allowed for a 36-foot “buffer zone” around abortion clinics, banning protest assemblies in that area. The purpose of the ban was to allow potential patients and staff to enter the building freely, and the clinic itself to operate free of interference. In *Madsen v. Women’s Health Center, Inc.* (1994), the Supreme Court agreed, upholding the buffer zone. The restriction did not prevent the assembly or its content, but rather placed a restriction on its location. In 2000, the Supreme Court further defined this type of time, place and manner restriction on assemblies. Ruling on a similar state law in *Hill v. Colorado*, the Court said it “is not a regulation of speech…rather, it is a regulation of the places where some speech may occur. [It does not] place any restriction on the content of any message that anyone may wish to communicate to anyone else.”

The Founders wanted the citizens of the United States to be free to discuss and debate political actions because they understood that liberty fed a growing nation. The First Amendment protects your right to gather with others and speak your collective mind in places and in ways that you feel will be most effective for the communication of your message, no matter how controversial. Your right to assemble, however, must always be balanced with the rights and safety of others.

**Comprehension Questions**

1. How did early English documents, such as the Magna Carta and the English Bill of Rights, develop and expand the rights to petition and assembly, and how did these rights influence the Founders?

2. How have Americans throughout history exercised the freedom of petition? In what ways do Americans today petition the government?

3. How was the Supreme Court’s ruling in *National Socialist Party of America v. Village of Skokie* (1977) important to defining the protections of the First Amendment’s right to assembly?

4. What types of limitations on assembly are acceptable? Provide an example.

5. What does the following statement say to you regarding the importance of petition and assembly? (Answer in 2-3 sentences): “It was not by accident or coincidence that the right to freedom [of] speech… [was] coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable.” (Supreme Court Justice Wiley B. Rutledge, 1944)
1. My right to meet with others to discuss political ideas is protected by the First Amendment.

2. I have a First Amendment right to write a letter expressing my views, gather signatures on it to show that others agree, and then send the letter to my government leaders.

3. I have the right to hold a protest in the food court of a mall, so long as no shoppers complain.

4. I have the right to hold a protest with a group of others on the sidewalk of a public street next to the mall, even if it annoys those passing by.

5. I can hold a protest at or near my school, even if my goal is to disrupt classes.

6. The government can stop people from demonstrating if others might find the ideas of the demonstration unpopular or offensive.

7. I can hold a protest at midnight in a residential neighborhood about the town’s skateboarding policy.

8. If I’m protesting in a public park, I still must follow all of the rules of the park that apply to all who visit it (trash, noise, posted hours of operation, etc.).

9. If I support a ballot measure, or just want some extra money, I can go to work for a political action committee to circulate petitions in support of the measure.

10. The family of a fallen service member can sue me for pain and suffering caused by my offensive protest near the funeral of their loved one.
1. My right to meet with others to discuss political ideas is protected by the First Amendment.

2. I have a First Amendment right to write a letter expressing my views, gather signatures on it to show that others agree, and then send the letter to my government leaders.
3. I have the right to hold a protest in the food court of a mall, so long as no shoppers complain.

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6. The government can stop people from demonstrating if others might find the ideas of the demonstration unpopular or offensive.
7. I can hold a protest at midnight in a residential neighborhood about the town’s skateboarding policy.

8. If I’m protesting in a public park, I still must follow all of the rules of the park that apply to all who visit it (trash, noise, posted hours of operation, etc.).
9. If I support a ballot measure, or just want some extra money, I can go to work for a political action committee to circulate petitions in support of the measure.

10. The family of a fallen service member can sue me for pain and suffering caused by my offensive protest near the funeral of their loved one.
**Directions:** Together with your group, create a petition regarding a social or political issue that matters to you. Your issue can be something pertaining to your school, community, state, or the nation. First brainstorm topics that matter to the members of your group. Then, settle upon one issue, and form a group position statement. Finally, state what you’d like to see done about this issue (a law, a policy, etc.).

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**PETITION TITLE**

**Issue & Statement Of Purpose:**

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**Our Position:**

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**What We’d Like To See Done:**

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**JOIN US BY SIGNING BELOW!**

**NAME:** ___________________ **SIGNATURE:** ___________________

**NAME:** ___________________ **SIGNATURE:** ___________________

**NAME:** ___________________ **SIGNATURE:** ___________________
The Bill of Rights and GUNS

Explores the origins of the Second Amendment and the right to bear arms. Also explores relevant Supreme Court decisions and engages students in the current debate over gun regulation.

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.

–SECOND AMENDMENT
Few issues dealing with the Bill of Rights are as contentious and continuously at the forefront of the political debate in the United States as the debate over gun control. What exactly did the Founders intend to protect with the language of the Second Amendment? What rights and whose rights does it guarantee? Every session, proposals to control the use and ownership of guns are introduced in Congress and state legislatures. Which limits or regulations are appropriate under the Second Amendment?

UNIT OBJECTIVES
Students will:
- Understand the Founders’ objectives in ratifying the Second Amendment.
- Determine what rights the Second Amendment guarantees.
- Understand the ways the Supreme Court has interpreted the Second Amendment.
- Evaluate arguments both for and against government regulation of weapons.

SYNOPSIS OF LESSONS

Lesson 1: What Are the Origins and Interpretations of the Right to Keep and Bear Arms?
The lesson explores the meaning of the Second Amendment. Students will read the Founders’ original language about guns, analyze the Founders’ concerns about guns, and assess the validity of different interpretations of the Second Amendment.

Lesson 2: How Has the Second Amendment Been Interpreted?
Students focus on District of Columbia v. Heller (2008) and contemporary gun control issues, and debate various questions regarding different gun control measures.

CONSTITUTIONAL PRINCIPLES
- Individual responsibility
- Natural rights
- Private property

FOUNDERS’ QUOTES
“O sir, we should have fine times, indeed, if, to punish tyrants, it were only sufficient to assemble the people! Your arms, wherewith you could defend yourselves, are Gone; and you have no longer an aristocratical, no longer a democratical spirit. Did you ever read of any revolution in a nation, brought about by the punishment of those in power, inflicted by those who had no power at all?”
–PATRICK HENRY

KEY TERMS
Militia
Standing Army
LESSON OVERVIEW
The Founders wanted to be sure they preserved the right to keep and bear arms as they established their new sovereign government. They did not want, as some put it, to trade one tyrant for another. Americans asserted a natural right to defend themselves and their property against all threats, including tyranny of any kind, foreign or domestic. The Second Amendment in the Bill of Rights was included to reflect concerns of many citizens in a number of states.

LESSON OBJECTIVES
Students will:
- Understand the historical roots of the right to keep and bear arms.
- Analyze the Second Amendment.
- Analyze how colonists and the British regarded control of weapons.
- Compare gun issues of 1775 to a modern gun controversy.
- Evaluate arguments about how best to provide security for one’s community.

CONSTITUTIONAL PRINCIPLES
- Individual responsibility
- Natural rights
- Private property

MATERIALS
- Key Terms
- Handout A: Background Essay – What Are the Origins of the Right to Keep and Bear Arms?
- Handout B: The Second Amendment
- Handout C: Tickets
- Handout D: Group Discussion Guide
- Handout E: Town Council Discussion Guide

RECOMMENDED TIME
One 50-minute class period

STANDARDS
- NCHS (5-12): Era III, Standards 1C
- CCE (9-12): IB1
- NCSS: Strands 2, 5, and 10
- Common Core (9-12): RI.1, RI.4, RI.8, RI.9, SL.1, SL.4
LESSON PLAN

Background/Homework  

10 minutes the day before

A. Have students read Handout A: Background Essay – What Are the Origins of the Rights to Keep and Bear Arms?

B. Display or distribute Handout B: The Second Amendment. Discuss the wording and ask students to consider the meaning of the Amendment.

Warm-Up  

10-15 minutes

A. Using Handout C: Tickets, copy enough tickets before class for approximately three equal groups: British Soldiers, Concord Town Council, and Sons of Liberty.

B. As students enter the room, hand each one a “ticket.” Use the tickets to assemble the students into three identity groups (“Group One”) from 1775.

C. Have each “Group One” meet to read and discuss the scenario on Handout D: Group Discussion Guide. Have them record their answers on their own paper.

D. Choose two students from each of the groups to form new six-member groups (“Group Two”). Each “Group Two” will be made be made up of two from the British Soldiers, two from the Concord Town Council, and two from the Sons of Liberty groups.

Activity  

40 minutes

A. Have students jigsaw into their newly assigned “Group Two” configuration and give each group a copy of Handout E: Town Council Discussion Guide. Have each pair of students explain their response on Handout D to the Concord Town Council members.

B. Record general types of responses from each Sons of Liberty and British Soldiers group.

C. Ask the pair representing the Concord Town Council within each group to listen to each group and then fill out Handout E and explain which side (if either) the council will support in the deepening controversy.

D. Have the Town Council members from each Group Two report to the whole class their answers to Handout E.

E. Close by asking the class to discuss any lessons for today that they can draw from the role-playing activity. Possible discussion questions:

1. Does the United States face any current challenges that might be similar to the challenges faced by Concord citizens?

2. How might the right to bear arms relate to the need to provide security today?

3. Why might some people favor stronger/weaker gun regulation laws?
**Homework/Extensions**

A. Present political cartoons related to the Second Amendment, gun control laws, and other pertinent current issues. Have students analyze the cartoons for what they reveal about views of the Second Amendment.

1. Have students draw a political cartoon presenting their point of view on a current gun issue such as school shootings, gangs, or allowing airline pilots to carry guns.

2. How do these documents protect citizens’ rights?

B. Have students write a two to three paragraph response to the following question: One argument against gun control laws is that tyrants will always try to confiscate weapons belonging to individuals. What evidence from history to the present day is available to support or refute this assertion?

C. Have students research individuals among the Sons of Liberty, such as Samuel Adams, John Hancock, Paul Revere, and William Dawes. Have them prepare brief biographical sketches in the form of business cards to present and share with the class.
What Are the Origins of the Right to Keep and Bear Arms?

BACKGROUND ESSAY

The church bells rang in Concord in the pre-dawn hours of April 19, 1775. The bells signaled neighbors to grab their muskets and rush to the bridge. A group of 800 British soldiers had been ordered to seize the colonists’ weapons. By sunrise, a group of 150 locals called the Minutemen had gathered in the British troops’ path. The colonists believed their rights as Englishmen included keeping their weapons. The two groups faced each other across the North Bridge, and then a shot rang out in the dawn air.

It was the “shot heard around the world.” The American Revolution began in defense of the right to bear arms. The Founders remembered this right twelve years later when they wrote the Second Amendment to the Constitution.

What Were English Origins?

The right to bear arms in England dates prior to 1066. The tradition of militia also existed in medieval England. English law required men who owned land to have weapons and serve in their baron’s militia. But as new religious and political ideas emerged, the government began to limit the right to bear arms.

By 1328, Parliament forbade Englishmen from carrying arms in public. After that, only the nobility and gentry could own guns. The English Bill of Rights in 1689 also gave gun rights only to some people. While the English Bill of Rights said Protestant individuals could own guns, it denied that right to the Catholic minority.

How Did the Colonists Use and Think of Guns?

Colonists learned how vital the right to bear arms was during their revolution against Britain. Trained militias of citizens were the first line of defense. The Sons of Liberty, a group of colonists who took the lead in resisting the British, and other individual colonists fought the British well before Congress was able to assemble, train, and equip the Continental Army. After the Revolution was over, the fresh scars of the war would remind Americans the importance of the right to bear arms.

During the Revolution, most people owned guns. It is likely, however, that the Founders did not consider the right to bear arms universal or unlimited. Several colonies regulated guns. Many said women, free blacks, and Roman Catholics could not own them. States still denied free blacks the right to own and use guns well after the Revolution, fearing they would take up arms against white landowners.
States also did not want a federal standing army. A standing army is a permanent military group maintained in times of peace as well as war. The states demanded that they keep control of their own militia to protect themselves from federal tyranny. The inclusion of the Second Amendment in the Bill of Rights was a way to protect states and individuals from a central government with too much power.

What Are Interpretations of the Second Amendment?

Scholars, politicians, and the courts search through history and the law to find the meaning of the Second Amendment. Three issues lead the debate over guns today. They involve the origin of the right to bear arms, the meaning of the word “militia,” and the meaning of “people.”

Where does the right to bear arms come from? The English Bill of Rights (1689) clearly spoke of an individual’s right to bear arms. It did, however, only allow Protestants to own guns. Also, the right to bear arms stems from the colonial rights associated with a militia. The Massachusetts and Virginia Declarations of Rights mention that a well-regulated militia is the natural defense of a free government.

The second issue revolves around the definition of “militia.” Some scholars argue that the militia of the
Second Amendment means state armies, like today’s National Guard. According to this argument, the Second Amendment does not grant an individual’s right when it refers to “the right of the people to keep and bear arms.” Instead, they say the Second Amendment simply protects state militias from the federal government as the Anti-Federalists had insisted.

Others believe “militia” referred to a group of citizens. Since there was no official army or police force, some scholars argue that the “militia” was individual citizens who could be called to protect themselves and their neighbors.

Finally, does the Second Amendment mean “individuals” when it refers to “the people”? In *United States v. Verdugo-Urquidez* (1990), the Supreme Court said it does. The term, “‘the people’ … refers to a class of persons who are part of a national community.” The First District Court affirmed an individual right to bear arms in *United States v. Emerson* (1999).

Whether the Second Amendment was meant to protect militias or individuals is not perfectly clear. But one thing is certain: without the right to bear arms, the colonists would never have won the Revolutionary War.

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**Comprehension Questions**

1. How were gun rights protected in the English Bill of Rights? How were they limited?
2. What are the two definitions of militia? Why do you think people define militia differently?
3. What were the Supreme Court findings in *United States v. Verdugo-Urquidez* (1990) and *United States v. Emerson* (1999)? How did they change or confirm the interpretation of the Second Amendment?
The Second Amendment

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.
Tickets

Sons of Liberty

Concord Town Council

British Soldiers
Group Discussion Guide

Directions: Read the following scenario and answer the questions below. Everyone should be prepared to present your group’s answers and reasoning to the class.

SCENARIO: It is 1775, and tensions with King George III are high. Colonists have begun storing guns, cannons, and other weapons in Concord. The British know about the arms and have decided to send troops from Boston to Concord to confiscate them. In your discussion with members of your identity group, address these questions:

1. To whom do the guns at Concord belong?
2. What should your group do in order to protect the best interests of the people of Massachusetts?
3. Who has the legal right to control the guns? Why?
Town Council Discussion Guide

Directions: Town Council members: As you hear arguments from the Sons of Liberty and the British Soldiers, discuss and answer the questions below.

1. Which side will the Town Council support in this controversy?
2. How will you recommend that the Town Council prepare citizens of Concord for the likely upcoming clash with the British soldiers?
3. How does the ancient right to bear arms relate to your preparation? Why is this right so important?
LESSON OBJECTIVES

Students will:

- Examine the text and history of the Second Amendment.
- Evaluate arguments for and against the constitutionality of selected gun control provisions.

CONSTITUTIONAL PRINCIPLES:

- Individual responsibility
- Natural rights
- Private property

MATERIALS

- Handout A: Background Essay – How Has the Second Amendment Been Interpreted?
- Handout B: Total Ban on Handguns?

RECOMMENDED TIME

One 50-minute class period.

STANDARDS

- NCHS (5-12): Era II, Standard 1A; Era 10, Standard 2E
- CCE (9-12): VB1
- NCSS: Strands 2, 5, 6, and 10
- Common Core (9-12): RI.1, RI.4, RI.8, RI.9
Background/Homework 10 minutes the day before

Have students read Handout A: Background Essay - How Has the Second Amendment Been Interpreted? After reading, students should write a one paragraph response to the question: In light of the Second Amendment, what kinds of limits on gun ownership are constitutional?

Warm-Up 15-20 minutes

A. Distribute and display Handout B: A Total Ban on Handguns?

B. Have students read each statement and mark whether they believe each stated law would be constitutional or unconstitutional.

C. After students have worked through all the statements, go over each one as a large group. Invite students to share their reasoning, and to ground their arguments in the Second Amendment.

Note: several of the statements are based on historical examples: Virginia law permits one handgun purchase per month (3); Felons cannot own firearms in any state (4); Various states prohibit people who have been confined for mental illness or subject to a domestic restraining order from buying guns (5); Under the English Bill of Rights (1689) Catholics could not own guns (6); The final statement (8) is based on the DC law overturned in District of Columbia v. Heller (2008).

Activity 20-30 minutes

A. Ask students to recall what they learned in Handout A about the case of District of Columbia v. Heller (2008). Students should recognize that the case challenged the District of Columbia’s law banning virtually all handguns, and that the law was overturned by the Supreme Court.

B. Cut out and distribute one card per student from Handout C: District of Columbia v. Heller (2008).

C. Have students read the statement on their card. Then have them paraphrase it in their own words.

D. Ask students to stand up and mingle with their classmates and find students who have the same statement on their card. They should do this by sharing their paraphrases only. Students should end up in six groups.

E. Once in their groups, write the following questions on the board. Students should discuss them within their groups, and then as a large group.

Is this a statement for or against the constitutionality of the District of Columbia’s gun law? Do
you agree with this statement? Why or why not?

F. To wrap up, explain to students that the statements against the constitutionality of the District’s gun law were from the Supreme Court’s majority ruling in District of Columbia v. Heller (2008). The statements in favor of the law’s constitutionality were from the dissenting opinion in that case. In students’ opinions, was the Court’s ruling correct?

G. Ask students how the Court’s reasoning compared with their own reasoning in the Warm-Up activity.

Homework/Extensions

A. Have students write a model firearms law that they believe would be constitutional under the Second Amendment. They may choose to make no restrictions on guns, impose strict limits, or to find some middle ground—but they should be prepared to justify their law using constitutional arguments.

B. Have students research the gun laws in countries such as the United States, Japan, and Switzerland as well as their homicide rates. Does the data provide for a clear policy path for gun control? Does the legality of guns appear to affect murder rates? If so, how?

C. Have students research gun control laws, homicide rates, and accidental shootings in various U.S. states, and present their findings in a PowerPoint presentation. Students should conclude their presentations by explaining their own conclusions about the wisdom and effectiveness of various gun control laws.
How Has the Second Amendment Been Interpreted?

The Second Amendment is phrased unlike any other amendment in the Bill of Rights. It is unique because it contains an opening phrase, or “preamble.” The preamble of the Second Amendment says “A well-regulated militia, being necessary to the security of a free State…” The next part of the amendment is known as the “operative clause.” This means it is the part of the sentence with force or effect. The operative clause states “…the right of the people to keep and bear arms shall not be infringed.”

When people disagree about the meaning of the Second Amendment, it is usually because they disagree about the meaning and purpose of the preamble of the Amendment.

How Has the Supreme Court Ruled?

In Presser v. Illinois (1886), the Court held that states could not disarm citizens because that would interfere with the federal government’s ability to raise a militia. But the Court added, “We think it clear that [laws] which…forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms.” The Court also interpreted the word “militia.” They stated that a militia was “all citizens capable of bearing arms.”

In United States v. Miller (1939), the Supreme Court held that the Second Amendment did not protect the right to possess all types of weapons. The Court upheld a federal law that regulated sawed-off shotguns.

The Court reasoned that since that type of weapon was not related to keeping up a militia, the Second Amendment did not protect the right to own it. In other words, the Second Amendment protected a right to own weapons. The question was how far that right went.


District of Columbia v. Heller (2008) was the first time the Supreme Court interpreted the Second Amendment in
terms of what it meant for an individual’s right to possess weapons for private uses such as self-defense.

The District of Columbia had one of the strictest gun laws in the country. It included a total ban on handguns. Further, long guns had to be kept unloaded and disassembled or trigger locked. Heller believed the law made it impossible for him to defend himself in his home. He argued that it violated the Second Amendment.

The District of Columbia argued that the prefatory clause, which refers to militia service, secured the “right of the people” to have weapons only in connection with militia service. The city also pointed out that the law did not ban all guns, and that it was a reasonable way to prevent crime.

The Court agreed with Heller and overturned three provisions of District’s law. The Court reasoned that the prefatory clause gave one reason for the amendment, but did not limit the right. The Court also reasoned that elsewhere in the Constitution, such as the First, Fourth, and Ninth Amendments, the phrase “the right of the people” is used only to refer to individual rights—that is, rights held by people as individuals.

Finally, the Court reasoned that the right to own weapons for self-defense was an “inherent” (natural) right of all people. “It has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a preexisting right,” the majority stated.

Four of the nine Supreme Court Justices disagreed with the Court’s ruling. The dissenters agreed that the Second Amendment protected an individual right. However, they argued that the scope of that individual right was limited by the amendment’s preamble. One dissenting Justice argued that the Second Amendment’s prefatory clause (or preamble) showed the Founders’ “single minded focus” on protecting “military uses of firearms, which they viewed in the context of service in state militias.”

One thing is certain. Like all other rights in the Bill of Rights (such as freedom of speech and press), the right to keep and bear arms is not an absolute right. Working out the limits of the Second Amendment’s protection continues to challenge society.

Comprehension Questions:

1. In Presser v. Illinois (1886), what did the Supreme Court decide about militias?

2. What are the possible ramifications from the Court’s ruling in United States v. Miller (1939)?

3. What did the Supreme Court rule in District of Columbia v. Heller (2008)? How did this change or confirm the interpretation of the Second Amendment?
Total Ban on Handguns?

Directions: Read each statement and decide whether you think such a regulation would be constitutional (C) or unconstitutional (U).

1. All types of firearms are legally available for purchase.  
   
   C  U

2. Individuals can buy many kinds of firearms, but not some of the most dangerous, like AK-47s.  
   
   C  U

3. Individuals can buy handguns. They can only buy one per month, though. Handguns must be registered.  
   
   C  U

4. Most individuals can legally buy handguns. Convicted felons cannot.  
   
   C  U

5. Some individuals can legally buy handguns. Convicted felons, those accused of domestic violence, and people who have ever been diagnosed mentally ill cannot buy them.  
   
   C  U

6. Some individuals can buy handguns. Protestants may buy them, while Catholics may not.  
   
   C  U

7. Individuals can own handguns, but they must be kept unloaded in a person’s home.  
   
   C  U

8. No one may own handguns.  
   
   C  U

Note: The following quotations are taken from the majority and dissenting opinions in District of Columbia v. Heller (2008).

1. “The inherent [natural] right of self-defense has been central to the Second Amendment right.”

2. “The handgun ban amounts to a prohibition of an entire class of “arms” that is overwhelmingly chosen by American society for that lawful purpose [of self-defense].”

3. “The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.”

4. “We must decide whether a District of Columbia law that prohibits the possession of handguns in the home violates the Second [Amendment]...In my view, it does not.”

5. “The Second Amendment protects militia-related, not self-defense-related, interests.”

6. “The protection the Amendment provides is not absolute. The amendment permits government to regulate the interests that it serves.”
The Bill of Rights and PROPERTY

Spotlights safeguards to property in the Bill of Rights, explores various types of property, and the concepts of takings, just compensation, and eminent domain.

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.

–THIRD AMENDMENT

The right of the people to 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.

–FOURTH AMENDMENT

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.

–FIFTH AMENDMENT

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 re-examined in any Court of the United States, than according to the rules of the common law.

–SEVENTH AMENDMENT

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

–EIGHTH AMENDMENT
The Bill of Rights and PROPERTY

While most people think of property as land or a dwelling, the term has much more constitutional significance and touches almost every aspect of citizens’ lives. The Founders, influenced by English philosopher John Locke, believed property rights in one’s body and person to be the root of all rights – rights that governments are established to protect.

UNIT OBJECTIVES
Students will:

- Define the word “property” as understood by Enlightenment thinkers and modern legal minds.
- Identify provisions in the Bill of Rights that protect property rights.
- Analyze the Founders’ reasons for protecting property rights.
- Understand the Fifth Amendment’s due process and just compensation clauses.
- Understand how the Supreme Court has interpreted the Takings Clause.

SYNOPSIS OF LESSONS

Lesson 1: What is Property? Why Protect It?
Students will explore the reasons for protecting property, compare different types of property, and explore how the Bill of Rights protects property.

Lesson 2: How Does the Fifth Amendment Protect Property?
Students will explore how the Fifth Amendment protects property rights through the due process of law and how the Supreme Court has interpreted property rights.

CONSTITUTIONAL PRINCIPLES
- Due Process
- Natural rights
- Private property
- Rule of Law

FOUNDER’S QUOTES
“In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.”
–JAMES MADISON

KEY TERMS
Due process
Eminent domain
Intellectual property
Just compensation
Partial taking
Property
Public use
Takings clause
What is Property? Why Protect It?

LESSON OVERVIEW
The Founders were extremely concerned with protecting private property as a cornerstone of a free society. Property is not only physical possessions, but also ideas, works, and even what someone should earn in wages.

LESSON OBJECTIVES
Students will:
- Explain the definitions of property.
- Explore the origins of property rights in the United States.
- Summarize the reasons for the protection of personal property.
- Analyze the property rights protections found in the Bill of Rights.

MATERIALS
- Handout A: Property or Not?
- Handout B: Background Essay - What Is Property? Why Protect It?
- Handout C: Understanding the Third, Fourth, Fifth, Seventh, and Eighth Amendments
- Handout D: English Origins of Property Protections
- Handout E: Samuel Adams, James Madison, and Property
- Handout F: The Bill of Rights and Property

RECOMMENDED TIME
One 60-minute class period.

STANDARDS
- NCHS (5-12): Era III, Standard 1B
- CCE (9-12): IB1 and IB2
- NCSS: Strands 5, 6, 7, and 10
- Common Core (9-12): RI.8, RI.9, SL.1, RH.1, RH.2, RH.3, RH.4, RH.5, RH.6, RH.8, RH.9
LESSON PLAN

Warm-Up 25 minutes

A. Write the word “property” on the board and ask students how they would define the term. Write key terms and ideas on the board. Ask students to brainstorm examples of property and continue to record responses.

B. Distribute Handout A: Property or Not? Have students work in pairs to complete the handout and write explanations for their answers.

C. As a class, discuss the students’ answers and explanations.

D. Go over Handout A as a class and answer any questions.

E. Distribute Handout C: Understanding the Third, Fourth, Fifth, Seventh, and Eighth Amendments. Have students complete it as they read the Handout B: Background Essay – What Is Property? Why Protect It?

Activity 25 minutes

A. Distribute Handout D: English Origins of Property Protections. Read the excerpts from the Magna Carta and discuss the questions that follow. Continue the same method for the excerpts from William Blackstone and John Locke.

B. Explain in a mini-lecture that when the British colonists came to America, they brought with them a strong tradition of respect for property rights. Colonial governments enshrined protections for property and against arbitrary taxation in the Massachusetts Body of Liberties, the Fundamental Orders of Connecticut, and other documents. Property rights were one foundation of the colonists’ rallying-cry “No taxation without representation.” James Otis objected to the British officers’ use of general search warrants, declaring, “A man’s home is his castle, and whilst he is quiet, he is as well guarded as a prince in his castle.” When the colonies declared independence from Great Britain, they charged the King with taxing them without their consent, seizing their ships, and denying them due process in Admiralty Courts.

C. Students will now explore the writings of two important Founders, Samuel Adams and James Madison, on property rights. Their views were complex and varied, but Adams, Madison, and indeed all the Founders agreed that property rights were fundamental to liberty.

D. Distribute Handout E: Samuel Adams, James Madison, and Property, and divide the class into groups of four. Have two students in each group read the excerpts from Adams’s The Rights of the Colonists and two read the excerpts from Madison’s Property.
E. After they read, students should brief their group members on how each author used the word “property.”

F. Reconvene the class and go over the questions on Handout E. Which definition(s) of property do students find most useful?

**Wrap-Up**

A. Distribute Handout F: The Bill of Rights and Property, reminding students that Madison was highly influential in adopting the Bill of Rights. Have students return to working in their groups to determine how property is protected by the Bill of Rights.

B. After the students have finished, assign each group to represent either “physical property” (e.g. material goods) or “the most sacred property” (e.g. conscience). Read aloud the Bill of Rights and have students stand whenever they believe their type of property is being protected.

C. As you proceed, pause when needed to debrief the class. Are there any instances where everyone is standing up? Are there times when no one is standing? What does this tell you about the property protections in the Bill of Rights?

**Homework/Extensions**

A. Have students compare the excerpts from John Locke and William Blackstone to Samuel Adams and James Madison. They can create a graphic organizer or presentation that shows the similarities and differences between the four men’s arguments and report their findings to the entire class.

B. Have students research other Founders’ or philosophers’ views on property rights and write an essay on their findings.
Do you think each of the following are examples of property or not?

<table>
<thead>
<tr>
<th>EXAMPLE</th>
<th>PROPERTY</th>
<th>NOT PROPERTY</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Yourself</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Your music collection</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Your iPod</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. The sheet music to a song you composed</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5. The lyrics you wrote to go along with your song</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6. The guitar you play your song on</td>
<td></td>
<td></td>
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<tr>
<td>7. The money you earn from your record contract</td>
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The students returned to class on Monday after enjoying a relaxing weekend. As they streamed in from the parking lot and buses, many were shocked to see the brown row of lockers that had been in the main hallway was gone. Many students used their lockers to store not only their books, but also other personal belongings like clothing, music, and food. Confused, they walked into the principal’s office.

“What happened to our lockers?” they demanded.

The principal informed them that the school planned to fix up the front hallway and turn it into an alumni welcome center. Their lockers had been torn down.

“What happened to all our stuff?” the students asked, becoming angry.

The principal shrugged. “Oh, we just threw all those things out.”

**What Is Property?**

One might say the Founders were not only concerned with property rights, they were passionate about them. Half of the Bill of Rights deals with property. Most people think of property as land, however, property is includes much more than just land. It involves houses, cars, and other material things. It also includes things of the future, such as future profits from the sale of an object or idea.

Individuals also have property in their conscience, thoughts, and reputation. More than just securing these things for individuals, property rights secure freedom.

**What Are the Origins of American Property Rights?**

Early Americans had many things in mind when they used the word “property.” Rather than saying, “That horse is my property,” most Americans would have said, “I have property in that horse.” That phrase meant that they had a legal right to use the horse. They also had a right of exclusion, meaning they could stop others from using the horse.

Another example of property is one’s own body. People usually do not refer to themselves as “property,” but they clearly have a general right to do what they want with their bodies and to keep others from doing things to them. Thus, individuals have a property in their body. This concept is associated with English natural rights philosopher John Locke. It is called self-ownership, and helps explain why the Founders took many steps to protect property.

The Founders were deeply influenced by Locke as well as by English legal history. The *Magna Carta* (1215) and the Declaration of Rights (1689) restricted
the power of the king or queen to take belongings or put people in jail at random. Eventually, British abuse of property rights beginning with taxation without representation pushed many colonists to argue for revolution. They had had enough of forced housing of troops, searches with no warrants, and excessive fines.

How Did the Founders View Property?

Thomas Jefferson used one of Locke’s famous phrases dealing with property in the Declaration of Independence (1776). Locke wrote that people have natural rights to “life, liberty, and property.” Jefferson changed it to “life, liberty, and the pursuit of happiness.” He did not change Locke’s meaning so much as expand it. Colonists would have thought of ideas as well as material things as “property.” Jefferson believed the enjoyment of material things and the satisfaction of creativity were essential to happiness.

James Madison, who was important in developing the Bill of Rights (1791), believed property rights to be the key to protecting all rights. Securing rights is the purpose of “a just government,” as he put it in his essay entitled, “Property,” published in 1792. In it, Madison argued that man has a property in not just his body and possessions. He also has property (an interest) in the maintaining and exercising of opinions and religious beliefs. Madison noted that security of property plays a big role in personal growth. It allows each person “the free use of his faculties and free choice of the objects on which to employ them.”

Madison strongly believed in a commercial republic. He urged Americans to protect the acquiring and owning of property through hard work. He criticized excessive taxes. Madison concluded with a warning to his fellow citizens: “If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights.” It is no accident that half the Bill of Rights contains property protections. The Third and Fourth Amendments assure freedom and security of one’s home and possessions, while the Fifth Amendment guarantees due process and just compensation when the
government takes one’s property. The Seventh Amendment addresses the right to jury trial in common law suits involving more than twenty dollars, and the Eighth protects the freedom from excessive fines. The Founders understood that the protection of all kinds of property was key in protecting all rights.

**How Do Property Laws Affect Modern Life?**

Questions of property law are at the center of many social concerns today. Some examples are environmental issues, conservation of endangered species, and even the legality of media downloading websites. Individual property rights must be balanced with legitimate state concerns about natural resources, and media sharers must consider whether they are “sharing” or “stealing.”

The property protections in the Bill of Rights are essential to liberty. If the government can take anything from anybody at any time, no one can be free. As students and as citizens, your right to control your own property is one way you have the power to live as you wish.

**Comprehension Questions**

1. What is self-ownership? How did the Founders use this philosophy in the Constitution and Bill of Rights?

2. How did James Madison define property?

3. Why did the Founders believe that protecting property was key in protecting all rights?
Directions: Below each Amendment, explain how each provision safeguards individual property rights.

1. Third Amendment: 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.

2. Fourth Amendment: The right of the people to 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.
3. **Fifth Amendment:** 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.

4. **Seventh Amendment:** 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 re-examined in any Court of the United States, than according to the rules of the common law.

5. **Eighth Amendment:** Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.
English Origins of Property Protections

Directions: Read the following excerpts from legal and philosophical sources, and answer the questions that follow each excerpt.

Magna Carta (1215)

12. No scutage (tax) or aid shall be imposed on our kingdom, unless by common counsel of our kingdom.

27. If any freeman shall die intestate (without a will), his chattels shall be distributed by the hands of his nearest kinsfolk or friends, under the supervision of the Church, saving to every one the debts which the deceased owed to him.

30. No sheriff or bailiff of ours (the King), or other person, shall take the horses or carts of any freeman for transport duty, against the will of the said foreman.

31. Neither [the King nor his] bailiffs shall take, for our castles or for any other work of ours, wood which is not ours, against the will of the owner of that wood.

55. All fines made with us unjustly and against the law of the land … shall be entirely remitted (set aside)…

1. What kinds of property protections do you see in the Magna Carta excerpts?

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________
William Blackstone, *Commentaries 1:137-38 (1765)*

...Neither his majesty, nor his privy council, have any jurisdiction, power, or authority by English bill, petition, articles ... or by any other arbitrary way whatsoever, to examine, or draw into question, determine or dispose of the lands or goods of any subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by course of law.

1. In his explanation of English common law, what power does Blackstone say the King does NOT have over his subjects’ property?

__________________________________________________________________________

__________________________________________________________________________

2. Who or what does Blackstone say may have the power over the “lands or goods” of subjects?

__________________________________________________________________________

John Locke, *Second Treatise of Civil Government* (1689)

[People are] willing to join in society with others ... for the mutual preservation of their lives, liberties, and estates, which I call by the general name, property. The great and chief end, therefore, of men’s uniting into commonwealths, and putting themselves under government, is the preservation of their property.

1. Why does philosopher John Locke say that people choose to unite into societies?

__________________________________________________________________________

__________________________________________________________________________

2. What does Locke say is the most important reason people need government?

__________________________________________________________________________
Samuel Adams, James Madison, and Property

Directions: Read the following excerpts and answer the questions that follow.

Excerpts from The Rights of the Colonists (1772), by Samuel Adams

Among the natural rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the best manner they can...

The Legislative has no right to absolute, arbitrary power over the lives and fortunes of the people; nor can mortals assume a prerogative not only too high for men, but for angels, and therefore reserved for the exercise of the Deity alone.

There should be one rule of justice for rich and poor, for the favorite at court, and the countryman at the plough...

The supreme power cannot justly take from any man any part of his property, without his consent in person or by his representative.

These are some of the first principles of natural law and justice... Now what liberty can there be where property is taken away without consent?

1. What role does Adams argue the government should have with respect to “property”? 

__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
Excerpts from Property (1792), by James Madison

This term [property] … means “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.”

In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage.

In the former sense, a man’s land, or merchandise, or money is called property.

In the latter sense, a man has property in his opinions and the free communication of them.

He has a property of a peculiar value in his religious opinions, and in the profession and practice dictated by them.

He has a property very dear to him in the safety and liberty of his person.

He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights…

Conscience is the most sacred of all property…

1. What do you believe James Madison means by “property”?

__________________________________________________________________________

__________________________________________________________________________

2. Circle each kind of property to which Madison refers. Are these what you normally think of as “property”? Explain.

__________________________________________________________________________

__________________________________________________________________________
The Bill of Rights and Property

Directions: Read over the Bill of Rights and underline the words and phrases that secure protections for physical (or “real”) property. Then circle the words and phrases that secure protections of other kinds of property Madison mentions.

First Amendment
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.

Second Amendment
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.

Third Amendment
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.

Fourth Amendment
The right of the people to 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.

Fifth Amendment
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.
Sixth Amendment

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.

Seventh Amendment

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 re-examined in any Court of the United States, than according to the rules of the common law.

Eighth Amendment

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

Ninth Amendment

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

Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.
How Does the Fifth Amendment Protect Property?

LESSON OVERVIEW
The Founders believed that property is among the natural rights governments exist to protect. One of the ways the Founders protected property rights was in the Fifth Amendment. The Fifth Amendment restricts the government’s ability to take property and ensures that when it does take property, it must pay for it. When do governments’ actions become a taking, and when should the government pay for an intrusion?

LESSON OBJECTIVES
Students will:
- Explain how the Fifth Amendment protects property rights.
- Understand the concepts of just compensation and eminent domain.
- Analyze government actions to determine whether or not the actions would be considered a “taking.”

MATERIALS
- Handout A: The Takings Clause
- Handout B: Background Essay - How Does the Fifth Amendment Protect Property?
- Handout C: Property and the Supreme Court
- Handout D: Updates

RECOMMENDED TIME
One 60-minute class period.

STANDARDS
- NCHS (9-12): Era III, Standards 3b and 3c
- CCE (9-12): IA1 and IID1
- NCSS: Strands 6, 7, 8, and 10
- Common Core (9-12): RI.8, RI.9, SL.1, RH.1, RH.2, RH.3, RH.4, RH.5, RH.6, RH.8, RH.9
LESSON PLAN

Background/Homework  
A. Have the students work in pairs or groups to complete Handout A: The Takings Clause.  
B. As a large group, discuss the definitions they arrived at by consensus and clear up any misconceptions.

Warm-Up  
A. Have students read Handout B: Background Essay - How Does the Fifth Amendment Protect Property?  
B. Discuss each definition on Handout B as a class.

Activity  
A. Cut out the scenario cards on Handout C: Property and the Supreme Court. Ask two students to come to the front of the room, assume the roles of the people on the first scenario card, and present the information to the class in role-play form.  
B. After students have finished presenting, conduct a large-group discussion about the situation. Ask the class:  
   ▪ Is the situation described a “taking” of property?  
   ▪ Is the situation described a constitutional exercise of government power?  
   ▪ If so, what would be the best way to determine just compensation?  
C. Repeat this process for all three scenarios.  
D. After the scenarios have all been discussed, distribute or read aloud Handout D: Updates to share with the students how the Supreme Court ruled on each case. Ask students to share their reactions to the ruling.

Wrap-Up  
As a large group, discuss the following questions:  
1. In which case did the government attempt to take physical property? (Nollan v. California Coastal Commission, 1987)  
2. In which case did the Court rule that a “taking” had occurred, even though no land was actually taken? (United States v. Causby, 1946)  
4. How does the Kelo ruling differ from the other property rulings? Why do you think it has been a very controversial decision?

5. Is redevelopment through eminent domain the only way to revitalize a neighborhood? Is it the best way? What other methods can you think of?

**Homework/Extensions**

A. Have students research Supreme Court cases beyond the readings provided related to property rights and prepare journal entry on their findings. Guidelines should include a summary of the case, the majority and minority opinions, and the outcome of the case.

Some examples of Supreme Court cases related to property include:

8. *Stop the Beach Renourishment Inc. v. Florida Department of Environmental Protection* (2010)

B. The Supreme Court decision in *Kelo v. New London* (2005) has prompted some states to enact laws preventing the use of eminent domain to take non-blighted property for economic development. Eleven state supreme courts have forbidden Kelo-style takings under their state constitutions. Additionally, at least one bank has said it will not loan money to be used for development of land that was obtained through this kind of taking. Have students investigate the public and private reactions to the Kelo case and present their findings in a PowerPoint or oral presentation.

C. Ask students to simulate a situation where an environmental law prohibiting logging on land where an endangered species of eagle lives must be balanced with the rights of property owners who wish to sell timber from their land. Divide the class into groups of nine including three property owners, three environmental activists, and three policymakers. Have the owners and activists lobby the policymakers with their best arguments for how the law should be written and how takings, if any, will be compensated. Policymakers should write legislation and each group can present their law to the class. Have the class vote on the best one.

D. Have students learn more about the case of *Berman v. Parker* (1954), an important precedent for *Kelo v. New London* (2005). Students should make a Venn diagram comparing and contrasting the two cases with information on: the reasons the government gave for taking land; arguments against the takings; the court’s rulings; and who was affected by the decisions. Are “blight” takings or “redevelopment” takings more common? Which type is most important to the issue of property rights?
**The Takings Clause**

**Directions:** Read the following excerpt from the Fifth Amendment. With your group members, come to a consensus about how best to define the terms below. Then brainstorm ideas of things that could be considered “public use.”

No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

1. Definition of “due process of law”: ____________________________________________

2. Definition of “taken”: ______________________________________________________

3. Definition of “public use”: __________________________________________________

4. Definition of “just compensation”: ____________________________________________

5. Examples of things that could be considered “public use”: ________________________
How Does the Fifth Amendment Protect Property?

If a person owns some beautiful land and wants to build her home there, who is to say she cannot? But what if there were three-thousand-year old redwood trees on that land and building would mean cutting them down? Or what if the land is on the beach where construction would cause erosion and destruction of the shoreline? Are these valid reasons for the government to take the land?

What Does the Fifth Amendment Guarantee?

Among other things, the Fifth Amendment guarantees that people have the right to their life, liberty, and property. The government cannot randomly decide to meddle with those things without a reason, or without following due process. Due process means the government must act fairly and obey legal procedures when it tries to take property. The just compensation clause of the Fifth Amendment means the federal government must pay for any private property it does take for public use.

What Is a Taking?

Although the Constitution protects private property, the government can sometimes seize or restrict the use of that property. It can take property in the name of the public good. This is called a taking.

What Is Eminent Domain?

The Founders realized they needed to balance taking property for government use and protecting individuals’ rights to property. Sometimes the government needs land to build a road, school, post office, or military base. Historically, most takings happened through eminent domain. Eminent domain refers to the government’s right to acquire private property for public use. In the 1800s, eminent domain was used to claim land for railroads. In the twentieth century, it was used to remove residents from land along planned interstate highway routes. Even in cases of eminent domain, the government must provide just compensation.

What Is Just Compensation?

Individuals can sue the government to be reimbursed (paid back) for the lost value of their property. They are asking for just compensation. It is often difficult to determine the amount of just compensation. Today, the Supreme Court generally uses the fair market value standard, defining just
compensation as “what a willing buyer would pay in cash to a willing seller at the time of the taking.”

Recently, the government has been required to pay citizens, even if it did not actually take land. Some people have lost some or all of their property’s value through regulation or other government actions. They have claimed a right to be paid for a partial taking.

In *Lucas v. South Carolina Coastal Commission* (1992), the Court ruled that the owner of beachfront land must be paid back after a state law stopped all new construction on the property. Lucas had intended to build single-family homes on the land. Since he could no longer do this, the land’s economic value was reduced to zero. The Court ruled that this was a taking even though the land had not literally been taken away, because the state took away all of the economic value of the land.

More recently, in general, the Court has not taken the side of private property rights. It has generally sided with state and federal power to regulate. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002), the Tahoe Regional Planning Agency called a halt on new building at Lake Tahoe for nearly three years, but this delay went on to last for nearly twenty years. Property owners claimed that this ban was a taking and they should be paid back. The Court did not agree. In its decision, the Court ruled that, “a temporary restriction causing a diminution in value is not [a taking].”

*Kelo v. New London* (2005) became the landmark case surrounding the government’s ability to exercise eminent domain and changed the concept of public use versus private use forever. Suzette Kelo was forced from her property in New London, Connecticut when the local government used the Takings Clause of the Fifth Amendment. The Takings clause of the Fifth Amendment allows the government to take private land for the purpose of “public use.” While the term “public use” formally relates to the building of highways, railroads, or other uses that constituted the public welfare or public interest, Kelo’s land was to be used for a private business venture.

The Court ruled that the taking of Kelo’s property was constitutional because the public would benefit from increase in jobs, tax revenue, and economic development. In the majority opinion, Justice Stevens stated,
“The city has carefully formulated a development plan that it believes will provide appreciable benefits to the community.” However, in the dissenting opinion, Justice Sandra Day O’Connor asserted that, “Any property may now be taken for the benefit of another private party, but the fallout of this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms.”

The ruling in Kelo has spurred legislation at both the state and federal level in an attempt to clearly define “public use” and “just compensation.” As for the land in the Kelo case, it remains vacant. The economic development which forced Suzette Kelo out of her home never materialized.

Are Ideas Property?

Property is not always touchable or concrete. Authors, researchers, inventors, and artists also have a strong interest in protecting their rights to the products of their minds. These things are called intellectual property. Songs, books, or poems are property, just like cars, houses, or land.

The Internet has been an unmatched way of issuing information, but it has also made it much easier to steal intellectual property. Books and music can be downloaded for free, taking payment away from the authors and musicians. Some argue that if these owners do not think they will be justly paid for their work, they may produce less. The consequences to our culture may be huge: fewer novels, fewer medicines, fewer inventions, and less art. Others argue that few ideas are truly and wholly original but build on the efforts of prior artists and creators. Therefore, they say, giving too much protection to intellectual property can have the effect of reducing creative output.

The Founders believed that protecting private property was key to economic prosperity. As James Madison wrote, “Government is instituted to protect property of every sort … [It] will equally represent the rights of property, and the property in rights.”

Comprehension Questions

1. What does the Fifth Amendment guarantee?
2. What is just compensation?
3. Why was the case Lucas v. South Carolina Coastal Commission considered a taking?
4. Why was the Kelo v. New London case considered a landmark Supreme Court case?
Scenario One:

1. My name is Bob Dale, and I work on the Ventura, California Coastal Commission. We’re very proud of our gorgeous beaches. As our population has grown, more and more people want to experience them. Congestion on public beaches is worsening. We’ve made it a rule now that whenever people apply for building permits to do new construction on the beach, they will have to provide public walkways on their land. We believe this will cut down on congestion.

2. My name is Mr. Nollan. My wife and I have a small bungalow on our Ventura beachfront property. It has gotten kind of run down, and we would like to tear it down and build a new, three-bedroom house similar to others in the area. We applied to the city for a building permit, but we were told we would not be able to get one unless we let the government build a public walkway through the middle of our land so people can walk across it. We don’t want to do this, and, furthermore, we believe it’s an unconstitutional demand.

3. Dale: We believe that a walkway would serve a legitimate public purpose, especially since the Nollan’s land is surrounded by public beach on all sides. We told everyone we were going to make these walkways as a condition of new building permits, so I don’t know what they’re complaining about. The government is not taking their land away; we’re just asking that they people walk through a small part of it. If they don’t like it, then they don’t have to build a new house.

4. Nollan: They can’t restrict the use of our land this way without paying us for it.
Scenario Two:

1. My name is Thomas Lee Causby. Years ago, my wife Tinnie and I bought 2.8 acres of land in North Carolina. We decided it would be the perfect place for raising chickens. It was the perfect place until Army planes started taking off from the nearby airport. Now it’s unusable because of all the airplane noise. Therefore, I believe we’re entitled to just compensation from the government, since the government is causing the noise.

2. I am Rachel Ash, an attorney for North Carolina. I don’t believe the Causbys are entitled to compensation from the government. Their land was not taken from them. The government has never set foot on their land and has not physically intruded in any way. Furthermore, the Causbys knew that the land was close to the airport when they bought the land.

3. Causby: We knew it was just over 2,000 feet from an airport, but only a few commercial flights and crop dusters took off from there. It was many years after we bought the land that the Army started using the airport. Their planes are constantly flying right over us – just 67 feet over us to be exact. The noise keeps us awake and we lost 150 chickens because they would get so scared from the noise they would fly into the walls of the barn and die. I think that even though the government didn’t physically “take” our land, that we are entitled to just compensation.

4. Ash: I don’t know why Mr. Causby is complaining; he and his wife still own every acre of land that they did before. The government hasn’t “taken” anything.
**Scenario Three:**

1. My name is Suzette Kelo. About seven years ago I bought a Victorian home on the Thames River in Connecticut. I spent seven years restoring my house, and I really love it here. The city has been somewhat depressed economically, although the area surrounding my home is in good shape. Now I just found out that the city wants to take my land so that the area can be re-energized.

2. My name is Jason Helm, and I am on the New London City Council. We plan to take Ms. Kelo’s land using our power of eminent domain and turn it over to a private developer. The developer will build a new facility for a pharmaceutical company that will create hundreds of jobs and $680,000 in new tax revenue for the city. They will also build upscale condominiums. All these things will benefit the community and therefore amount to “public use.”

3. Kelo: I think this is an unconstitutional taking because the Fifth Amendment only says that property can be taken “for public use.” This means something like a library or a highway – something the public will actually use. I am fighting this because I believe it is an unconstitutional infringement on my right to private property. Fourteen of my neighbors are joining me.

4. Helm: The residents of New London can certainly “use” the additional money that will be brought in to this depressed area by the new development. I believe this taking is constitutional because it will benefit the city.
Updates

Scenario One:

1. In *Nollan v. California Coastal Commission* (1987) the Court held that “where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed,” there was a taking of property. Therefore, the government could not make the public walkway a condition of a building permit. If the government wished to take the property, it would have to exercise its power of eminent domain and provide the owners with just compensation: “If it wants an easement across the Nollan’s property, it must pay for it.”

Scenario Two:

1. The Court found a taking in *United States v. Causby* (1946) when low-flying jets at an airbase made farming impossible on nearby land even though the government never actually claimed the land itself. The Court held, “As a result of the noise, respondents had to give up their chicken business. As many as six to ten of their chickens were killed in one day by flying into the walls from fright … Production also fell off. The result was the destruction of the use of property as a commercial chicken farm.” The Causbys were entitled to just compensation from the government. “It is the owner’s loss, not the taker’s gain, which is the measure of the value of the property taken.”

Scenario Three:

1. The Supreme Court ruled on *Kelo v. New London* in 2005. The Court agreed with the city of New London and held that the government could take land from citizens in order to turn it over to a private developer. The Court explained that it had “rejected a literal requirement” of the phrase “public use” in the Takings Clause of the Fifth Amendment. The phrase “public use” could be interpreted as “public benefit.” Therefore, the government can take private property from an individual in order to turn it over to a private developer because the taking will result in “economic development” for the region.
The Bill of Rights and
DUE PROCESS

Covers search and seizure, rights of the accused, due process of law, jury trials, and protection from cruel and unusual punishment guaranteed in the Fourth, Fifth, Sixth, and Eighth Amendments.

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.

–Fourth Amendment

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.

–Fifth Amendment

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.

–Sixth Amendment

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.

–Seventh Amendment

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

–Eighth Amendment
In the years leading up to the Revolutionary War, inhabitants of most of the British colonies in North America did not enjoy the full rights of Englishmen. Homeowners could have their homes invaded by soldiers and their property taken without reason. Those accused of crimes could be tried without a jury and without a lawyer, or held without trial altogether.

In drafting a new Constitution for the federal government, the Founders reasoned that when that government suspected or accused an individual of wrongdoing, the government’s actions must follow certain procedures designed to secure justice. In the subsequently ratified Bill of Rights, the Founders sought to spell out those procedures to protect citizens from being abused, coerced, and wrongfully penalized.

UNIT OBJECTIVES

Students will:

- Understand why criminal procedure protections came to be included in the Bill of Rights.
- Understand and articulate specific protections found in the Fourth, Fifth, Sixth, and Eighth Amendments.
- Understand the principle of due process, which holds that the government must interact with all citizens according to the tenets of the law, and applying these rules equally among all citizens.
- Understand ways the Supreme Court has interpreted the Fourth and Eighth Amendment.

SYNOPSIS OF LESSONS

Lesson 1: How Do Due Process Protections for the Accused Protect Us All?

Students explore criminal procedure protections included in the Fourth, Fifth, Sixth, and Eighth Amendments and evaluate the Supreme Court’s interpretation of these amendments.

Lesson 2: What Is A Reasonable Expectation of Privacy?

Students understand the principle of due process and evaluate the Supreme Court’s interpretation of the Fourth Amendment.

CONSTITUTIONAL PRINCIPLES

- Due process
- Individual responsibility
- Liberty
- Natural rights

FOUNDERS’ QUOTES

“All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate which would be oppression.”

–THOMAS JEFFERSON

“Government should be formed to secure and to enlarge the exercise of the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind.”

–JAMES WILSON

KEY TERMS

Double jeopardy
Self-incrimination
Warrant
How Do Due Process Protections for the Accused Aim to Protect Us All?

LESSON OVERVIEW
Throughout history, many governments’ treatment of the accused has served as a hallmark of tyranny and unlimited government. While British subjects were some of the most free people on earth in the 1700s, American colonists experienced a variety of legal abuses at the hands of Britain and found themselves outside of many common protections afforded to English citizens. The Founders paid close attention to the rights of the accused because they realized that this was one group of people who particularly needed protection from government. Understanding how the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments operate to guarantee such protection and how they work both to ensure individual liberty and to limit government power, is vital to maintaining free citizenship.

LESSON OBJECTIVES
Students will:
- Understand why criminal procedure protections came to be included in the Bill of Rights.
- Identify ways in which these protections serve to ensure liberty and limit government.
- Understand and articulate specific protections found in the Fourth, Fifth, Sixth, and Eighth Amendments.
- Evaluate Supreme Court rulings concerning the Eighth Amendment’s Cruel and Unusual Punishment Clause.

CONSTITUTIONAL PRINCIPLES
- Due process
- Individual responsibility
- Liberty
- Natural rights

MATERIALS
- Handout A: Background Essay - How Do Due Process Protections for the Accused Aim to Protect Us All?
- Handout B: Criminal and Civil Procedure Protections
- Handout C: Defining Cruel and Unusual
- Handout D: Cruel and Unusual?

RECOMMENDED TIME
One 60-minute class period.

STANDARDS
- NCHS (9-12): Era III, Standards 3A and 3B
- CCE (9-12): IIA1, IIA2, IID3
- NCSS: Strands 6 and 10
- Common Core (9-12): RI.4, RI.8, RI.9, RH.1, RH.4, SL.1, SL.2
LESSON PLAN

Background/Homework  20 minutes the day before

Have students read Handout A: Background Essay - How Do Due Process Protections for the Accused Protect Us All? Instruct students to answer the questions at the end of the Background Essay.

Warm-up  10 minutes

A. Point students back to the bullet-pointed descriptors of a society without criminal procedure protections, contained in the beginning of Handout A.

B. Conduct a brief class discussion. Ask students to consider the following questions:
   1. If you lived in such a society, would you be free? Why or why not?
   2. Would the government have any limitations on its powers if society looked like this? Why or why not?
   3. What types of governments/nations/societies around the world still look like this?

Activity I  20 minutes

A. Distribute Handout B: Criminal and Civil Procedure Protections and a copy of the Bill of Rights (see Appendix). Put students into groups of four.

B. Assign one amendment—Fourth, Fifth, Sixth, Seventh, or Eighth—to each group. Have groups complete the portion of Handout B that is applicable to their assigned amendment only. Instruct students to discuss each element/clause of their amendment, and arrive at an agreed upon interpretation for each clause.

C. Have one group who read the Fourth Amendment explain their interpretations. If there is a second group who worked with the Fourth Amendment, have them share their interpretations only if they feel their interpretations are substantially different from the ones just presented. Compare student responses to the Answer Key and clarify any misunderstandings.

D. Repeat procedure for the Fifth, Sixth, Seventh, and Eighth Amendments, in each case making sure that each element of the amendment is identified and its meaning clarified.
Activity II

A. Distribute Handout C: Defining Cruel and Unusual, and put students into groups of five.

B. Instruct students to spend a few minutes sharing their individual thoughts/ideas about Handout C. Explain that they are now acting, in their groups, as the Supreme Court. Have them construct a one-sentence, group definition of “cruel and unusual” that they can apply to Eighth Amendment scenarios. Walk around to the room, visiting groups, to keep their discussion focused and assist them in coming to a group definition for Handout C.

C. Distribute Handout D: Cruel and Unusual? to all students. Instruct groups to select one student in each group to read Scenario 1 aloud to his/her group, while the other students read along. Then, have students discuss and complete questions 1-3 for Scenario 1, deciding, as a Supreme Court, whether the punishment involved in Scenario 1 is “cruel and unusual.” In deciding, each group should carefully apply their definition of cruel and unusual as written in Handout C, and should vote, just as the real Supreme Court might do to answer question 3 (3 students agreeing constitutes a majority of the group, and thus is their ruling). Have students individually answer question 4 and briefly discuss with their group if anything would have changed their view.

D. Have students continue the process for Scenarios 2 and 3.

E. Wrap up by conducting a class discussion to answer the following questions:
   1. How do several Bill of Rights amendments protect due process?
   2. How does due process protect our liberty?
   3. How should “cruel and unusual” be defined?
   4. Why should law-abiding citizens care about protections for criminals?

Homework and Extension Options

A. Have students locate one local or national news article about an individual who is accused of committing a crime (students should use a newspaper or news-station website for local stories; or http://www.billofrightsinstitute.org for daily headlines of national stories). Students should cut out or print the news article, and submit a 2-paragraph response on the following:
   1. A brief summary of the individual involved, the crime he/she is accused of committing, and any other pertinent details.
   2. Identification/explanation of particular elements of the Bill of Rights that are evident in the article (mentions of a search, representation by an attorney, trial, punishment, etc.). In doing so, students should make specific reference to the amendment(s) that is/are evident.
B. Have students visually depict the WHY and the HOW of due process. The Fourth, Fifth, Sixth, Seventh, and Eighth Amendments trace the criminal procedure process in order, from the initial search/seizure/questioning to trial and punishment. Have students create a collage using images found online tracing this process (an image of a search warrant, for example). Students can do a posterboard, or an electronic collage/presentation through Prezi or Glogster. Images should illustrate a variety - but not necessarily all - of the protections, with a brief statement below each of what particular right is illustrated and the amendment that protects it. Students should title their presentations with a statement or slogan about WHY the constitutional principle of due process is important. (e.g. "Protecting the accused protects us all.")

C. Invite your School Resource Officer (or a local police officer, if your school does not have one assigned) to speak to your class. Prior to his/her visit, brainstorm with students a list of questions to ask, centering on how he/she follows and upholds the protections of the Fourth, Fifth, Sixth, and Eighth Amendments in the course of their job enforcing the law and dealing with suspected criminals. Ask the officer to share police department policies relating to these protections, real scenarios they’ve encountered, etc.

D. As of 2013, 33 states and the federal government have the death penalty as an option for particular violent crimes. Utilizing the “State by State” section of the Resources tab at http://www.deathpenaltyinfo.org, have students do research to answer the following questions:

1. Does your state allow the death penalty? If so, for which crimes? If not, when was it abolished?

2. Do you agree with your state’s position on the death penalty? What do you believe about the death penalty itself? Is it cruel and unusual? Or is it appropriate punishment in certain circumstances? Explain your position thoroughly using the Constitution, legal precedent, facts, and data.
Imagine living in a society in which your government can do the following things to you:

A. Demand to enter your home for no particular reason and forcibly enter if you object.
B. Ignore your demands to know why your home or property is being searched.
C. Bring you up on charges that you’re not even aware of, and force you to confess your guilt.
D. Find you guilty in secret a very long time after your arrest.
E. Keep putting you on trial over and over until a jury decides you are guilty.
F. Take your property without paying you for it.

If you lived in such a society, would you be free? If government could do these kinds of things, would there be any real limit on its powers?

Why Did the Founders Include So Many Provisions Regarding the Rights of the Accused?

People are often surprised to find how much of the Bill of Rights involves protections for those who have been accused of a crime. Five amendments in the Bill of Rights deal with some aspect of criminal procedure—the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments. History and experience told the Founders that if there were not specific protections provided for citizens who are accused of committing crimes, and corresponding rules for the government to follow, then citizens could not live freely and the government would have unlimited power. The traditional principle was that it was better for guilty people to go free than for the judicial system to condemn even one innocent person.

Gathering Evidence: What Does the Fourth Amendment Protect?

One of the most common violations that the American colonists experienced at the hands of the British was the use of “general” search warrants. These warrants were easy to get and did not list a particular person or place to be searched. Any official who held a general warrant could search for anything he pleased, and British officers often used these warrants to harass colonists. The Founders sought to eliminate this type of tyranny with the Fourth Amendment. It requires that warrants be issued only when probable
cause supports it and that the warrant must state the particular person and place to be searched. Law enforcement officials must present evidence to a judge showing the probable cause that the individual is involved in a crime or may be involved in a future crime. It also requires that the warrant specifically list the items that officials may search for and seize. The Fourth Amendment demands that government officials go beyond simple suspicion and balance citizen rights with proper enforcement of laws.

**Government Power: What Does the Fifth Amendment Protect?**

The Fifth Amendment contains a variety of protections for individuals after a search has been conducted or an arrest has been made. One of the most important safeguards is protection from self-incrimination. Also known as “the right to remain silent,” this protection prevents the government from forcing an individual to offer up evidence against himself. A person may refuse to answer police questions that might make one seem guilty, and, at trial, one cannot be required to take the stand and testify under oath.

The Fifth Amendment also provides a guarantee that the government cannot endlessly try an accused individual for the same crime, also known as double jeopardy. Without a ban on double jeopardy, the government could just keep trying an individual over and over using its vast resources until it got the verdict it wanted.

**Determining Guilt or Innocence: What Does the Sixth Amendment Protect?**

The Sixth Amendment guarantees a jury trial for all individuals accused of a criminal offense. Trials must be speedy, public, and be held in the location where the alleged crime took place. It also requires that citizen juries, not a judge, determine the guilt or innocence of the accused. (This protection is also in the body of the Constitution.) Accused individuals have a right to know the specific crime(s) for which they are being tried, to examine all evidence the government has against them, to confront their
accuser(s), to call witnesses in their defense, and to have a lawyer to assist in their defense. The Sixth Amendment is vital to liberty, and it is crucial in protecting individuals from the overwhelming power and resources of the government.

Jury Overruled? What Does the Seventh Amendment Protect?

The Seventh Amendment to the Constitution guarantees a right to trial by jury in common law cases where the value disputed is over $20. It also states that cases decided by a jury cannot be overturned unless there was a factual error. A judge can set aside a jury’s verdict, but he or she cannot state a verdict or call a new trial. The Supreme Court upheld this clause in *Slocum v. New York Insurance Co.* (1813). The Court stated that, “Under the rules of the common law, an appellate court may set aside a verdict for error of law in the proceedings and order a new trial, but it may not itself determine the issues of fact.”

Guilty: What Does the Eighth Amendment Protect?

The Founders recognized that individual rights do not end when someone is found guilty, even of a hideous crime. The Eighth Amendment requires that fines and penalties for guilty persons not be excessive. Most people understand this as the principle that the punishment must fit the crime. While the Bill of Rights does not specify what is “excessive,” the Supreme Court has defined it as one that is extremely out of balance with the offenses committed in *United States v. Bajakajian* (1988).

Perhaps more challenging to define is the Eighth Amendment’s requirement that no “cruel and unusual punishments” be imposed upon guilty individuals. Generally, this protection was meant to prevent punishments such as drawing and quartering, whipping, or other methods common throughout history. What constitutes “cruel and unusual” punishment is often hotly debated.

Criminal Procedure Protections and You

Most citizens are law-abiding, but the principle of due process does not protect just those people who find themselves on the wrong side of the law. It is important for us all. The Founders wrote the Constitution to “establish justice” and “to secure the blessings of liberty” for themselves and future generations. A big part of that was protecting minorities (including suspected criminals who are often disliked) from the “tyranny of the majority.” The protections of the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments all help strike the balance between individual rights and the powers of government.
Comprehension and Critical Thinking Questions

1. What amendments contained in the Bill of Rights address protections for those accused of crimes? Why did the Founders include them in the Bill of Rights?

2. What specific protections for the accused are contained in the Fourth Amendment? In the Fifth Amendment?

3. In what ways does the Sixth Amendment protect an accused individual after he has been charged with a crime?

4. Consider the following quote from the Supreme Court case of Mapp v. Ohio (1961), which held that evidence obtained in violation of the Constitution could not be used against defendants at trial:

   “The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”

   How does this quote illustrate the importance of criminal procedure protections? Do you think the Founders would agree with this statement? Why or why not? (Answer in 2-3 sentences.)

5. Imagine you were talking to someone who said that she didn’t worry about protecting the rights of the accused because she never planned to commit a crime. How would you respond?
**Criminal and Civil Procedure Protections**

**Directions:** Using a copy of the Bill of Rights, complete the chart of due process protections for accused persons in the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments. Several are completed for you.

<table>
<thead>
<tr>
<th>FOURTH AMENDMENT</th>
<th>INTERPRETATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. “the right of the people to be secure … against unreasonable searches and seizures, Shall not be violated…”</td>
<td>1. People and their homes, possessions, etc., cannot be searched or taken without reason.</td>
</tr>
<tr>
<td>2.</td>
<td>2.</td>
</tr>
<tr>
<td>3.</td>
<td>3.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>FIFTH AMENDMENT</th>
<th>INTERPRETATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. “No person shall be held to answer for a capital … crime unless on a presentment or indictment of by a Grand Jury”</td>
<td>1. People suspected of very serious crimes must be indicted [formally accused] by a Grand Jury.</td>
</tr>
<tr>
<td>2. “nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb….</td>
<td>2.</td>
</tr>
<tr>
<td>3.</td>
<td>3.</td>
</tr>
<tr>
<td>4.</td>
<td>4.</td>
</tr>
</tbody>
</table>
**SIXTH AMENDMENT**  
1. “the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”
2. “[the accused shall] be informed of the nature and cause of the accusation.”
3. 
4. 
5. 

**INTERPRETATION**
1. 
2. People must be told what crime they are accused of committing.
3. 
4. 
5. 

**SEVENTH AMENDMENT**  
1. “where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved”
2. 

**INTERPRETATION**
1. 
2. 

**EIGHTH AMENDMENT**  
1. Excessive bail shall not be imposed.
2. 
3. 

**INTERPRETATION**
1. 
2. 
3.
Defining Cruel and Unusual

Directions: Pretend that your group is the Supreme Court. As the Justices, your job is not only to interpret the words of the Constitution, but also to apply your interpretation to cases and situations that affect the lives of millions of people. Taking what you know about the Constitution into account, think about how you would interpret the ban on “cruel and unusual” in deciding the constitutionality of government action. Discuss the guiding questions below.

Text of the Eighth Amendment:
…”nor cruel and unusual punishments inflicted.”

“Cruel:”
A. How do you know if a punishment is cruel?
B. Is a cruel punishment one that...
   1. ...causes lots of pain and suffering?
   2. ...is unnecessarily lengthy to carry out?
   3. ...involves other considerations that are not mentioned here?
D. Does the type of crime committed, the characteristics of the accused, or the method of punishment matter in how you interpret this word?

“Unusual:”
1. How do you know if a punishment is unusual?
2. Where is the line drawn between “usual” and “unusual”? How uncommon does a punishment have to be to be called unusual?
3. What comparisons should be used to determine what is unusual? State and federal laws and practices? International laws and practices?

Notes:
**Cruel and Unusual?**

**Directions:** Read each of the three scenarios, and answer the questions that follow each.

**SCENARIO 1**

Christopher, a high school junior who was within months of his 18th birthday, told two of his friends, aged 15 and 16, that he wanted to murder someone. He had a plan. Christopher would break into someone's home, tie him or her up, and throw him or her off a nearby bridge. His two friends, while hesitant, decided to be a part of his plan when Christopher assured them they could "get away with it" because they were minors. The three boys met at 2:00 a.m. on the night of the murder, but Christopher's 16-year-old friend was nervous and backed out. Christopher and his 15-year-old accomplice set out to commit their pre-planned crime.

The pair entered Shirley's home through an open window, awakening her. She turned on a hallway light and called out, "Who's there?" Christopher went down the hall and entered Shirley's bedroom. He realized he recognized her from a car accident the two had been involved in, which he later admitted reinforced his decision to kill. The boys bound Shirley's hands, covered her eyes with duct tape, and drove her to a nearby bridge. They tightened her bindings and threw her into the river below where she drowned. Christopher was overheard bragging about the murder the next day at school where police arrested him. He waived his rights to remain silent and to have an attorney present. Christopher then confessed to the murder and agreed to reenact the crime on videotape.

His first-degree murder trial occurred nine months later, after he had turned 18. After hearing about the plan, Christopher's bragging, and watching the videotaped reenactment, the jury quickly convicted him and recommended the death penalty. The judge agreed, and Christopher was sentenced to death.
SCENARIO 2

Evan was a very troubled 14-year-old who had been in and out of foster care for years. His mother was addicted to drugs and alcohol, and he had been abused by his stepfather. Evan himself was a regular user of drugs and alcohol, and he had attempted suicide four times. The first attempt was when he was only six years old.

One night Evan was at home with his two friends, Colby and Cole. The two friends came to make a drug deal with Evan’s mother, who sold them marijuana and gave them alcohol. All three boys left and went to Cole’s trailer, where they smoked their drugs and played drinking games. Eventually, Cole passed out. Evan decided to steal Cole’s wallet, grabbing it from the pocket of his passed out friend. Evan and Colby split the $300 between them. When Evan was trying to put the wallet back into Cole’s pocket, Cole woke up and grabbed Evan by the throat. Evan got hold of a nearby baseball bat and repeatedly hit Cole with it. After a number of hits, Evan placed a sheet over Cole’s head, said “I am God, I’ve come to take your life,” and hit Cole one more time. Evan and Colby then ran from Cole’s trailer, but quickly returned to cover up their crime. They lit two fires, burning the trailer and leaving Cole to die from trauma and smoke inhalation.

Alabama tried Evan as an adult, pointing to his mental maturity and his record of past crimes. He was charged with murder in the course of arson, a crime that carried a mandatory sentence of life without the possibility of parole. A jury convicted Evan, and he was sentenced to life in prison.
SCENARIO 3

The death penalty has been available as a punishment for certain crimes in most American states since before the Founding era. Methods of carrying out the death penalty have changed over the years in an effort to make the process more humane. Plenty of Americans disagree entirely with the death penalty, however, arguing that it is outside the powers of properly limited government, or that it is a moral, religious, and social wrong no matter how it is carried out.

By the mid-1800s, hanging was the nearly universal method of execution throughout the country. In 1888, New York’s governor commissioned a study to determine the most humane method of executing dangerous criminals. The committee’s answer was the electric chair, which the state legislature adopted. The electric chair became the preferred method of execution for the vast majority of states for the next 100 years, but there were growing concerns about the pain and suffering caused by the electric chair. In response, Oklahoma became the first state to seek a different method. Upon the advice of the head of anesthesiology at the University of Oklahoma’s College of Medicine, it replaced the electric chair with lethal injection. Lethal injection is now the primary way condemned prisoners are put to death in the United States.

Medical personnel are responsible for setting up the IVs, drugs and dosages. The prison warden typically conducts the execution from a separate room with doctors overseeing the process for any signs of trouble. In some instances it is difficult for the prison warden to find a doctor willing to oversee the execution. This is because they are sworn to abide by the Hippocratic Oath, which commands each doctor to “do no harm.”

Kentucky uses lethal injection. Two Kentucky death row inmates, both sentenced to death for their role in a double homicide, contend that the lethal injection process itself is cruel and unusual. They argue it can lead to pain, torture, suffering and an unnecessarily long death if it is not carried out with exact timing, dosages, and medical expertise.
CRUEL AND UNUSUAL SCENARIO QUESTIONS

1. What arguments would convince you that the punishment in this situation *IS NOT* cruel and unusual?

2. What arguments would convince you that the punishment in this situation *IS* cruel and unusual?

3. How would you rule in this case?

4. Is there anything about the details of this case that, if different, would change your ruling? Explain.
### LESSON OVERVIEW

The Constitutional principle of due process, which holds that government must interact with citizens according to duly-enacted laws, balances the rights of suspects with public safety. The Fourth Amendment was added to the Constitution to ensure we would be protected from unreasonable searches and seizures. But do all searches require a judge-approved warrant? How do we know which ones do? Further, surveillance technology has posed challenges to the meaning and application of the Fourth Amendment, and understandings of “reasonable,” “papers and effects,” and “search” have changed over time. Understanding, analyzing, and applying the Fourth Amendment is vital to maintaining the freedom the Founders sought to protect and the principle of due process.

### LESSON OBJECTIVES

Students will:

- Understand the principle of due process, which holds that the government must interact with all citizens according to the tenets of the law; applying these rules equally among all citizens.
- Understand ways the Supreme Court has interpreted the Fourth Amendment.
- Evaluate whether the Fourth Amendment is effectively protecting citizens from unreasonable search and seizure.

### CONSTITUTIONAL PRINCIPLES

- Due process
- Individual responsibility
- Liberty
- Natural rights

### MATERIALS

- Handout A: Background Essay—How Have the Protections of the Fourth Amendment Been Interpreted, Applied, and Enforced?
- Handout B: Attitude Inventory
- Handout C: Interpreting the Fourth Amendment
- Handout D: Should You Expect Privacy?
- “Are They Watching You” Game, available at http://teachingfoundingprinciples.org

### RECOMMENDED TIME

Two 50-minute class periods plus game time.

### STANDARDS

- **NCHS (9-12):** Era III, Standards 3A and 3B
- **CCE (9-12):** IIA1, IIA2, IID3
- **NCSS:** Strands 6 and 10
- **Common Core (9-12):** RI.4, RI.8, RI.9, RH.1, RH.4, SL.1, SL.
LESAON PLAN

Background/Homework  15 minutes the day before
Have students read Handout A: Background Essay—How Have the Protections of the Fourth Amendment Been Interpreted, Applied, and Enforced? and answer the questions.

DAY I

Warm-up  10 minutes
A. Distribute Handout B: Attitude Inventory and do a think-pair-share. Allow students to change their answers after discussing with their partner.
B. Reconvene the class and ask for a few volunteers to share their responses. Which items led to the most discussion? Did anyone change their mind? Why?
C. Ask students how they responded to the questions that asked about their understanding of concepts (numbers 1-2). What information do students need to increase their understandings? Make a list on the board and refer to it through the activities.

Activity I  10 minutes
A. Project and/or distribute Handout C: Interpreting the Fourth Amendment. Read the text of the Fourth Amendment aloud to the class.
B. Ask students to contribute their answers, and type or write their contributions on the projected handout. See the Answer Key for suggested responses.

Activity II  20 minutes
A. Put students in groups of 2-4, and distribute Handout D: Should You Expect Privacy?
B. Give students 10 minutes to complete the chart. After deciding on each scenario, they should include a one-sentence justification.
C. Bring the class together and ask for student responses to the first scenario.
D. When student discussion of each scenario is complete, share the information from the Answer Key.

Wrap-Up  10 minutes
Conduct a brief discussion on the following questions.

1. Is it always clear when someone has a “reasonable expectation of privacy”?
2. Based on the kinds of things the Supreme Court has said the Fourth Amendment allows government to do, is the amendment effectively protecting citizens from unreasonable search and seizure?

3. Why is it important that Americans have an ongoing conversation about what is private and what government can and cannot do to its citizens?

**DAY II**

**Activity I**

A. Have students play the “Are They Watching You” interactive game, available at [http://teachingfoundingprinciples.org](http://teachingfoundingprinciples.org). In this game, students will explore five colorful, interactive scenes and analyze instances of possible searches or surveillance.

B. Remind students that the Fourth Amendment only limits government, but they should look for all instances of searches or surveillance. The questions that follow several of the items will ask them to consider whether the Fourth Amendment would apply.

C. Encourage students to write thoughtful answers to the final question.

**Wrap-Up**

A. Clarify any questions about Fourth Amendment applications, especially the difference between public and private actors.

B. Ask students to answer the questions on Handout B again individually, using a different color pen than they did last time. After a few minutes, have students pair up once again to discuss their answers.

C. Reconvene the class for one final discussion on the questions:

   1. Is the Fourth Amendment effectively protecting citizens from unreasonable search and seizure?
   2. What can citizens do if the government violates constitutional protections?
   3. Why is the constitutional principle of due process important?

**Homework and Extension Options**

A. Have students pretend they are a member of Congress who wishes to propose a new amendment to the U.S. Constitution that “updates” the Fourth Amendment and addresses new issues of personal privacy. In ONE sentence—just as the Fourth Amendment is one sentence—have them write a new amendment that includes Fourth Amendment-style
protections for new technologies and modern life. In 2-3 paragraphs, have students defend and justify what they included in their new, proposed Amendment.

1. Do they believe their proposed amendment answers ALL of the potential challenges to both privacy and search/seizure in modern life and going forward? Is it even possible?
2. What does this assignment reveal about the durability of the Fourth Amendment?

B. Explain to students that customs agents at the national border may search a person or their property without a warrant. The same is true at an airport when someone wants to board a flight. (Airports have been the subject of controversy with the installation of backscatter radiation full-body scanners and the carrying out of full-body pat-downs). Write a 2-3 paragraph response to the following questions:

1. How have fears of terrorism affected the way people view these practices?
2. What other criminal procedures, if any, would it be acceptable to relax in light of the War on Terror?

C. Although the Bill of Rights does not explicitly protect a “right to privacy,” such a right to be free from unwarranted government intrusion is implicitly protected by the Constitution and Bill of Rights in many ways. Give students a copy of the Bill of Rights from the Appendix.

1. Putting them in pairs or small groups, have them locate specific provisions of Amendments 1-10 that they believe protect privacy. They should keep a running list of all of the provisions they believe imply such a right and be able to justify their selections.

2. Have each group share their results, noting similarities and differences. Explain to students that while Griswold v. Connecticut (1965) didn’t “create” the right to privacy within marriage, it is considered to be the first case where the Supreme Court specifically defined a right to privacy and justified it via our Bill of Rights.

3. Have students read selected parts of the majority opinion of Griswold at www.law.cornell.edu/supct/html/historics/USSC_CR_0381_0479_ZO.html and compare/contrast their discovery of privacy in the Bill of Rights with the Supreme Court’s decisions.

D. Have students interview a school official and ask the following suggested questions. Students should then write a 1-2 page summary of the official’s answers, closing with a statement of student opinion regarding the state of the Fourth Amendment in your school:

1. What recent situations have you encountered in which you’ve conducted a search?
2. How do you go about the decision to conduct a search? What district policies, state laws, and/or Supreme Court rulings guide your decision to conduct a search?
3. Do you believe the application of the Fourth Amendment in schools strikes a good balance between student rights and the need to preserve school safety and learning?
The Founders knew that some of the most vulnerable people in our society are those suspected of crimes. Suspected criminals tend to be disliked, and almost all lack the vast resources of government. The Fourth Amendment was added to the Constitution to protect the rights of accused persons - and all citizens - from abuse by government. Due process protections are evident in the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments to the Constitution. The principle of due process means that, in going about the business of enforcing laws, government must follow established rules and procedures that respect all citizens’ rights. (In other words, it is not enough for the laws to be followed. The principle of due process requires that laws themselves are constitutional.) The Fourth Amendment’s warrant requirement provides for one of the most important individual protections: freedom from unreasonable searches and seizures. If the police want to search someone, they must first get a warrant by convincing a court that there is probable cause to believe that an individual has committed a crime. If the court agrees, they will give the police permission to act.

When is a Warrant Required?

Warrant requirements are not always clear-cut. In general, a search of someone’s home requires a warrant that states the person and place to be searched and the items to be located. The Supreme Court has ruled, however, that many types of searches can be considered “reasonable” even if conducted without a warrant. If a police officer is in a place where he is allowed to be and sees an illegal item in plain sight, the item may be seized without a warrant. Police may also conduct a warrantless search if they believe there is an immediate danger to his life or the life and property of others. In these “exigent circumstances,” a search is considered reasonable, so long as there is no intent by the officer to either arrest or seize evidence. Cars, the Supreme Court has ruled, can be searched without a warrant, provided the officer legally stopped the vehicle in the first place and has reasonable suspicion that a crime may have been committed. Finally, no warrant is required if an individual voluntarily allows a search.
What is the Exclusionary Rule?

All searches are subject to the Exclusionary Rule, which holds that evidence obtained through unconstitutional means may not be used against defendants at trial. The Court first interpreted the Fourth Amendment this way in federal trials in 1914 and applied it to the states in the case of *Mapp v. Ohio* (1961). Police must be certain their warrant is correct and complete, as the Court ruled in *Groh v. Ramirez* (2004). An incorrectly written search warrant could also lead to evidence being excluded from trial.

The Exclusionary Rule can be controversial. The text of the Fourth Amendment does not require it, and critics argue there are others ways to discourage police from conducting illegal searches that do not threaten public safety by setting guilty people free. Other critics claim the rule does not actually stop officers from conducting illegal searches because they face no personal punishment. Supporters tend to agree with the Court that allowing the government to punish people using evidence it obtained in violation of the law would be unjust and violate the principle of due process.

Like the warrant requirement of the Fourth Amendment, however, the Exclusionary Rule is not absolute, according to the Court. If the police can prove the evidence would surely have been found through legal means, it may be presented in court. This is called “inevitable discovery.”

Has Technology Changed the Meaning of the Fourth Amendment?

Technological advances, surveillance technology, and the use of military-grade equipment by police have dramatically enhanced the government’s power to search. In many cases, these developments have forced citizens and the Court to wrestle with finding the constitutional balance of liberty and security.

In 1965, Charles Katz was suspected by the FBI of being involved in illegal interstate gambling. He would often use a pay-phone near his apartment to place his bets, so police attached a listening device to the outside of the phone booth to record his conversations. He was arrested and later convicted. He challenged the search on the basis that his conversation, though in a public location, was private and protected by the Fourth Amendment. The Supreme Court agreed in *Katz v. United States* (1967), reasoning that the Fourth Amendment protected “people, not places,” and that Katz had a “reasonable expectation of privacy” that was protected from an unreasonable government search.

The case of *Kyllo v. United States* (2001) also concerned issues of technology and privacy.

Police believed Danny Kyllo was growing marijuana in his home. They used a heat-sensing device to look for the telltale signs of heat lamps that are commonly used to grow the illegal plants. The Court found that the
police actions were an illegal search, as the government “use[d] a device… to explore the details of the home … [which is] unreasonable without a warrant.”

The widespread use of GPS devices has prompted constitutional questions about privacy and the Fourth Amendment. Antoine Jones was suspected of possessing and dealing drugs. In 2005, police attached a GPS-tracking device to his car without a warrant. They traced his movements for nearly a month. In mapping his whereabouts, along with other evidence, police were able to tie Jones to locations where drug transactions were known to occur. In *United States v. Jones* (2012), the Supreme Court unanimously agreed that the warrantless GPS tracking was an unreasonable search. The Court further argued that while Jones drove on public streets, he did so with a “reasonable expectation” of privacy. This ruling may prove an important precedent in future cases, as many Americans now carry GPS-enabled cell phones as they go about their daily lives.

**How Does the Fourth Amendment Apply in Public School?**

Public schools have long been considered by the Supreme Court as a special place. The Fourth Amendment does protect you in school, but at a much lower threshold than would be the case for adults in the “real world.”

Terri was a high school student in New Jersey, and exited the girl’s bathroom smelling like smoke. A teacher took Terri to the principal’s office, where an assistant vice principal searched her purse, finding not only cigarettes, but rolling papers, a pipe, and other evidence of marijuana use. In *New Jersey v. T.L.O.* (1985), the Supreme Court upheld the constitutionality of the search, adopting a lower standard than is applied to police in criminal situations. The court held that school officials only needed “reasonable suspicion” to search students.

While the Court found this lower standard met in *T.L.O.*, it found in 2009 that Arizona school officials went too far in strip-searching a 13 year old student who they thought might be distributing ibuprofen (Advil). In *Safford Unified School District v. Reading* (2009), the Court ruled that while schools have search authority to root out contraband, the search cannot be “excessively intrusive” in light of the age and sex of the student, and the nature of the items being searched.

Drug tests can also be a kind of “search,” and the Supreme Court has weighed in on the use of them by public schools. In the 1995 case of *Vernonia School District v. Acton*, the Court ruled that schools may force athletes to submit to random drug tests. In *Board of Education of Pottawatomie County v. Earls* (2002), students fought a school rule that required drug testing for all extra-
curricular activities, not just sports. The drug test was even a condition to take courses such as band or choir. The Court upheld the policy because it “reasonably serve[d] the School District’s important interest in preventing drug use among students.”

The principle of due process, like other constitutional principles, is a means to an end. In other words, as the Constitution’s Preamble states, it is a way to ensure our government establishes justice and secures the blessings of liberty for future generations. While technologies and threats to security change, the rights protected by the Constitution don’t. This means it will always be important to understand the protections in our Bill of Rights and the reasons for them.

Comprehension and Critical Thinking Questions

1. How does the Fourth Amendment’s warrant requirement protect you?

2. What is the Exclusionary Rule?

3. How has the Supreme Court applied the Fourth Amendment to public school officials? How have they ruled with regard to drug testing in schools? Do you agree with these rulings?

4. The principle of due process, like other constitutional principles, is a means to an end. What is that end? Explain.

5. You may have noticed that the Fourth Amendment applies differently in different circumstances. Do you think the Court has allowed government officials (including public school administrators) too much leeway in conducting searches? Just enough? Not enough? Is the Fourth Amendment today being enforced in ways its text commands, and in ways the Founders would agree with?
Attitude Inventory

Directions: For each statement, circle the number that best describes your response, 1 being you completely disagree, 10 being you completely agree.

1. I understand the purpose of the Fourth Amendment.
   1  2  3  4  5  6  7  8  9  10

2. I understand the constitutional principle of due process.
   1  2  3  4  5  6  7  8  9  10

3. I believe that protections from unreasonable search and seizure are important.
   1  2  3  4  5  6  7  8  9  10

4. It is important for the people to give government more power to search because it will keep us safe.
   1  2  3  4  5  6  7  8  9  10

5. If people object to being searched, it’s because they have something to hide.
   1  2  3  4  5  6  7  8  9  10

6. When balancing liberty and security, I think liberty is more important.
   1  2  3  4  5  6  7  8  9  10
Interpreting the Fourth Amendment

“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.”

–FOURTH AMENDMENT

1. What qualifies as “persons”?

__________________________________________________________________________

2. What qualifies as “houses”?

__________________________________________________________________________

3. What qualifies as “papers”?

__________________________________________________________________________

4. What qualifies as an “effect”?

__________________________________________________________________________

5. What words/phrases come to mind for the word “unreasonable”?

__________________________________________________________________________

6. How do you know if you or your property has been “seized”? What characteristics define “seizure”?

__________________________________________________________________________

7. In general, “probable cause” means the facts of a given situation would convince a reasonable person that a crime has been, or is being, committed. What sorts of facts or circumstances might make up probable cause?

__________________________________________________________________________
**Should You Expect Privacy?**

**Directions:** Imagine your friend is being charged with a crime. The police have evidence against her which they found in several different ways. For each example, decide whether you believe the government should be able to use that evidence if they didn't have a warrant when they seized it.

<table>
<thead>
<tr>
<th>ITEM/LOCATION SEARCHED WITHOUT A WARRANT</th>
<th>SHOULD POLICE BE ABLE TO USE THIS EVIDENCE AGAINST HER?</th>
<th>WHY OR WHY NOT?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Evidence from her public school locker.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Websites that she visited on her home computer.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. An email that she sent to a friend.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. Information from her Facebook page, including status updates and pictures with locations and other people tagged.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5. Her movements by car on public streets.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6. The contents of her cell phone.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ITEM/LOCATION SEARCHED WITHOUT A WARRANT</td>
<td>SHOULD POLICE BE ABLE TO USE THIS EVIDENCE AGAINST HER?</td>
<td>WHY OR WHY NOT?</td>
</tr>
<tr>
<td>------------------------------------------</td>
<td>--------------------------------------------------------</td>
<td>-----------------</td>
</tr>
<tr>
<td>7. Things she said on a land-line phone conversation she had at home.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8. Trash from her home placed by her family in a garbage can by the curb.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9. Something in her fenced backyard, not visible from the street.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Explores the unenumerated rights reserved to the people with reference to the Ninth and Fourteenth Amendments and a focus on rights including travel, political affiliation, and privacy. Probes the ways the Ninth and Fourteenth Amendments have been used to claim rights to personal liberty.

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

–NINTH AMENDMENT

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

–FOURTEENTH AMENDMENT, SECTION 1
The Bill of Rights and Liberty

Personal liberties, guaranteed and protected by constitutional provisions, include both freedom from unauthorized physical restraint and the freedom to act. Two key amendments, the Ninth and Fourteenth, are relevant to personal liberty issues. How the Supreme Court interprets the Ninth and Fourteenth Amendments influences its rulings on some very controversial issues.

UNIT OBJECTIVES
Students will:

- Identify personal liberty and privacy rights recognized by the Supreme Court.
- Identify their own expectations of privacy in everyday life.
- Understand why the Founders included the Ninth Amendment in the Bill of Rights.
- Understand enumerated and unenumerated rights.
- Evaluate opinions regarding which behaviors should and should not be recognized as rights.

SYNOPSIS OF LESSONS

Lesson 1: How Does the Constitution Protect Liberty?
Students role-play a Supreme Court case to understand protections for liberty under the Constitution and Bill of Rights.

Lesson 2: What is the Scope of the Bill of Rights?
Students explore Supreme Court cases relating to liberty and privacy, compare and contrast the majority and dissenting opinions, and determine whether the Court ruled correctly.

CONSTITUTIONAL PRINCIPLES
- Individual Responsibility
- Liberty
- Natural Rights

FOUNDERS’ QUOTES
“The Constitution is not an instrument for the government to restrain the people, it is a instrument for the people to restrain the government.”
–PATRICK HENRY

KEY TERMS
Due Process
Right to privacy
Unenumerated rights
How Does the Constitution Protect Personal Liberty?

LESSON OVERVIEW
The Founders listed several rights guaranteed to the people in the first eight amendments of the Bill of Rights. They did not believe that this list was all encompassing, so they included the Ninth Amendment as a way to protect the rights of the people that were not listed in the first eight. What are these rights that they felt worth protecting under the Ninth? Is it appropriate for judges to make the decision about the nature and content of these rights, or should it be up to the people through their elected representatives?

LESSON OBJECTIVES
Students will:
- Identify some enumerated and implied rights.
- Summarize why the Founders included the Ninth Amendment in the Bill of Rights.
- Understand the impact of the Fifth and Fourteenth Amendments on liberty.
- Analyze how an invasion of privacy affects an individual.
- Evaluate liberty cases in the courts.
- Evaluate the balancing of the right of personal liberty with public policy.

CONSTITUTIONAL PRINCIPLES
- Individual Responsibility
- Liberty
- Natural Rights

MATERIALS
- Key Terms
- Handout A: Background Essay—How Does the Constitution Protect Liberty?
- Handout B: Pierce v. Society of Sisters (1925) Brief
- Handout C: Pierce v. Society of Sisters (1925) Unanimous Opinion
- Handout D: Newspaper Story Guideline

RECOMMENDED TIME
70 minute class period.

STANDARDS
- NCHS (5-12): Era III, Standards 1B, 3A, 3B
- CCE (9-12): IIB1, VB1
- NCSS: Strands 2, 4, 5, 6, and 10
- Common Core: RI.8, RI.9
LESSON PLAN

Background/Homework 10 minutes the day before

Have students read Handout A: Background Essay—How Does the Constitution Protect Liberty?, and write a one paragraph response to the question: How do the Constitution and the Bill of Rights protect liberty?

Warm-Up 10-15 minutes

Have students read Handout B: Pierce v. Society of Sisters (1925) Brief and answer the questions that follow.

Activity 20-30 minutes class time, 20 minutes research time

A. Review the Ninth and Fourteenth Amendments. The text of these amendments can be found in the Appendix.

B. Divide students into four groups.
   - Group 1: The Society of Sisters of the Holy Names of Jesus and Mary
   - Group 2: Hill Military Academy
   - Group 3: Representatives for the Governor Pierce, the attorney general, and the county district attorney.
   - Group 4: The Supreme Court

C. Using Handout B and any other research materials available, have students research the case.
   1. Groups 1-3 should research the arguments for their sides.
   2. Group 4 should research the case as a whole and determine which argument makes the most sense.
      a. The students should base their arguments on the Constitution and/or Bill of Rights.
   3. Have Groups 1-3 share their arguments with Group 4.
      a. Group 4 should make their decision based on the arguments and the constitutionality of the law. They should announce their decision to the group.

D. Have students read Handout C: Pierce v. Society of Sisters (1925) Unanimous Opinion.
   1. Have a class discussion about the opinion. Ask these questions:
      a. Did the Courts’ ruling match what Group 4 decided? How was the ruling similar? How was it different?
      b. Do you think the Court’s decision was correct? Why or why not?
**Homework/Extensions**

A. Have students complete **Handout D: Newspaper Story Guideline** in which they will write a newspaper article about the Ninth Amendment.

B. In 1944, President Franklin Roosevelt outlined a “Second Bill of Rights.” Have students compare the rights Roosevelt proposes to the rights listed in the Bill of Rights. How are they similar? How are they different? Have students write a response paper explaining whether they would support adding these rights to the Constitution.

C. Students should design a security policy for their school that protects the public property, students’ safety, and also protects the rights of the population of the school.
   1. What problems do they encounter while writing the policy?
   2. What sacrifices did they make about security or rights in the final policy?
   3. Have them submit their final policies to the school board for consideration.
Preserving the Bill of Rights

How Does the Constitution Protect Liberty?

BACKGROUND ESSAY

Personal liberty is at the heart of freedom. Americans cherish their independence to make choices every day that affect their lives. The diverse and colorful society we enjoy is possible because each of us has personal liberty. Personal liberty is the freedom to act and to do the legal things you want to do: get a certain job, listen to music you enjoy, or travel to places you want to see. In the end, personal liberty is the right to have some control over your own destiny. At the same time, personal liberty must be balanced against the rights of others. For instance, you do not have the personal liberty to blast music in a public library, wear revealing clothing that disturbs the school environment, or drink beer before you reach the legal age.

Do You Have a Right to Force Others to Act?

You have a right to free speech. You do not, however, have the right to make anyone listen to you. The right to speak does not include the right to be heard. Along these same lines, you have the right to write songs and record them. No one can stop you from making your own record. You do not, however, have the right to get a record contract. You don’t have a right to have your album produced and distributed. There is no right to force a record label to do these things for you. This principle demonstrates how personal liberty goes hand in hand with personal responsibility. There are no rights in the Bill of Rights that require others to act on your behalf. There are numerous rights, though, which guarantee persons are free to go after their own dreams and goals. This fulfills the inalienable right to pursue happiness stated in the Declaration of Independence.

What Rights Does the Ninth Amendment Protect?

The Bill of Rights was added to make sure the federal government did not intrude too much into peoples’ lives. But adding the amendments was controversial. It would be impossible to list every right. The Federalists worried that listing some rights might mean that others would be thought of as less important. To guard against this, the Ninth Amendment was included in the Bill of Rights.

The Ninth Amendment acknowledges the people’s unenumerated rights, or rights not listed in the first eight amendments or elsewhere in the Constitution. Of course, this often leaves open as many questions as
it answers. Among the rights listed in the first eight are speech, religion, property and others. What rights does the Ninth Amendment cover? It does not say. Because of its broad scope, the Ninth Amendment is one key to the defense of personal liberty. Another consequence of its broad scope is that many believe that where the Constitution does not specifically recognize a particular right, it should be left to the people and their elected officials to determine whether a right exists. This raises the issue of balancing personal liberty with democracy.

How Do the First Eight Amendments Protect Personal Liberty?

Sometimes the Supreme Court decides that the listed rights imply the existence of a right that is not specifically mentioned. A famous example of this is the right to privacy. The First Amendment guarantees that you can associate with whomever you like. The Third and Fourth Amendments promise that the government cannot intrude into your home arbitrarily and without legal cause. The Fifth Amendment assures that you can keep silent if accused of a crime. The Supreme Court first identified and labeled this right “privacy” in *Griswold v. Connecticut* (1965). The right to privacy is involved in many issues of personal liberty including contraception, abortion, gay rights, and drug testing of students, athletes, and workers.

What Does Due Process Mean?
The Ninth Amendment alone has rarely been expressly used to claim unenumerated rights. The Fifth and Fourteenth Amendments are crucial in protecting personal liberties such as property, contracts, and so forth. The Fifth and Fourteenth Amendments protect the individual’s right to due process. Due process entitles all citizens to fair treatment by the government.
For instance, the government cannot skip part of a trial because that would be unfair. The government cannot take your property away from you without compensating you for your loss. Due process also means that the law itself must be constitutional. Due process rights protect personal liberty in that they check government power.

Lawmakers must write legislation that respects individual rights, and those laws must be enforced fairly. One thing is certain: personal liberties are among the most hotly debated issues today. What kind of government involvement in peoples’ lives is appropriate? The question raises issues that are fundamental to liberty.

### Comprehension Questions

1. How do the rights in the Bill of Rights protect liberty? Why did the Founders enumerate these rights in the Bill of Rights?

2. Why is due process protected in several amendments? What due process rights are protected?

3. Explain why the distinctions addressed in the following passage are important and how they are related to liberty.

   “You have a right to free speech. You do not, however, have the right to make anyone listen to you. The right to speak does not include the right to be heard ... This principle demonstrates how personal liberty goes hand in hand with personal responsibility. There are no rights in the Bill of Rights that require others to act on your behalf.”
Pierce v. Society of Sisters (1925)

Brief

Case Background: In 1922, the state of Oregon passed the Compulsory Education Act that stated that all children between the ages of eight and sixteen must attend public school. The Society of Sisters of the Holy Names of Jesus and Mary, nuns who ran a local Catholic school, and Hill Military Academy, a private school, sued the governor, attorney general, and district attorney. Both groups alleged that the state was infringing upon their Fourteenth Amendment rights. The Sisters alleged the state was infringing upon parents’ right to choose where their children went to school, and the Academy argued that the policy violated right to due process in depriving the school of their property in revenues collected through contracts with parents, employees, and for supplies and equipment.

Comprehension Questions

1. What did the Compulsory Education Act require? Why were parochial and private schools concerned about this law?

2. What other constitutional provisions or amendments could have been brought before the Court in this case? Why do you think these arguments were not made?
The Supreme Court agreed that the Oregon law was unconstitutional in requiring children to attend public schools. The majority opinion stated, “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.” The Court also “declared the right to conduct schools was property, and that parents and guardians, as a part of their liberty, might direct the education of children by selecting reputable teachers and places,” and, “children are not mere creatures of the state.” The Court believed that parents have a right to decide whether their children will be home-schooled or go to a public, private, or parochial school. It is not up to the government to decide.

Do you agree with the Court’s ruling? Explain your answer. What is the significance, if any, of the fact that the ruling in this case was unanimous?

_____________________________________________________________________________
_____________________________________________________________________________
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_____________________________________________________________________________
_____________________________________________________________________________
_____________________________________________________________________________
_____________________________________________________________________________
_____________________________________________________________________________
Newspaper Story Guideline

Directions: You are a reporter for the award-winning newspaper The Daily American. As the Supreme Court hears the case of the Pierce v. Society of Sisters (1925), you have been assigned to write a story about the Fourteenth Amendment because most readers don’t know that much about it. The story should answer the question: “What does the Fourteenth Amendment mean?”

Include:

- An attention-grabbing headline and introduction.
- The reasons that the Fourteenth Amendment was added to the Constitution and how this case changed the scope of the Fourteenth Amendment.
- What rights the Fourteenth Amendment includes.
- The definition of implied and enumerated rights.
- One specific example of the Fourteenth Amendment for personal liberty.
- Possible future uses of the Fourteenth Amendment for society.

Headline

Paragraph 1/Grabber – Reasons the Fourteenth Amendment was added to the Constitution.

Body – Rights included in the Fourteenth Amendment, definitions, and an example.

Conclusion – The Fourteenth Amendment in the future.
What is the Scope of the Bill of Rights?

LESSON OVERVIEW
The Supreme Court has protected many rights not listed explicitly in the Bill of Rights, such as the freedom to travel without restriction, although it has not used the Ninth Amendment to do so very often. Other activities have not been protected, such as assisted suicide. How do the courts and citizens know which rights are protected by the Constitution and which are not? Who should make the decision?

LESSON OBJECTIVES
Students will:
- Identify rights people have claimed under the Ninth Amendment.
- Understand the ways the Supreme Court has applied the Ninth Amendment to privacy cases.
- Analyze various perspectives of personal liberty issues.
- Evaluate whether the Ninth and Fourteenth Amendments apply to personal liberty cases.

CONSTITUTIONAL PRINCIPLES
- Individual Responsibility
- Liberty
- Natural Rights

MATERIALS
- Handout A: Background Essay—What Is the Scope of the Bill of Rights?
- Handout B: Supreme Court Personal Liberty Decisions

RECOMMENDED TIME
50 minute class period.

STANDARDS
- NCHS (5-12): Era III, Standards 1B, 3A, 3B
- CCE (9-12): VB1, VB5
- NCSS: Strands 2, 4, 6, and 10
- Common Core (9-12): RI.8, RI.9
Background/Homework 10 minutes the day before

Have students read Handout A: Background Essay - What Is the Scope of the Bill of Rights?

Warm-Up 10-15 minutes

A. Display the following quote:

“We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty, and the pursuit of Happiness…”

Discuss how the Declaration of Independence explained the Founders’ view that everyone has the right to life, liberty, and the pursuit of happiness.

B. Display the first clause of the Fourteenth Amendment:

“…nor shall any state deprive any person of life, liberty, or property, without due process of law.”

Point out that this language echoes the Fifth Amendment’s due process clause.

C. Discuss: What are some examples of unlisted rights? Write the students’ answers on the board. Ask students to come to the board and circle any that were mentioned in Handout A. (For example, choosing your spouse, terminating pregnancy, driving, taking medicines, etc.)

Activity 20-30 minutes

Divide students into pairs and have them complete Handout B: Supreme Court Personal Liberty Decisions.

1. Students should refer to Handout A to complete the issue and court opinion sections.

2. Explain to students that the majority opinion represents how the justices ruled, while the justices who did not vote with the majority write the dissenting opinions.

3. Go over Handout B: Supreme Court Personal Liberty Decisions columns A and B as a group. For each case, ask the students to summarize the Court’s opinion and dissent in their own words and complete columns C and E.

4. After clarifying any of the Supreme Court opinions or dissents, have students complete column F individually, filling in their own opinion regarding the case.
What Is the Scope of the Bill of Rights?

BACKGROUND ESSAY

The Bill of Rights lists the rights guaranteed to American citizens, but what about the rights not listed? What if the rights of one person infringe upon the rights of another? The Ninth Amendment states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” The Founders believed that the Ninth Amendment was important to ensure that citizens’ rights were not limited to the rights listed in the Constitution or Bill of Rights.

What Is the Ninth Amendment’s Purpose?

The Ninth Amendment ensures that the rights actually listed in the Bill of Rights are not assumed to be more important than rights not listed. The Ninth Amendment does not list any specific rights, but it raises many possibilities. It has been read to protect all natural rights not specifically listed in the First through Eighth Amendments.

There are questions as to whether some personal liberty rights are truly natural rights. Further, many ask who should be the ones to decide whether a right exists. If the Constitution does not specifically list a right, should judges be the ones to say if it exists or not? Or, particularly with respect to moral issues, should it be up to the people and their elected representatives? There is no right to drive a car listed in the Bill of Rights. Some people claim, though, that the Ninth Amendment protects citizens’ right to drive. The Supreme Court has been hesitant to use Ninth Amendment claims alone when deciding cases. They have looked for other support of rights in the Bill of Rights and Constitution.

Is There a Right to Privacy?

People often talk about a right to privacy. This is not among the rights explicitly mentioned in the Bill of Rights or elsewhere in the Constitution. But most people feel that privacy and the right to make personal choices are part of being free. The Supreme Court has indeed found some kinds of privacy to be a right that the Ninth Amendment protects.

Modern “privacy” constitutional law began in 1965. The Supreme Court cited the Ninth Amendment when it struck down a state law banning the use of birth control. The ban applied to married couples as well as singles. In *Griswold v. Connecticut* (1965), the Court determined that the Ninth Amendment protects privacy within marriage. The Court said, “We deal with
a right of privacy older than the Bill of Rights...To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments...is to ignore the Ninth Amendment and to give it no effect whatsoever.”

Like most cases about the Ninth Amendment, the Court found further constitutional basis for its decision. In *Griswold*, the Court cited the First, Third, Fourth, and Fifth Amendments as creating a “zone of privacy.”

**What Are Reproductive Rights?**

The Supreme Court built on *Griswold* and the zone of privacy. It used the Ninth and Fourteenth Amendments in the reasoning of *Roe v. Wade* (1973). It reaffirmed a right to privacy when it recognized a woman’s right to an abortion. “This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”

Some argue that the Court decided *Roe v. Wade* incorrectly. They maintain that the Constitution is silent on the issue of abortion. They believe therefore it is up to state legislatures to decide the matter. Others believe life begins at conception and therefore the embryo or fetus has inalienable rights. They argue that a woman’s privacy rights need to be balanced against the right to life of the embryo, fetus, or unborn child.

**Do You Have a Right to Die? To Take Drugs?**

Other issues alleging personal liberty continue to be debated. As was the case in *Griswold* and *Roe*, many personal liberty cases hinge on privacy. For that reason, they are often about actions that are personal and intimate. For example, the Court said states could outlaw homosexual activity in *Bowers v. Hardwick* (1986), but reversed this decision in *Lawrence v. Texas* (2003). In *United States v. Windsor* (2013) case, the Court determined that the Defense of the Marriage Act
was unconstitutional. The decision asserted that the federal government must recognize same-sex marriages and same-sex spouses equally.

Few things are as personal as death. Should terminally ill people be able to ask their doctor to help them die? The Court has rejected a doctor’s argument that a person had a constitutional right to physician-assisted suicide. States could allow assisted suicide, the Court said, but the Constitution granted no such right.

Some people demand that they have a right to take whatever medicine they wish, even ones that have not yet been approved by the United States Food and Drug Administration. Opponents argue that the federal government has a duty to make sure all of the country’s medicine is safe and effective.

The debate surrounding Ninth Amendment issues continues today. How should the Court decide whether certain individual rights exist? Should natural law, the Founders’ intent, or the Constitution guide the Supreme Court? Or should these issues be left to local communities and legislatures?

James Madison said, “In Republics, the great danger is, that the majority may not sufficiently respect the rights of the minority.” The questions raised by the Ninth Amendment—what these rights truly are—are some that will continue to challenge Americans.

Comprehension Questions

1. What is the purpose of the Ninth Amendment in protecting the rest of the rights listed in the Bill of Rights?
2. According to the Supreme Court, how does the Ninth Amendment protect privacy?
3. How did the Court rule in Bowers v. Hardwick (1986), Lawrence v. Texas (2003), United States v. Windsor (2013)? How has the interpretation of the Ninth Amendment changed over time?
<table>
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<tr>
<th>CASE</th>
<th>A. ISSUE</th>
<th>B. EXCERPT FROM COURT’S OPINION (SEE ESSAY)</th>
<th>C. SUMMARY OF COURT’S OPINION IN YOUR OWN WORDS</th>
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<td><strong>GRISWOLD V. CONNECTICUT (1965)</strong></td>
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<td><strong>ROE V. WADE (1973)</strong></td>
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<td><strong>BOWERS V. HARDWICK (1986)</strong></td>
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<td>“[The] respondent would have us announce, [that there is] a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.”</td>
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<td>LAWRENCE V. TEXAS (2003)</td>
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<td>“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. Bowers v. Hardwick was not correct when it was decided, and it is not correct today…”</td>
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<td>UNITED STATES V. WINDSOR (2013)</td>
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<td>“DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects.”</td>
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<td>D. EXCERPT FROM DISSENTING (MINORITY) OPINION</td>
<td>E. SUMMARY OF DISSENTING OPINION IN YOUR OWN WORDS</td>
<td>F. DO YOU AGREE WITH THE SUPREME COURT’S DECISION? EXPLAIN.</td>
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<td>“…The Court talks about constitutional ‘right of privacy’ as though there is some constitutional provision… forbidding any law ever to be passed which might abridge the ‘privacy’ of individuals. But there is not.”</td>
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<td>“The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”</td>
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<td>“…The mere knowledge that others… do not adhere to one’s value system cannot be… an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.”</td>
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<td>“The Texas [law] ... imposes constraints on liberty. So do laws prohibiting prostitution ... heroin, and ... working more than 60 hours per week ... But there is no right to 'liberty' under the Due Process Clause. States [may] deprive their citizens of 'liberty,' so long as 'due process of law' is provided.”</td>
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The Bill of Rights and FEDERALISM

Explores the powers reserved to the states as provided by the Tenth Amendment. Explains the Founders’ understanding of a federalist system and the expansion and contraction of federal government power.

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.

—TENTH AMENDMENT

The Congress shall have the power …To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

—COMMERCE CLAUSE, UNITED STATES CONSTITUTION ARTICLE I, SECTION 8, CLAUSE 3

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

—ELASTIC CLAUSE, UNITED STATES CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 18
Before and since the states ratified the Constitution, people debated what powers the Constitution gives the federal government. The relationship between the states and the federal government, and the relation of the people to both of these entities, stood as the central issues of the Constitutional Convention. In the new system of government, the Founders envisioned a strong, but limited, federal government, though the states maintained most of their powers. This power-sharing—or federal—system divides the powers and functions of government between the states and the federal government.

UNIT OBJECTIVES

Students will:

- Recognize how the Supreme Court has found government action constitutional or unconstitutional based on the Commerce Clause.
- Understand the purposes of a federal system.
- Understand criticisms of a strong central government, as well as objections to state sovereignty.
- Understand the Federalist and Anti-Federalist visions of the proper relationship between state and federal power.

SYNOPSIS OF LESSONS

Lesson 1: What is a Federal Republic?

Students explore different options available to the Founders in the organization of the government.

Lesson 2: What is the Commerce Clause?

Students analyze the Founders’ intentions in giving Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes,” and understand the ways power granted to Congress in the Commerce Clause has been interpreted by the Supreme Court through American history.

CONSTITUTIONAL PRINCIPLES

- Federalism
- Limited government
- Natural rights

FOUNDERS’ QUOTES

“The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. ...The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.”

– JAMES MADISON

KEY TERMS

- Commerce
- Commerce Clause
- Jim Crow laws
- Ratify
- Rights
- Segregation
What is a Federal Republic?

LESSON OBJECTIVES
Students will:

- Identify powers belonging to the national government, state government, and shared by both.
- Understand Article I, Section 8 of the Constitution and the Tenth Amendment.
- Understand Federalist and Anti-Federalist views of the power-sharing relationship between the national government and the states.
- Analyze current events in the context of federalism.
- Evaluate issues and determine if they would be best dealt with at the national level, state level, or neither.

CONSTITUTIONAL PRINCIPLES
- Federalism
- Limited government
- Natural rights

LESSON OVERVIEW
The constitutional principle of federalism holds that the people delegate certain powers to the national government in the Constitution. All those powers not delegated to the national government remain with the states and the people. For the Founders, the principle of federalism was a means of protecting liberty by limiting and dividing government power. After the failure of the Articles of Confederation, many people realized the need for a stronger central government. The delegates to the Constitutional Convention were tasked with the difficult duty of crafting a government that appropriately distributed the power between the national government and states.

MATERIALS
- Highlighter Pens in Blue, Yellow, and Green
- Key Terms
- Handout A: Background Essay—What Is a Federal Republic?
- Handout B: Patrick Henry at the Virginia Ratifying Convention
- Handout C: James Madison and Federalism - Excerpts from Federalist No. 39
- Handout D: Federalism Venn Diagram
- Handout E: Article I, Sections 8, 9, 10 of the Constitution and the Tenth Amendment
- Handout F: State Power—Criticisms and Responses

RECOMMENDED TIME
Two 50-minute class periods.

STANDARDS
- NCHS (9-12): Era III, Standards 2A, 3B, and 3C
- CCE (9-12): IB1, IIA1, IID3, IIIA1, IIIA2, IIIB1, IIIC1, IIIC3
- NCSS: Strands 6 and 10
- Common Core: RI.4, RI.8, RI.9, RH.4, RH.5, SL.1
LESSON PLAN

Background/Homework 20 minutes the day before

On the day prior to the lesson, have students read Handout A: Background Essay—What Is a Federal Republic? Instruct students to answer the questions at the end of the essay.

Warm-Up 20 - 30 minutes

A. As students enter, hand one student a copy of the Patrick Henry quotation on Handout B: Patrick Henry at the Virginia Ratifying Convention. Once class has started, ask that student to stand up and read the quotation aloud. Lead the class in a discussion about Henry’s concerns.

B. Divide students into small groups and distribute Handout C: James Madison and Federalism: Excerpts from Federalist No. 39. After students have completed it, lead the class in a discussion of the questions. See the answer key for suggested responses.

Activity 45-60 minutes

A. Have students complete Handout D: Federalism Venn Diagram individually.

B. Divide students into groups of four and have them read Handout E: Article I, Sections 8, 9, 10 of the Constitution and the Tenth Amendment.

C. While in groups, students should identify any similarities or differences between what they wrote on Handout D and the powers listed in the Constitution on Handout E.

D. Have students continue to work in their groups using Handout E to identify additional ways in which the people’s rights are protected by limits on the powers of Congress.

E. As a class, briefly discuss their results and observations about the similarities and differences between their Venn diagrams and the Constitution.
   ▪ How did the Founders view the size of the federal government and its relationship with the state governments?
   ▪ How did the Founders dictate limits on government power to protect the rights of the people?

Wrap-Up 10 minutes

A. As a large group, ask students to share their responses to the final critical thinking question from Handout A: To what extent should the national government make laws concerning the controversial topics listed below? Use the Constitution to frame your response:
   ▪ Health insurance ▪ Marriage and family law ▪ Assisted suicide
   ▪ Education standards ▪ Medical marijuana
B. Bring the conversation back to Patrick Henry’s concern at the Virginia Ratifying convention. Taking the history of the United States and these current issues into account, has the principle of federalism endured? Was Patrick Henry right? Explain.

**Homework/Extensions**

A. Using the local newspaper, television coverage, or an online news source, have students identify a current federalism issue and write an abstract for one of the reports they find. The abstract should address the “reporter questions”: who, what, why, when, where, results, and analysis. In the “analysis” section, have students explain why the issue is an example of federalism, and how they think it should be resolved.

B. Have students identify a portion(s) of Article I, Sections 8, 9, and the Tenth Amendment that they would like to revise to clearly specify the duties of Congress, powers denied to Congress, and/or the powers of the states. After revising the relevant portions, answer the following questions:
   - Why did you make the changes?
   - How would the proposed changes affect the country today?
   - How do your revisions reflect the principles of federalism and limited government?

C. Have students research current issues of federalism such as same-sex marriage, health care, or national standards in education. Are these issues best left to individual states, or should the national government be involved? Ask students to take a position on whether the federal government or state governments would best handle their topic and to prepare to defend the chosen position in a debate.

D. Have students complete **Handout F: State Power—Criticisms and Responses** as a bridge between this lesson and lesson two of this unit.
The Founders were always wary of government power. They wrote the Constitution to make a strong government, but to limit its authority. One way they did this was to create a federal republic. The national government was given specific powers, and others remained with the states or the people. These two separate powers – the national government and state governments – could co-exist because the national government was given only those powers specified in the Constitution. Among these were the powers to regulate commerce between states, to coin money, to raise armies, and to collect taxes. This type of political system is defined as federalism. The states have their laws, but they are also subject to the laws of the federal government. This separation gives the states greater autonomy to create laws based on the will of their citizenry.

Another way the principle of federalism was applied in the Constitution was in the structure of the U.S. Congress. The people would be represented in the House of Representatives. States would be equally represented in the Senate, with each state legislature selecting two Senators. In this manner, both the states and the people would have a say in federal laws.

The Federalist/Anti-Federalist Debate

The two major political groups at the time of the Founding were the Federalists and the Anti-Federalists. They disagreed about the new distribution of power. Many Anti-Federalists had been happy with the Articles of Confederation and feared that the new central government created by the Constitution would take over the states. They believed that the states should retain more power, and they argued that the new Constitution should not be ratified. They were especially alarmed by vague phrases in the listing of Congress’s powers, such as “necessary and proper,” and “general welfare.” They worried these words might be interpreted as broad grants of power to allow the federal government to interfere with the powers of the states and the liberties of the people. They also believed the people needed a bill of rights to protect themselves from the national government.

Federalists favored the Constitution as written. They supported a strong but constrained central government and weaker state governments. They believed that state powers and individuals’ rights were secure under the Constitution because the central
government’s role was limited by the list of enumerated powers (Article I, Section 8), as well as by the list of denied powers (Article I, Section 9). The Constitution did not list powers of states because it was assumed the states kept all the powers given to them by their state constitutions except those given to the federal government and those powers denied to states in Article I, Section 10.

The Tenth Amendment

The Federalists eventually won the debate when the Constitution was ratified (approved) in 1789 by the required number of states, but calls for a bill of rights continued. In fact, eight states submitted lists of proposed amendments along with their ratifications. The one amendment proposed by all was the principle now contained in the Tenth Amendment.

The Tenth Amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” The Founders included the Tenth Amendment to support the constitutionally-limited nature of the federal government. It highlights the fact that the states and the people keep all powers not given by the Constitution to the federal government. If a power is not given to the federal government, it remains with the states or the people.

Changes to Our Federal System

The Seventeenth Amendment further changed the balance of federalism when it was added to the Constitution in 1913. The Seventeenth Amendment provided for the direct election of Senators to U.S. Congress by the people of each state. State governments would no longer be represented in one house of Congress. Supporters of this change believed it resulted in a more democratic society. Critics argued that the change resulted in more federal laws that infringed on the powers of states or that carried mandates with no funding attached.

The Fourteenth Amendment, ratified after the Civil War in 1868, dramatically altered the federal republic created by the Founders. By limiting the types of laws states could pass, the amendment struck a blow to state sovereignty. About sixty years after it was passed, the Supreme Court began using the Fourteenth Amendment to apply Bill of Rights limits to the states. Until the 1920s, the Bill of Rights only applied to the federal government. This expansion of the Fourteenth Amendment became the cornerstone for equal protection under federal law for all individuals in the states, too.

Legislation also altered the balance of power between the national government and the states. After the Civil War, a majority of states enacted Jim Crow laws requiring racial
segregation. By September 1949, only fifteen U.S. states had no segregation laws. The U.S. armed forces and much of the federal government were also segregated. In response to state segregation laws, many argued for increased federal power. They pointed to the legal inequality and violation of natural rights caused by such laws. They claimed a strong federal government could correct such wrongs. They made the case that states often commit wrongful acts, and that the federal government is an important force to correct these wrongs. Others disagreed, pointing out that the federal government did nothing to protect citizens’ rights over decades of segregation. The 1954 Supreme Court case Brown v. Board of Education marked the beginning of the Civil Rights Movement toward equal treatment in public life and the end of the Jim Crow period. Later federal legislation intended to correct civil rights violations by states included the Civil Rights Act (1964) and the Voting Rights Act (1965). These laws and the enforcement of them came almost a century after the passage of the Fourteenth Amendment.

The Debate over Federalism

Debates over federalism often turn to other topics. Critics of federalism argue that a strong national government is needed to address unequal treatment by states. A patchwork of laws across the country makes it difficult for individuals and families who travel or move. Supporters of federalism argue that state power allows the states to make policies that meet the needs of their citizens, or to adopt successful policies from other states. What is acceptable for the people in some states—casinos and gambling, for example—may not be welcome in others. Finally, some supporters of federalism ask: why would the people elected to federal offices do any better at protecting rights than people in states offices would? The answer to these questions, they say, is not to trust certain leaders more than others, but to hold all officials accountable to the requirements set by the Constitution.

The Founders believed, like many political philosophers, that the desire for power was a natural human tendency. This power could be used to do bad things as easily as it could be used to do good things. The American federal system was designed to prevent abuses of power and protect freedom. Neither a very strong federal system nor complete state independence has been shown to be perfect. Finding the right balance of power has been vital to liberty—as well as controversial—throughout our history.
Comprehension Questions

1. What is the principle of federalism?

2. What does the Tenth Amendment state?

3. How did the Fourteenth and Seventeenth Amendments alter the system of federalism originally established in the Constitution?

4. To what extent should the national government make laws concerning the controversial topics listed below? Use the following sources to frame your response: Article I, Section 8; Article I, Section 9, Article IV; Article VI, the Tenth Amendment, the Fourteenth Amendment.

   a. Health insurance
   b. Education standards
   c. Marriage and family law
   d. Medical marijuana
   e. Assisted suicide
“And here I would make this inquiry of those worthy characters who composed a part of the late federal Convention. I am sure they were fully impressed with the necessity of forming a great consolidated government, instead of a confederation. That this is a consolidated government is demonstrably clear; and the danger of such a government is, to my mind, very striking. I have the highest veneration for those gentlemen; but, sir, give me leave to demand, What right had they to say, We, the people? My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, Who authorized them to speak the language of, We, the people, instead of, We, the states? States are the characteristics and the soul of a confederation. If the states be not the agents of this compact, it must be one great, consolidated, national government, of the people of all the states!”

–PATRICK HENRY, VIRGINIA RATIFYING CONVENTION, JUNE 4, 1788
James Madison and Federalism: Excerpts from Federalist No. 39

Directions: Using three highlighter pens, read the following passages from Federalist No. 39 and discuss the questions below. Numbers in brackets show paragraph numbers from the complete essay, and all italics are Madison’s. Note vocabulary tips (for underlined terms) at the end.

- Where Madison uses the term, “national,” think “We the People,” and highlight those aspects blue.
- Where he uses the term “federal,” think, “We the States,” and highlight those aspects yellow.
- Where he says we have both federal and national influences, highlight in green.

1. RATIFICATION OF THE CONSTITUTION [10]
   “[R]atification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. …The act, therefore, establishing the constitution, will not be a national, but a federal act.”

2. THE HOUSE OF REPRESENTATIVES [12]
   “[The House of Representatives] will derive its powers from the people of America; and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular state. So far the government is national, not federal.”

3. THE SENATE [12]
   “[The Senate] will derive its powers from the states, as political and co-equal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is federal, not national.”

4. GOVERNMENT POWER [14]
   “The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government…[T]he proposed government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects...”
5. AMENDING THE CONSTITUTION [15]

“[O]n the authority by which amendments are to be made, we find it neither wholly national nor wholly federal. Were it wholly national, the supreme and ultimate authority would reside in the majority of the people of the Union…Were it wholly federal on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all…In requiring more than a majority, and particularly in computing the proportion by States, not by citizens, it departs from the national and advances towards the federal character; in rendering the concurrence of less than the whole number of States sufficient, it loses again the federal and partakes of the national character…”

6. SUMMARY [16]

“The proposed Constitution … [is] neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.”

Comprehension Questions:

1. According to Madison, did the Constitution provide for a nation of people or a nation of states—or both? Explain.

2. To what extent was Alexander Hamilton on target in this statement: "This balance between the National and State governments ought to be dwelt on with peculiar attention, as it is of the utmost importance. It forms a double security to the people. …Indeed, they will both be prevented from overpassing their constitutional limits by a certain rivalship, which will ever subsist between them." (1788)

VOCABULARY

Ratification: official approval
Derive: to receive from a specific source
Indefinite: difficult to determine
Supremacy: having the highest authority or power
Enumerated: listed
Residuary: remaining
Inviolable: sacred; permanent
Sovereignty: independence
Reside: originate in
Concurrence: agreement
Alteration: change; amendment
Federalism Venn Diagram

Directions: Use the spaces below to show what powers you think should belong to each level of government.

Federal Government Powers
1. 
2. 
3. 

Shared Powers
1. 
2. 
3. 

State Government Powers
1. 
2. 
3.
Directions: Work with your group to complete the following.

1. Write your own title for each section or amendment.

2. Compare the ways you divided power between state and federal levels with the system the Founders provided in the Constitution.

3. What reasoning can you see behind the way the Founders divided power? Why were certain powers given to the federal government, but not others? Why were the powers not delegated to the federal government reserved to the states and the people?

4. Identify and underline ways in which the people’s rights are protected by limits on the powers of Congress. Be prepared to explain the significance of each point that you identify.

ARTICLE I, SECTION 8

Your title: ____________________________________________

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 a 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;

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, dockyards, 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.

ARTICLE I, 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 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.

ARTICLE I, SECTION 10

Your title: ____________________________________________

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything 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.

TENTH AMENDMENT

Your title: ____________________________________________

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.
State Power – Criticisms and Responses

Directions: Read the essay and be ready to discuss the questions that follow.

One major criticism of strong state power comes from the legacy of slavery. After the Civil War and Reconstruction enslaved people had been freed, but they were not equal under the law. A majority of states enacted Jim Crow laws (after a black character in popular variety shows of the time). These laws outlawed interracial marriage, and they legalized segregation and unequal treatment based on race. By 1914, every Southern state and many Northern ones had passed laws that preserved two separate societies: one for whites, and one for blacks and “non-whites.” Blacks could not use white facilities like restrooms, restaurants, or parks, or even be buried in the same cemeteries as whites. In the case of Plessy v. Ferguson (1896), the Supreme Court upheld separate but equal accommodations. By September 1949, only fifteen U.S. states had no segregation laws.

The National Association for the Advancement of Colored People (NAACP) launched a strategy of challenging these laws in court. The cases eventually made their way to the Supreme Court. The first major legal blow to Jim Crow laws came with the landmark 1954 decision of Brown v. Board of Education. In this case, the Supreme Court found that segregation violated the equal protection clause of the Fourteenth Amendment. This eventually meant that the states would have to follow the directions of the federal government and integrate their schools. The 1954 Brown case marked the beginning of the Civil Rights Movement toward equal treatment in public life and the end of the states’ use of federalism to make Jim Crow laws. Later federal legislation, intended to overcome the use of federalism to violate civil rights by states, included the Civil Rights Act (1964) and the Voting Rights Act (1965). These laws and the enforcement of them came almost a century after the passage of the Fourteenth Amendment.
Responses to Jim Crow

In response to Jim Crow laws, many argued for increased federal power. They pointed to the legal inequality and violation of natural rights caused by such laws, and that a strong federal government could correct such wrongs. They made the case that states often commit wrongful acts, and that the federal government is an important force to correct these wrongs.

Others disagreed, pointing out that national governments have no better record of protecting rights than states do. The federal government did not effectively protect citizens’ rights during centuries of slavery and segregation. If more power were given to the federal government in the name of protecting rights, what would happen if officials then used that greater power to do bad things that affected the whole nation?

Critical Thinking Questions

1. How does the legacy of slavery relate to the principle of federalism?
2. What are some arguments for and against increased federal power in response to state violations of rights?
3. Which arguments are most persuasive?
What is the Commerce Clause?

LESSON OVERVIEW
The battle between the power of the federal government and state governments has been an ongoing struggle during the course of our nation’s history. Congress’s power to regulate interstate commerce, granted in the Commerce Clause, is often invoked as justification for laws regulating a wide variety of economic activities. How much power does the Commerce Clause allow the federal government to have over the states? This question has been addressed by the Supreme Court, but with varying results. With a couple of notable exceptions, the Court’s decisions after the New Deal resulted in expansion of the federal government’s power under the Commerce Clause.

LESSON OBJECTIVES
Students will:

- Analyze the Founders’ intentions in giving Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”
- Understand the ways power granted to Congress in the Commerce Clause has been interpreted by the Supreme Court through American history.
- Evaluate arguments for and against federalism as a principle.
- Determine whether federalism helps or harms freedom.

CONSTITUTIONAL PRINCIPLES
- Federalism
- Limited government
- Natural rights

MATERIALS
- Handout A: Background Essay—How Has the Supreme Court Interpreted the Commerce Clause?
- Handout B: Federalism: For or Against?
- Handout C: Commerce Clause Timeline

RECOMMENDED TIME
One 50-minute class period.

STANDARDS
- NCHS (9-12): Era III, Standards 2A, 3B, and 3C
- CCE (9-12): IB1, IIA1, IID3, IIIA1, IIIA2, IIB1, IIC1, IIC3
- NCSS: Strands 6 and 10
- Common Core: RI.4, RI.8, RI.9, RH.4, RH.5, SL.1
LESSON PLAN

Background/Homework

10 minutes the day before

On the day prior to class, have students read Handout A: Background Essay—How Has the Supreme Court Interpreted the Commerce Clause?

Warm-Up

10 - 15 minutes

Begin discussion of federalism by talking about a “real life” news story highlighting the topic. Visit the Teaching with Current Events pages of the Bill of Rights Institute website. Have a few student volunteers share articles with the class.

Activity

20 - 25 minutes

Divide students into groups of three or four and have them complete Handout B: Federalism: For or Against?

Wrap-Up

10 - 15 minutes

A. Go over the chart and clarify any questions students have.

B. Go over the chart and clarify any questions students have.
   - What arguments of their own did students write in the chart?
   - Which arguments are most convincing?
   - Recalling their analysis of Federalist No. 39 (lesson one), how did the Founders believe the national government would have interpreted the Commerce Clause?
   - What trade-offs are involved in giving the federal government increased power over states and individuals?
Homework/Extensions

A. Have students complete **Handout C: Commerce Clause Timeline**.

B. Have students find additional examples of Commerce Clause rulings and add them to a larger version of the graph in **Handout C**. Using this background knowledge and observation of current events, predict what direction Commerce Clause rulings are likely to take in the near future. What kinds of variables are likely to affect these rulings? How do these issues reflect the issues of federalism and limited government?

C. The Fourteenth Amendment in 1868, as well as the Sixteenth and Seventeenth Amendments in the early twentieth century, dramatically changed the structure of our federal republic. State powers were diminished, and greater power shifted to the national government. Have students complete the readings and activities in the Incorporation unit of this book to learn more about this topic.
How Has the Supreme Court Interpreted the Commerce Clause?

BACKGROUND ESSAY

When the Founders drafted a new Constitution in Philadelphia in 1787, they set out to address the economic problems of the 1780s by creating a national government that would have the authority to impose taxes, regulate foreign trade and, most importantly, create a common commercial policy among the various state governments. In the Federalist Papers, James Madison and Alexander Hamilton argued forcefully that the federal government needed these expanded powers in order to create a large free trading area within the continental United States and to regulate conflicting state economic interests for the common good. They also argued for a strong commercial policy to open up markets for foreign trade.

The reach of the Commerce Clause, found in Article I, Section 8 of the Constitution, is an important focus of debate about federal power. It states, “Congress shall have the power... to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.” The first Supreme Court case on this part of the Constitution was Gibbons v. Ogden in 1824. The Court held that the Commerce Clause granted Congress “the power to regulate; that is, to prescribe the rule by which commerce is to be governed.” That power extended to interstate commerce: “Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one.”

One of the first twentieth century cases to deal with the Commerce Clause was Hammer v. Dagenhart (1918). The Court ruled that the federal government could not outlaw child labor in manufacturing activities where the process took place in one state and did not cross state lines. The Justices might have agreed that it was a worthy goal to protect young children from long work hours. However, the Court did not agree that the federal government had the power to legislate on this issue. The Court found that the Tenth Amendment left this power to the states and that Congress could not make rules related to the production of goods where interstate commerce was not involved.

The New Deal

Midway through the twentieth century, Congress started using the Commerce Clause as the grounds for the enactment of many new types of laws to regulate not merely commerce, but the conditions of economic and social life. The Commerce Clause
has been a significant basis for the expansion of federal power. The Supreme Court changed its way of thinking in the 1930s under great political stress. President Franklin Delano Roosevelt proposed, and Congress passed, many new programs called the “New Deal.” One program was Social Security, which gave pensions and aid to the disabled and elderly through taxes paid by younger citizens. Other programs regulated the stock market. At first, the Supreme Court ruled in several cases that Congress had no authority to enact such laws. In 1937, President Roosevelt spoke out against the Supreme Court for its actions on the New Deal legislation. He wanted to be able to add one new justice for every current justice over the age of 70. Most experts now view his idea as a political plan to help his legislation. Some of the political conflict eased when one justice began voting to support the New Deal. Another justice retired and was replaced by a supporter of the New Deal programs.

The new majority found the increased federal power of New Deal legislation constitutional. The Supreme Court was going in a new direction. Congress was now able to create laws regulating, banning, and supporting a wide range of activities, and it did. Laws would be upheld as long as the Court was convinced that the regulated activities had a close and substantial relation to interstate commerce. Federal power expanded dramatically for over fifty years.

Lopez, Morrison, and Raich

After 59 years of upholding legislation, in 1995 the Court ruled that Congress had gone too far under the Commerce Clause. In United States v. Lopez (1995), the Court struck down a federal law that created gun-free school zones. Congress had argued that because schools prepared people for the business world, there was a connection between schools and interstate commerce. Therefore, Congress argued, it could regulate guns in school. However, the Court ruled that the law dealt only with possession of arms and not interstate commerce. The Court appeared to be continuing in this direction when it overturned parts of the Violence Against Women Act in the 2000 case of U.S. v. Morrison. The Court held that the Commerce Clause did not give Congress the power to allow rape victims to sue their attackers in federal court for money damages. In Gonzalez v. Raich (2005), however, the Court did not continue this trend. It ruled Congress could ban marijuana throughout the nation even when an individual state had laws allowing individuals to grow their own marijuana for medicinal purposes. The Court reasoned that the policy within that single state would affect supply and demand, and therefore Congress’s ban was sufficiently related to interstate commerce.
The Affordable Care Act

In *NFIB v. Sebelius* (2012), the Supreme Court upheld most of the 2010 Affordable Care Act (ACA). The case involved a lawsuit by 26 state governments and multiple private plaintiffs, including the National Federation of Independent Business—the nation’s largest small business organization. They challenged the constitutionality of two key parts of the ACA: the individual health insurance mandate, which requires most Americans to purchase government-approved health insurance by 2014, and a provision forcing state governments to greatly expand the Medicaid health care program for the poor, or risk losing all their existing Medicaid funds.

The federal government claimed that the individual mandate was authorized by the Commerce Clause, the Necessary and Proper Clause, and the Tax Clause – which gives Congress the power to impose taxes. In a 5-4 decision, the Supreme Court rejected the first two arguments, but upheld the mandate on the third. In other words, the Court ruled that the Commerce Clause did not give Congress the power to force Americans to buy health insurance. But the mandate was a constitutional by virtue of its taxing power. Though the text of the ACA refers to a “penalty” and not a “tax,” Chief Justice Roberts reasoned that it was not a real penalty because it was “not a legal command to buy insurance.” It was merely a requirement that violators pay a fine. He also argued that the Court had a duty to construe the law as a tax, if such an interpretation were at all plausible, so as to give Congress the benefit of the doubt and avoid ruling that one of its laws was unconstitutional.

Comprehension Questions:

1. What was the purpose of the Commerce Clause?
2. Why is *Gibbons v. Ogden* (1824) an important federalism case?
3. Describe the shift that began around the time of the New Deal in the Supreme Court’s interpretation of the Commerce Clause.
4. Do you think the Founders thought the Commerce Clause would be used to expand the power of the federal government? Why or why not?
5. What trade-offs are involved in giving the federal government increased power over states and individuals?
Federalism is the principle that divides the powers and functions of government between the national government and the states, designating certain powers that belong at the national level and reserving all other powers to the state governments.

Directions: Read the following arguments. Then classify them by putting them in the correct column. Finally, fill in the chart with at least one additional argument of your own on each side.

1. Throughout U.S. history, states have a long history of violating the rights of their citizens.

2. Throughout world history, national governments have a long history of violating the rights of their citizens.

3. State governments are closer to the people and can enact laws that allow the people there to govern themselves.

4. A patchwork of laws makes it difficult for people who move from state to state.

5. The division of power in the Constitution enables the national government to perform necessary functions while leaving the several states free to control their own affairs.

6. If some states have education policies that promote better outcomes, it leaves people in other states with a disadvantage.

7. Individuals are free to move to states where laws better reflect their preferences.

8. After the Civil War, every Southern state, as well as many in the North, enacted Jim Crow laws.

9. The federal government did very little to stop every Southern state, as well as many in the North, from enacting Jim Crow laws.
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Directions: Place a dot and the corresponding number for each of the events listed in the boxes below in the correct position on the graph. Then draw a line to connect the dots to indicate the historical trend with respect to the power of the national government based on the Commerce Clause rulings.

1. *Hammer v. Dagenhart*, 1918
2. Early New Deal Legislation
3. New Deal Legislation after 1937
4. Post-New Deal Legislation regulating a wide range of activities
7. *Gonzalez v. Raich*, 2005
The Bill of Rights and INCORPORATION

Explores incorporation of the Bill of Rights against the states as provided for in the Fourteenth Amendment. Highlights the controversies about incorporation as well as significant incorporation cases.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States 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.

–FOURTEENTH AMENDMENT, SECTION 1
The Bill of Rights and INCORPORATION

Incorporation—the application of parts of the Bill of Rights to the states through the Fourteenth Amendment—is a complex legal and constitutional issue. Incorporation deals with two significant questions: Does the Constitution/Fourteenth Amendment permit states to understand the fundamental rights of Americans in fundamentally different ways? Which level of government can best protect those rights? The concept of incorporation is key to understanding the explosion of cases involving the Bill of Rights in the 20th and 21st centuries, as well as the increased role of the Supreme Court in defining and defending the rights of Americans.

UNIT OBJECTIVES

Students will:
- Explain the constitutional significance of the Fourteenth Amendment.
- Analyze the constitutional implications of incorporation.
- Evaluate how the Fourteenth Amendment has been used to protect individual rights.
- Analyze the various approaches to incorporation in the twentieth and twenty-first centuries.
- Appreciate the concept of “fundamental fairness.”

SYNOPSIS OF LESSONS

Lesson 1: What is Incorporation?
Students are introduced to the history of the Fourteenth Amendment, its impact on the Bill of Rights, and potential problems raised by the concept of incorporation.

Lesson 2: Who Should Protect Our Fundamental Freedoms?
Students explore the impact of incorporation on American life and discuss how citizens can best exercise and defend their rights.

CONSTITUTIONAL PRINCIPLES
- Individual Responsibility
- Liberty
- Natural Rights

FOUNDERS’ QUOTES
“The best general key for the solution of questions of power between our governments is the fact that every foreign and federal power is given to the federal government and to the states every power purely domestic.”
–THOMAS JEFFERSON

KEY TERMS
Due process
Equal protection
Fourteenth Amendment
Fundamental fairness
Incorporation
Total incorporation
What Is Incorporation?

LESSON OVERVIEW
What is the significance of the Fourteenth Amendment? It was written to ensure that freed slaves would be treated as citizens. But, in the twentieth century, the courts have extended its protections to various classes of people in various circumstances. This concept of incorporation means that the federal government uses the Fourteenth Amendment to address limitations on liberty by states against their citizens. But, does incorporation give the federal government too much power?

LESSON OBJECTIVES
Students will:
- Explain the constitutional significance of the Fourteenth Amendment.
- Contrast the Founders’ divergent views about which level of government can best protect individual liberty.
- Analyze the constitutional implications of incorporation.
- Evaluate how the Fourteenth Amendment has been used to protect individual rights.

CONSTITUTIONAL PRINCIPLES
- Federalism
- Natural Rights

MATERIALS
- Handout A: Background Essay - What Is Incorporation?
- Handout B: The Nation, the States, and Liberty
- Handout C: Consequences of Incorporation (five copies needed)

RECOMMENDED TIME
One 50-minute class period.

STANDARDS
- NCHS (5-12): Era III, Standards 3B, 3C; Era V, Standards 3B, 3C; Era IX, Standards 4A, 4C; Era X, Standard 2E
- CCE (9-12): IIA1
- NCSS: Strands 1, 2, 5, 6, and 10
- Common Core: RI.8, RI.9
LESSON PLAN

Background/Homework 10 minutes the day before
Have students read Handout A: Background Essay—What Is Incorporation? Encourage students to answer the “Critical Thinking” questions at the end of the essay.

Warm-Up 15 - 20 minutes
A. Briefly review with the students the key points and/or the “Critical Thinking” questions from Handout A.
B. Distribute (or project on a whiteboard) Handout B: The Nation, the States, and Liberty. Give students 4-5 minutes to answer the questions. Spend a few minutes discussing their responses.

Activity 20 - 30 minutes
A. Ask for five volunteers to present to the class from Handout C: Consequences of Incorporation. Encourage them to read their parts expressively and energetically.
B. Once students have finished the presentation, discuss the following questions with the entire class:
   - Who was affected by the teachers’ decisions?
   - Who was affected by the principal’s decision?
   - Who was affected by the superintendent’s decision?
   - Why did the superintendent incorporate her decision? Who would have liked or disliked her first decision? Her second decision?
   - In the real world of schools, at which level (class, school, or district) is it easiest to get changes made? Hardest to get changes made?
   - What are the advantages or disadvantages of incorporation?
   - Some say that incorporation has resulted in an expansion of our liberties. Others say that incorporation has resulted in an expansion of the federal government. What do you say?

Homework/Extensions
A. Have students find an online article about a fundamental freedom protected by the Bill of Rights. Students should:
   1. Identify the fundamental right.
   2. Identify the amendment protecting that fundamental right.
   3. Describe what action is being taken by either the federal or state government concerning the fundamental right.
4. Explain whether or not the action violates a fundamental right

5. Determine the best way to resolve any conflict between the individual’s freedom and the government’s position.

B. Have each student research their state constitution and bill of rights. They could create a chart, listing their state provisions in one column and the provisions of the federal Bill of Rights in the other.

1. Does the federal Bill of Rights protect certain rights that the state constitution does not? Or vice-versa?

2. Do the citizens of their state “need” the Fourteenth Amendment to secure their rights?
What is Incorporation?

BACKGROUND ESSAY

Whose Actions Did the Bill of Rights Limit?

In 1791, the Bill of Rights protected American citizens only against the actions of the national government. Forty years later, the Supreme Court confirmed this situation. In Barron v. Baltimore (1833), the Court noted that the federal constitution did not prohibit an individual state from executing heretics, shutting down newspapers, or confiscating property. The Bill of Rights protected individuals against the actions of the federal government. It did not limit state action. Individual states had their own bills of rights, but these differed from state to state. Many thought the Court’s decision supported the constitutional principle of federalism. Others were concerned that the states could limit fundamental liberties.

Why Was the Fourteenth Amendment Written?

After the Civil War, America was struggling over how to treat former slaves. Three amendments were passed by Congress and ratified by the states. The Thirteenth Amendment abolished slavery. The Fourteenth Amendment guaranteed citizenship to the freed slaves. The Fifteenth Amendment guaranteed to former male slaves the right to vote.

The first section of the Fourteenth Amendment states that all who are born or naturalized in the United States are citizens. The Amendment continues, “No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States…”

How Did the Fourteenth Amendment Change the Bill of Rights?

The significant part of this statement is the first two words: “No State…” The Founders intended that the Bill of Rights be protections against the federal government only. Now, the Fourteenth Amendment placed limitations on what the state governments could do.

Five years later, a case about butchers (the Slaughter House Cases, 1873) provided an opportunity to clarify which rights, if any, were protected against both state and federal governments. The answer: not very many. The Privileges or Immunities Clause did not “bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States.” Twenty years later, the Courts had a different view of these protections.
What is the Due Process Clause?

The next section of the Fourteenth Amendment, the Due Process clause, also places limits on the actions of states: “...nor shall any State deprive any person of life, liberty, or property, without due process of law.” Due process means that the laws themselves are fair. The procedures for enforcing those laws must also be fair.

In *Quincy Railways v. Chicago* (1897), the Supreme Court ruled that the state violated due process when it took property without paying just compensation. By using the Fourteenth Amendment to apply part of the Bill of Rights to a state action, the Court opened the door for similar protections.

A good example of the debates over expanded protection is Frank Palko of Connecticut. In 1935, Palko killed two police officers and escaped after stealing a phonograph. He was found guilty of second-degree murder and sentenced to life in prison. Prosecutors appealed, hoping for a death penalty, and a state law permitted a second trial.

In that trial, he was found guilty of first-degree murder and was sentenced to death.

Palko took his case to the Supreme Court. His attorneys argued that, because of the due process protection of the Fourteenth Amendment, the Connecticut law that had permitted two different trials was in violation of the Fifth Amendment protection against double jeopardy. The Court ruled against Palko and he was executed in 1938.

What is the Equal Protection Clause?

Finally, the Equal Protection Clause of the Fourteenth Amendment says, “[No State will] deny to any person within its jurisdiction the equal protection of the laws.” This clause means that states must apply the law equally. States cannot discriminate against people or groups of people arbitrarily. Of course, all people do not have to be treated the same way. For example, states can require some people to wear glasses when they drive. However, they cannot ban people from driving because of their race.

The understanding of the equal protection clause has changed over time. In *Plessy v. Ferguson* (1896), the Supreme Court held that racial segregation by a state-owned railroad did not violate the equal protection clause. In *Brown v. Board of Education* (1954), the Court ruled that “separate but equal” segregated classrooms
were in violation of the Fourteenth Amendment. Today, the clause is understood to protect various classes of people from discrimination by government.

**What Is Incorporation and Why is It Controversial?**

During the twentieth century, protections provided by the Bill of Rights against the national government were incorporated (meaning “included within”) the protections against state or local governments. In the *Gitlow v. New York* (1925) case, the Supreme Court ruled that the First Amendment’s protection of free speech applied to the states as well as to the federal government. Since then the Supreme Court has extended the protections of the Bill of Rights one right at a time one case at a time. Today, almost all of the protections of the Bill of Rights have been incorporated so that they now limit all levels of government.

Many debate whether incorporation is a good idea. Incorporation can speed up the process of ensuring that everyone’s basic liberties are protected. Some have even referred to the Fourteenth Amendment as the “second” Bill of Rights.

Others argue that the Founders were very clear that the Bill of Rights should apply only to actions of the federal government. Keeping the federal government out of state issues is a way to help to ensure that the federal government cannot get too much power.

Incorporation means that thousands of controversies have been decided by federal judges. In 1895, around 400 cases were filed with the Supreme Court. Today, over 10,000 cases are filed annually. It seems that fewer people are making more decisions about the nature of our fundamental rights.
Comprehension Questions

1. What are three important clauses [parts of sentences] in the first section of the Fourteenth Amendment?

2. Can you think of a time when you (or someone you know) was denied due process?

3. Can you think of a time when you (or someone you know) was denied equal protection under the law?

4. Why do some people call the Fourteenth Amendment the “Second Bill of Rights”?

5. What is incorporation?

6. Do you agree/disagree with most of the Founders that the Bill of Rights should apply only to actions of the federal government? Why?
In the 1780s, James Madison believed that the greatest threat to liberty came from the individual states, not from Congress. Accordingly, he favored allowing Congress to veto state laws.

“A constitutional negative [veto] on the laws of the States seems equally necessary to secure individuals against encroachments [limitations] on their rights.”
–JAMES MADISON TO THOMAS JEFFERSON, 24 OCTOBER, 1787

“No state shall violate the equal rights of conscience…”
–JAMES MADISON

1. Restate each of Madison’s ideas in your own words.

__________________________________________________________________________
__________________________________________________________________________

2. How did Madison’s proposal for protecting individual liberties above differ from the language used in the final version of the First Amendment?

Congress shall make no law respecting the establishment of religion, or the free exercise thereof...

__________________________________________________________________________
__________________________________________________________________________
3. Restate in your own words each of these excerpts from the Fourteenth Amendment.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

__________________________________________________________________________

__________________________________________________________________________

[No State] shall deprive any person of life, liberty, or property, without due process of law.

__________________________________________________________________________

__________________________________________________________________________

[No State shall] deny to any person within its jurisdiction the equal protection of the laws.

__________________________________________________________________________

__________________________________________________________________________

4. As a result of incorporation, individuals who are unhappy with how states protect their liberties can bring suit in federal courts. Does it matter whether the state governments or the federal government has the power to protect our rights?

__________________________________________________________________________
Consequences of Incorporation

Directions: Read your assigned part with expression.

Student: Both my government teacher and my English teacher have said that I will have two hours of homework each night. This is so unfair. I’m going to speak with them. (Turning to English teacher) Mr. Smith, will you please reconsider?

Mr. Smith: On second thought, that does seem to be too much homework. I’ll plan to assign thirty minutes about twice a week—that should do it.

Student: Terrific. (Turning to government teacher) Ms. Jones, how about you?

Ms. Jones: There is just so much to cover in this course, and I can’t do it all in class. You will just have to budget your time so you can spend two hours each night on government homework.

Student: This is just ridiculous. I’m going to speak to the principal. (Turning to the principal) Principal Hart, what do you think about two hours of homework each night?

Principal Hart: I agree that the policy is unfair. It only applies to government class. Students in all classes will now be given two hours of homework each night.

Student: That’s not what I was expecting. Now the entire school is affected by that stupid homework requirement. I’m going to speak with the superintendent. (Turning to the superintendent) Superintendent Sole, my principal is violating the rights of students in our school by requiring every course to have two hours of homework each night. This isn’t fair.

Superintendent Sole: I agree that the policy isn’t fair. Students in your school have too much homework and students in some schools have too little. In order to be fair to everyone, I am going to incorporate my decision so that it applies not only to your school but to every school. From now on, every class in every high school in the district will have no more than 30 minutes of homework once a week.

Student: Now that’s what I’m talkin’ about! But some of my friends in other high schools where they didn’t have very much homework might not be too happy. (Long pause.)

Student: It’s six months later now. Can you believe this e-memo that the superintendent sent out to all schools?
Superintendent Sole: Students and teachers, I have reconsidered my homework policy and realize that I have given you too much free time. Therefore, I am changing the policy. From now on, all students in all classes in all schools will have 30 minutes of homework every night.

Student: That is so unfair. I’m going to ask my teachers to change things. And if they say no, I’ll talk to the principal.

And if they say no, I’ll go back to the superintendent.

Mr. Smith and Ms. Jones (together): Sorry, it’s a district policy. We can’t change it.

Principal Hart: Sorry, it’s a district policy. I can’t change it.

Superintendent Sole: Sorry, you asked me to make decisions about homework policy, and I’ve made them for the district. I’m not going to change.
Who Should Protect Our Fundamental Freedoms?

LESSON OVERVIEW
Incorporation’s effects have been far reaching—perhaps even more than the writers of the Fourteenth Amendment could have imagined. The role of the federal government has been significantly transformed, as has the role of the Supreme Court. The basic responsibility of government to protect fundamental rights has not changed. However, citizens and the courts are still working to determine exactly what those rights are and who should best protect them.

LESSON OBJECTIVES
Students will:
- Describe fundamental freedoms.
- List the multiple protections provided by the Bill of Rights.
- Review Supreme Court incorporation cases.
- Assess the constitutional implications of incorporation.
- Appreciate the challenges in defining fundamental freedoms.

CONSTITUTIONAL PRINCIPLES
- Federalism
- Natural Rights

MATERIALS
- Handout A: Background Essay—Who Should Define Our Fundamental Freedoms?
- Copies of the Bill of Rights
- Handout B: Attitude Inventory
- Handout C: Fundamental Freedoms?
- Handout D: Incorporation Cases Chart

RECOMMENDED TIME
One 50 minute class period.

STANDARDS
- NCHS (5–12): Era III, Standards 3B, 3C; Era V, Standards 3B, 3C; Era IX, Standards 4A, 4C; Era X, Standard 2E
- CCE (9–12): IIA1
- NCSS: Strands 1, 2, 5, 6, and 10
- Common Core: RI.8, RI.9
Background/Homework

10 minutes the day before


B. Have them also complete Handout B: Attitude Inventory. They should take the survey twice: once before reading the essay and again after reading the essay.

Warm-Up

15-20 minutes

A. Briefly review with the students the key points and/or the “Critical Thinking” questions from Handout A.

B. Review responses to Handout B: Attitude Inventory. Ask students the following:

1. Did your responses change after reading the essay? If so, how and why?
2. Would you be bothered if your state allowed 18-year-olds to purchase alcohol but a neighboring state did not? What if the situation were reversed?
3. What if your state did not permit trial by jury but a neighboring state did?
4. Is the right to purchase alcohol a fundamental freedom? Is the right to trial by jury a fundamental freedom?
5. What is a fundamental freedom?
6. How does your state government protect your rights? How does the federal government protect your rights?

Activity

20–30 minutes

A. Distribute Student Handout C: Fundamental Freedoms? along with a copy of the Bill of Rights from the Appendix. Give students about ten minutes (working in pairs) to complete their list.

B. Ask students to circle those rights which they think are fundamental freedoms. They may circle as few or as many as they wish, but should be prepared to discuss their selection.

C. Distribute Handout D: Incorporation Cases Chart and give students time to indicate in the Incorporation column on Handout C which freedoms have been incorporated against the states. Discuss the following questions with the entire class:

1. Which rights listed in the Bill of Rights have not been incorporated? Why?
2. Would your conscience be “shocked” if some rights listed in the Bill of Rights were denied you by your state government? Which rights are those?
3. Are those rights fundamental freedoms?

4. Which list of fundamental freedoms is longer, yours or the Supreme Court’s (as indicated by the rights that have been incorporated)? How do you account for the differences? Is your list too long? Is the Court’s too short?

5. Looking at Handout D, do you observe any patterns in the cases; e.g. Types of issues decided? When they were decided? Amendments which were referenced?

**Homework and Extension Options**

A. Have students choose one of the rights which is not incorporated and write a “Letter to the Editor” either opposing or supporting incorporation. Their letter should include an explanation of why the right is/is not a fundamental freedom, and why it would be better for the citizens of their state if the right were/were not incorporated.

B. Have each student research one of the incorporation cases and write a one-paragraph explanation of why and how the Supreme Court incorporated the specific right in the case.
“You have the right to remain silent. Anything you say may be used against you in a court of law. You have the right to consult with an attorney.”

You probably recognize these statements as part of the “Miranda warning.” This “warning” is named after a famous Supreme Court case, *Miranda v. Arizona* (1966). The Court ruled that suspects had the right to be informed of their rights.

Miranda is known as a “landmark” Supreme Court case because of the directions it offers for future decisions. You may be familiar with other landmark cases: *Gitlow v. New York* (1925), *Everson v. Board of Education* (1947), *Mapp v. Ohio* (1961), *Gideon v. Wainright* (1963). What do all these landmark cases have in common? Each decision reviewed protections against the federal government provided by the Bill of Rights and made those protections effective against the state governments. Each of these decisions incorporated part of the Bill of Rights against the states.

In the *Gitlow* case, the Supreme Court interpreted the Fourteenth Amendment to mean that the right of free speech must be recognized at the state level as well as the national level. Up to this point, the Bill of Rights only applied to the federal government. This meant that states could establish religions or refuse a person due process rights if those rights were not protected in their own state constitutions.

**What Is Selective Incorporation?**

**What Is Total Incorporation?**

There are two different approaches to incorporation. In the 1940s, some Supreme Court justices favored total incorporation: every single part of the Bill of Rights should be applied to the states.

By the 1960s, other judges developed the idea of selective incorporation: only those rights guaranteed in the first eight amendments that are “fundamental and essential in the concept of ordered liberty” should be incorporated. The Court has to look at the “fundamental fairness” of laws. Are the laws fairly written? Are they fairly applied? Incorporation should only happen when the actions of a state violate a fundamental freedom and “shock the conscience.”

Since the 1920s, provisions of the Bill of Rights have been incorporated selectively. Each right has been incorporated as a result of a specific Supreme Court decision. But, almost every single right has been incorporated. So, the result is almost total incorporation.
Why Does It Matter?

Whether the federal government or state governments can more effectively promote individual liberties is a question that has been debated since the Founding.

When the Founders ratified the Bill of Rights, individuals had very little contact with the federal government. Most people thought of themselves as citizens of their states. Most political decisions occurred at the state level. The influence of the federal government was generally limited to national defense and foreign relations. Citizens felt protected by their own state’s bill of rights.

Incorporation increased the role of the federal government in citizens’ lives. Many people now expect that the federal government—not the states—will be the main protector of individual rights. The Bill of Rights was originally a list of limits on the federal government. Incorporation means that these limits are enforced by the federal government.

Some legal scholars support incorporation. They see it as the fulfillment of the Declaration of Independence and its promise of “inalienable” rights. So, it seems only logical that those same rights should also be protected against the state government.

Incorporation also gives more power to American citizens. They now have a way to challenge most government action in federal court.

Other scholars think that incorporation gives the Supreme Court too much power to define “fundamental fairness.” Essentially, the federal government has veto power over state law. James Madison wanted this power for the federal government, but other Founders overruled him.

What Is the Future of Incorporation?

In 2010, the Supreme Court incorporated one more right: the individual right to own handguns. In the landmark decision of *McDonald v. Chicago* (2010), the Court held that the right of an individual to “keep and bear arms” is a fundamental right. That right is incorporated by the due process clause of the Fourteenth Amendment. Therefore, it applies to the states.

One justice disagreed with this reasoning. Associate Justice Stephen Breyer wrote, “In sum, the Framers did not write the Second Amendment in order to protect a private right of armed self defense. There has been, and is, no consensus that the right is, or was, ‘fundamental.’”

If members of the Supreme Court disagree about what is a fundamental right, how can ordinary Americans figure it out? If the Supreme Court is the only institution to define “fundamental fairness,” what options do citizens have if they disagree with those definitions? Incorporation continues to be a controversial subject for all Americans.
Critical Thinking Questions

1. Define “landmark case.”

2. Briefly describe the two different approaches to incorporation.

3. What actions taken by your state government would “shock” your conscience? What would be the best way to ensure that these actions don’t occur?

4. How has incorporation increased the role of the federal government in people’s lives?

5. The Bill of Rights was originally a list of limits on the federal government. Incorporation means that these limits are enforced by the federal government. What conflicts, problems, or tensions could this situation create?

6. Does the Supreme Court have too much power to define fundamental rights?

7. What are five or six fundamental rights shared by all Americans?
**Attitude Inventory**

**Directions:** Circle whether you agree or disagree with each statement. Complete this survey twice: once **before** you read the Handout A and once **after** you have read Handout A.

<table>
<thead>
<tr>
<th>BEFORE READING</th>
<th>AFTER READING</th>
<th>STATEMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>AGREE</td>
<td>AGREE</td>
<td>1. If I were travelling outside the country, and someone asked me where I was from, I would most likely say “America” or “the United States.”</td>
</tr>
<tr>
<td>DISAGREE</td>
<td>DISAGREE</td>
<td>2. If I were travelling outside the country and someone asked me where I was from, I would answer “my state.” (Virginia, California, etc.)</td>
</tr>
<tr>
<td>AGREE</td>
<td>AGREE</td>
<td>3. My state government is the best protector of my rights.</td>
</tr>
<tr>
<td>DISAGREE</td>
<td>DISAGREE</td>
<td>4. The federal government is the best protector of my rights.</td>
</tr>
<tr>
<td>AGREE</td>
<td>AGREE</td>
<td>5. Every right protected by the federal Bill of Rights should also be protected by my state’s Bill of Rights.</td>
</tr>
<tr>
<td>DISAGREE</td>
<td>DISAGREE</td>
<td>6. The Supreme Court is qualified to determine what are my fundamental freedoms.</td>
</tr>
<tr>
<td>AGREE</td>
<td>AGREE</td>
<td>7. My state should have the power to make laws without the federal government looking over its shoulder.</td>
</tr>
<tr>
<td>DISAGREE</td>
<td>DISAGREE</td>
<td>8. If my state passes a law that limits my rights, I should be able to challenge that law in the Supreme Court.</td>
</tr>
<tr>
<td>AGREE</td>
<td>DISAGREE</td>
<td>9. If different states have different laws about things like gambling, drinking age, speed limits, etc., that is a good thing. States are more likely to pass laws in the best interests of their citizens.</td>
</tr>
</tbody>
</table>
Fundamental Freedoms?

Directions: Using a copy of the Bill of Rights, list the specific rights or freedoms guaranteed by each amendment. The number of blanks corresponds to the number of freedoms.

Next, circle those rights which you think are “fundamental freedoms.” Circle as many or as few as like, but be prepared to defend your selections.

When you are done, use Handout D: Incorporation Cases to determine which of these freedoms have been incorporated against the states. Circle “Yes” or “No” in the column.

<table>
<thead>
<tr>
<th>AMENDMENT AND FREEDOMS</th>
<th>INCORPORATED?</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Amendment</td>
<td></td>
</tr>
<tr>
<td>1.</td>
<td>YES NO</td>
</tr>
<tr>
<td>2.</td>
<td>YES NO</td>
</tr>
<tr>
<td>3.</td>
<td>YES NO</td>
</tr>
<tr>
<td>4.</td>
<td>YES NO</td>
</tr>
<tr>
<td>5.</td>
<td>YES NO</td>
</tr>
<tr>
<td>6. Freedom to associate (an additional right inferred by the Court)</td>
<td>YES NO</td>
</tr>
</tbody>
</table>

<p>| Second Amendment       |              |
| 1.                     | YES NO       |</p>
<table>
<thead>
<tr>
<th>AMENDMENT AND FREEDOMS</th>
<th>INCORPORATED?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Third Amendment</strong></td>
<td></td>
</tr>
<tr>
<td>1.</td>
<td>YES NO</td>
</tr>
</tbody>
</table>

| **Fourth Amendment**   |               |
| 1.                     | YES NO        |
| 2.                     | YES NO        |
| 3. Freedom from punishment based on unlawfully seized evidence (an additional right inferred by the Court) | YES NO |

| **Fifth Amendment**    |               |
| 1.                     | YES NO        |
| 2.                     | YES NO        |
| 3.                     | YES NO        |
| 4.                     | YES NO        |

<p>| <strong>Sixth Amendment</strong>    |               |
| 1.                     | YES NO        |
| 2.                     | YES NO        |
| 3.                     | YES NO        |</p>
<table>
<thead>
<tr>
<th>AMENDMENT AND FREEDOMS</th>
<th>INCORPORATED?</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.</td>
<td>YES NO</td>
</tr>
<tr>
<td>5.</td>
<td>YES NO</td>
</tr>
<tr>
<td>6.</td>
<td>YES NO</td>
</tr>
<tr>
<td>7.</td>
<td>YES NO</td>
</tr>
<tr>
<td>8.</td>
<td>YES NO</td>
</tr>
</tbody>
</table>

**Seventh Amendment**

| 1. | YES NO |
| 2. | YES NO |

**Eighth Amendment**

| 1. | YES NO |
| 2. | YES NO |
| 3. | YES NO |
**Incorporation Cases Chart**

**Directions:** *Use this chart to determine which freedoms listed on Handout C: Fundamental Freedoms have been incorporated against the states.*

<table>
<thead>
<tr>
<th>YEAR</th>
<th>CASE</th>
<th>AMENDMENT/FUNDAMENTAL RIGHT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1869</td>
<td>The Justices v. Murray</td>
<td>7th – freedom from re-examination of facts at trial</td>
</tr>
<tr>
<td>1897</td>
<td>Chicago, Burlington, &amp; Quincy Railway Co. v. Chicago</td>
<td>5th – right to just compensation</td>
</tr>
<tr>
<td>1925</td>
<td>Gitlow v. New York</td>
<td>1st – right to free speech</td>
</tr>
<tr>
<td>1931</td>
<td>Near v. Minnesota</td>
<td>1st – right to free press</td>
</tr>
<tr>
<td>1932</td>
<td>Powell v. Alabama</td>
<td>6th – right to counsel in capital cases</td>
</tr>
<tr>
<td>1937</td>
<td>DeJonge v. Oregon</td>
<td>1st – freedom of peaceful assembly</td>
</tr>
<tr>
<td>1940</td>
<td>Cantwell v. Connecticut</td>
<td>1st – freedom to practice religion</td>
</tr>
<tr>
<td>1947</td>
<td>Everson v. Board of Education</td>
<td>1st – freedom from establishment of religion</td>
</tr>
<tr>
<td>1948</td>
<td>In re Oliver</td>
<td>6th – right to public trial and notice of accusation</td>
</tr>
<tr>
<td>1949</td>
<td>Wolf v. Colorado</td>
<td>4th – freedom from unreasonable search &amp; seizure</td>
</tr>
<tr>
<td>1958</td>
<td>NAACP v. Alabama</td>
<td>1st – freedom to associate</td>
</tr>
<tr>
<td>1961</td>
<td>Mapp v. Ohio</td>
<td>4th – freedom from unlawfully seized evidence</td>
</tr>
<tr>
<td>1962</td>
<td>Robinson v. California</td>
<td>8th – freedom from cruel &amp; unusual punishment</td>
</tr>
<tr>
<td>1963</td>
<td>Gideon v. Wainwright</td>
<td>6th – right to counsel in all felony cases</td>
</tr>
<tr>
<td>YEAR</td>
<td>CASE</td>
<td>AMENDMENT/FUNDAMENTAL RIGHT</td>
</tr>
<tr>
<td>------</td>
<td>--------------------------</td>
<td>----------------------------</td>
</tr>
<tr>
<td>1963</td>
<td>Edwards v. South Carolina</td>
<td>1st – freedom to petition</td>
</tr>
<tr>
<td>1963</td>
<td>Ker v. California</td>
<td>4th – right to specified standards for legal warrants</td>
</tr>
<tr>
<td>1964</td>
<td>Malloy v. Hogan</td>
<td>5th – freedom from self-incrimination</td>
</tr>
<tr>
<td>1964</td>
<td>Aguilar v. Texas</td>
<td>4th – right to legal warrants</td>
</tr>
<tr>
<td>1965</td>
<td>Pointer v. Texas</td>
<td>6th – right to confront witnesses</td>
</tr>
<tr>
<td>1966</td>
<td>Parker v. Gladden</td>
<td>6th – right to impartial jury</td>
</tr>
<tr>
<td>1967</td>
<td>Klopfer v. N. Carolina</td>
<td>6th – right to speedy trial</td>
</tr>
<tr>
<td>1968</td>
<td>Duncan v. Louisiana</td>
<td>6th – right to jury</td>
</tr>
<tr>
<td>1969</td>
<td>Benton v. Maryland</td>
<td>5th – freedom from double jeopardy</td>
</tr>
<tr>
<td>1972</td>
<td>Rabe v. Washington</td>
<td>6th – right to notice of accusation</td>
</tr>
<tr>
<td>1972</td>
<td>Argersinger v. Hamlin</td>
<td>6th – right to counsel in all criminal cases with a jail term</td>
</tr>
<tr>
<td>2010</td>
<td>McDonald v. Chicago</td>
<td>2nd – right to own handguns</td>
</tr>
</tbody>
</table>
Handout A: Background Essay - What Are the Origins of the Bill of Rights?

Comprehension Questions

1. At least three of the following: right of Protestants to practice their faith; protections of property; rights of the accused; rights of criminals.

2. As a result of his violation of the rights of Englishmen, King Charles I was beheaded in 1649.

3. The fundamental reason why, according to Locke, government’s main purpose must be to protect the rights of individuals is that all men are by nature free and equal.

4. At least three of the following: forced quartering of troops; weapons were taken away; restrictions on speech, press, and assembly.

5. The Articles of Confederation established the first attempt of the former American colonies to organize a united government.

Handout B: Rights Attitude Inventory

1. Answers will vary. Accept well-reasoned responses.

2. The principles of limited government and individual rights reinforce each other because limits on government can keep it from invading people’s rights.

Handout C: Foundations of Our Rights

Magna Carta: 1st, 3rd, 4th, 5th, 6th, 8th
Petition of Right: 4th, 5th, 6th, 8th
Massachusetts Body of Liberties: 1st, 5th, 6th, 8th
Declaration of Right and Toleration Acts 1st, 2nd, 4th, 5th, 6th, 8th
Rights violated in the colonies: all

Two Treatises of Government (1690) - Explains the concept of natural rights and the purposes of government—primarily to protect rights.

Declaration of Independence (1776) - Explains why people must demand that government protect rights; announces and justifies formal separation of the colonies from Great Britain.

United States Constitution (1787) - Framework of system for providing a limited central government that would protect individual rights as well as preserving the powers of state and local government.

Handout D: Founding Documents and Philosophies

1. Both John Locke’s Two Treatises of Civil Government and the Declaration of Independence are explanations of why people should expect government to protect individual rights. Jefferson used ideas from Locke in drafting the Declaration of Independence.

2. The documents were written about 100 years apart, on different continents. “Life,
liberty, and property” became “life, liberty, and pursuit of happiness”

3. The Founders wrote the Constitution to provide a stronger central government than that provided under the Articles. The Bill of Rights was an attempt to protect against a potentially overbearing central government.

4. Each document reflected concern about the biggest abuses of its time period.

5. Answers will vary. Accept well-reasoned responses.

**LESSON 2: WHY A BILL OF RIGHTS? WHAT IMPACT DOES IT HAVE?**


1. Federalists believed a bill of rights was unnecessary because the Constitution itself limited government's powers. They believed it could be dangerous because it would be impossible to list every right, and they did not want rights to be ignored or violated just because they were not specifically listed.

2. Madison changed his mind because he corresponded with colleagues whose opinions he valued, and they all supported the addition of a bill of rights.

3. The Bill of Rights did not strongly affect most citizens’ lives because it only limited the actions of the federal government and did not apply to the states until after the Fourteenth Amendment was ratified in 1868. In the 1920s the Supreme Court began to interpret the Fourteenth Amendment's Due Process Clause to protect certain liberties from action by the states.

**Handout B: Understanding Positions of Federalists and Anti-Federalists**

Federalists
- A bill of rights was not needed because the Constitution created a government of limited powers.
- Composing a list of rights might endanger any rights not listed.
- A strong central government is needed to protect rights of minorities.
- State constitutions already included declarations of rights.

Anti-Federalists
- The central government could not be trusted—it might grow too strong and suppress freedoms.
- Several states (MA, SC, NH, VA, NY, NC) approved the new Constitution only on the condition that a list of rights be added.
- Popular opinion supported development of a bill of rights.

**Handout C: Federalists and Anti-Federalists Venn Diagram**

Federalists
- A bill of rights was not needed because the Constitution created a government of limited powers.
- Composing a list of rights might endanger any rights not listed.
- A strong central government is needed to protect rights of minorities.
- State constitutions already included declarations of rights.

Anti-Federalists
The central government could not be trusted—it might grow too strong and suppress freedoms.

Several states (MA, SC, NH, VA, NY, NC) approved the new Constitution only on the condition that a list of rights be added.

Popular opinion supported development of a bill of rights.

Both Federalists and Anti-Federalists.

The purpose of government is to protect unalienable rights (life, liberty, pursuit of happiness).

Both central authority and some level of state authority was needed.

A somewhat stronger form of government than that provided under the Articles of Confederation was needed.

Certain founding principles were essential: separation of powers, checks and balances, federalism, rule of law, due process, limited government, majority rule/minority rights, popular sovereignty, representative government.

Handout D: Classifying Quotes
1. Federalist
2. Federalist
3. Anti-Federalist
4. Anti-Federalist
5. Anti-Federalist
6. Federalist

Unit 2: The Bill of Rights and Religion

LESSON 1: THE ESTABLISHMENT CLAUSE - HOW SEparate ARE CHurch AND STATE?

Handout A: Background Essay - The Establishment Clause: How Separate Are Church and State?

1. The Founders believed that the Establishment Clause prohibited the involvement of the national government in religion, as well as the establishment of a national church. They believed that the clause permitted the existence of state-supported religions.

2. These tests include the Lemon Test, the Endorsement Test, and the Coercion Test.

3. Accept all reasoned responses.

4. Accept all reasoned responses.

5. The Founders would be more inclined to support the “picket fence” image since they all believed that religious belief and practice would strengthen and support republican government and civil society. The “wall” metaphor implies no interaction between church and state while the “picket fence” metaphor implies that, while there are barriers between religion and government, there are also appropriate opportunities for one to influence the other.
Handout B: Religion at My School
1. Answers will vary.

Handout C: Interpreting the Establishment Clause
1. Accepted reasoned answers. Students should give significant thought to the Founders’ purpose for the Establishment and Free Exercise Clauses and should determine the interpretations of both by the Supreme Court over time.

LESSON 2: WHAT IS THE SIGNIFICANCE OF THE FREE EXERCISE CLAUSE?

Handout A: Free Exercise Anticipation Guide
1. The Court held that Cantwell could not be barred from giving out his materials because they were religious in nature. General rules for solicitation were valid, but restrictions on religion were not. Since local laws allowed government officials to decide what causes should be called “religious,” the law violated the First Amendment.

2. The Court ruled that the state government did not have to pay unemployment benefits to the individual who lost his job. The state could turn down benefits to anyone who lost their job because of illegal activity.

3. The Court said that these laws actually targeted the Santeria religion, which uses animal sacrifice in prayer. Since they targeted a specific religious group, the laws were unconstitutional.

4. A famous 1972 ruling (Wisconsin v. Yoder), concluded that Amish teens could be excused from mandatory school attendance laws since their religion says they must live apart from the world and worldly influence.

Handout B: Background Essay - What Is the Significance of the Free Exercise Clause?
1. The government can never restrict freedom of belief because it is a natural right.

2. Most free-exercise cases are about people who feel they’ve been treated unfairly because of their religion. Examples include denying unemployment benefits because an individual cannot work on Saturdays; denying similar benefits to someone who lost their job because they smoked illegal drugs in a religious service; denying a scholarship to a student because he planned to study theology.

3. The Court asks whether or not “a reasonable” exception can be made to the general laws.

4. Accept all reasoned responses while encouraging students to focus on the fundamental right to religious liberty.

5. Accept all reasoned responses. Guidelines which might help resolve the conflict include the general exception principle and must articulate constitutional principles.

Handout C: Ten Commandments on Public Property Scenario
1. Accept reasoned answers.
Handout D: Restrictions on the Free Exercise of Religion

A. Public employees may display religious symbols in their personal workspace, unless the supervisor bans all symbols/photos/etc. from personal workplaces. Public employees may not be singled out for their religious displays.

B. Some Christian Science parents have been tried and convicted for failure to provide their children with medical care.

C. Legislation passed in 1965 exempts Old Order Amish from paying Social Security taxes.

D. In Goldman v. Weinberger (1986), the Court ruled that the various military services could ban non-uniform headcoverings.

E. Most witnesses today are required to “affirm” that they will tell the truth, and do not need to swear an oath upon a sacred book.

F. Each of these books was used by at least one new member of Congress during the most recent swearing-in ceremonies.

G. In Christian Legal Society v. Martinez (2010), the Court ruled that a Christian society must open membership to individuals who do not espouse its religious beliefs.

H. This issue has not been reviewed by the Supreme Court. Individual local jurisdictions have passed different regulations about this issue.

I. This is an on-going debate between advocates of the Affordable Care Act and members of various religious institutions.

J. Several states have legalized gay marriage as a secular ceremony. To this date, no state requires members of the clergy to perform religious services for gay couples.

Unit 3: The Bill of Rights and Free Speech


Handout A: Background Essay - Why is Free Speech Essential to Self-Government?

1. Madison felt that man “owned,” as a natural right, both his opinions and the ability to express them freely. These natural rights are protected in the Bill of Rights because the British had repeatedly censored political speech, key to the concepts of liberty and self-government.

2. Free speech acts as a “safety valve,” giving citizens a way to share and debate their thoughts, lessening the chance that people turn to violence as a way of having their opinions heard.

3. Free speech allows citizens to challenge their government and leaders, share ideas, and take part in the political process. The free exchange of ideas and criticism lessens the chance for corruption in government, and can act to force government to serve the best interests of the people.

4. The First Amendment does not protect speech that encourages people to
commit “imminent lawless action” (immediate illegal behavior), false speech, or speech that maliciously puts other people in harm’s way or threatens public safety. It also does not necessarily protect things such as certain types of obscenity and pornography, speech deemed to be offensive, or indecent things uttered on the public airwaves. Government may also place reasonable time/place/manner restrictions on speech.

5. Answers will vary. Accept all reasoned answers.

**Handout C: Speech Scenarios**

Scenario 1: Yes/Protected. The group has a political message and is calling people to exercise their right to vote.

Scenario 2: No/Not Protected. The man’s call for people to throw rocks at the corporate headquarters is a call to imminent lawless action or immediate illegal behavior.

Scenario 3: Yes/Protected. While the group is calling for the overthrow of the government, they are not inciting people to imminent lawless action. Their goal of overthrow is “eventual,” not immediate.

Scenario 4: Yes/Protected. While the students may be in violation of the new dress code, both their message and method of convincing others is peaceful, non-disruptive, and poses no threat to the safety of others.

Scenario 5: No/Not Protected. When one of the students called in a bomb threat as a method of drawing attention to their protest, he posed a threat to the safety of others, maliciously putting the assembled students in harm’s way.

Scenario 6: Yes/Protected. While his speech may be offensive to others, it is political speech (preferred speech) that does not promote imminent lawless action or put others in harm’s way, and does not qualify as obscene.

**LESSON 2: HOW HAS SPEECH BEEN BOTH LIMITED AND EXPANDED, AND HOW DOES IT APPLY TO YOU AND YOUR SCHOOL?**

**Handout A: Background Essay – How Has Speech Been Both Limited and Expanded, and How Does it Apply to You and Your School?**

1. The “marketplace of ideas” is the idea that the widest possible range of speech must be allowed and that citizens must be left free to choose a voice among many to believe. This concept broadens liberty in that it expands Americans’ ability to express themselves and leaves us “free to think for ourselves.”

2. Government can pass laws restricting speech if:
   - the law is clearly defined
   - limits only unprotected speech
   - limits speech as little as possible
   - limits speech for reasons other than its content

3. The First Amendment now protects things such as: materials that have serious literary, artistic, political or scientific value; “indecent” photos on the internet; computer-generated child pornography; campaign spending by individuals and corporations on political causes or candidates; symbolic speech, such as
burning a flag or cross, as a method of communicating a message.

4. The Supreme Court has said that students DO have speech rights in school, but that this right may be limited in ways that would not be acceptable in general society. Schools may limit speech that disrupt the educational environment, contain vulgar or offensive language, or promote illegal drug use.

5. Answers will vary. Some students might say that the First Amendment demands that citizens accept a nearly unlimited range of ways people speak, and the things they wish to express. Others might argue that while the First Amendment requires citizens to accept a wide range of speech, it does not necessarily require that we accept ALL messages and methods people may employ to express themselves. Students should not lose sight of the Amendment’s initial purpose – protecting political speech to enable self-government.

Handout B: What Do I Believe About the Freedom of Expression?

1. Answers will vary.

Handout C: Student Code of Conduct

1. Student should cite the following cases: 
   *Tinker v. Des Moines* (students have constitutional protections of expression at school, symbolical speech through armbands/clothing, restrictions based on “substantial disruption” only); 
   *Bethel v. Fraser* (“appropriate conduct,” restrictions based on “substantial disruption” only); 
   *Morse v. Frederick* (“expression constitutes a health or safety hazard”); 
   *West Virginia v. Barnette* (“the right to refrain from expressing themselves”).

2. Students should reference the following forms/reasons of expression: speaking, writing, distributing, wearing or displaying symbols (buttons, badges, emblems, armbands); modes of dress or grooming; expressing ethnic, cultural or political values.

3. Students should reference the following administrative reasons for regulating expression: involves a legitimate educational concern; has a factual basis for believing the expression is causing, or will cause, a substantial disruption of school activities; the expression poses a health or safety hazard.

4. Answers will vary. Accept all reasoned answers.

Handout D: Schools and the Marketplace of Ideas – 4 Scenarios

SCENARIO 1:

Context: Scenario one is entirely based on the facts of *Tinker v. Des Moines* (1969). It is anticipated that students will recognize the fact pattern, as described in Handout A.

1. Students should reference the following instance(s) of speech/expression: the wearing of an armband, as a method of symbolic expression, to communicate a political message. Students may point to specific portions of Handout B: Student Code of Conduct. Students are likely to answer that the speech in question is directly protected in both the First Amendment and the Conduct Code.

2. Answers will vary, but students are likely to plot their opinion on the far left (least disruptive) end of the continuum. Students will likely state that the speech in question posed no substantial
disruption to school activities, and was not likely to, and that the principal was not justified in limiting the expression or the method by which it was expressed.

3. See answers to Questions 1 & 2 above for potential summary arguments in support of the student speech. It is highly likely that the Supreme Court would agree with your students’ summary arguments. The Supreme Court ruled in favor of the students and their speech in Tinker v. Des Moines (1969), stating that “students…[do not] shed their…rights to freedom of speech or expression at the schoolhouse gate,” and that schools may not restrict students speech unless there is a factual basis for believing it will cause a substantial disruption.

SCENARIO 2:

Context: Scenario two is not directly the subject of a Supreme Court case, but is a real scenario that occurred in a suburban Iowa school in 2002. It is included to pose a more challenging and less obvious application of the principles applied in Court’s ruling in Tinker v. Des Moines (1969) regarding substantial disruption. No lawsuits resulted from this scenario.

1. Students should reference the following instance(s) of speech/expression: the wearing of a shirt, as a method of symbolic expression, to communicate a cultural or political message. Students may point to specific portions of Handout B: Student Code of Conduct. Students are likely to answer that the speech in question is directly protected by the First Amendment, and is SEEMINGLY protected in the Conduct Code, though answers will vary on this point.

2. Answers will vary. Some students may plot their opinion on the left (least disruptive) end of the continuum, and others may plot on the right (most disruptive) end of the continuum. Students will likely state that the message of the speakers is clearly protected by the First Amendment, but the method they chose to communicate it could easily pose a substantial disruption to school activities due to the reactions by other students to the graphic image used on the shirt. Some may argue that the principal is justified in limiting the expression due to the method used to communicate the message, while others may argue that the message should not be limited simply because others are bothered by the method.

3. See answers to Questions 1 & 2 above for potential summary arguments in support of the student speech. Answers will vary as to whether the Supreme Court would agree with your students. However, in light of Tinker’s “substantial disruption” principle, it is likely that the Court would agree with a restriction of the expression due to the likelihood that the chosen method would prove controversial enough to rise to a disruptive level.

SCENARIO 3:

Context: Scenario three is entirely based on the facts of Bethel School District No. 403 v. Fraser (1986). It is anticipated that students will recognize the fact pattern, as described in Handout A. NOTE: see OPTIONAL HANDOUT E if you wish to expose students to the controversial speech in question; at your discretion.

1. Students should reference the following instance(s) of speech/expression: speaking to communicate a political message regarding an election to student government. Students may
point to specific portions of **Handout B: Student Code of Conduct**. Students are likely to answer that the speech in question is directly protected by the First Amendment and MAY be protected in the Conduct Code, though answers will vary on this point.

2. Answers will vary. Some students may plot their opinion on the left (least disruptive/offensive/obscene) end of the continuum, and others may plot on the right (most disruptive/offensive/obscene) end of the continuum. Answers will vary as to whether the principal is justified in limiting the expression. Some students will argue that the innuendo contained in the speech was disruptive to the assembly due to raucous crowd reaction to it; they may also add that some in the crowd exhibited discomfort, clearly finding the speech offensive and/or obscene. Others may argue that the speech did not actually disrupt the assembly, as it continued on as normal after his speech and the student in question was not spoken to and punished by administration until the day after his speech; they may also argue that they do not view the speech as obscene or offensive.

3. See answers to Questions 1 & 2 above for potential summary arguments in support of the student speech. It is highly unlikely that the Supreme Court would agree with your students’ summary arguments. The Supreme Court ruled in favor of the school administration and the restriction of speech in *Bethel School District No. 403 v. Fraser* (1986), stating that the First Amendment did not require school officials to allow “vulgar and offensive” speech. The Supreme Court also drew a line between the type of political speech communicated in *Tinker* (Scenario 1) with other forms of speech that schools are free to prohibit.

**SCENARIO 4:**

Context: Scenario four is not directly the subject of a Supreme Court case, but is a real scenario that occurred in an urban California school in 2010. It is included to pose a more challenging and less obvious application of the principles applied in the following Court rulings: *Tinker v. Des Moines* (1969; substantial disruption), *Bethel School District No. 403 v. Fraser* (1986; substantial disruption; offensive speech or conduct), and *Morse v. Frederick* (2007; substantial disruption; student health and safety concerns). NOTE: As of this writing (2013), a Federal District Court has reviewed the students’ First Amendment challenge to the actions of the principal. The District Court upheld the principal’s restriction of the students’ speech, citing legitimate substantial disruption and school safety concerns. It is currently on appeal.

1. Students should reference the following instance(s) of speech/expression: the wearing of a shirt, as a method of symbolic expression, to communicate a cultural or political message. Students may point to specific portions of Handout B: Student Code of Conduct. Students are likely to answer that the speech in question is directly protected by both the First Amendment the Conduct Code.

2. Answers will vary. Some students may plot their opinion on the left (least likely to pose a substantial disruption or a health/safety hazard) end of the continuum, and others may plot on the right (most likely to pose a substantial disruption or health/safety hazard) end of the continuum. Answers will vary as to whether the principal is justified in limiting
the expression. Some students will argue that, given past Cinco de Mayo clashes on campus and the hostility encountered by the students earlier in the morning, the speech is likely to pose a substantial disruption and/or pose a health or safety hazard and the principal is justified in limiting it. Others may argue that the speech is no more disruptive or likely to pose a health/safety hazard than the expression of those celebrating Cinco de Mayo and the principal is not justified; students may also point out that Cinco de Mayo celebrants were allowed by the principal to speak freely while detractors were not.

3. See answers to Questions 1 & 2 above for potential summary arguments in support of the student speech. It is entirely unknown whether the Supreme Court would agree with your students’ summary arguments. However, as noted above, a Federal District Court upheld the principal’s restriction of the students’ speech, citing legitimate substantial disruption and school safety concerns, and the case is, at time of writing, on appeal.

Unit 4: The Bill of Rights and Freedoms of the Press, Assembly, and Petition

LESSON 1: WHY DOES A FREE PRESS MATTER?

Handout A: Background Essay – Why Does A Free Press Matter?

1. Press freedom is a traditional right, though its practical definition has changed over time. Nearly all of the American colonies protected the freedom of the press. At the time, freedom of the press was understood to mean that government could not censor the publication of material in advance, known as “prior restraint.” The Founders valued newspapers themselves, because they helped support an informed citizenry.

2. Accept reasoned answers.

3. In a unanimous decision, the Supreme Court ruled in favor of the New York Times. In order to prove libel, a “public official” must know that the newspaper acted with “‘actual malice’ – that is, with knowledge that it was false or with reckless disregard” for the truth. The Court asserted America’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” Free and open debate about the conduct of public officials, the Court reasoned, was more important than occasional, honest factual errors that might hurt or damage officials’ reputations.

4. The result of the Sullivan decision is that, generally speaking, it is very difficult for public officials to win in court if they accuse a publisher of libel. The Court ruled in 1987 that public officials cannot sue for emotional distress in libel cases unless the publication contained a false statement made with “actual malice.”

5. Accept reasoned answers.
LESSON 2: WHY ARE THE RIGHTS TO ASSEMBLY AND PETITION IMPORTANT TO LIBERTY?

Handout A: Background Essay - Where Did the Rights to Petition and Assembly Come From, and How Do Americans Exercise Them?

1. The Magna Carta (1215) first provided a right to assemble and petition the king for small groups of barons, but it was very limited. This right was then expanded to all citizens, and the limitations lifted, in the English Bill of Rights (1689). These rights influenced our Founding generation in the various petitions they made to the king, such as the Stamp Act Congress and the Olive Branch Petition, culminating in the Declaration of Independence.

2. Americans petitioned the Congress and their states from very early on, regarding issues ranging from slavery, to child labor to prohibition. Civil Rights leaders, such as Martin Luther King, urged citizens to petition and protest in favor of expanded political and civil rights. Americans today exercise this right through petition drives, organized protests, emailing and calling government officials, and through social media outlets, such as Facebook and Twitter.

3. In National Socialist Party of America v. Village of Skokie (1977), the Supreme Court ruled that government cannot, through its laws, prevent an assembly from occurring simply because it disagrees with the message. The content of the speech an assembly produces cannot be a reason for restricting them from assembling in the first place.

4. Reasonable time, place, and manner restrictions on assemblies are acceptable, so long as they are not made on the basis of the message. Suggested examples of acceptable time/place/manner restrictions: assemblies cannot occur on private property without the permission of the property owner; a “buffer zone” around abortion clinics; assemblies that threaten the rights or safety of others.

5. Students are likely to say that assembly and petition both go hand-in-hand with other protections of the First Amendment, such as the right to free speech. The ability to come together with others is what gives power to an individual's right to speak, and one without the other would be less effective.

Handout B: Assembly and Petition True/False Challenge

1. True.

2. True.

3. False. In Lloyd v. Tanner (1972), the Court held that protest groups do not have the right to gather in private shopping malls. The First Amendment applies only to government restrictions on speech/assembly, not that of private companies or individuals.
4. True. In *Coates v. Cincinnati* (1971), the Court held that an assembly on a public sidewalk, even if it annoys passersby, is protected by the First Amendment. So long as others are still able to use the sidewalk, the assembly is constitutional.

5. False. In *Grayned v. City of Rockford* (1972), the Court held that protests near schools that are intended to disrupt classes are not protected by the First Amendment.

6. False. In *Gregory v. City of Chicago* (1969), the Court held that the government cannot stop protestors from demonstrating because their cause is unpopular. In *National Socialist Party of America v. Village of Skokie* (1977), the Supreme Court extended this principle by holding that governments could not stop an assembly because a majority of citizens find the content of the demonstration to be “offensive to the core.”

7. False. Courts have routinely upheld local night-time noise and/or peace ordinances of residential neighborhoods as a reasonable time, place or manner restriction.

8. True. General rules of public, government-provided parks that apply to all visitors equally are generally not considered restrictions on speech or assembly.

9. True. In *Meyer v. Grant* (1988), the Court held that states could not prevent groups from hiring and paying people to circulate petitions.

10. False. In *Snyder v. Phelps* (2011), the Court held that those who stage a peaceful protest on an issue of public concern near a soldier’s funeral are shielded by the First Amendment, protecting them from civil lawsuits, or lawsuits by private individuals, for reasons such as pain and suffering.

**Handout C: A Petition**

1. Accept reasoned responses.
LESSON 1: WHAT ARE ORIGINS AND INTERPRETATIONS OF THE RIGHT TO KEEP AND BEAR ARMS?

Handout A: Background Essay - What Are Origins and Interpretations of the Right to Keep and Bear Arms?

1. The English Bill of Rights (1689) also gave gun rights only to some people. While the English Bill of Rights said Protestant individuals could own guns, it denied that right to the Catholic minority.

2. Some scholars argue that the militia of the Second Amendment means state armies, like today's National Guard. According to this argument, the Second Amendment does not grant an individual's right when it refers to "the right of the people to keep and bear arms." Instead, they say the Second Amendment simply protects state militias from the federal government as the Anti-Federalists had insisted. Others believe "militia" referred to a group of citizens. Since there was no official army or police force, some scholars argue that the "militia" was individual citizens who could be called to protect themselves and their neighbors.

3. In United States v. Verdugo-Urquidez (1990), the Supreme Court said it the Second Amendment means "individuals" when it says "people." The individual right to bear arms was affirmed in United States v. Emerson (1999).

Handout D: Group Discussion Guide

1. Answers will vary. Accept reasoned answers.

LESSON 2: HOW HAS THE SECOND AMENDMENT BEEN INTERPRETED?

Handout A: Background Essay – How Has the Second Amendment Been Interpreted?

1. In Presser v. Illinois (1886), the Court held that states could not disarm citizens, because that would interfere with the federal government's ability to raise a militia.

2. In United States v. Miller (1939), the Supreme Court held that the Second Amendment did not protect the right to possess all types of weapons. The Court upheld a federal law that regulated sawed-off shotguns. The Court reasoned that since that type of weapon was not related to keeping up a militia, the Second Amendment did not protect the right to own it. In other words, the Second Amendment protected a right to own weapons. The question was how far that right went.

3. District of Columbia v. Heller (2008) was the first time the Supreme Court interpreted the Second Amendment in terms of what it meant for an individual's right to possess weapons for private uses such as self-defense. The Court reasoned that the right to own weapons for self-defense was an "inherent" (natural) right of all people.
Handout B: Total Ban on Handguns?
1. Answers will vary.

1. Answers will vary.

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**Unit 6: The Bill of Rights and Property**

**LESSON 1: WHAT IS PROPERTY? WHY PROTECT IT?**

Handout A: Property or Not?
1. Property
2. Property
3. Property
4. Property
5. Property
6. Property
7. Property

Handout B: Background Essay - What Is Property? Why Protect It?
1. Ownership means one has the legitimate right to control and direct the use of an object or idea. Self-ownership means a person has control and directs the use of him or herself, as long as it does not harm another or interfere with others’ rights to do the same.
2. Madison believed that man has a property in not just his body and possessions. He also has property (an interest) in the maintaining and exercising of opinions and religious beliefs.
3. Accepted reasoned answers.

Handout C: Understanding the Third, Fourth, Fifth, Seventh, and Eighth Amendments

**Third**: Recognizes the right of people to control the property in their homes.

**Fourth**: Recognizes the right of people to control (“be secure”) in their persons (self-ownership) and homes (physical property).

**Fifth**: Safeguards private property ownership by ensuring due process when the government tries to take property. The Fifth Amendment also provides for government to pay property owners in those times when it does take their property.

**Seventh**: Ensures a jury trial to safeguard property rights in disputes.

**Eighth**: Protects property rights (money) by prohibiting excessive bail and fines.

Handout D: English Origins of Property Protections

**Magna Carta**
1. The Magna Carta protects money, chattels, horses, carts, and wood.

**Blackstone**
1. Blackstone says the king and his privy council cannot arbitrarily give or remove land from citizens unless determined by a court.
2. Blackstone says that only the courts or the course of law have power over lands or goods.

**Locke**

1. Locke said that people join societies to preserve their property rights.
2. Locke believed that people need government to protect their property.

**Handout E: Samuel Adams, James Madison, and Property**

**Adams**

1. The government cannot justly take from any man any part of his property, without his consent in person or by his representative.

**Madison**

1. Madison believed property included: a man’s land, merchandise, money. He also believed that a man has property in his opinions and the free communication of them including religious opinions, and the free use of his faculties. Property can also be found in the safety and liberty of one’s self.
2. See previous answer and accept reasoned answers.

**Handout F: The Bill of Rights and Property**

Real property examples:
- The right of the people to keep and bear arms.
- No soldier shall, in time of peace, be quartered in any house, without the consent of the Owner.
- The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.
- 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.
- Excessive bail shall not be required.

Other property examples:
- 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.
- No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.
- 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.
- 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.
- To be informed of the nature and cause of the accusation; to be confronted with the witnesses against him.
- 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 re-examined in any Court of the United States.
Handout A: The Takings Clause

**Due Process**: Due process means the government must act fairly and obey legal procedures when it tries to take property.

**Taking**: The government can sometimes seize or restrict the use of property. It can take property in the name of the public good.

**Eminent Domain**: Eminent domain refers to the government’s right to acquire private property for public use.

**Public Use**: The use of land for the benefit of the public.

**Just Compensation**: The just compensation clause of the Fifth Amendment means the federal government must pay for any private property it does take for public use.

**Examples of things that could be considered “public use”**: roads, schools, post offices, military bases, railroads, interstate highways, canals.

Handout B: Background Essay - How Does the Fifth Amendment Protect Property?

1. The Fifth Amendment guarantees that people have the right to their life, liberty, and property. The government cannot randomly decide to meddle with those things without a reason, or without following due process.

2. The Court ruled that this was a taking even though the land had not literally been taken away, because the state took away all of the economic value of the land.

3. *Lucas v. South Carolina Coastal Commission* was considered a taking because the state had taken away the value of the land because owners were not allowed to build on it.


Handout C: Property and the Supreme Court

1. Accept reasoned answers.
Handout A: Background Essay - How Do Due Process Protections for the Accused Aim to Protect Us All?

1. The Fourth, Fifth, Sixth, and Eighth Amendments of the Bill of Rights address a variety of protections for the accused. These were included in the Bill of Rights by the Founders because they knew, from experience, that if specific safeguards were not in place for those who commit crimes, the government could exercise unlimited power and liberty would be endangered.

2. Fourth Amendment: no unreasonable searches and seizures by government without a warrant; warrant only issued upon probable cause; warrant must be specific to who will be searched, the place to be searched, and the items to be searched/seized. Fifth Amendment: the accused cannot be forced by government to self-incriminate (right to remain silent); no double jeopardy/cannot be tried for the same crime twice.

3. The Sixth Amendment protects the accused after having been charged with a crime in the following ways: a speedy and public trial by a citizen jury; trial must occur where the alleged crime was committed; know the specific crimes/accusations/evidence; confront accuser; call witnesses in defense; right to a lawyer.

4. Answers will vary, but students should point out that the protections of the Fourth, Fifth, Sixth, and Eighth Amendments require government to follow the rule of law as well; if government is not bound by law, the principle of due process is no more; the government cannot commit crimes or disregard its own rules while trying to enforce laws.

5. Answers will vary, but students should explain the principle that justice and due process require that the rights of all individuals – even those who are ostracized as suspected criminals – are likely to be protected and laws be enforced equally.

Handout B: Criminal Procedure Protection

Fourth Amendment:

2. “No warrants shall issue, but upon probable cause.” Police must show probable cause to a judge in order to get a search warrant.

3. “...describing the place to be searched and the persons or things to be seized.” The warrant must name the place or person that police will search, as well as what they are looking for.

Fifth Amendment:

2. People may not be put on trial more than once for the same crime.

3. “No person . . . shall be compelled to be a witness against himself.” People do not have to give evidence that may make them appear guilty.
4. “No person shall be deprived of life, liberty or property without due process of law.” If the government wants to take away someone’s life, liberty, or property, it must follow duly-enacted laws and apply them in the same way to everyone.

Sixth Amendment:
1. People accused of crimes have the right to a trial by jury in a timely and open manner.
3. “To be confronted with witnesses against him.”

Defendants have the right to know who the witnesses are against them and to ask them questions.
4. “…to have compulsory process for obtaining witnesses in his favor…”

Defendants have the right to legally demand witnesses who might help their case to testify at their trials.
5. “…and to have the assistance of counsel for his defense.”

Defendants have the right to a lawyer to help defend them.

Seventh Amendment:
1. All cases with $20 or more at stake should be decided by a jury.
2. “No fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

Courts will not decide on a case after a jury has declared a verdict.

Eighth Amendment:
1. Bail cannot be unreasonably high.
2. “…nor excessive fines imposed.”

Bail cannot be unreasonable.
3. “…nor cruel and unusual punishments inflicted.”

Punishments may not be brutal or bizarre.

Handout C: Defining Cruel and Unusual
1. Accept reasoned answers

Handout D: Cruel and Unusual?
SCENARIO 1
1. Answers will vary, but students may suggest: the murder was planned in advance; Christopher bragged about his role in it, both before and after; he is very close to 18 and his decisions show adult-like behavior. Some may also suggest that sentencing someone to death for intentionally causing the death of another is neither cruel nor unusual.

2. Answers will vary, but students may suggest: Christopher is a minor, and sentencing a minor to death is cruel and unusual; he showed child-like immaturity in bragging about it both before and after; he showed child-like immaturity in convincing other, even younger friends to go along with him. Some may also suggest that sentencing someone to death is always cruel and unusual, no matter the crime they commit.

3. Answers will vary as to each group’s ruling; accept reasoned answers. The U.S. Supreme Court, in Roper v. Simmons (2002), ruled that both American and international “standards of decency” have evolved so that executing individuals who were legally minors when their crime was committed is now both cruel and unusual. In its ruling, the Court cited that the vast majority of state legislatures have done away with the death penalty for minors, and that it is a disproportionate punishment for juveniles.
4. Answers will vary, but students may state the following factual changes might have made their ruling different: if Christopher had been an adult, not a minor; if the murder had not been planned in advance. Some may also voice continued opposition to the death penalty, no matter the circumstances.

SCENARIO 2

1. Answers will vary, but students may suggest: Evan intentionally caused the death of his friend Cole; they went back to the crime scene to cover up the evidence of their crime, showing adult-like behavior. Some may also suggest that a sentence of life in prison without parole for an extreme crime is neither cruel nor unusual.

2. Answers will vary, but students may suggest: Evan, while guilty of murder, did not originally set out or plan to murder Cole; that he is very clearly a minor at age 14, and exhibited a variety of child-like, immature actions throughout the scenario; that Evan had a long history of a troubled life that should be taken into consideration as mitigating factors. Some may also suggest that a sentence of life in prison without parole for someone so young is cruel and unusual.

3. Answers will vary as to each group’s ruling; accept all reasoned answers. The U.S. Supreme Court, in Miller v. Alabama (2012), ruled that children are constitutionally different than adults and should be treated differently when sentencing them for their crimes. While a life sentence for such a crime by an adult does not violate the Eighth Amendment, the Court ruled it is disproportionate for a child, amounting to cruel and unusual punishment.

4. Answers will vary, but students may state the following factual changes might have made their ruling different: if Evan had been an adult, not a minor; if the murder had been planned in advance; if Evan did not have a history of physical and/or drug/alcohol abuse.

SCENARIO 3

1. Answers will vary, but students may suggest: careful medical considerations have been taken to ensure the condemned do not suffer; the method is quick and painless, particularly in comparison to past methods of execution; medical personnel who are trained in the administration of drugs are responsible for preparing the conditions of the execution. Some may also suggest that sentencing someone to death for intentionally causing the death of another is neither cruel nor unusual.

2. Answers will vary, but students may suggest: the process, if not followed exactly, can lead to prolonged suffering and death; the actual execution, while set up by medical personnel, is conducted by the warden, who is not himself trained in medicine and the administration of drugs. Some may also suggest that sentencing someone to death is always cruel and unusual, no matter how it is carried out.

3. Answers will vary as to each group’s ruling; accept all reasoned answers. The U.S. Supreme Court, in Baze and Bowling v. Rees (2008), ruled that Kentucky’s lethal injection process and procedures similar to it in other states, did not amount to cruel and unusual punishment. The Court noted a lack of evidence supporting the claim that even an incorrect administration of drugs would lead to
unconstitutional pain and/or suffering. The Court did suggest, however, that a state may violate the Eighth Amendment if it continued to use method(s) that have been shown to produce needless pain or suffering and/or an unnecessarily prolonged process of death.

4. Answers will vary, but students may state the following factual changes might have made their ruling different: if it can be shown that the lethal injection process does indeed cause pain and suffering, and/or needlessly prolongs the execution if not carried out in an exact medical manner; if there have been a number of “botched” lethal injection procedures, as has been the case for the electric chair throughout history; if there is no doctor/medical personnel willing to oversee the execution.

LESSON 2: WHAT IS A REASONABLE EXPECTATION OF PRIVACY?

Handout A: Background Essay - How Have the Protections of the Fourth Amendment Been Interpreted, Applied, and Enforced?

1. The Fourth Amendment’s warrant requirement provides for one of the most important individual protections: freedom from unreasonable searches and seizures.

2. The Exclusionary Rule means that government is not allowed to use evidence against a suspect at trial that was gained as a result of an illegal search.

3. Accept reasoned answers. The Court has held that school officials need only “reasonable suspicion” to search students. The Court has upheld policies of drug-testing public school students who play sports or participate in extra-curricular activities because the tests “reasonably serve the School District’s important interest in preventing drug use among students.”

4. Due process ensures that our government establishes justice and secures the blessings of liberty for future generations.

5. Accept reasoned answers. Some students may say that the numerous and varied exceptions the Supreme Court has carved out - or that citizens allow by passively accepting them - violate the letter and spirit of the Fourth Amendment, and that the promise of greater security is not worth the threat to liberty. Others may say that the exceptions, while numerous, strike a good balance between the requirements of the Fourth Amendment and the need for effective law enforcement to maintain a safe and orderly society. Still others may say that the variety of exceptions are appropriate in a large, diverse society, and that the need to identify criminals or terrorists before they do harm is sometimes more important than individual liberty and freedom from searches, even if they are unreasonable.

Handout B: Attitude Inventory

1. Answers will vary.

Handout C: Interpreting the Fourth Amendment

Students may suggest:

1. “Persons”: one’s body, clothing, blood/bodily fluid, etc.

2. “Houses”: one’s home; apartment, residence, mobile home, dwelling place, etc.
3. “Papers”: personal documents (whether paper or electronic) such as contracts, letters, receipts, financial statements, bills, notes, diaries, books, hard drives, emails, etc.

4. “Effects”: one’s property contained in one’s home, one’s belongings outside the home, all other property, etc.

5. “Unreasonable”: having no just or reasoned cause, not fair or acceptable, irrational, etc.

6. Characteristics of “seizure”: something is taken from you, something is closely examined with or without your presence, you are not free to leave or walk away, you are not able to take your property back from whomever has seized it, etc.

7. Facts that might convince someone of a crime: actually witnessing a crime; seeing/smelling evidence of a crime; receiving information/evidence about a crime from someone else; etc.

**Handout D: Should You Expect Privacy?**

1. Yes, schools retain ownership of the locker and can search it. Police officers do need a warrant to search a specific locker.

2. Accept reasoned answers. This type of information can go into privately-owned databases. While these databases are not owned or maintained by government, telecommunication companies who have been asked by government to provide the information have at times handed it over. Courts have upheld a U.S. law granting telecoms immunity from lawsuits by citizens whose information was given over to government without a warrant.

3. Accept reasoned answers. In U.S. v. Warshak (2010), the Sixth Circuit Court of Appeals ruled that there is a “reasonable expectation of privacy” in emails both sent by an individual and stored on third party servers (e.g. Google’s Gmail servers). The issue has not been addressed by the U.S. Supreme Court.

4. Yes, regardless of steps one may feel one has taken (such as limiting the visibility of activities to “friends”).

5. Accept reasoned answers. In U.S. v. Jones (2012), the Court ruled that one’s daily travel on public thoroughfares possesses a “reasonable expectation of privacy.” (In this case, police put a GPS unit on Jones’ car to trace his movements – without a warrant – for 28 days.)

6. Accept reasoned answers. While the issue has yet to be addressed by the Supreme Court, some lower courts have ruled that a cell phone is the equivalent of a “closed, non-see-through container,” and therefore its physical contents are private, absent additional probable cause to conduct a search of it. Other lower courts have disagreed.

7. No, police need a warrant to tap land-line phones.

8. Yes. In California v. Greenwood (1988), the Court ruled that a trash bag at the curb is “readily accessible to animals, children, scavengers, snoops, and other members of the public,” so there was no expectation of privacy.

9. Yes. In California v. Ciraolo (1986), the Court held that a police fly-over was “nonintrusive” and “took place within public navigable airspace,” therefore there was no reasonable expectation of privacy.
LESSON 1: HOW DOES THE CONSTITUTION PROTECT LIBERTY?

Handout A: Background Essay - How Does the Constitution Protect Liberty?

1. The First Amendment guarantees that you can associate with whomever you like. The Third and Fourth Amendments promise that the government cannot intrude into your home arbitrarily and without legal cause. The Fifth Amendment assures that you can keep silent if accused of a crime. The Founders believed that these rights should be protected so they decided to list them in the Bill of Rights.

2. Due process rights protect personal liberty in that they check government power, and it entitles all citizens to fair treatment by the government. Due process rights that are protected include: the right to a speedy, public trial by a jury; no person shall be tried for the same crime twice; no person should be forced to testify against himself; no person shall be deprived of life, liberty, or property; and all persons should be equally protected under the law.

3. Answers will vary. Accept reasoned responses.

Handout B: Pierce v. Society of Sisters (1925)

1. The Act required that all students attend public school through eighth grade. Private and parochial schools were concerned that they would lose students, their jobs, and their businesses because of this law. They also believed that it was a parent’s right to choose where the student went to school.

2. The First Amendment could have been discussed in this case, too. It could have been argued that the state of Oregon was infringing upon the freedom of religion.

Handout C: Pierce v. Society of Sisters (1925) Unanimous Opinion

Answers will vary. Accept reasoned answers.

Handout D: Newspaper Story Guideline

Answers will vary. Accept reasoned answers.

LESSON 2: WHAT IS THE SCOPE OF THE BILL OF RIGHTS?

Handout A: Background Essay – What Is the Scope of the Bill of Rights?

1. The Ninth Amendment ensures that the rights actually listed in the Bill of Rights are not assumed to be more important than rights not listed. The Ninth Amendment does not list any specific rights, but it raises many possibilities. It has been read to protect all natural rights not specifically listed in the First through Eighth Amendments.

2. In Griswold v. Connecticut (1965), the Court determined that the Ninth Amendment protects privacy within marriage. The Court cited the First, Third, Fourth, and Fifth Amendments as creating a “zone of privacy.”
3. In *Bowers v. Hardwick* (1986), the Court said states could outlaw homosexual activity, but reversed this decision in *Lawrence v. Texas* (2003). In the *United States v. Windsor* (2013) case, the Court determined that the Defense of the Marriage Act was unconstitutional. The decision asserted that the federal government must recognize same-sex marriages and same-sex spouses equally. Accept reasoned answers.

**Handout B: Supreme Court Personal Liberty Decisions**

   a. Privacy in marriage
   b. Court’s Opinion: “We deal with a right of privacy older than the Bill of Rights...To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments... is to ignore the Ninth Amendment and to give it no effect whatsoever.”
   c. Accept reasoned answers.
   e. Accept reasoned answers.
   f. Accept reasoned answers.

   a. Abortion rights
   b. “This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”
   c. Accept reasoned answers.
   e. Accept reasoned answers.

   a. Homosexual activity
   c. Accept reasoned answers.
   e. Accept reasoned answers.
   f. Accept reasoned answers.

   a. Homosexual activity
   c. Accept reasoned answers.
   e. Accept reasoned answers.
   f. Accept reasoned answers.

   a. Defense of Marriage Act
   c. Accept reasoned answers.
   e. Accept reasoned answers.
   f. Accept reasoned answers.
**Unit 9: The Bill of Rights and Federalism**

**LESSON 1: WHAT IS A FEDERAL REPUBLIC?**

**Handout A: Background Essay - What is a Federal Republic?**

1. Federalism is the principle that people delegate certain powers to the national government in the Constitution. All those powers not delegated to the national government remain with the states and the people.

2. All those powers not delegated to the national government remain with the states and the people.

3. The Fourteenth Amendment limited the types of laws states could pass. Eventually, the Supreme Court began applying Bill of Rights limitations to state governments via the Fourteenth Amendment. The Seventeenth Amendment ended state representation in the U.S. Congress.

4. Accept reasoned answers.

**Handout C: James Madison and Federalism - Excerpts from Federalist #39**

1. According to Madison, the Constitution provided for a nation that is both a nation of people and a nation of states.
   - Yellow: Its foundation is federal.
   - Green: The sources of its powers are partly federal and partly national.
   - Blue: In its operation it is national.
   - Yellow: In the extent of its powers it is federal.

**Handout D: Federalism Venn Diagram**

1. Accept reasoned answers.

**Handout E: Article I, Sections 8, 9, and Amendment Ten of the Constitution**

1. Answer will vary.

2. The decision to divide power among (federalism) and within (checks and balances) several governments positioned the American people to enjoy the benefits of a large republic (e.g., strong defense against foreign encroachments, national system of commerce, etc.) while still retaining significant control over their day-to-day affairs within the states.

3. Accept reasoned answers.

4. Suggested titles:
   - Article I, Section 8: “Powers given to Congress” or “The things Congress can do”
   - Article I, Section 9: “Some things Congress cannot do” or “Some powers denied to Congress”
   - Article I, Section 10: “The things states cannot do” or “The powers denied to states”

**Handout F: State Power - Criticisms and Responses**

1. Answers will vary. Accept reasoned responses.
LESSON 2: WHAT IS THE COMMERCE CLAUSE?

Handout A: Background Essay – What is the Commerce Clause?

1. The Commerce Clause was intended to create a common commercial policy between the various state governments, encouraging free trade within the continental U.S. and with foreign markets.

2. The case of Gibbons v. Ogden established that the national government had the power to make rules for commerce between more than one state.

3. The Court began interpreting the Commerce Clause as permitting national regulation of a wide variety of activities that had not previously been understood as “interstate commerce.”

4. Accept reasoned answers.

5. Accept reasoned answers.

Handout B: Federalism – For or Against?

1. Argues against federalism

2. Argues in favor of federalism

3. Argues in favor of federalism

4. Argues against federalism

5. Argues in favor of federalism

6. Argues against federalism

7. Both/neither

8. Both/neither

9. Both/neither

Handout C: Commerce Clause Timeline

Accept reasoned answers; a sample timeline might look like the diagram below.

Depending on student analysis of the Affordable Care Act case, federal power to regulate activities on the basis of the Commerce Clause may have stayed the same, while power to regulate through taxing power may have increased.
LESSON 1: WHAT IS INCORPORATION?

Handout A: Background Essay - What Is Incorporation?
1. Any three of these: the definition of citizenship; the “no state” clause; the due process clause; and the equal protection clause.
2. Accept all reasoned responses.
3. Accept all reasoned responses.
4. Some people call the Fourteenth Amendment the “second Bill of Rights” because it ensures that everyone’s basic liberties are protected.
5. Incorporation means that the protections of the Bill of Rights against the federal government are also protections against state or local governments.
6. Accept all reasoned responses.

Handout B: The Nation, the States, and Liberty
1. A veto on state laws is necessary to protect liberties. States shall not interfere with freedom of religion.
2. Madison’s drafts refer to protections against state limitations on liberties; the first amendment refers to protections against congressional limitations on liberties.
3. Anyone born in the United States is a citizen both of the country as well as of the state where they were born. All people are entitled to protections of life, liberty, and property. Each state must ensure that anybody living within the state is equally protected by the state’s laws.
4. Accept all reasoned responses. Some students may say that state governments, since they are closer to the people, are better protectors of rights. They may argue that the federal government cannot protect people against the federal government. Others may argue that the federal government, which takes a national view of rights and liberties, is best positioned to ensure that anyone, no matter which state they live in, is guaranteed the same basic rights.

LESSON 2: WHO SHOULD PROTECT OUR FUNDAMENTAL FREEDOMS?

Handout A: Background Essay - Who Should Define Our Fundamental Freedoms?
1. A “landmark case” is one which offers directions for future decisions.
2. Total incorporation suggests that every single part of the Bill of Rights be applied against the states. Selective incorporation suggests that only those rights guaranteed in the first eight amendments which are “fundamental and essential in the concept of ordered liberty” be incorporated.
3. Accept all reasoned responses while encouraging students to focus on whether or not these actions violate our fundamental freedoms.
4. Because of incorporation, individuals’ identification with their nation has
increased while their identification with their state has decreased. People expect that the federal government—not the state governments—will be the main protector of individual rights. The federal government now enforces protections instead of being the institution that people needed protection from.

5. Problems could arise since the institution which is protecting individuals (e.g., the federal government) is also the institution that individuals are being protected against. Creates a conflict of interest. This situation also makes the federal government the final determiner of which rights will/will not be protected.

6. Accept all reasoned responses while reminding students both of the Founders’ vision of the purpose of the Bill of Rights as well as the potential problems in giving one branch of government the ability to define our rights.

7. Accept all reasoned responses. Most students will likely reference life, liberty, pursuit of happiness, due process (both procedural and substantive), property, conscience, etc.

Handout B: Attitude Inventory
1. Answers will vary.

Handout C: Fundamental Freedoms?

First Amendment
Freedom from establishment of religion
Freedom to practice religion (free exercise)
Freedom of speech
Freedom of the press
Freedom to peaceably assemble

Second Amendment
Right to keep and bear arms

Third Amendment
Freedom from quartering of soldiers

Fourth Amendment
Freedom from unreasonable search and seizure
Right to valid search warrants

Fifth Amendment
Right to indictment by a grand jury
Freedom from double jeopardy
Freedom from forced self-incrimination
Right to just compensation when property is taken

Sixth Amendment
Right to a speedy trial
Right to a public trial
Right to an impartial jury
Right to a jury trial selected from residents where the crime was committed
Right to notice of accusations
Right to confront adverse witnesses
Right to process for obtaining witnesses (subpoena)
Right to counsel

Amendment VII
Right to jury trial in civil cases
Freedom from re-examination of facts in trials

Amendment VIII
Freedom from excessive bail
Freedom from excessive fines
Freedom from cruel and unusual punishment
As of 2013, all rights have been incorporated except the Third Amendment; the Fifth Amendment’s guarantee to the right of indictment by a grand jury; the Sixth Amendment’s guarantee to a jury trial selected from residents where the crime was committed; and the Eighth Amendment’s protections against excessive bail and excessive fines.
Sec. 4. To understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a state of perfect freedom to order their actions. A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more power than another; ...

Sec. 6. But though this be a state of liberty, yet it is not a state of license: though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it.

Sec. 22. THE natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of nature for his rule. The liberty of man, in society, is to be under no other legislative power, but that established, by consent, in the commonwealth; nor under the dominion of any will, or restraint of any law, but what that legislative shall enact,

Sec. 87. Man being born, as has been proved, with a title to perfect freedom, and an uncontrolled enjoyment of all the rights and privileges of the law of nature, equally with any other man, or number of men in the world, hath by nature a power, not only to preserve his property, that is, his life, liberty and estate ... But because no political society can be, nor subsist, without having in itself the power to preserve the property, and in order thereunto, punish the offences of all those of that society; there, and there only is political society... Those who are united into one body, and have a common established law and judicature to appeal to, with authority to decide controversies between them, and punish offenders, are in civil society one with another: ...

Sec. 124. The great and chief end, therefore, of men’s uniting into commonwealths, and putting themselves under government, is the preservation of their property. To which in the state of nature there are many things wanting.

Sec. 222. ...[W]henever the legislators endeavor to take away, and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience... Whenever therefore the legislative shall transgress this
fundamental rule of society; and either by ambition, fear, folly or corruption, endeavour to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties, and estates of the people; by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and, by the establishment of a new legislative, (such as they shall think fit) provide for their own safety and security, which is the end for which they are in society.
APPENDIX B

Articles of Confederation

To all to whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting.

Articles of Confederation and perpetual Union between the states of New Hampshire, Massachusetts-bay Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

I.
The Stile of this Confederacy shall be “The United States of America”.

II.
Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.

III.
The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

IV.
The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

If any person guilty of, or charged with, treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the Governor or executive power of the State from which he fled, be delivered
up and removed to the State having jurisdiction of his offense.

Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

V.
For the most convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislatures of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

No State shall be represented in Congress by less than two, nor more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress, and the members of Congress shall be protected in their persons from arrests or imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

VI.
No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, Prince or State; nor shall any person holding any office of profit or trust under the United States, or any of them, accept any present, emolument, office or title of any kind whatever from any King, Prince or foreign State; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any King, Prince or State, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessel of war shall be kept up
in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defense of such State, or its trade; nor shall any body of forces be kept up by any State in time of peace, except such number only, as in the judgement of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of filed pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the Kingdom or State and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

VII.
When land forces are raised by any State for the common defense, all officers of or under the rank of colonel, shall be appointed by the legislature of each State respectively, by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

VIII.
All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled.
IX.
The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article — of sending and receiving ambassadors — entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever — of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated — of granting letters of marque and reprisal in times of peace — appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other causes whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the secretary of Congress shall strike in behalf of
such party absent or refusing; and the
judgement and sentence of the court
to be appointed, in the manner before
prescribed, shall be final and conclusive;
and if any of the parties shall refuse to
submit to the authority of such court,
or to appear or defend their claim or
cause, the court shall nevertheless
proceed to pronounce sentence, or
judgement, which shall in like manner
be final and decisive, the judgement
or sentence and other proceedings
being in either case transmitted to
Congress, and lodged among the
acts of Congress for the security of
the parties concerned: provided that
every commissioner, before he sits in
judgement, shall take an oath to be
administered by one of the judges of
the supreme or superior court of the
State, where the cause shall be tried,
‘well and truly to hear and determine
the matter in question, according to the
best of his judgement, without favor,
affection or hope of reward’: provided
also, that no State shall be deprived of
territory for the benefit of the United
States.

All controversies concerning the
private right of soil claimed under
different grants of two or more States,
whose jurisdictions as they may respect
such lands, and the States which passed
such grants are adjusted, the said
grants or either of them being at the
same time claimed to have originated
antecedent to such settlement of
jurisdiction, shall on the petition of
either party to the Congress of the
United States, be finally determined
as near as may be in the same
manner as is before prescribed for
deciding disputes respecting territorial
jurisdiction between different States.

The United States in Congress
assembled shall also have the sole and
exclusive right and power of regulating
the alloy and value of coin struck by
their own authority, or by that of the
respective States — fixing the standards
of weights and measures throughout
the United States — regulating the
trade and managing all affairs with the
Indians, not members of any of the
States, provided that the legislative
right of any State within its own
limits be not infringed or violated —
establishing or regulating post offices
from one State to another, throughout
all the United States, and exacting
such postage on the papers passing
through the same as may be requisite
to defray the expenses of the said
office — appointing all officers of the
land forces, in the service of the United
States, excepting regimental officers
— appointing all the officers of the
naval forces, and commissioning all
officers whatever in the service of the
United States — making rules for the
government and regulation of the said
land and naval forces, and directing
their operations.

The United States in Congress
assembled shall have authority to
appoint a committee, to sit in the recess
of Congress, to be denominated ‘A
Committee of the States’, and to consist
of one delegate from each State; and
to appoint such other committees and
civil officers as may be necessary for managing the general affairs of the United States under their direction — to appoint one of their members to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses — to borrow money, or emit bills on the credit of the United States, transmitting every half-year to the respective States an account of the sums of money so borrowed or emitted — to build and equip a navy — to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the legislature of each State shall appoint the regimental officers, raise the men and cloath, arm and equip them in a solid-like manner, at the expense of the United States; and the officers and men so cloathed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled. But if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of each State, unless the legislature of such State shall judge that such extra number cannot be safely spread out in the same, in which case they shall raise, officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque or reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of the majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months,
and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgement require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several States.

X.

The Committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of the nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said Committee, for the exercise of which, by the Articles of Confederation, the voice of nine States in the Congress of the United States assembled be requisite.

XI.

Canada acceding to this confederation, and adjoining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

XII.

All bills of credit emitted, monies borrowed, and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

XIII.

Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

And Whereas it hath pleased the Great Governor of the World to incline the hearts of the legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said Articles of Confederation and perpetual Union. Know Ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual
Union, and all and singular the matters and things therein contained: And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said Confederation are submitted to them. And that the Articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual.

In Witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the State of Pennsylvania the ninth day of July in the Year of our Lord One Thousand Seven Hundred and Seventy-Eight, and in the Third Year of the independence of America.

Agreed to by Congress 15 November 1777 In force after ratification by Maryland, 1 March 1781.
APPENDIX C

Declaration of Independence

IN CONGRESS, July 4, 1776.

The unanimous Declaration of the thirteen united States of America,

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.–That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, –That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.–Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in
the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.

He has affected to render the Military independent of and superior to the Civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

For Quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing Taxes on us without our Consent:

For depriving us in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.
He has abdicated Government here, by declaring us out of his Protection and waging War against us. He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people. He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Nor have We been wanting in attentions to our Brittish brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.
The 56 signatures on the Declaration appear in the positions indicated:

Georgia: Button Gwinnett, Lyman Hall, George Walton
North Carolina: William Hooper, Joseph Hewes, John Penn
South Carolina: Edward Rutledge, Thomas Heyward, Jr., Thomas Lynch, Jr., Arthur Middleton
Massachusetts: John Hancock
Maryland: Samuel Chase, William Paca, Thomas Stone, Charles Carroll of Carrollton
Pennsylvania: Robert Morris, Benjamin Rush, Benjamin Franklin, John Morton, George Clymer, James Smith,

George Taylor, James Wilson, George Ross
Delaware: Caesar Rodney, George Read, Thomas McKean
New York: William Floyd, Philip Livingston, Francis Lewis, Lewis Morris
New Jersey: Richard Stockton, John Witherspoon, Francis Hopkinson, John Hart, Abraham Clark
New Hampshire: Josiah Bartlett, William Whipple
Massachusetts: Samuel Adams, John Adams, Robert Treat Paine, Elbridge Gerry
Rhode Island: Stephen Hopkins, William Ellery
Connecticut: Roger Sherman, Samuel Huntington, William Williams, Oliver Wolcott
New Hampshire: Matthew Thornton
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, 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 chuse 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 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.

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 increased 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 a 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;

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, dockyards, 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.

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 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 anything 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 behaviour, 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.

**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 states 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.

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, anything 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.

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,

G. Washington-Presidt. and deputy from Virginia
New Hampshire: John Langdon, Nicholas Gilman
Massachusetts: Nathaniel Gorham, Rufus King
Connecticut: Wm: Saml. Johnson, Roger Sherman
New York: Alexander Hamilton
New Jersey: Wil: Livingston, David Brearly, Wm. Paterson, Jona: Dayton
Delaware: Geo: Read, Gunning Bedford jun, John Dickinson, Richard Bassett, Jaco: Broom
Maryland: James McHenry, Dan of St Thos. Jenifer, Danl Carroll
Virginia: John Blair–, James Madison Jr.
South Carolina: J. Rutledge, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler
Georgia: William Few, Abr Baldwin
APPENDIX E

The United States Bill of Rights

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.

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 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
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**

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**

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

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**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.
APPENDIX F

Additional Amendments to the United States Constitution

Amendment XI (1798)

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 (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 persons 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 (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 (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 (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 (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 of enumeration.

**Amendment XVII (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 (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 (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 (1933)**

Section 1. The terms of the President and 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 3d 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 elect 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 (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 (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 the 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 (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 (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 (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 (1971)

Section 1. The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.
Amendment XXVII (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.
Federalist No. 51

The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments

To the People of the State of New York:

TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

It is equally evident, that the members of each department should
be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal. But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State. But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconvenience is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified.

An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither
altogether safe nor alone sufficient. On ordinary occasions it might not be
exerted with the requisite firmness, and on extraordinary occasions it might be
perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department? If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion to the several State constitutions, and to the federal Constitution it will be found that if the latter does not perfectly correspond with them, the former are infinitely less able to bear such a test.

There are, moreover, two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view. First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.

There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the majority, as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.
In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States oppressive combinations of a majority will be facilitated: the best security, under the republican forms, for the rights of every class of citizens, will be diminished: and consequently the stability and independence of some member of the government, the only other security, must be proportionately increased. Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful.

It can be little doubted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practical sphere, the more duly capable it will be of self-government.
And happily for the REPUBLICAN CAUSE, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the FEDERAL PRINCIPLE.

PUBLIUS.
FOUNDING PRINCIPLES

**Due process:** The government must interact with all citizens according to the duly-enacted laws and apply these rules equally among all citizens.

**Civil discourse:** Reasoned and respectful sharing of ideas between individuals is the primary way people influence change in society/government, and is essential to maintain self-government.

**Federalism:** The people delegate certain powers to the national government, while the states retain other powers; and the people, who authorize the states and national government, retain all freedoms not delegated to the governing bodies.

**Individual Responsibility:** Individuals must take care of themselves and their families, and be vigilant to preserve their liberty.

**Liberty:** Except where authorized by citizens through the Constitution, government does not have the authority to limit freedom.

**Limited government:** Citizens are best able to pursue happiness when government is confined to those powers which protect their life, liberty, and property.

**Majority rule/minority rights:** Laws may be made with the consent of the majority, but only to the point where they do not infringe on the inalienable rights of the minority.

**Natural rights:** Rights which belong to us by nature and can only be justly taken away through due process.

**Private property:** The natural rights of all individuals to create, obtain, and control their possessions, beliefs, faculties, and opinions, as well as the fruits of their labor.

**Rule of Law:** Government and citizens all abide by the same laws regardless of political power. Those laws are justly applied, consistent with an ethos of liberty, and stable.
KEY TERMS

Anti-Federalists: A faction of Founders that supported amending the Articles of Confederation, were concerned about a strong central government, wanted to maintain strong state governments, and fought for the Bill of Rights as a way to protect citizens from a strong central government.

Coercion test: A test used by the Supreme Court to determine if someone is being coerced or forced into participating in a religious ceremony, or indirectly by offering aide to private religious schools.

Commerce: The economic system that constitutes the working environment for business including the legal, economic, political, social, cultural and technological systems that are in operation in any nation-state.

Commerce Clause: Article I, Section 8 of the Constitution states, “Congress shall have the power…to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

Double jeopardy: The Fifth Amendment states, “[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb…” The government cannot continually prosecute a person for the same crime repeatedly to obtain the verdict it wants.

Due process: Requirement that government must use fair and reasonable procedures in making, applying, and enforcing the law.

Eighth Amendment: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Eminent domain: The government’s right to acquire private property for public use, with just compensation.

Endorsement test: Test used to determine whether government policies or actions that endorse (support) a specific religious message and, therefore, violate the Establishment Clause.

Equal protection: The Fourteenth Amendment states that “No state shall…deny to any person within its jurisdiction the equal protection of the laws.”

Establishment Clause: The clause in the First Amendment that states, “Congress shall make no law respecting an establishment of religion.”
Federalists: A group of Founders that believed the central government was not strong enough under the Articles of Confederation and advocated for the new Constitution. They believed a bill of rights was not needed because the Constitution itself limited the government’s powers. They also feared that creating a list of rights might lead to other dangers, such as implying powers that had not been granted to the government.

Fifth Amendment: “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.”

First Amendment: “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”

Fourteenth Amendment: Amendment which guaranteed citizenship to freed slaves. The Amendment also placed limitations on the actions of state governments.

Fourth Amendment: “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.”

Free Exercise Clause: The clause of the First Amendment that states, “Congress shall make no law…prohibiting the free exercise thereof.”

Fundamental fairness: A determination that laws are fairly written and fairly applied.

General Law Test: A test to determine the constitutionality of laws relating to religion. Laws that apply to all religions in general are usually constitutional. Laws that apply to only one religion are unconstitutional.

Hate Speech: Derogatory speech directed toward a specific group.

Incorporation: The Supreme Court’s application of portions of the Bill of Rights to the states through the Fourteenth Amendment from Gitlow v. New York (1925). Originally, the Bill of Rights applied only to the actions of the federal government.
**Intellectual property:** Things that are intangible; songs, books, poems, music, and even art.

**Jim Crow laws:** Laws enacted after the Civil War which created “legal” racial discrimination and upheld by the *Plessy v. Ferguson* (1896) ruling which established the separate but equal doctrine. Examples of these laws include but are not limited to: segregation of public schools, public transportation, restaurants, and even the military.

**Just compensation:** Compensation for the loss of property value, either from a public works project or eminent domain. It is generally understood to be the fair market value at the time or what a willing buyer would pay in cash to a willing seller at the time of the taking.

**Lemon test:** Three-part test sometimes used by the Court to distinguish acceptable and unacceptable government involvement in religion. Acceptable policies or actions must a) have a primarily secular purpose; b) neither principally aid nor harm religion; and c) not cause the government to be excessively entangled with religion.

**Libel:** Speech that intentionally spreads falsehood about someone's character

**John Locke:** Locke believed that a government’s purpose is to protect individual natural rights such as life, liberty, and property, and therefore citizens must be able to dissolve the government if it failed to protect them.

**Magna Carta:** The oldest document in the British and American heritage of rights. Contributed to the adoption of the 1st, 3rd, 4th, 5th, 6th, and 8th amendments of the Bill of Rights, and speaks of these rights as ancient.

**Militia:** An individual or group of individuals charged with the duty to protect themselves and their neighbors.

**Natural rights:** Rights which belong to us by nature and can only be justly taken away through due process.

**Ninth Amendment:** “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

**Partial taking:** When citizens have lost some of their property or their property's value through regulation or other government actions.

**“Picket Fence” Approach:** The idea that there is some room for religion to influence government and vice-versa in the constitutional system. This concept is in contrast to
the “wall of separation” approach

**Property:** Anything that is excludable such as land, houses, cars, and other material things; as well as future profits from the sale of an object or idea, and even one’s conscience, thoughts, and reputation.

**Protected speech:** All speech that does not incite “imminent lawless action” or immediate illegal behavior is protected.

**Public use:** Formally relates to the building of highways, railroads, or other uses that constitute the public welfare or public interest.

**Ratify:** The process in which nine of the thirteen original states had to approve the Constitution in order for it to become law.

**Right to privacy:** The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. The Supreme Court has ruled that the Ninth Amendment protects some forms of privacy.

**Rights:** The Founders believed that natural rights, or rights which were inherent from birth, could not be denied to anyone.

**Second Amendment:** “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.”

**Sedition Act of 1798:** Outlawed any criticism of the President or any member of Congress under the threat of fines and jail.

**Segregation:** Arbitrary discrimination against a particular group based on race, gender, or sexual orientation.

**Self-incrimination:** This Fifth Amendment provision prevents the government from being able to force an individual to give evidence against himself.

**Seventh Amendment:** “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.”

**Separation of Church and State:** Principle that the federal government and religious institutions should be separate. This language is not actually included in the Constitution or Bill of Rights, but can be found in a letter written by President Thomas Jefferson.
**Sixth Amendment:** “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.”

**Slander:** Speech that intentionally spreads falsehood about someone’s character, or speech that maliciously puts others in harm’s way.

**Standing Army:** A permanent military group maintained during times of peace and of war.

**Takings clause:** This clause of the Fifth Amendment states, “nor shall private property be taken for public use without just compensation.” The government cannot take private land for the purpose of “public use” without paying the property owner.

**Tenth Amendment:** “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

**Third Amendment:** “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.”

**Total Incorporation:** The notion that every part of the Bill of Rights should be applied to the states.

**Unprotected speech:** Speech that intentionally spreads falsehood about someone’s character, such as libel or slander, or speech that maliciously puts others in harm’s way, such as speech that may start a riot, incite a panic, or otherwise threaten public safety.

**Unenumerated rights:** Rights not listed in the first eight amendments or elsewhere in the Constitution, but still protected by the Constitution under the Ninth Amendment.

**Voucher System:** Parents receive a fixed amount of public funds called a voucher to pay for a charter, private, or religious school of their choice.

**“Wall of Separation” principle:** The idea that there should be significant separation between government and religion.

**Warrant:** A document that law enforcement officials must obtain by showing evidence
beyond a reasonable suspicion, in order to search an individual or place or to make an arrest.