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THE PRESIDENTS AND THE CONSTITUTION
A LIVING HISTORY

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WHY CONSIDER THIS BOOK FOR YOUR CLASS?

• A chapter for each president, so that the reader learns about dramatic moments in constitutional history in the context of the people and events who shaped them.

• A skillfully edited book so that forty-four chapters on unique chief executives weave together seamlessly to tell a powerful and rich story worthy of all readers of history, law, politics and the presidency.

• The only book of its kind that shows the U.S. Constitution itself evolving through the bold initiatives (some successful, some ill-fated) of presidents whom the Framers entrusted to bring energy to the American system of government.
The Presidents and the Constitution: A Living History can serve as the textbook for undergraduate, graduate, and law school courses. It consists of 44 chapters, one for each president, arranged chronologically, authored by prominent political scientists, historians, law professors and journalists. The goal of the book’s editor—a prominent author and scholar in the fields of American presidencies and constitutional law—is to create an accessible and engaging text for a variety of courses and seminars.

The book focuses on a familiar subject, the American presidency. However, it does so through a unique lens—the constitutional issues and crises that each of the 43 men who have occupied the presidency have faced during the 225-year history of the American Republic. The parameters of presidential power and the meaning of constitutional provisions are explored in the context of major events of American history. Broad themes that have constitutional implications—such as race, war powers, national security, gender, etc.—are linked together to show how events during one presidency interrelate with and shape events in later administrations.

With the exception of the initial classes, which are aimed at providing background and covering foundational principles as an introduction, the course is designed to be participatory. For each class, students can be assigned book chapters and expected to participate in a class discussion of questions (which may be given to the students in advance) based on the material they have read. For each chapter, this Teachers Manual provides a set of discussion questions and a brief analysis of several key issues to make teaching the course efficient and enjoyable.

Students should understand at the outset that due to the open-ended nature of certain provisions in the Constitution and the historical context in which each president has operated, many of the questions raised in class have no “right” answer, and that the analysis one presents of an issue is often as significant as the conclusion one reaches. Typically, students are required to write a short paper and a long paper, and present them in class. The papers ordinarily focus on one or more constitutional issues as they relate to a president or presidents of choice, a presidential era, a historic event, a presidential power, etc.

The course tends to be lively, and provides a wonderful introduction to students who are considering a law degree, or advanced study in American law, political science or history. By learning about the presidents as they have shaped—or have been shaped by—various provisions in the U.S. Constitution, students learn about history, government, policy-making, and law. Simultaneously, they also learn how to analyze legal issues that confront all three branches of government. In this sense, the course can serve as a creative substitute for traditional undergraduate and graduate courses in Constitutional Law, and develop students’ skills that will prove invaluable in future courses of study. Hopefully, you will enjoy teaching the course as much as the authors (and editor) have enjoyed writing this unique and exciting book.
BACKGROUND

At the outset of the course, students should be introduced to the Constitution and the principles on which it was founded. A good beginning is the historical context in which the Constitutional Convention of 1787 took place, with a particular emphasis on the matters that influenced the founders in drafting the Constitution. In this regard, the following information about the Articles of Confederation, the state constitutions adopted during the Revolutionary War, and the ideas of the Enlightenment that influenced the founding fathers can provide useful background.

The Articles of Confederation. Adopted in 1781, the Articles served as the written document that established the United States of America after the colonies declared independence from Great Britain. The Articles created a loose alliance of sovereign states, as well as a sovereign central government. The central government, however, was weak, consisting of a single body, a one-house legislature. While the central government was given the authority to make treaties, maintain armed forces, coin money, and conduct foreign affairs, it did not have the authority to tax or regulate commerce. In addition, it lacked both an executive to carry out or enforce the acts of the legislature and a court system to adjudicate national concerns. The limited power of the central government under the Articles led to significant problems for the new country—disputes among states over claims to western lands; a crippling national debt that the states refused to address; border clashes with Britain and Spain; and a currency crisis. As a result, a convention was called for the purpose of amending the Articles. Ultimately, however, the delegates agreed that more than a mere revision of the Articles was needed and began drafting an entirely new document to govern the country.

State Constitutions. Since many of the delegates to the Constitutional Convention had participated in state constitutional conventions, state constitutions served as models for the federal constitution. Many of them predated the U.S. Constitution. Almost uniformly, state constitutions guaranteed and protected individual rights; emphasized that government’s power emanated from the people; and required that the branches of government be separate.

Intellectual Influences on the Founders. The founders embraced the central idea of the Enlightenment—that humanity could be improved through rational change. The founders were influenced by, among others: Blackstone (the rule of law), John Locke (the natural right of all men to life, liberty and happiness); Montesquieu (the separation of powers among branches of government); Rousseau (the social contract—all citizens contribute to the greater good and cede power to the government for what ); Voltaire (religious tolerance and freedom of thought and expression); and Adam Smith (a free-market economy based on rational self-interest leads to prosperity for all).
INTRODUCTION TO THE COURSE

FOUNDATIONAL PRINCIPLES
Students should be familiar with the following principles found in the Constitution, as they are encountered repeatedly throughout the book’s chapters: separation of powers, checks and balances, federalism, republicanism, limited government, and the rule of law. The points to be made about each include the following:

Separation of Powers. The separation of powers doctrine aims to avoid the tyrannical consequences of absolute power. The doctrine calls for a government consisting of separate, distinct, and co-equal branches of government, each wielding defined and unique powers. Under the Constitution, the government is divided into three branches—the legislature, which is given the power to enact the laws, the executive, which is given the power to execute the laws, and the judicial, which is given the power to adjudicate. However, the doctrine does not demand a complete and strict division of labor. Rather, the branches work in coordination with one another.

Checks and Balances. Under the system of checks and balances in the Constitution, each of three branches is able to restrain the others, so that no single branch has too much power. For example, the executive branch has the power to veto a law passed by the legislature, but the latter may override the veto. The executive branch executes the laws, but the legislature appropriates the funds to the executive to do so. The executive negotiates treaties, but the legislature must ratify them. The legislature passes laws, but the laws are subject to the judiciary’s interpretation and review.

Federalism. Federalism is a system of government in which the same territory is controlled by two levels of government. (Other major types of government in the world today are the unitary system, in which power is held at the national level with very little power being held in political subdivisions, and the confederation, in which there is a union of equal states, with some power being held at the national level.) Under a federalist scheme, an overarching national government governs issues that affect the entire country, and smaller subdivisions, such as states, govern issues of local concern. Both the national government and the smaller political subdivisions have the power to make laws and both have a certain level of autonomy from each other.

Limited Government. The federal government has only the authority the Constitution gives it to intervene in the affairs of individuals and in the activities of the states.

Republicanism. The principle of republicanism reflected in the Constitution refers to a form of government where the citizens conduct their affairs for their own benefit and not for the benefit of a ruler. The term also refers to the fact that democracy in America is not direct. Rather, the people elect representatives to
INTRODUCTION TO THE COURSE

hold office and exercise the powers of government.

The Rule of Law. The rule of law, as embodied in the Constitution, is associated with the notion that there is a formal, regular process of law enforcement and adjudication; “a government of laws, not of men.” (John Adams, “Letters of Novanglus,” published in the Boston Globe, 1774.) The rule of law also means that these rules are binding on rulers and the ruled alike.

THE CONSTITUTION

It is generally helpful to have students read the entire U.S. Constitution at the beginning of the course, paying particular attention to its structure and organization. Spending some time in class discussing the Constitution and pointing out highlights sets the stage for later discussions of specific provisions, the evolution of key issues, and as well as the interaction among the three branches of government.

POWERS

Because the students will find references in the book to the types of power the Constitution grants, the following categories of power should be defined, as part of your discussion of the Constitution:

Enumerated Powers. Also known as delegated powers, enumerated powers are those expressly assigned to the federal government. For example, in Article I, Section 8, Congress is expressly empowered to regulate interstate commerce; in Article II Section, the president is expressly empowered to serve as commander in chief.

Implied Powers. Implied powers are not expressly stated in the Constitution, but flow from the express powers. For example, Article I, Section 8 grants implied powers to Congress by stating that Congress the power to do make laws “necessary and proper” to carry out its duties; Article II, Section gives the president the implied power to remove cabinet officers by granting him or her the express power to appoint them.

Inherent Powers. The federal government has those powers that are inherent in the very idea of a sovereign nation and national government. The primary inherent power is the power of self-preservation; i.e., a state has the right to defend itself from foreign and domestic enemies.

Prohibited Powers. The Constitution also explicitly prohibits the federal government from exercising certain powers. For example, Congress cannot tax exports (Article 1, Section 9, Clause 5) or pass bills of attainder (laws that punish individuals or groups without a judicial trial) or ex post facto laws (laws that classify an act as a crime leading to punishment after the act occurs) (Article 1, Section 9, Clause 3).
Reserved Powers. Reserved powers are the powers that derive from that portion of the Tenth Amendment which provides that powers not granted to the national government and not prohibited to state governments, are “reserved to the States.”

Concurrent Powers. Concurrent powers are powers held by both states and the national government. An example of a concurrent power is the power to tax.

TEXT
The students should familiarize themselves with those parts of the Constitution that they will encounter in the book's chapters, with particular attention paid to Article II. This can be accomplished by walking through and reading from the provisions listed below. Preliminarily, you might introduce the competing approaches that have been used since the nation's founding to interpret the Constitution. The proponents of a “strict construction” give the Constitution's text a literal and narrow meaning; the proponents of a “liberal construction” read the words broadly and allow for a more expansive meaning.

The Preamble. The Preamble is the introductory statement of the goals at work in the full text in the Constitution. With the words, “We the People...do ordain and establish” the Preamble reflects the idea that the people (as opposed to a King, for example) are sovereign and that the source of governmental power resides in the governed themselves.

Article I. Article I establishes the legislative branch. Under Section 1, “all legislative powers shall be vested in the Congress,” which is made up of two chambers—the House of Representatives and the Senate. Section 7 describes the process by which Congress enacts laws. Section 8 lists the specific powers of Congress, and includes the power to make “all laws necessary and proper for the execution” of the specified powers. Often, the power of Congress will collide with powers of the president; this is one of the book's recurring themes.

Article II. Article II establishes the executive branch in the office of the presidency. For this reason, it is central to the course. As the founders were drafting the Constitution, they grappled with competing concerns—on the one hand, they wanted an “energetic” chief executive who could effectively enforce the laws and prevent abuse by a runaway legislature; on the other, they did not want a chief executive who could usurp power and become despotic. Out of their work, a new and unique model for a chief executive emerged in Article II.

Students should be made aware that the provisions in Article II are often general and vague—with many blanks that have been filled in over time. The Article II provisions that should be specifically reviewed include: the presidential eligibility requirements of age, residency and citizenship (Article II, Sec. 1, cl. 3); the selection process under the Electoral College (Art. II, Sec 1, cl. 3 and the Twelfth
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Amendment); the presidential term (Art. II, Sec. 1, cl. 1 and the Twenty-second Amendment); the Vesting Clause (Art. II, Sec. 1, cl. 1); the Take Care Clause (Art. II, Sec. 1, cl. 8); the Commander in Chief provision (Art. II, Sec. 2, cl. 1); the Appointments Clause (Art. II, Sec. 2, cl. 2), the pardon power (Art. II, Sec. 2, cl. 1); the Treaty Clause (Art. II, Sec. 2, cl. 2); the veto power (Art. I, Sec. 7, cl. 2); presidential succession (Art. II, Sec. 1, cl. 6); and impeachment (Art. II, Sec. 4).

Article III. Article III establishes the federal judiciary. Under Section 1, “[t]he 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 Supreme Court, ultimately, possesses the authority to determine when Congress and the president overstep their bounds and take action inconsistent with the Constitution. For this reason, the Supreme Court also plays an important role in the book’s chapters.

The Supremacy Clause. Article VI, Section 2 of the Constitution declares that the Constitution and any laws passed under it are “the supreme Law of the Land.” The Supremacy Clause essentially means that federal law, when applicable, prevails over conflicting state law.

The Amendments. Article V of the Constitution spells out the processes by which constitutional amendments are proposed and ratified. There are 27 Amendments in all. (The original text of the Constitution remains intact; amendments are appended at the end of the text.) Amendments 1 through 10 are referred to as the Bill of Rights. The Bill of Rights and the Amendments have often played an important role in specific presidencies. It is worthwhile for students to review them and to have a sense of their contents.

PREVIEW

Finally, you might wish to preview the interconnections spanning presidencies. A good example is the fact that President Woodrow Wilson and the George Burdick pardon are later connected to President Gerald Ford and the Richard Nixon pardon; President Abraham Lincoln and the Civil War are connected to Presidents George W. Bush and Barack Obama and the War on Terror. You might also preview the overarching themes that span presidencies—race, gender, Commerce Clause, national security, shaping the Supreme Court, and special prosecutors. Students should be invited to begin noting these interconnections and themes for themselves, and to identify their own interconnections as they move through the book. If you wish to get an overview of these overarching themes and connecting threads, be sure to review the Conclusion chapter; it seeks to accomplish this goal in an exhaustive fashion, at the end of the book.
KEY ISSUES

As the nation’s first president to serve under a new Constitution, George Washington was well aware that he would play a critical role in shaping the American presidency and defining what it meant to be a president, not a king. The Washington Chapter introduces students to several enduring precedents Washington established for his successors.

You might open class discussion by noting that one of Washington’s immediate concerns upon assuming office was finding the right balance between strong executive leadership and respect for the power of the legislative branch. You might also observe that Washington determined that building a collegial relationship between the executive and legislative branches to demonstrate that the Constitution’s system of checks and balances would work effectively was essential to the country’s success. Consequently, you might add, Washington made the conscious decision to approach Congress with deference, but also with firmness of purpose. Students should be able to understand the wisdom of Washington’s approach—he won the good will of Congress and secured its cooperation and inspired trust in the people that their new government would serve their interests.

Turning to the foreign policy challenges that Washington faced, a brief review of the manner by which the Constitution divides war-related powers between the president and Congress might be useful. Students should know that on some matters, the division is clear. For example, the Constitution explicitly grants the president certain exclusive powers as commander in chief—he or she decides strategy on the field of battle and makes treaties (provided the Senate gives its advice and consent)—and explicitly grants Congress certain others, such as the authority to declare war and finance military operations. On other matters, however, the allocation of power between the president and Congress is less than clear. As a result, they have been the subject of dispute and settled through the political process or by the U.S. Supreme Court. One such matter highlighted in the Washington Chapter is the policy of neutrality, which came to the fore when France and Great Britain went to war in 1793. Washington wanted America to remain neutral; in his view, the country could not afford to become embroiled in the conflict. The Constitution, however, did not clearly state which branch of the federal government—the president or Congress—had the authority to decide that America would remain neutral. When discussing Washington’s approach to securing the policy of neutrality he favored, you might point out the prudence and political adroitness it revealed. Washington announced the country’s neutrality in the Proclamation of Neutrality of 1793. While he believed that neutrality was in the president’s sphere of power to declare, he did not ignore Congress. Instead, he invited Congress to comment on and improve his Proclamation. Congress accepted Washington’s Proclamation and backed it up.
in a statute, the Neutrality Act of 1794. Thus, the question of the president’s authority to decide neutrality was settled. The take-away for students is that the course Washington steered not only avoided a showdown with Congress, but also demonstrated that the executive and legislative branches could work together and accomplish what the country needed.

You might remind students that when it came to organizing the presidency, the Constitution did not give Washington much guidance. In Article II, Section 2, Clause 1, the framers anticipated the creation of executive departments by Congress, to be headed by a “principal officer” who would provide the president with an opinion “on any subject relating to the duties of their respective offices.” However, the framers did not set forth the process by which the president would secure those opinions. Consequently, Washington experimented. Eventually, he settled on bringing the heads of departments and the attorney general together into a body he dubbed his “cabinet,” and meeting with them collectively to discuss and debate the issues of the day. When asked to evaluate Washington’s choice, students should be able express that a president’s receipt of a variety of views from cabinet members who debate the pros and cons of a particular policy decision leads to a better decision-making process.

Turning to the Supreme Court, you might confirm that students understand that although the Constitution provides for the establishment of a Supreme Court and “such inferior Courts as the Congress may from time to time ordain and establish” (Article III, Section 1), it does not prescribe the size of the highest court or the number of lower courts. Congress first supplied the missing pieces in the Judiciary Act of 1789—the Supreme Court was to have six members: five associate justices and a chief justice; there were to be 13 district courts—roughly one per state—and three regional circuit courts, which could hear appeals from the district courts. As to how the appointment and confirmation of U.S. Supreme Court justices (and lower court judges) was to proceed, the framers gave no guidance in the Constitution. When the Senate denied Washington his choice of John Rutledge as chief justice, it became clear that the process was not going to be a mere formality and the Senate was not going to defer to the president’s choice.

Another matter left unaddressed in the Constitution was the process by which the president should secure the Senate’s “advice and consent.” The Chapter describes the chaos that erupted in the Senate when Washington sought its advice and consent on a treaty in person, and his determination never to seek the Senate’s advice personally again. You might ask students to consider whether Washington should have made more of an effort to establish a presidential tradition of personal appearances before the Senate. The better answer seems to be that in light of what happened when he did so, Washington correctly concluded that the president should not be involved, even as a spectator, in the
Senate’s debates. It ran the risk of demeaning the dignity of the office and could have weakened the office for his successors.

As to the Supreme Court’s role, after reminding students that Chief Justice Jay indicated that Washington had likely overstepped his constitutional boundaries by asking the Court to serve as an advisory council, they should understand that Chief Justice Jay’s admonition was correct under the separation of powers doctrine—executive decision-making is vested only in the executive branch. You might also note that Washington’s request was inconsistent with that portion of Article III, Section 2 which limits the judiciary’s power to “Cases” and “Controversies.”

It is also important that students appreciate the fact that at the time, the Constitution placed no term limits on the presidency. Washington, however, chose not to seek a third term. He believed it was important to show the success of America’s new political system was not dependent on any one person. A two-term presidency became a tradition that all presidents honored, until Franklin D. Roosevelt, who served for four terms, from 1933 to 1945. The Twenty-second Amendment, which limits the president to two terms, was ratified in 1951 and formalized Washington’s two-term practice.

QUESTIONS FOR DISCUSSION

1. George Washington was a president of “firsts.” Is it surprising to you that he received the votes of all 69 presidential electors in 1788? Was this more like a coronation?

2. Was Washington’s deference to other branches of government, particularly Congress, a detriment to his presidency? Was this deference necessary to building trust in the office of chief executive, as Washington believed?

3. We’ve already discussed the concept of separation of powers embodied in the Constitution. Why did President Washington feel so strongly that it had to be respected?

4. The debate over neutrality with respect to the issue of war between England and France led to a public disagreement between the primary drafters of the Federalist Papers. In the Pacificus-Helvidius debate, Alexander Hamilton asserted that the president had the power to declare neutrality because the Constitution made the chief executive “the organ of intercourse between the United States and foreign nations.” (Art. II, Sec. 1). In contrast, James Madison argued that the legislature, which was tasked with declaring war (Art. 1, Sec. 11), logically possessed the power to declare neutrality. Who had the better argument?

5. Although the framers viewed the appointment and confirmation of U.S.
Supreme Court justices as little more than a mere formality in theory, presidents beginning with Washington have learned that this is not the reality in practice. Should the Senate be more deferential to the president and his nominees, or does a highly-critical confirmation process better serve the nation? Should political considerations be a basis for rejecting a president’s nominee?

6. Washington invented the notion of a “cabinet” that advised the chief executive, although the Constitution said little about organizing the executive branch. (Art. II, Sec. 2) Was this a positive step?

7. When Washington sought to use the Supreme Court as an advisory council, Chief Justice Jay rebuked the president’s attempt, stating that “the lines of separation, drawn by the Constitution between the three departments of the government” prevented the Court from rendering advisory opinions to the president. What, if anything, in the Constitution supports Chief Justice Jay’s determination?

8. Washington’s effort to appear before Congress in person, to seek “advice and consent” of the Senate on a treaty, was a colossal failure. Why? Would it have been better, long-term, if presidents had made it a point to appear regularly before Congress to work out disagreements on treaties, presidential appointment and other matters requiring the approval of the legislative branch?

9. Why do presidents continue to give a “State of the Union” address (Article II, Sec. 3) in Congress, in person? Could they simply mail the address to Congress consistent with the Constitution?

10. Washington, we see, was a very “cautious” president. Would that approach work today?

11. Another way of asking the same question: Compared to modern chief executives, Washington’s presidency was weak. Yet, he still managed to assert himself in several key respects, and to establish himself as one of the great presidents in American history. What was Washington’s most significant contribution to the development of presidential power under the Constitution?

12. Was it a good or bad decision for Washington to decide, voluntarily, not to seek a third term?
PART I. THE FOUNDING ERA
CHAPTER 2. JOHN ADAMS, 1797-1801
PAGES 34-46

KEY ISSUES

The highlights of the John Adams presidency include the Election of 1796, which ushered Adams into office, and the Election for 1880, which ushered him out. In addition to informing students about these consequential elections, the John Adams Chapter introduces students to questions they will encounter repeatedly in the book: what are the parameters of the president’s power to engage the country militarily without congressional approval; what types of restrictions on constitutional rights are Americans willing to tolerate in the name of national security; and what conduct did the framers contemplate would merit a president’s impeachment.

To put the Election of 1796 in context, you might start with a brief history of the rise of party politics in America. Students are likely unaware that the Constitution did not refer to political parties. The reason, you might point out, was that the founding fathers sought to prevent their formation, having witnessed vicious fighting among political parties in Europe and saw “factions” as a threat to the rational, collaborative process of government they sought to establish. Therefore, when devising the procedure for electing the president, the founders did not give political parties a role. Rather than designing a contest of competing political ideologies, they created a contest among individuals. Article II, Section 1, Clause 3 of the original Constitution provided for the establishment of “The Electoral College.” In that body, each state had a number of delegates, known as “electors.” That number was based on a state’s total number of U.S. Senators and Representatives. Each elector was originally authorized to vote for two persons for president; a first and a second choice were not designated. The person receiving the most electoral votes became president and the runner-up became vice president.

You might add that despite the founders’ hopes and intentions, political parties did emerge. During Washington’s second term, Alexander Hamilton formed the Federalist Party to advance his political philosophy, and Jefferson created the Republican Party, later called the Democratic-Republican Party, to advance his. During the formative years of our nation’s history, the interests of North and South, rich and poor, and industry and agriculture competed. Out of that competition, two profoundly different ideas about the role of federal government came into view, as expressed by Hamilton and Jefferson, respectively. Hamilton, aligned with the urban, mercantile interests of the North, believed that America would thrive if it had a strong federal government with broad powers. He advocated for the creation of a national bank that would establish fiscal policy, institute credit, and standardize a national currency. Jefferson, aligned with agrarian interests in the South, feared that a strong federal government would function more like a monarchy and wipe out the newly-born democracy. He believed it prudent to limit centralized power and allow more power to individual states.
Turning to the Election of 1796, students should understand that the political parties Hamilton and Jefferson established were firmly in place and assumed center stage in the presidential election. They should know that in one corner, stood John Adams, a Federalist; and in the other, Thomas Jefferson, a Democratic-Republican. Under the rules then in place, Adams won the presidency with the largest number of electoral votes (71) and Thomas Jefferson, who secured the second largest number of electoral votes (68), was elected vice president. (Thomas Pinckney, the person the Federalists had selected to be Adams's vice president, came in third and lost out to Jefferson.) Accordingly, the nation's top two executives represented not only widely disparate views, but were also of two opposing political parties. It became clear that the unanticipated rise of political parties compelled significant change to the Constitution. Congress ratified the Twelfth Amendment in 1804. This Amendment requires separate votes for the president and vice president and also stipulates that the president and vice president must come from different states. This progression can be used to show students how early provisions regarding the presidency had to adapt based upon the experiences of the new nation.

Students should next understand that in the so-called “Quasi-War,” Congress did not declare war against France and that the country’s military engagement was limited to naval operations, with American vessels capturing numerous French warships. The question the Quasi-War raises for class discussion is whether Adams overstepped his constitutional authority in the way he handled it. Some students may indicate that without a declaration of war from Congress, Adams had no authority to issue orders that the U.S. Navy attack and seize French ships. Others might point out that although Congress never officially declared war, it gave Adams, as commander in chief, the statutory authority and means to take defensive measures that were necessary to protect American interests. The larger point to be made here is that the Quasi-War illustrates that the Constitution did not clearly allocate power between Congress and the president with respect to the control and deployment of military force and the line of authority between the two branches had to be sorted out in practice over time.

You might advise students that the Alien and Sedition Acts, which Congress passed and Adams signed in 1798, during the Quasi-War, were prompted by rumors that there were French spies in the county and a French invasion was imminent. After outlining the broad contours of the legislation (the Alien Acts increased the residency requirement for American citizenship and authorized the president to imprison or deport aliens who were deemed dangerous; the Sedition Act restricted speech critical of the government), it would be worthwhile to point out that these laws reflect a dilemma that students will see repeatedly in the book—how should the country reconcile the inevitable tension that arises in times of conflict between constitutional freedoms and the interests of national security?
When discussing the Thomas Nash affair, you might confirm that students understand that President Adams was accused of interfering with the federal judiciary when he handed Nash over to the British to be tried and executed, and that this was why some in Congress called for Adams’s impeachment and/or censure. Students should be able to see that such calls were the result of partisan politics for the following reasons. If the decision on Nash was incorrect, Adams was, at most, mistaken as to the exact contours of his executive powers. Such a mistake would not be grounds for censuring a president, assuming the Constitution, which speaks only to impeachment, allows it. Moreover, Adams’s decision on Nash, even if mistaken, did not rise to the level of “treason, bribery, or other high crimes and misdemeanors” the conduct that is impeachable under Article II, Section 4 of the Constitution.

In the Election of 1800, Adams was the first president to lose his reelection bid, defeated by Thomas Jefferson. Following the election, power changed hands as a matter of course—Adams departed for home and Jefferson assumed office. Students should be able to appreciate that the election marked a milestone in American history—Americans could be confident that our leaders would abide by the Constitution, that power would be secured through the ballot box, not violence, and that the country could engage in lively, even contentious, political debate, but be capable of uniting once the victor was declared.

QUESTIONS FOR DISCUSSION

1. Were you surprised that John Adams only lasted one term as president? Did his governing style contribute to this?

2. Did Adams over-step his constitutional authority in seeking to handle the “Quasi-War” and the conflicts between France and England, or was he simply a victim of politics?

3. Does the Constitution envision that the president, as a general rule, should be the “sole organ” of government who represents the nation in the sphere of foreign affairs? [See Justice Sutherland’s opinion in U.S. v. Curtiss–Wright Corp. (1936) discussed in the chapter on President Franklin D. Roosevelt].

4. If the Alien and Sedition Acts of 1798 had been challenged in court, would the laws have survived constitutional scrutiny under the First Amendment? Why or why not?

5. Did Adams truly violate the separation of powers when he handed Thomas Nash over to the British to be tried and executed? Were the calls for Adams’ impeachment and/or censure legitimate, or were they simply the result of partisan politics?
6. Like Washington, Adams associated himself with the Federalists, but was not a full-fledged partisan. Were Washington and Adams the only two presidents of this type? Would the nation in modern times benefit from a less partisan chief executive, as the framers may have envisioned?

7. In the election of 1796, Adams was elected president and his political rival, Thomas Jefferson, was elected vice president pursuant to Article II, Section 3, because he received the second highest number of votes. This result would no longer be possible, because the Twelfth Amendment (1804) requires each member of the Electoral College to cast a separate vote for president and vice president. Was there any benefit to the original system, by which the two highest vote-getters became president and vice president, respectively, regardless of political affiliation?

8. Adams was the first president to lose his reelection bid. How important was the peaceful transfer of power in terms of stability for the young nation? How much credit does Adams deserve for this (i.e. the Revolution of 1800)?

9. Would you rank Adams as a good or bad president?
CHAPTER 3

PART I. THE FOUNDING ERA
Chapter 3. Thomas Jefferson, 1801-1809

PAGES 47-60

KEY ISSUES

In learning about one of Thomas Jefferson’s greatest achievements as president—the Louisiana Purchase—students will see that once in office, a president may have to choose between sticking to his or her constitutional principles or pursuing a course of action that runs counter to those principles, but which is likely to advance the country’s best interests. The Thomas Jefferson Chapter also introduces students to the establishment of the doctrine of judicial review, which is considered a key check in the hands of the federal judicial branch on the legislative and executive branches.

Jefferson was a Democratic-Republican and a strict constructionist. You might instruct students that as such, he was a proponent of states’ rights and popular rule; he read the Constitution narrowly; he sought to limit the scope of the federal government’s power to only those powers specifically enumerated in the Constitution; and he believed that Congress was the more democratic institution and should be strengthened. You might also observe that because no provision in the Constitution addressed the federal government’s acquisition and incorporation of foreign territory into the Union, Jefferson expressed doubts regarding the constitutionality of the government’s purchasing land from another country. Yet, one of his significant accomplishments as president was the Louisiana Purchase, by which the United States purchased approximately 828,000,000 square miles of territory from France, thereby doubling the size of the country. (What was known as Louisiana Territory stretched from the Mississippi River in the East to the Rocky Mountains in the West and from the Gulf of Mexico in the South to the Canadian border in the North. Part or all of 15 states were eventually created from the land deal.) Jefferson structured the Louisiana Purchase as a treaty between the United States and France. Thus, he could point to Article II, Section 2, clause 2, which authorizes the president to negotiate treaties, as the constitutional provision that empowered him to consummate the transaction. You might ask students what they think of Jefferson’s decision to move forward with the Louisiana Purchase from a constitutional standpoint. Some are likely to say the Louisiana Purchase stretched the Treaty Clause beyond its intended purpose, but others might say it got the job done and took advantage of a meaningful opportunity for the country.

When discussing the U.S. Supreme Court’s landmark decision in Marbury v. Madison, you might keep in mind that the decision is significant less for the specific dispute that it settled regarding Marbury’s judicial commission than for the fact that Chief Justice Marshall used the case as a vehicle to articulate that the Court has the power of judicial review. You might confirm that students understand that the decision solidified the notion that the judiciary is the final arbiter as to whether the acts of Congress, and by implication the acts of the executive, are constitutional. Students should appreciate that under the doctrine, the federal judiciary is not only empowered to pass on the constitutionality of the actions of
the other branches, but is also empowered to void those actions it finds to be unconstitutional. The Chapter describes Jefferson’s response to the ruling—he loathed it. You could ask students to explore why. First, given Jefferson’s distrust of centralized and concentrated power in the hands of a few, he was deeply concerned that the doctrine of judicial review gave immense and unchecked power to a judicial body consisting of several unelected officials. In addition, the decision offended Jefferson’s strict constructionist approach; the doctrine of judicial review is not expressed in the Constitution. Nonetheless, you might point out, Jefferson had no choice but to acquiesce in the ruling because the administration won the case; that is, Madison prevailed and did not have to deliver Marbury’s commission.

You might emphasize the significance of Marbury v. Madison to our system of checks and balances. The decision gave the federal judiciary a powerful role, providing it with the capacity to check the other branches of federal government (and state governments too). Without judicial review, the judicial branch would have been relegated to interpreting and applying the law and, conceivably, would not have evolved into the co-equal branch of government it is today. You might ask students to consider a question constitutional scholars debate to this day—whether a system that lacks judicial review would be better or worse for the county. In guiding the debate, you might ask students to focus on which branch should be responsible for upholding the terms of the Constitution. Should it be the legislative branch made up of politicians who participate in the political process and can be voted out of office for displeasing their constituents? Or should it be judges who are members of an institution that is largely insulated from politics and are appointed for life and removable from office only for bad behavior? What students should take away from the debate is whatever one thinks of the doctrine, it is an integral and permanent aspect of our system.

QUESTIONS FOR DISCUSSION

1. We often think of Thomas Jefferson in connection with individual liberties. He was the author of the Declaration of Independence, champion of free speech and religious expression, and the person who pushed for the Bill of Rights. But in this chapter he is largely defined—in his role as Secretary of State and President—as the champion of federalism—protecting states vis-a-vis the federal government—e.g. opposing the national bank. But we also see he wasn’t always consistent in his views...

2. Jefferson expressed doubts regarding the constitutionality of the Louisiana Purchase—an agreement with France that paved the way for the westward expansion of United States—yet he still pushed the deal through Congress. Does this episode suggest that an individual’s view of the Constitution inevitably changes when he or she occupies the office of the presidency?
CHAPTER 3

PART I. THE FOUNDING ERA

CHAPTER 3. THOMAS JEFFERSON, 1801-1809

PAGES 47-60

How would a true strict constructionist (such as Jefferson himself during
the Washington and Adams presidencies) have interpreted the president’s
powers in this case.

3. During John Adams’ presidency, did Vice President Jefferson’s provocative
suggestion that the Alien and Sedition Acts could be nullified by the states
reflect a rogue attitude toward the Constitution? How would he get around
the Supremacy Clause (Article VI) which states that the Constitution and laws
of the United States are supreme over those of the states? Does Jefferson
bear some responsibility for planting the seeds for the nullification crisis that
would later erupt during the Jackson administration and persist until after
the Civil War?

4. Jefferson was privately skeptical of organized religion; yet, as a public figure
he took unprecedented steps to safeguard religious freedom. What might
explain Jefferson’s apparently contradictory views?

5. Discuss the landmark Supreme Court decision of Marbury v. Madison. What
was the ultimate significance of Chief Justice Marshall’s ruling, holding that
the Court lacked authority to order the delivery of the commissions? Why
did Jefferson despise the ruling? If he loathed the ruling so much, why didn’t
he simply refuse to obey it?

6. If Jefferson and those who shared his views had prevailed, and Marbury v.
Madison had turned out differently—such that each branch of government
had the final say over the constitutionality of its own actions, rather than
leaving these matters to the Supreme Court—how would the American legal
system be different today? Would this difference be good or bad?

7. Was it a good or bad thing that the Twelfth Amendment was added in 1804,
ending the practice that the V.P. was the candidate with the second highest
number of votes for president, and allowing a president to select his own
running mate? (This allowed Jefferson to ditch Aaron Burr.)

8. Many Jefferson biographers have been criticized for romanticizing the
former president’s influential views on liberty while largely overlooking his
track record with slavery. Was Jefferson deeply hypocritical in this respect?
What impact, if any, should this have upon Jefferson’s legacy as one of the
nation’s founding presidents?

9. Jefferson’s commitment to a limited national government of enumerated
powers, and his skepticism about the unelected federal judiciary, are themes
that are ever-present in modern politics. Which party or parties today tend
to favor Jefferson’s views? Which tend to oppose them? To what extent have
these competing views been resolved in the past 200-plus years?
KEY ISSUES

You might begin class discussion with an explanation as to why James Madison is referred to as the “Father of the Constitution.” Madison earned the title because no one contributed more than he did in shaping and explaining the Constitution’s terms. As a delegate to the Constitutional Convention from Virginia, he played a prominent role in the drafting of the Constitution. He then played a pivotal role in the Constitution’s ratification, which required that two-thirds of the 13 states approve it. Madison campaigned for ratification by co-authoring a series of essays with John Jay and Alexander Hamilton that appeared in various New York newspapers and then circulated around the states. The essays, known as The Federalist Papers, commented on and explained the principles in the proposed Constitution.

The Chapter highlights a constitutional question that loomed large during the Founding Era—did Congress have the power to establish a national bank? In discussing the question, students should come to understand that presidents are often called upon to apply the words in the Constitution, which are often less than clear, to critical policy decisions that have far-reaching ramifications for the country. More specifically, given the decisions Madison made regarding the establishment of a national bank, students should learn that events that transpire during a president’s tenure can change even long-held views as to what the Constitution means.

Students are likely to take the existence of a federal banking institutions for granted and will be surprised to learn that establishment of a national bank was one of the most controversial and disputed issues early in America’s history, pitting several founding fathers, one against the other. From a historical perspective, you might advise students that the First Bank of the United States was chartered by Congress for a term of 20 years in 1791 when Washington signed the bank bill into law and that the establishment of the First Bank was part of a three-point plan, along with a federal mint and excise taxes, devised by Secretary of Treasury Alexander Hamilton. By holding federal monies, issuing notes that could be used to pay debts, and extending loans to stimulate manufacturing and economic growth, Hamilton believed the First Bank would stabilize the nation’s currency and credit and improve the financial business of the U.S. government.

To place Madison’s thinking regarding the constitutionality of the national bank in context, you might point out that he (along with Thomas Jefferson) disagreed with Hamilton’s perspective. Madison believed that chartering a national bank would lead to the unhealthy dominance of a wealthy upper class. The First Bank, he feared, could create a privileged group of non-producers—people who would get rich by merely handling paper money rather than
through hard work—and encourage corruption, as businessmen cultivated unsavory partnerships with the government. In addition and more significantly, Madison was a strict constructionist who read the Constitution narrowly. To decide whether the First Bank was constitutional, he looked for a provision that specifically empowered the federal government, through Congress, to establish a national bank. However, he found none. In his view, not even Congress’s power to regulate interstate commerce encompassed the authority to charter a bank. Thus, Madison concluded that the establishment of a national bank was unconstitutional. (When the First Bank’s 20-year charter expired in 1811, Congress failed to re-authorize it.)

Ultimately, however, as the Chapter teaches, Madison came to think otherwise. You might explain that the War of 1812 had much to do with Madison’s change of mind. The war took a heavy financial toll on the country. No plans had been made for meeting the costs of war—the states offered no financial support, Congress had imposed no new taxes to pay for it, and the disruption in trade caused by the war curtailed federal government revenues derived mainly from tariffs. As a result, the national debt soared from 45 million in 1811 to 125 million in 1815. Additionally, the lack of a national bank deprived the federal government of a reliable source of currency and placed the country’s monetary system on unsteady ground. As a result, Madison was persuaded that a central banking system was needed to maintain fiscal and monetary order. He abandoned his argument that the Constitution did not permit the establishment of a national bank and signed the bill chartering the Second National Bank in 1816. You might point out the significance of Madison’s position that his prior arguments against the bank, though sound when made, had been rendered inoperable “by repeated recognitions...of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by...a concurrence of the general will of the nation.” By so stating, Madison openly acknowledged that the judgment of the people as to what the country needed, as expressed through their representatives in the government, had to play a role in determining what the Constitution means and allows. Coming from a strict constructionist, Madison’s change of heart was nothing short of radical. This example can be used to show students the fluidity of perspective that the office of the presidency often requires of its occupants.

QUESTIONS FOR DISCUSSION

1. James Madison came to the presidency having played a major role in drafting the Constitution, and defending it in the Federalist papers. Do you think that impacted how he approached major issues before he became president?

2. On June 1, 1812, Madison issued a message to Congress urging it to
declare war against Great Britain. Was this request significant in any way? Could Madison have simply commenced military action against Great Britain without asking Congress for permission?

3. Were you surprised that Madison fled the White House and watched the Capitol and White House go up in flames under British attack?

4. During his presidency, Madison came to support the National Bank even though he had once viewed it as unconstitutional. In supporting the 1816 re-charter of the Bank, Madison stated that “requisite evidence of the national judgment and intention” had rendered the creation of the Bank constitutional. What did Madison mean by this? Did the War of 1812 play a role in his change of heart? Should the fact that something benefits the country over time be enough to render it “constitutional?”

5. After the war, Madison vetoed Congress’ “internal improvements” bill even though it would have improved national infrastructure (roads, canals, etc.), because he believed that the bill was unconstitutional. Do you agree that this legislation was unconstitutional? How could Madison’s position on this bill be squared with his decision to switch positions and support the National Bank?

6. Do you agree with Madison that, if Congress wished to exercise a power not expressly given to it in the Constitution (such as setting up a national program to build roads, etc.), it needed to initiate a Constitutional amendment expanding its powers in this fashion? How easy or hard would this be?

7. Why was the Supreme Court’s decision in *Fletcher v. Peck* significant? Did the decision alter the balance of power between the states and the federal government? How did it shape the role of the Supreme Court? Do you think Madison and his mentor Thomas Jefferson were correct in their belief that the case illustrated Chief Justice Marshall’s political hostility toward them?

8. Madison wrote in *The Federalist* No. 47 (1788) that separation of powers did not mean total separation of the branches of government. Rather, borrowing from the French political philosopher Montesquieu, Madison explained that legislative, judicial and executive powers were separated in the Constitution so that no single branch could wield the entire power of another and become tyrannical. Please explain this concept. How did Madison seek to live out this notion of separation of powers as president?

9. We see that Washington and others favored freeing slaves in their wills to gradually resolve the slavery conundrum; whereas Madison supported
a solution called “colonization” whereby slaves would be freed and the federal government would “resettle” them in Africa. Would that have been a better solution than what ultimately happened to the slaves?

10. Madison is considered the “Father of the Constitution” due to his role as the principle drafter of the document. How, if at all, did his role in creating and defending the proposed Constitution influence his behavior as president?
CHAPTER 5
SUMMARY

You might open class discussion of the Monroe Chapter by observing that two of the most significant events in the nation’s history occurred during James Monroe’s presidency—Congress passed the federal statute known as the Missouri Compromise and Monroe issued a foreign policy declaration known as the Monroe Doctrine. You might explain why you emphasize these events by observing that the Missouri Compromise revealed the shadow that slavery would increasingly cast over the country until it culminated in the Civil War and the Monroe Doctrine demonstrated the growing power of the president to take the initiative in and speak for America in foreign affairs.

Before delving into the Missouri Compromise, students might find the following brief review of how slavery was originally expressed in Constitution’s provisions helpful. Slavery took hold in America as a solution to a labor shortage in the colonies. When the North American continent was first colonized by Europeans, men and women were needed to work the land. Early in the Seventeenth Century, a Dutch ship loaded with African slaves provided a solution. By the end of the American Revolution, slavery had proven unprofitable in the North and was dying out. In the South, however, slavery was rooted in the economy as it provided the most economical source of labor for the tobacco and cotton farms that had sprung up in the region. Though the word “slave” or “slavery” did not appear in drafts of the Constitution, the issue was very much alive during the Constitutional Convention of 1787. The difficulty for the framers was to craft a document that would bind the states into an effective union without offending Northern and Southern sensitivities over the issue of slavery. One of the main questions the founders confronted was how the slave populations of the Southern states should be counted. A compromise was reached: a slave would be counted as three-fifths of a person for determining the representation of a state in the House of Representatives and therefore, the number of electoral votes to which each state was entitled. The Three-fifths Clause (Article I, Section 2, clause 1) proved to be powerful political tool for the South, providing a premium in Electoral College representation. (For example, in the Election of 1800, Thomas Jefferson’s margin of victory over Adams was the 12 electoral votes the Three-fifths Clause provided to southern slave-owning states.) A second constitutional issue concerning slavery was the slave trade. In Article I, Section 9, clause 1, Congress was prohibited from banning the slave trade until 1808. A third key issue was the question of fugitive slaves. Under the Privileges and Immunities Clause (Article IV, Section 2, clause 3), fugitive slaves who found their way to free states had to be returned upon their owner’s request.

When turning specifically to the Missouri Compromise, you might confirm that students understand that in 1819, the nation was balanced between free and slave states—there were 11 of each. In that year, however, the balance was
threatened when the Missouri Territory, which was part of the Louisiana Purchase, applied for admission to the Union as a slave state. The application engendered a bitter debate in Congress. While Northerners argued that under Article IV of the Constitution, Congress had the authority to regulate slavery in the territories, Southerners argued that new states had the same freedom of action as the original thirteen and were thus free to choose slavery if they wished. Ultimately, a compromise bill which maintained the balance was worked out. Missouri was admitted as a slave state and Maine was admitted as a free state. A line was drawn and in the remainder of the Louisiana Purchase lands north of latitude 36°30’ slavery was prohibited.

You might note that Monroe did not have a hand in the Missouri Compromise, save for signing the final bill. He thought the issue of slavery’s expansion into the territories was for Congress to decide. Further, he apparently saw the Compromise as the country’s best option because it continued the delicate equilibrium between slave and free states that had been struck and accepted at the nation’s inception. In point of fact, the Missouri Compromise held for more than 30 years. That said, you might also note that Monroe has been criticized for not trying to help the country move toward a final decision on slavery’s continued existence as an institution. Finally, you might note that whether there actually were viable alternatives to the approach the Missouri Compromise encompassed can be debated, but that it is safe to say is that no political leader at the time, including Monroe, was able or willing to present a permanent solution to the slavery issue or confront the growing sectional differences between the North and South that were boiling just below the surface.

With regard to the Monroe Doctrine, you might first point out that although there is little, if any, debate that the president is the nation’s representative with regard to foreign nations and a prime mover in America’s foreign policy, the phrases “foreign affairs” and “foreign relations” do not appear in Article II of the Constitution. In fact, many scholars see the actual text of the Constitution as largely unhelpful for locating the president’s power to formulate (as opposed to announcing or implementing) foreign policy, and therefore, rely on extra-textual sources, like the inherent rights of sovereignty, custom and practice, necessity, etc. However, it is reasonable to assume that the Vesting Clause in Article II, which grants executive power to the president, was intended to include a foreign affairs component. Students should understand that the Monroe Doctrine was a policy, not a statute or a treaty, and that as such, it did not have the force of law, was not legally binding, and it did not need to be formally repealed to discontinue observance of its directives. Students should also understand that the Monroe Doctrine played a pivotal role in U.S. national security, putting all foreign powers on notice that any attempt to regain control of their former colonies in this hemisphere would be viewed as a hostile act. The Doctrine made it clear that any foreign power would be prevented from expanding their
presence in the area that would become the west coast of the United States.

QUESTIONS FOR DISCUSSION

1. Why was General Andrew Jackson’s apparent insubordination during the Florida campaign so troublesome for James Monroe? The Constitution, in Article II, Section 2, dictates that the president is the Commander-in-Chief of the military. Does it provide a mechanism to deal with a situation where a general usurps the president’s authority?

2. Tell us what the “Missouri Compromise” was. Was supporting the Missouri Compromise Monroe’s best option at the time? Given the explosive nature of the slavery issue, what other alternatives might he have considered? Did Monroe’s approval of the Missouri Compromise contribute to the outbreak of the Civil War four decades later, or help to hold the country together longer than would have been possible otherwise?

3. Consider Chief Justice Marshall’s decision in *McCullough v. Maryland* and discuss how he arrived at his determination that the National Bank was constitutional. Was Marshall simply manipulating the language of the Constitution to justify the existence of the National Bank, which both he and Monroe favored? Why do you think Monroe approved of Marshall’s decision relating to the National Bank, when he generally opposed decisions of the Marshall Court that expanded national power at the expense of the states? (“necessary and proper” to carrying out taxing, spending and national defense power).

4. Monroe’s presidency, which came to be known as the “Era of Good Feeling,” focused heavily on foreign policy, as demonstrated by his articulation of the influential “Monroe Doctrine.” Tell us what the Monroe Doctrine said. Is the Monroe Doctrine compatible with the Constitution? From which power of the chief executive in Article II does it flow? Does the president possess inherent authority to issue broad foreign policy directives that bind the nation, or do such actions violate the separation of powers between the executive branch and the legislature?
You can use the allegations that John Quincy Adams secured the presidency by entering into a “corrupt bargain” with Henry Clay to explore the notion that one error in judgment can doom a president to failure. Students should recognize that JQ Adams made a political misstep by nominating Clay for Secretary of State. If nothing else, Clay’s nomination had the appearance of impropriety. As a result, it opened JQ Adams up to the political liabilities that accompany even unproven charges of corruption. Andrew Jackson and his supporters launched a four-year campaign of revenge, attacking the JQ Adams administration as illegitimate. While JQ Adams’ political adversaries would have challenged his policies and proposals on political or philosophical grounds in any event, Clay’s nomination gave them the perfect pretext for mounting a constant barrage of opposition against the administration. JQ Adams’ stature as president was undermined, which made advancement of his agenda all the more difficult. Thus, in the end, it did not matter that JQ Adams had every right to appoint the experienced Clay to the State Department, just as Clay had every right to support JQ Adams and to try to influence others to follow suit. Nor did it matter whether an actual agreement existed between Clay and JQ Adams. The mere whiff of corruption was enough to damage JQ Adams’s Administration beyond repair.

You can also use the JQ Adams presidency to introduce the presidential power of removal. Removal is a complicated issue. The parameters of the removal power, as later Chapters show, have been teased out over time. At this point, it would be sufficient for students to understand that the Constitution is silent as to the president’s power of removal, but that Article II, Section 2, Clause 2, which gives the president the power to appoint federal officers, impliedly gives him the power to remove them. Further, with a review of the text of the Appointments Clause, students can see that it divides federal officials into so-called principal officers, who the presidents appoints appointed through the advice and consent mechanism, and so-called inferior officers, whose appointment Congress may place “in the President alone, in the Courts of Law, or in the Heads of Departments.” After reminding students of the Decision of 1789 (see John Adams Chapter), students should be able appreciate that JQ Adams was authorized to remove members of his predecessor’s cabinet and members his own cabinet without the Senate’s advice and consent.

**QUESTIONS FOR DISCUSSION**

1. Many historians maintain that the presidency of JQ Adams was dealt a fatal blow by the allegation that the outcome of the Election of 1824 was the result of a “corrupt bargain” between Adams and Henry Clay. Might there have been reasons, other than corruption, that led Clay to support Adams
for president and led JQ Adams to ask Clay to serve as secretary of state? Would the better course have been for Adams to nominate someone other than Clay? Should JQ Adams have taken an alternative course?

2. To which provisions in the U.S. Constitution would JQ Adams have pointed in support of his view that the federal government had the power to build roads and construct canals, etc.

3. Article II gives the president the power of appointment. When JQ Adams took office, he did not remove individuals already holding federal executive offices. Did the Constitution give him the power to do so? Had Adams chosen to remove an executive officer, did the Constitution require that he secure the advice and consent of the Senate?

4. The Tariff of 1828 was a protective tariff passed by the Congress to protect businesses in the northern United States that were being driven out of business by low-priced imported goods. Southerners, however, were harmed by the Tariff—it made for higher prices on goods the South did not produce and had to import. They claimed the Tariff was unconstitutional because it favored one sector of the economy over another. Were they correct?

5. JQ Adams struggled in the presidency and is widely viewed as a failed president. In his post-presidential years, however, he had an illustrious career as a member of the House. How was the role of congressman more suited to Adams’ talents?
PART II. THE AGE OF JACKSON
CHAPTER 7. ANDREW JACKSON, 1829-1837
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KEY ISSUES

President Andrew Jackson ushered in a new presidential era. He was the first political “outsider;” a self-made man, who lacked a close association with founding of the Constitution. You might begin class discussion by exploring the Chapter’s description of Jackson as a “second-generation leader.” Not being a founder liberated Jackson from the past. He was free to depart from the ideas the founders held regarding the Constitution and advance his own different constitutional vision.

One aspect of the Jackson presidency you can emphasize is Jackson’s notion that the president, more so than Congress, gave voice to the people’s will. Jackson worked to forge a direct connection with the people, and used public support to exert presidential leadership on policy matters. The political struggle between Jackson, a Democrat, and the Whig Party, whose members (e.g., John Quincy Adams, Henry Clay) resisted the expansion of executive power at the expense of Congress’s authority came to a head when Jackson vetoed the bill to re-charter the national bank. Students should recall that although Madison, like Jackson, doubted that the national bank was constitutional, he ultimately reconciled himself to it. Madison believed that it would be improper for the president to ignore Congress’s will as reflected in its repeated support of the bank. He also came to see the Bank as a necessary to certain critical national concerns i.e., it was essential to maintaining the nation’s defense and fiscal affairs. Jackson, however, did not accept the notion of legislative supremacy. From Jackson’s perspective, the bank bill was the perfect vehicle to put Congress and the public on notice that he intended to assert the powers of the executive branch to the fullest. In addition, unlike his predecessors, Jackson was a populist. His attack on the Bank as an institution which advanced the interests of the rich and privileged to the detriment of the common man was consistent with his political messaging.

When you discuss Jackson’s veto of the National Bank, which included his conclusion that the Bank was unconstitutional, you might make sure that students appreciate that Jackson’s view contradicted and essentially sought to undo the Supreme Court’s ruling in *Maryland McCulloch*. There, the Court had concluded that the Necessary and Proper Clause (Article I Section 8, clause 18) of the Constitution empowered Congress to establish a national bank. The Court reasoned that although the Constitution did not expressly grant Congress the power to establish a bank, the Constitution did grant Congress the power to tax and spend and raise armies, and that Congress’s establishment of a bank was “necessary and proper” in order to exercise its taxing and spending and national defense power. Students should be aware that there was more to Jackson’s veto than a disagreement with the Court over the Constitution’s meaning. The veto was also grounded on Jackson’s belief that the bank reflected bad policy. He believed that a centralized banking system threatened the country’s economic
stability. The veto demonstrated that Jackson saw no conditions placed on the president's use of the veto; it was a tool the Constitution gave the executive to exercise during the legislative process as he wished. The president could use the veto to protect the country from congressional action he concluded was unacceptable.

After discussing the details of Treasury Secretary William Duane's removal, you might confirm that students understand that by now, it was accepted that a member of the cabinet served at the pleasure of the president, and was removable by the president for any reason or no reason at all. Moving next to the Senate's censure of Jackson, you might observe that some at the time argued that the Senate did not have the authority to censure the president. Censure of the president was neither expressed nor implied in the Constitution; only impeachment was covered. But, others argued in favor of the Senate's authority to censure, noting that the Constitution did not prohibit censure. They characterized a censure as a legitimate expression of the Senate's institutional opinion on a matter of high political and constitutional import. At any rate, students should be able to see that the entire episode was as much political theater as anything else. In that sense, expungement of the censure was as appropriate as was the censure itself.

You might also use the Court's decision in *Worcester v. Georgia* (1832), declaring that the Cherokee Indians were a sovereign nation that could not be subject to the criminal laws of Georgia, and Jackson's reputed response—"John Marshall has made his decision; now let him enforce it."—to confirm that students understand that Article III does not give the judiciary its own means to enforce its orders. The federal courts have no recourse against government officials, state or federal, or private individuals who ignore judicial declarations and orders. Upon request, the courts may hold a party in contempt for disobedience, but, after that, they rely on the executive branch for enforcement of the law they pronounce.

**QUESTIONS FOR DISCUSSION**

1. Andrew Jackson was the first president to lack a close association with founding of the Constitution. In what ways did his presidency reflect this evolution? Were the challenges that Jackson faced different from those of his predecessors because he was a second-generation political leader?

2. What did Jackson's veto of the Maysville Road Bill indicate about his view of the president's role under the Constitution? Was Jackson's assertion that the Constitution did not permit federal internal improvements if they were not approved by the states (similar to Madison) a valid interpretation? Was his conclusion that the federal government could only finance internal improvements that promised substantial national benefits supported by the Constitution?
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3. Why did Jackson break with his immediate predecessors, Presidents Monroe and Madison, and oppose the National Bank? Did his veto in this matter essentially overrule the Supreme Court’s declaration in McCulloch v. Maryland that the bank was constitutional? From what source did Jackson derive the power to override the Supreme Court?

4. Jackson was the first president to declare that public support in the national elections validated his positions on certain policy matters and thus shaped and expanded his Constitutional powers. Did the founders contemplate such a fluid notion of executive power?

5. Did Jackson demonstrate a consistent constitutional theory when it came to the powers of the respective branches of government, or was his primary goal to advance his own authority by interpreting the Constitution to suit his ends?

6. Was Jackson justified in removing his secretary of treasury, when that official refused to remove all federal funds from the National bank? Was the Senate justified in censuring Jackson? Where in the Constitution does it give the Congress a power to censure? Was it appropriate, later, for that censure vote to be expunged, once Jackson’s own party gained control of the Senate? Where does the line between the Constitution and politics begin and end in such conflicts between two different branches of government?

7. Jackson, following Chief Justice Marshall’s decision in Worcester v. Georgia (1832), declaring that the Cherokee Indians were a sovereign nation that could not be subject to the criminal laws of Georgia, famously stated: “John Marshall has made his decision; now let him enforce it.” What did Jackson mean by this? What does this episode reveal about Jackson’s view of the chief executive vis-a-vis the Supreme Court?

8. Many scholars have asserted that Jackson’s presidency was the most powerful of any chief executive who held office before Abraham Lincoln. Is this accurate? In what ways were Jackson and Lincoln similar? Different? Keep in mind Jackson’s response to the Su ruling in Worcester v. Georgia and his handling of the Nullification Crisis (in which he condemned South Carolina secessionists, as an offense to the Union, even though he was from South Carolina). How would Lincoln have handled a similar situation?
KEY ISSUES

When introducing the Van Buren Chapter, you might explain that Martin Van Buren’s presidency demonstrated that during a nationwide crisis, the president should be flexible, and willing, at the very least, to reconsider his or her ideological commitment to a constitutional point-of-view. It also showed that the significant effect that Supreme Court rulings can have on a president’s administration and those of his or her successors.

After reminding students that throughout the Panic of 1837, Van Buren did not veer from his Jacksonian belief (and the policies of the Jackson administration) that the federal government’s power to alleviate the country’s economic distress was narrow and limited, you might explore the alternative view that there were constitutional provisions that arguably authorized federal intervention and assistance. As the Whigs argued, the Constitution did not prohibit the suggestions they put forward to ease the economic crisis—the creation of the Third Bank of the United States, abandonment of the Specie Circular, and the establishment of a uniform national currency. Such measures, they also argued, were in fact allowed to Congress under the Necessary and Proper Clause (Article I, Section 8, Clause 18), as interpreted by the Supreme Court in *McCulloch v. Maryland*, the Commerce Clause (Article I, Section 8, Clause 3), and the Coinage Clause (Article I, Section 8, Clause 5). In light of the fact Americans suffered significantly from the economic dislocation that persisted throughout Van Buren’s watch, his insistence on hewing the party line and unwillingness to consider federal intervention was misguided. Van Buren remained true to his principles, but his decision against federal intervention led to a continuing economic crisis and contributed to his defeat in the next presidential election. (The same fate awaited Herbert Hoover, a century later; his reluctance to use the federal government to tackle the Great Depression led to economic chaos and ushered him out of office.)

Turning to the *Amistad* case, easily one of the most dramatic in the country’s history, you might begin by confirming that students understand that Van Buren supported the claims Spain made in the case and wanted the Africans returned to the Spanish authorities in Cuba. Given the context in which the case arose, it would seem that various political pressures were driving Van Buren’s preference. Van Buren was in the midst of a reelection campaign. The economic dislocation caused by the Panic of 1837 had eroded Van Buren’s standing in the South. If Van Buren supported the Amistad mutiny, his chances for reelection would likely diminish. In addition, avoiding an international dispute with Spain would have been high on the administration’s list of priorities at the time.

The U.S. Supreme Court, however, reached a conclusion that differed from the result the Van Buren Administration wanted. Students should be able to
appreciate that Chief Justice Story’s decision was premised on the conclusion that the Africans were not slaves, but were natives of Africa who had been kidnapped and unlawfully transported to Cuba. Students may need assistance to understand Story’s next step—because the Africans were free men, they were not the property of Spain that the U.S. was obligated to restore under the Treaty of 1795. If students understand the basis of the Supreme Court’s ruling, they should also understand that the Court made no comment on the institution of slavery.

You could compare Van Buren’s acceptance of an unfavorable ruling in the Amistad case with Andrew Jackson’s reputed defiance in Worcester v. Georgia. Students should be able to see the significance of Van Buren’s response. It affirmed the principle that the president must honor and enforce final judgments rendered by the Supreme Court, even if he or she disagrees with them. That principle, in turn, was necessary to the establishment of the federal judiciary as a co-equal branch of the government that has the plenary power to issue binding and enforceable judgments that finally settle disputes and legal questions.

Finally, when discussing Van Buren’s tenure in office, you can point out that the executive branch lost some ground to Congress from a power perspective as a result of the Supreme Court’s decision in Kendall v. United States, 37 U.S. 524 (1838). The decision made clear that certain offices created by Congress—even those housed in the executive branch—were nonetheless subject to congressional mandates. With assistance, students should be able to surmise that the Court was concerned with clothing the president with too much power. The Court was unwilling to accept a reading of the Take Care Clause that allowed the president to direct a federal officer to ignore the duties Congress had imposed upon him when creating his office. The Court essentially decided that the president’s obligation under the Take Care Clause to see that the laws are faithfully executed did not extend to empowering the president to command their disregard.

QUESTIONS FOR DISCUSSION

1. Throughout the Panic of 1837 (the nation’s first great depression), Martin Van Buren did not veer from his Jacksonian belief that the federal government’s power to alleviate the country’s economic distress was narrow and limited. Was it so clear that the Constitution restrained the federal government from acting during times of economic crisis like this? Were there constitutional provisions that arguably authorized federal measures? Should Van Buren have taken the alternative course, even if it meant abandoning his own view of limited federal power under the Constitution?

2. In connection with the Amistad case, Van Buren supported Spain’s claims and wanted the Africans returned to Spain. Why would he have preferred this
outcome? Was his preference based on the Constitution or on politics?

3. On what basis did Justice Story of the U.S. Supreme Court reach a different conclusion?

4. What if the ship had landed on the coast of Georgia (a slave state) rather than New York (and abolitionist state)? Would the case have turned out differently? Did the Supreme Court’s decision in the *Amistad* case shed any light on one of the significant constitutional questions of Van Buren’s day—the extent to which the Constitution gave the federal government the power to regulate slavery in the states?

5. When the Court ruled against President Van Buren’s position in the *Amistad* matter, he chose not to follow Andrew Jackson’s example in *Worcester v. Georgia* and suggest that he wouldn’t recognize or honor the Supreme Court’s ruling. What might explain Van Buren’s restraint? From a constitutional perspective, was Van Buren’s response significant in any way?

6. Tell us about *Kendall v. U.S.*. What did Van Buren try to do here? What did the Supreme Court decide? In what ways does the case of *Kendall v. United States* tell us something about the operation of the separation of powers doctrine among the three branches of the federal government?
KEY ISSUES

Students might be interested to know that President William Henry Harrison delivered the longest and perhaps the only fatal inaugural address in American history—he spoke some 8,445 words in the cold in March 1841 and died of pneumonia one month later. Harrison’s administration was the shortest in American history, and his death marked the first of a sitting president. Harrison’s death also opened the sticky and untested issue of presidential succession.

The Constitution’s provisions did not spell presidential succession out clearly. So that students fully appreciate the ambiguity in the Constitution regarding presidential succession, they should review the words in the Succession Clause in Article II, Section 1, clause 3 of the Constitution and that portion of the Twelfth Amendment that speaks to the issue. While Article II, Section I stipulated that in the event the president’s death, resignation, removal, or inability to discharge the duties of the office, “the Same” shall “devolve on the Vice President;” it provided no guidance as to whether devolution of “the Same” referred to the “Office” itself or merely to its “Powers and Duties.” While the Twelfth Amendment confirmed that the vice president was to “act” as the president, it was silent as to the precise status the vice president assumed while doing so. Thus, when Harrison died, the question no one could answer conclusively was: Did John Tyler, Harrison’s vice president, remain vice president upon Harrison’s death and merely act as president until a special election could be held or did Tyler succeed fully to the office of the presidency and serve as president for the rest of Harrison’s four-year term?

It should be evident to students that by immediately and boldly asserting that he was the president in every sense of the word, Tyler was largely responsible for the constitutional interpretation that was ultimately accepted—“the Same” in the Succession Clause referred to the “Office,” not merely the “Powers and Duties.” It should not be difficult for students to posit that had Tyler assumed no more than the role of acting president, many in Congress would have viewed him as a temporary caretaker. As a result, his ability to govern would have been severely compromised. In addition, it would have established a precedent regarding presidential succession under Article II for future vice presidents. From that point forward, a vice president in similar circumstances would have been relegated to being a mere place-holder.

QUESTIONS FOR DISCUSSION

1. Did the framers of the Constitution give sufficient thought to what would happen if the president died in office? (See Art. II, Sec. 1, Ch. 6). What exactly did the Twelfth Amendment (1804) of the Constitution say about succession at the time William Henry Harrison died in 1841?
2. How did the interpretation of the Constitution by the Whigs in Congress (like Rep. Henry Wise) differ from that of the Democrats (like John McKeon), with respect to Tyler’s proper role and title under the Constitution? Was this difference based upon the text of the Constitution, or was it purely political?

3. How did Vice President Tyler’s actions shape the ultimate interpretation of the Constitution? If he had remained the Vice President, “exercising the duties of the President,” how would that have impacted his ability to govern? How would it have impacted future vice presidents when presidents died or resigned while in office?

4. Examine the Twenty-fifth Amendment, added to the Constitution in 1967 after the assassination of President John F. Kennedy. First, who is Vice President? Does this resolve the issue of succession? If both the president and vice president die or leave office, who is next in line? In that case, who serves as vice president?
KEY ISSUES

The John Tyler presidency provides you with an opportunity to cover what might be new ground for many students—the so-called Guarantee Clause in Article IV of the Constitution. In addition, the Tyler’s presidency illustrates that the assertion of a presidential power by even a maladroit president (in this case the veto) can permanently strengthen the executive branch for his successors (See Grover Cleveland Chapter, Second Term).

Since Article IV may be unfamiliar, before you discuss the Dorr Rebellion, a brief review of its terms and meaning might be helpful to students. Under Article IV, Section 4, the federal government has three obligations to the states: (1) it must protect each state “against invasion;” (2) it must guarantee to every state “a Republican form of government;” and (3) on application of Congress or president (when Congress cannot be convened), it must protect the states against “domestic Violence.” The first, protection from foreign invasion, continued an obligation Congress had assumed under the Articles of Confederation and reflected the understanding that although the federation was decentralized internally, it had a unified foreign policy. This provisions was also designed by the framers to prevent a president who might prefer one section of the country over another from refusing to defend certain parts of the nation from foreign attack. The second, the assurance of a republican form of government was new. Participants at the Constitutional Convention expressed varying views over exactly what constituted a republican from of government. However, there was a consensus as to several criteria of republicanism, the lack of any of which would render a government un-republican. It was a government accountable to the governed (but not a pure democracy). Political decisions were to be made by the citizenry through elected representatives. It was a government that had no monarchial attributes. The founders feared that the rise to power in any state by a king-like figure would threaten the entire federal republican system the Constitution established. Thus, the Constitution guaranteed a republican government in every state in order to insure that republicanism prevailed throughout the nation. It was a government in which the rule of law was paramount, such that ex post facto laws, bills of attainder, and retroactive legislation, for example, which were deemed inconsistent with the rule of law, were not allowed. The third, the protection against “domestic violence” encompassed armed rebellion and was aimed at intrastate activity that flouted the rule of law through violence. Because the founders concluded that local authorities would be in the best position to determine when federal intervention was needed, the guarantee of federal assistance against domestic violence was conditioned on a request from a state.

Applying Article IV, Section 4 to the circumstances of the Dorr Rebellion, students should understand that Congress had the authority to: designate which
of the two competing groups constituted the established government of Rhode Island; assess whether that government was republican in form; and adopt the means necessary to protect Rhode Island from domestic violence. Further, you could explain that although Article IV, Section 4 does not empower the executive branch in such matters, it allows Congress to delegate enforcement of the Guarantee Clause to the president. Thus, if Congress assigns the president (as it did in the Act of 1795) the task of deciding whether a state government's request for federal protection from domestic violence should be granted, the president is authorized to pass on the legitimacy of a state government.

During the Dorr Rebellion, Tyler asserted that he, as president, had an obligation under Article IV, Section 4 to avoid undue intervention by the federal government. The final clause of Article IV, on its face, supported Tyler's position. It set a high standard, premised on the existence, not anticipation, of domestic violence. Since the Dorr Rebellion and the Nullification Crisis (see the Andrew Jackson Chapter), called upon a president to consider intervening with federal force in a state's affairs, you could ask students to compare the situations Andrew Jackson and Tyler respectively faced. Students should be able to appreciate that although the two episodes differed in significant ways (the Dorr Rebellion was a dispute between opposing factions within a state; the Nullification Crisis grew out of a confrontation between a state and the federal government), resistance to lawful authority was emblematic of them both. Jackson showed himself more than ready and willing to use his power to crush nullification in South Carolina; by contrast, Tyler was cautious and saw the commitment of federal force as a last resort to resolving the dispute in Rhode Island.

As the Chapter observes, Tyler was a failed president in many respects. Even so, he was responsible for a significant expansion of presidential power. Tyler's repeated use of the veto finally settled that the president may veto a bill for any reason at all; on programmatic as well as constitutional grounds. It should not be difficult for students to see that as a result, the role the president would play in the federal legislative process grew enormously.

**QUESTIONS FOR DISCUSSION**

1. Was John Tyler correct in his assertion that the president should avoid intervening in the Dorr Rebellion against the government of Rhode Island? How does Tyler's handling of the situation compare with President Andrew Jackson's response to the Nullification Crisis in South Carolina? Whose interpretation of executive power was more faithful to the Constitution? What did this episode reveal about Tyler's view of federal and executive power?

2. What was the effect of the Supreme Court's decision in *Luther vs. Borden*? Should the Court be able to avoid “political questions?” If so, how should
3. What authority was vested in Congress, by the Constitution, to decide which government of Rhode Island was the valid one? What authority was vested in the president under the Constitution to make the same decision? What if those two political branches had disagreed?

4. Take a look at the veto power in the Constitution. (Art. 1, Sec. 7, Ch. 2, part of Congress’s section of Constitution). How did Tyler’s use of the veto power expand executive authority? Was this his most significant contribution to the presidency?

5. What would our system look like if the president had to justify his reasons for using the veto power? Who would decide if it was valid? Congress? The Courts?
KEY ISSUES

James K. Polk exemplified an approach to presidential decision-making that should be familiar to students at this point in the course. When faced with the realities of the office, a president may take actions that are, at the very least, in tension with statements he or she has made about how the U.S. Constitution is to be interpreted and understood. To illustrate the point, you may remind students of Thomas Jefferson, who argued for strict adherence to the letter of Constitution, but used the Treaty Clause in Article II of the Constitution (which states nothing about the acquisition of land by the United States) to make the Louisiana Purchase.

Polk was (like Jefferson) a Democrat and a strict constructionist who stated repeatedly that the words in the Constitution were to be construed narrowly and with fidelity to their original meaning. Yet, Polk took the country to war in a manner that many believed was in derogation of the power given to Congress in the Constitution in Article I to “declare war.” The passage from a speech given to Congress by Congressman Alexander H. Stephens set forth in the Chapter regarding the commencement of the Mexican-American War presents one side of the argument. You might use it to prompt class discussion as to whether Polk overstepped his constitutional bounds and usurped Congress’s war powers.

The accusation in Lincoln’s Spot Resolutions that Polk’s justification for the Mexican-American War was a manufactured pretense is a springboard for exploring whether Congress may demand that a president offer evidence to support the choices he or she makes as commander in chief. Students can be asked to contemplate whether the Constitution requires such a presentation by a president to Congress. There is nothing stated in the Constitution that mandates it; and arguably, as a matter of the separation of powers doctrine, a president may take the position that such a demand from Congress is unconstitutional. In discussing what Congress can require of the president in this realm of foreign affairs, you could note the difference between a war in which Congress has an expressly-stated constitutional role, and, by comparison, a military engagement abroad to protect American interests, in which Congress does not.

Circling back to Jefferson, the broader theme you may explore is which approach to presidential decision-making—one that adheres to an uncompromising set of principles or one that refuses to be bound to a particular political outlook and instead, is pragmatic and aimed at accomplishing goals—is better for the country. To set the stage, you could point out that despite questions regarding their constitutional footing, both the Louisiana Purchase and the Mexican-American War significantly advanced America’s interests, by expanding the country’s borders and adding to its resources. Students should be able to voice the positive and negative consequences of each approach—the predictability,
but the rigidity of the former; the capacity to take advantage of opportunities that benefit the country, but the dangers associated with “anything goes” in the latter. Students can be guided to recognize that, perhaps, a president should not be an idealist or a pragmatist, but something in-between. In other words, a president should not abandon his/her principles, but should consider whether principles can be stretched to achieve a result the country needs.

QUESTIONS FOR DISCUSSION

1. Explain what James Polk meant by his theory of “Manifest Destiny,” which propelled him to victory in 1844? Was there a dark side to this notion that the United States was destined to rebuild the western lands in its own image?

2. How did Polk’s actions surrounding the Mexican-American War contradict his inaugural claim that he would strictly adhere to the written text of the Constitution? Did Polk usurp the role of Congress in the process? Compare and contrast Polk’s use of the presidential war power to that of modern presidents.

3. The two land acquisitions that were most responsible for America’s massive westward expansion—the Louisiana Purchase and the Mexican American War—were both predicated on dubious constitutional footing. Do American presidents, such as Polk and Jefferson, only adhere to the letter of the Constitution when it suits their political agendas, and disregard the Constitution when it is an obstacle? Does a pragmatic approach to the Constitution benefit the nation? Does it create corresponding risks?

4. Compare Polk’s justification for the Mexican-American War—i.e., that Mexico had invaded United States territory, shedding American blood upon the American soil—with President George Bush’s justification for the Iraq War—i.e., that Saddam Hussein had accumulated weapons of mass destruction and had deployed them used against his own people. How are these situations similar? Different?
PART III. THE PRE-CIVIL WAR ERA
CHAPTER 12. ZACHARY TAYLOR, 1849-1850
PAGES 161-172

KEY ISSUES

The Chapter on Zachary Taylor is the first in the book to delve into the long build-up to the Civil War. During Taylor’s presidency, the growing rift between the North and the South was reflected in what became the thorniest issue relating to slavery—its expansion into the new territories that were added to the country as a result of the Mexican-American War. The expansion-of-slavery issue can serve to illuminate Article IV, Section 3 of the Constitution, the constitutional provision that addresses the addition of new states and the regulation of U.S. territories. It can also provide a foundation for an interesting “what-if” discussion for subsequent classes—might the Civil War have been avoided had Taylor served his full four year term? (To confirm that students understand where the matter of slavery’s expansion stood in 1849, when Taylor took office, it would be helpful to review the terms of the Missouri Compromise (James Monroe Chapter)).

A review in class of the terms of Article IV, Section might help students more readily understand that as between the president and Congress, the Constitution gives primary authority to Congress on the matters of admitting new states into the Union and governing territories. Under Article IV, Section 3, “[n]ew states may be admitted by the Congress into this union.” The only restriction Article IV placed upon Congress is that a new state not be carved out of an existing states without their consent. Article IV also states: “Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or any other Property belonging to the United States.” As students may not be familiar with the process by which new states are admitted, you might explain that under historic practice, Congress passes an enabling act prescribing the process by which the people of a United States territory may draft and adopt a state constitution. Enabling acts may contain restrictions. The applicant state submits its proposed constitution to Congress, which either accepts it or requires changes. Congress passes a bill of statehood, which the president signs; or the president may issue a proclamation certifying the entry of the new state into the United States.

Placing the issue in context, you may remind students that even though Taylor had Southern roots and owned slaves, he opposed the expansion of slavery. Knowing that neither California nor New Mexico would permit slavery in their proposed state constitutions, Taylor urged settlers in those areas to bypass the territorial stage as soon as possible and apply for statehood. In doing so, Taylor contradicted the terms of the Compromise of 1850, the initiative that Senator Henry Clay, the Whig’s founder and leader, had introduced to settle the question of slavery’s expansion. Members of Congress were dismayed because they believed that Taylor was usurping Congress’s policy-making prerogatives on the issue. In addition, Taylor’s stance angered members of his own Whig Party, who considered Congress the preeminent branch of government and expected the president to acquiesce in Congress’s wishes on an issue as a matter of course.
With Article IV, Section 3 in mind, students should be able to see that when Taylor inserted himself into the debate over whether the land acquired from Mexico should be slave or free, and attempted to derail the compromise that Congress was advancing, his critics had some basis to argue that under the Constitution, Congress’s views on the admission of California and New Mexico as new states should count for more than those held by Taylor. You might also mention that it was hotly debated at the time whether the Constitution gave Congress any say over slavery in the territories in the first place. Those opposed to slavery argued that Congress was empowered under Article IV, Section 3 to address slavery in the territories in any way it saw fit; those in favor of slavery argued that the Constitution did not give Congress the authority to exclude slavery from a territory.

Lastly, given the positions Taylor took and the way he conducted his presidency, you might ask students to contemplate the opinion of the Chapter’s author that had Taylor lived to serve as president for four years, he might have succeeded in reducing the sectional tensions over slavery that seemed on the verge of engulfing the nation, as they read Chapter 13 on Millard Fillmore.

QUESTIONS FOR DISCUSSION

1. Is there an actual or potential conflict when an individual who actively holds a military appointment (here, Zachary Taylor was the commanding general of the Western Division of the United States Army) runs for president? Once elected, must an individual who holds a military commission resign that position?

2. Explain how the Fugitive Slave Act of 1793 worked. Then, discuss the U.S. Supreme Court decision in Prigg v. Pennsylvania (1842), declaring unconstitutional state laws that interfered with this federal law. How did some free states seek to frustrate these federal pronouncements?

3. What steps did Taylor take to halt the scheme (supported by southern slave-owners) to invade and seize Cuba? If Taylor had not taken such firm measures, how would this activity in Cuba have threatened the president’s constitutional authority?

4. How did Senator Henry Clay of Kentucky seek to undermine his former political opponent, Taylor? Was it primarily Congress’s duty, or the president’s, to shape policy with respect to the new territories and the terms under which California and New Mexico were admitted to statehood? Whose vision counted? (See Article IV, Section 3).

5. If Taylor had lived to serve out his full four-year term as president—until 1853—how (if at all) would the United States have turned out differently? Could slavery have been phase-out over time, rather than the country marching toward Civil War?
CHAPTER 13
KEY ISSUES

Through the Millard Fillmore Chapter, student should be able to appreciate the profound impact a vice president’s unexpected succession to the presidency can have on the course of American history. While Fillmore’s predecessor, Zachary Taylor, opposed and worked against passage of the Compromise of 1850, Fillmore embraced it and was determined to see it enacted. Ultimately, with Fillmore’s thumb on the scales, the bills comprising the Compromise were enacted, and Fillmore signed them into law.

The Compromise of 1850 added California as a free state, allowed New Mexico and Utah to decide their status when they were ready to seek admission to the Union, gave Texas, a slave state, $10 million to pay off debts in exchange of its abandonment of a claim to disputed lands, prohibited the slave trade in the District of Columbia, but not slavery altogether; and strengthened the federal fugitive slave law. You might point out that a comparison of the Missouri Compromise with the Compromise of 1850 reveal they were similar in fundamental ways—they added new states to the Union, tried to create an acceptable and lasting balance between free and slave states, and sought to appease both Northern and Southern sentiments on the issue of slavery, rather than compel the country to choose between what many believed were irreconcilable positions on the question. You might also point out that Compromise of 1850, and accordingly, Fillmore’s legacy, remains the subject of debate among scholars. Some historians argue that the Compromise of 1850, while far from perfect, managed to settle the expansion-of-slavery issue for a decade and thereby give the country some breathing room within which to try and address the slavery issue once and for all. Other historians, however, argue that the Compromise contributed to the inevitability of the Civil War as the means by which the country would resolve the slavery question because its terms, especially enforcement of the Fugitive Slave Act of 1850, brought sectional divisions between the North and South to the boiling point.

As noted, it would be interesting to have students speculate as what might have happened had Taylor served out his term. Of course, there is no right answer; but students should be able to hypothesize that had Taylor lived, there might have been no Compromise of 1850, slavery’s westward expansion might have been thwarted, and Southern secessionists, as yet unorganized, might have been unable to gain widespread acceptance in the South that secession was the only means of preserving Southern interests. If so, perhaps, there would have been no Civil War; perhaps, the country’s leaders would have found an alternative way to resolve the North and South’s differences.
QUESTIONS FOR DISCUSSION

1. Compare the Compromise of 1850 with the Missouri Compromise of 1820. How might a president who was stronger than Millard Fillmore have affected the Compromise of 1850? If Zachary Taylor had still been in office would the outcome have been different?

2. Discuss the Supreme Court’s decision in *Strader v. Graham*. Was the Court’s later decision in *Dred Scott v. Sanford* even necessary?

3. How was the issue of interstate commerce linked to the slavery issue? Did the Supreme Court’s decision in *Cooley v. Board of Port Wardens of Philadelphia*, and its interpretation of Congress’s power under the Commerce Clause of the Constitution (Article 1, Section 8, Clause 3) favor or disfavor states that sanctioned slavery?

4. How did Fillmore’s performance in office lead to the disintegration of the Whig Party? Was this a good or bad thing?
KEY ISSUES

The presidency of Franklin Pierce was marked by the deepening crisis engulfing the nation over issue of slavery's expansion. This chapter reveals how another policy approach to the slavery issue, in this case, “popular sovereignty,” spun out of control and led to unintended consequences that likely hastened the march to civil war.

Your discussion of popular sovereignty could begin with the observation that political leaders of the day followed a familiar pattern—in championing the principle of popular sovereignty as the constitutionally-intended vehicle by which to determine whether a western territory would permit or prohibit slavery, they never stated its precise constitutional origins. Popular sovereignty, stated simply, argued that in a democracy, the people of a territory, and not the federal government, had the authority to decide on slavery within their borders. Some proponents anchored popular sovereignty in the Tenth Amendment, which reserves to the states the powers not delegated to the United States, and secondarily in the Ninth Amendment, which provides that the enumeration of certain rights in the Constitution does not deny or disparage others retained to the people. The doctrine of popular sovereignty was implemented in the Kansas-Nebraska Act of 1854. You could also point out how popular sovereignty was a convenient argument for politicians; it was used to bolster calls for the repeal of the ban in the Missouri Compromise on slavery's expansion in parts of the Louisiana Purchase and to provide a basis for allowing territories, like Kansas and Nebraska, to choose slavery without the federal government's having to become involved in the result. You could confirm that students understand that it was in response to the basic command of popular sovereignty that groups in both the North and the South encouraged families and individuals to migrate to Kansas and sway the final vote, such that the border between Kansas and Missouri became a scene of violence and lawlessness, known as “Bleeding Kansas.” (You could add that the dangerous breakdown in civil discourse over the issue of slavery that was occurring at the time was reflected even in the halls of Congress when Representative Preston Brooks of South Carolina entered the Senate chamber and struck Senator Charles of Massachusetts repeatedly with a gold-tipped cane.) You could also point out the irony—that popular sovereignty, which its supporters maintained would preserve the Union, arguably erased any hope for a peaceful solution to the widening rift between North and the South.

You may ask students to consider how the tenets of popular sovereignty are reflected in today's political debates. One example is the response of some state officials to the Supreme Court's 2015 decision in Obergefell v. Hodges, in which the Court ruled that the right to marry is a fundamental right inherent under the Fourteenth Amendment and that states may not deny couples of the same sex this right. These officials voiced objection to the ruling, arguing that the
definition of marriage is not for the federal government or the courts to decide, but is for the people in any given state to decide for themselves.

QUESTIONS FOR DISCUSSION

1. Franklin Pierce attempted to purchase Cuba from Spain. Is such a purchase a constitutional exercise of presidential power? Does the fact that Jefferson initiated the Louisiana Purchase amount to relevant precedent? Although there is no provision in Article II that expressly authorizes the president to make such purchases, is there a provision in Article II that gives the president the implied power to do so?

2. When it was time to nominate an individual for a vacancy on the U.S. Supreme Court, Pierce asked sitting U.S. Supreme Court justices for a recommendation. He then nominated the person the justices recommended. Was this course consistent with the separation of powers doctrine?

3. Describe the notion of popular sovereignty. Do you believe (as Pierce apparently believed) that this principle naturally flows from the Ninth and Tenth Amendments?

4. Why did the passage of the Kansas-Nebraska Act spark violence and bloodshed? Was it wise for Congress and the president to leave the issue of slavery to the people of this territory, to decide for themselves? Under the Constitution, can a president abdicate responsibility on sensitive or unpleasant issues and allow the people to resolve them?

5. Was the Missouri Compromise of 1820 constitutional? If so, what allowed Congress and Pierce to determine that it was “inoperative and void”?

6. Is the notion of popular sovereignty still alive today? Can you think of any examples of the Congress and Presidents seeking to leave sensitive and politically explosive matters to the people of the states to decide?
CHAPTER 15

KEY ISSUES

James Buchanan’s greatest hope as president was to resolve the country’s divisions over slavery and restore national harmony. Buchanan saw a decision from the Supreme Court in a pending case, *Dred Scott v. Sanford*, as the means by which the contentious expansion-of-slavery issue could be put to rest once and for all. You might use Buchanan’s role in the Court’s *Dred Scott* to revisit the separation of powers principle that underlies the Constitution, not as an abstract doctrine, but in the context of a concrete problem that was engulfing the country.

You might initially confirm that students understand the ruling in *Dred Scott* that Buchanan worked to achieve and why he (and others) expected that the ruling would settle the question of slavery’s westward expansion. The decision did more than declare that Scott was not set free from slavery because he had resided for a time in a free state, and that, as a black man, he was excluded from U.S. citizenship. It also declared that Congress did not have the authority to prohibit slavery in any territory because legislative bans on slavery were unconstitutional under the Fifth Amendment. In other words, because the Fifth Amendment prohibited the federal government from taking property without the due process of law, and slaves were property, the Fifth Amendment barred Congress from depriving a slave owner in a U.S. territory of this property, *i.e.*, his slaves. Thus, in Buchanan’s view, there was nothing left for the country to debate. As Congress could not prohibit slavery’s expansion into the territories, the West was open to slavery, period.

You can make certain that students are cognizant of the extent of Buchanan’s involvement in the *Dred Scott* decision and the pressure he personally brought to bear on Supreme Court justices while they were deciding the case by reviewing the details of those contacts set forth in the Chapter. Buchanan’s communications with the justices about the case were highly improper in and of themselves. As a matter of judicial ethics, even if the standards of the day were more generous than they are today, the contacts Buchanan had with justices compromised the independence, impartiality and integrity of the Court. But, in light of the fact that through those contacts Buchanan had a hand in framing the Court’s decision may be more than a matter of ethics; it may be an issue of constitutional magnitude. Indeed, the author of the Chapter describes Buchanan’s actions as a violation of the separation of powers doctrine. They certainly seem to be—the person about to become the chief executive of the federal government intervened and participated in and influenced the functioning of the judicial branch. The twist is that Buchanan was president-elect at the time. As the president-elect, Buchanan had not yet taken the oath of office. Under Article II, Section 1 of the Constitution, the oath is to be taken “*b*efore he enters on the execution of the Office.” Thus, the interesting question students may debate is whether an
action taken by the president-elect, who as such does not yet have the authority to act as the chief executive, is in a position to violate the separation of powers doctrine. In the end, however, it is fair to say that Buchanan violated the spirit of the doctrine, if not its letter, by inserting himself into the *Dred Scott* case.

1. Did James Buchanan’s communication with Supreme Court Justices during that Court’s deliberations on the *Dred Scott* case violate the separation of powers? Does it matter that Buchanan had not yet assumed the office of the presidency when he approached the justices and sought to influence the outcome of the case? How did Buchanan think the Court’s decision would get him (and the Democratic Party) off the hook on the slavery issue?

2. Could the Supreme Court have decided the *Dred Scott* case differently given the fact that the text of the Constitution protected the institution of slavery? On what constitutional grounds might a different outcome have been based?

3. Why did Buchanan support the Lecompton constitution in Kansas? What basis existed in the Constitution, if any, for supporting a state constitution that had only been approved by a pro-slave minority of that territory’s population?

4. Why was Buchanan more willing to use force to quell the Mormon uprisings than he was to combat states like South Carolina in the South, as they announced their intention to secede from the Union? Were there any differences between the two insurrections from a constitutional standpoint? Was Buchanan correct in his belief that the Constitution did not give him authority, as chief executive and commander in chief to respond forcefully to southern secession?

5. What factors led to the failure of Buchanan’s presidency? Was the situation beyond his control, or did he compound problems through his decisions?
KEY ISSUES

Students will find Abraham Lincoln’s trajectory interesting. With little formal education, Lincoln tried his hand at several endeavors. He was a carpenter, riverboat man, store clerk, soldier, merchant, postmaster, blacksmith, and surveyor. Eventually, he settled on law and politics, after concluding he couldn’t make an honest living doing anything else. From frontier lawyer, Lincoln evolved into one of America’s greatest presidents. The aspect of the Lincoln’s presidency that you might choose to emphasize is the fact that Lincoln, by virtue of the acts he took in the days leading up to and during the Civil War, significantly and permanently expanded the parameters of presidential power as commander in chief.

Facing the unprecedented threat to the Union’s very existence from the seceding states in the South, Lincoln concluded that the Constitution vested the executive branch with powers of self-preservation for confronting the crisis. Even further, Lincoln concluded that his oath to uphold the Constitution not only allowed him, but compelled him, to take extraordinary action as the nation’s commander in chief to protect the Union from disintegration. Students should come to appreciate that in Lincoln’s view, it made little sense to abide by legal technicalities at a time when the nation’s constitutional government was under assault. To make the point, you can share the following statement Lincoln made about the actions he saw as necessary to saving the Union: “Was it possible to lose the nation and yet preserve the Constitution? By general law, life and limb must be protected, yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the nation.” (Abraham Lincoln’s Letter to Albert G. Hodges,” The Evolving Presidency: Landmark Documents, 1787-2010, 4th ed. Michael Nelson, Washington, D.C.: CQ Press, 2012, 93-94).

A review with students of certain measures Lincoln instituted as commander in chief during the Civil War—the blockade of southern ports, the suspension of habeas corpus, the Emancipation Proclamation, and the use of military tribunals—are illustrative of Lincoln’s thinking. Before delving into the details of each, you might point out the irony in the fact that Lincoln, who had been a Whig and, as such, was opposed to the expansion of executive power, became the president who stretched executive authority to new boundaries. Further, you might remind students of the position Lincoln took in the Spot Resolutions, when he forcefully criticized President’s Polk for usurping power at the expense of the Congress in initiating and prosecuting the Mexican-American War.

After Confederate troops fired on Fort Sumter on April 12, 1861, Lincoln acted quickly. On April 17, while Congress was in recess, Lincoln issued a proclamation...
that imposed a naval blockade on certain Southern ports. The blockade was aimed at preventing the South from exporting crops for currency and receiving supplies and weapons to continue hostilities. Lincoln was aware that a blockade was viewed in many quarters as an act of war to be taken against a sovereign nation. Nonetheless, Lincoln proclaimed it, even though no declaration of war had been made by Congress under Article II. Congress ratified the proclamation after-the-fact on July 13. Ultimately, in the *Prize Cases* (1963), the Supreme Court eventually upheld the blockade as constitutional.

The doctrine of habeas corpus refers to the right of any person to who is imprisoned to appear in a court of law and claim he must be released because his detention is unlawful. The U.S. Constitution specifically addresses this right in Article I, Section 9: “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.” Without consulting Congress, Lincoln ordered suspension of the writ in the volatile border state of Maryland in April 1861 in order to detain civilian rioters and prevent the movement of Confederate troops on Washington. Lincoln then extended the order. Congress authorized the suspension in The Habeas Corpus Act enacted in March 1863.

Students might need assistance to grasp that the Emancipation Proclamation was based—shrewdly—on the president’s commander in chief powers. Lincoln concluded that he was empowered under his war powers to emancipate the slaves in unconquered parts of the Confederacy by regarding emancipation as a military measure that was essential to suppressing a rebellion. The Emancipation Proclamation, proposed in July 1862 and issued in January 1863, changed the federal legal status of more than three million persons from “slave” to “free.” It had a significant military effect—it crippled the Confederacy’s use of slave labor in its war effort and authorized the recruitment of black soldiers to serve in the Union’s armed forces.

Lincoln’s established military tribunals a few months after the Civil War began. They were used to subdue the increasing disorder in border states (like Missouri) which remained loyal to the Union but contained many citizens who sympathized with the Confederacy. The defendants who came before the tribunals were mainly civilians suspected of aiding southern rebels and charged with crimes, like treason, conspiracy, spying or avoiding the draft. It was believed that their fate could not be entrusted to the local courts because so many locals were likely to sympathize with the South. As is typical of military justice, the tribunals afforded fewer protections than those of civilian courts. For example, they had no juries, as the Constitution mandates. Nor did they require a unanimous vote to convict. In *Ex parte Milligan* (1866), the Court later ruled that Lincoln’s use the military to try civilians in areas where the civil courts were functioning violated the Fifth and Sixth Amendments. The Court observed that even a crisis as grave as the
Civil War did not empower the president to circumvent the courts because the Constitution protects all classes of men, at all times, and under all circumstances.

You should be sure that students are aware that one of Lincoln’s little noted, but lasting accomplishments as commander in chief was the creation of “Lincoln’s Code.” The Code, written by political philosopher Franz Liber and published in 1863, was a set of rules for fighting for Union soldiers. It prohibited the use of poison, torture, and other practices that had previously been tolerated by military leaders. The Code greatly influenced the conduct of war far beyond our shores. It would not only govern the Civil War, but would subsequently apply to international conflicts abroad. In fact, it served as the basis for the revised code of laws of war at the Hague Conventions of 1899 and 1907, as well as for the Geneva Conventions of 1929 and 1949. This international reach of Lincoln’s work is often overlooked.

**QUESTIONS FOR DISCUSSION**

1. How, if at all, did Abraham Lincoln’s career prior to his election prepare him for this historic presidency?

2. How did Abraham Lincoln’s opinions on executive power evolve from the time of Polk’s presidency to when he assumed the office of chief executive?

3. Was Lincoln’s Emancipation Proclamation unconstitutional, as former President James Buchanan believed? Or were Lincoln’s advisors correct in asserting that the president’s War Powers justified the Emancipation Proclamation?

4. What prompted Lincoln to create specific laws to govern warfare? Was his training as a lawyer relevant to his approach in tackling this issue? How did Lincoln’s Code affect the Civil War? Future international laws of war?

5. How did Lincoln’s Gettysburg Address relate to the Constitution? To the Declaration of Independence? Is the famous speech still significant today, and if so, why?

6. How did Lincoln’s handling of an obstructionist Supreme Court compare to that of prior presidents such as Andrew Jackson? What is a writ of habeas corpus? A military tribunal? How did Lincoln’s suspension of the writ of habeas corpus and use of military tribunals expand the powers of the presidency? On what provision of the Constitution did he rely to wield these extraordinary powers? Did Lincoln stretch presidential authority to its maximum parameters, or did his presidency exist outside the restraints imposed by the Constitution? Was the preservation of the Union dependent upon a stronger chief executive that the framers had envisioned?

7. In what way did Lincoln influence the development of law and democratic principles on an international scale?
PART IV. CIVIL WAR AND RECONSTRUCTION
CHAPTER 17. ANDREW JOHNSON, 1865-1869
PAGES 227-238

KEY ISSUES

The Chapter on President Andrew Johnson introduces students to the constitutionally-prescribed means for charging, i.e., impeaching, and removing a sitting president from office for misconduct. It illustrates the political nature of the process and the high stakes involved.

You might start with a review of provisions in Articles I and II of the Constitution that address presidential removal. Students should understand that Article II, Section 4 sets forth a two-step removal process consisting of “Impeachment” and “Conviction” for the commission of certain acts—“Treason, Bribery, or other high Crimes and Misdemeanors.” (You might remind students that the word “impeachment” is popularly used to indicate both the bringing of charges in the House and the Senate vote on removal from office; but that, in the Constitution, the term refers only to the former.) Under Article 1, Section 2, the House of Representatives has the “sole Power of Impeachment” and impeachment by the House requires a simple majority vote. Under Article I, Section 3, the Senate has the “sole Power to try all Impeachments” and a conviction by the Senate requires a two-thirds vote; when the official on trial in the Senate is the president, the Chief Justice of the United States presides; if an official is impeached and convicted, he or she is removed from office and further barred from holding federal office.

Students may find a brief discussion of what constitutes an impeachable offense useful. In Article III, Section 3, “Treason” is defined as “levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort.” “Bribery” is not defined in the Constitution, but at the time the Constitution was adopted, bribery had a settled common law meaning, namely, the intention to corrupt public policy by offering a government official something (such as money or a favor) in exchange for a vote or official action. However, what actions constitute “high Crimes and Misdemeanors” is unsettled and has been the subject of considerable debate. You might highlight for students the following alternative interpretations that have been given to the term. One view is that “high Crimes and Misdemeanors” is whatever Congress wishes the phrase to mean at a particular point in time. A second view is that the term is limited to indictable offense under the criminal law. A third view is that the term encompasses more than indictable crimes and includes acts which may not be criminal but which amount to the misuse of power or violations of the public trust. (Those holding this view point out that the phrase was well-known to the founding fathers; in England, officials accused of “high Crimes and Misdemeanors” were accused of offenses as varied as misappropriating government funds, appointing unfit subordinates, not prosecuting cases, not spending money allocated by Parliament, promoting themselves ahead of more deserving candidates, threatening a grand jury, or disobeying an order from
Parliament.)

With this background in mind, students should be able to voice their own opinions as to whether the principal charge in the impeachment proceedings brought against Johnson—his firing of Secretary of War Edwin Stanton without first securing the Senate’s approval, as required by the Tenure in Office Act—was indeed an impeachable offense. In addition, they should also be able to assess whether the Radical Republicans in the Senate were more interested in ridding themselves of Johnson than they were in deciding whether he had committed “high Crimes and Misdemeanors.” Ultimately, students should be able to see that if Johnson had been convicted under the circumstances, the power of the presidency and the prestige of the executive branch as a co-equal branch of government would have suffered significant damage.

QUESTIONS FOR DISCUSSION

1. Article II, Section 2 grants the president the power to pardon and grant reprieves. What is the difference between a reprieve and a pardon? What limits does the Constitution place on the presidential power to pardon? What purposes should a presidential pardon serve? Can a president pardon himself? Do you agree with Johnson’s decision to pardon all southerners who took an oath of future loyalty to the United States and promised to abide by the Emancipation Proclamation? Do you agree with the different rule he established for the political leaders and officers of the Confederacy and the wealthy elite, who had to apply for presidential pardons individually?

2. Given the terms of the Constitution (and its Amendments) when Andrew Johnson became the president in 1865, was he justified in taking the position that the kinds of rights and responsibilities accorded to various types of people—ranging from basic property rights to those associated with citizenship like the right to vote—were matters for the states to decide without interference from the federal government?

3. How did the Thirteenth, Fourteenth, and Fifteenth Amendments change the Constitution as originally written? What impact did these Amendments have on the balance of power between the state governments and the federal government?

4. Johnson vetoed the Tenure of Office Act, which provided that all federal officials whose appointment required Senate confirmation could not be removed without the consent of the Senate. Johnson declared that the Act was a violation of the separation of powers doctrine. Do you agree?

5. Johnson was impeached by the House for violating the Tenure of Office Act when he removed the secretary of war without the Senate’s approval. Was
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Pages 227-238

Johnson the victim of politics or was the removal an impeachable offense? Was Johnson’s claim that he violated the law only for the purpose of raising a court case to test the constitutionality of the Act a viable defense to impeachment?

6. If the Senate had found Johnson guilty, what effect would the conviction have had on the presidency as an institution?
KEY ISSUES

This chapter provides an excellent vehicle for showing students the adverse effect the U.S. Supreme Court can have on a president’s agenda and legacy. In Grant’s case, in a series of decisions issued during what has become known as the “Dreadful Decade,” the Court brought Grant’s efforts to secure the civil rights of former slaves to a screeching halt.

Dedicated to securing civil rights for African Americans, President Grant was a strong supporter of the Reconstruction Amendments and several pieces of civil rights legislation. During his two terms in office, he helped to secure the ratification of the Fifteenth Amendment which guaranteed the right to vote regardless of race; he signed Enforcement Acts to protect black voting rights; he signed the Klux Klan Act to quash violence against blacks; and he signed the Civil Rights Act in 1875 that prohibited several forms of racial segregation. However, by the time that Act was signed, Southern whites had reasserted control over state legislatures, and the influence of Reconstruction and Radical Republicanism was at a low ebb. As a result, the laws were virtually ignored in the South. In the meantime, a series of consolidated cases that sought to undermine the Reconstruction Amendments were wending their way to the U.S. Supreme Court.

In the Slaughter-House Cases in 1873 to the Civil Rights Cases in 1883, the Court undercut the protections the Reconstruction Amendments could have provided to basic civil rights. Students should understand that the Court gave a cramped interpretation of the “privileges or immunities” clause of the Fourteenth Amendment, sharply limiting the phrase to a set of national citizenship rights. It declared that the Thirteenth Amendment did no more than abolish slavery; it reasoned that the Fourteenth and Fifteenth Amendments reached only discriminatory state action, not private behavior. Students should also understand that with the Dreadful Decade rulings in hand, the South enacted Jim Crow laws which institutionalized racial discrimination. In essence, the rulings allowed states to continue the discriminatory elements of slavery without the institution itself.

Given Grant’s opportunity to nominate several justices who sat on the Court during the Dreadful Decade, you might ask students to ponder whether Grant deserves blame for the failures of his presidency in the area of civil rights. Some students are likely to answer in the affirmative—that Grant should have done a better job at vetting his appointees to make certain that their views of on issues and policies coincided with his; others are likely to answer in the negative—that Grant was fighting an uphill battle that no president could win, in light of the widespread attitudes of the age relating to race. Finally, an interesting question to ask students is whether Grant was a successful or failed president. While
some students are likely to applaud Grant’s efforts to advance the cause of civil rights, others are likely to focus on his lack of success in halting a new era of discrimination against African Americans in the United States.

1. Was the Supreme Court’s decision in *Texas v. White*—holding that secession was unconstitutional—necessary in light of the South’s defeat in the Civil War?

2. Grant wanted to annex the island of Santo Domingo (now the Dominican Republic) and allowed recently freed Southern blacks to live there. Would that have been a good plan?

3. Why were so many members of the Republican Party (the party of both Presidents Grant and Lincoln) eager to return to the status quo ante bellum? Were they correct in their view that the Civil War had not changed the fundamental constitutional relationship between the national government and the individual states? What would the United States look like today if this view had prevailed?

4. Why was the Supreme Court’s decision in the *Slaughterhouse Cases* such a set-back to the Reconstruction-era push for civil rights?

5. What did the Radical Republicans in Congress seek to accomplish their Reconstruction plan by adopting the 13th, 14th and 15th Amendments?

6. In the case *U.S. v. Cruikshank*, Chief Justice Waite held that the Fourteenth and Fifteenth Amendments reached only state action rather than individual acts. Explain the significance of this ruling and why it potentially permitted organizations like the Ku Klux Klan to continue committing atrocities.

7. Was Grant in any way to blame for the Supreme Court’s harsh decisions issued during the so-called “Dreadful Decade?” After all, his appointments to the Court (four in total) all sided with the anti-civil rights opinions of the Dreadful Decade. Why was the Supreme Court during that period so averse to supporting Congress’ civil rights legislation? Was Grant’s attempt to extend civil liberties to the newly freed slaves, overall, a failure?

8. As the author notes in opening the chapter, Grant’s Tomb in NY is one of the largest and most famous tributes to a deceased president in U.S. history. Was Grant a heroic president, or a rather sad figure who turned out to be a failure as chief executive?
CHAPTER 19

KEY ISSUES

The Rutherford Hayes Chapter presents you with the opportunity to instruct students on one of the least understood, but one of the most significant provisions of the Constitution—Article II, Section 1, which establishes the Electoral College as the process for electing the president and vice president.

Before delving into the intricacies of that process, you might point out the perspective the framers held regarding the method by which the nation’s chief executive should be chosen and the context in which they operated. Essentially, the Electoral College was a compromise between election of the president by Congress and election of the president by a popular vote of those citizens eligible to vote. It was the framers’ solution as to how to tap a qualified person for president in the absence of political parties and national campaigns in a country that was composed of 13 states of varying size, some large, some small, and containing about 4 million people who were spread apart and barely connected by transportation or communication.

You might then offer a brief summary of the Electoral College process as presently conducted: It commences with the nomination of slates of electors by party conventions, primaries, or committees in each state. The number of electors in each state is equal to its numbers of Representatives and Senators (the Twenty-Third Amendment allots three electors for the District of Columbia, making a total electoral vote of 538). A presidential candidate needs a majority of the electoral votes (270) to win the presidential election. With the exception of Maine and Nebraska, whose electoral votes are divided proportionally to the popular vote, states follow the winner-take-all rule. Typically, electors pledge themselves to vote for their party’s candidates for president and vice president, although neither the Constitution nor federal election laws require them to do so. Most states, however, require electors to support their party’s candidates for president and vice president. Following the November General Election, electors meet in their state capitals on a designated day and cast their votes for president and vice president on separate ballots. Each state sends a Certificate of Vote to Congress, and in January the electoral ballots are officially counted and certified before a joint session of Congress. The vice president, as president of the Senate, presides over the count and announces the results of the vote. The president of the Senate then declares which persons, if any, have been elected president and vice president of the United States. The president-elect takes the oath of office and is sworn in on January 20 in the year following the election.

Putting the Electoral College process in context for the Hayes Chapter, you might remind students that: Tilden won the popular vote (with 51% of the vote to Hayes’s 48%); Tilden’s 184 electoral votes were one short of the required majority, while Hayes’s 165 electoral votes left him 20 ballots shy; and twenty
remaining electoral votes were in dispute (one from Oregon, and 19 from the three Southern states—Florida (4), Louisiana (8), and South Carolina (7)). You might also remind students of the other presidential elections in which an Electoral College majority was lacking—the Election of 1800, after which the Twelfth Amendment was adopted (see the Thomas Jefferson and John Adams Chapters) and the Election of 1824, which led to allegations of a corrupt bargain between John Quincy Adams and Henry Clay (see John Quincy Adams Chapter)—and discuss why the Constitution could not resolve the scenario that unfolded in 1876. Students should be able to see that a dispute over multiple Electoral College returns from several states was simply not addressed in the Twelfth Amendment. Rather, the Twelfth Amendment insured that separate votes would be cast of president and vice president, and merely stated that the president of the Senate would open and count the election certificates before a joint session of Congress, without any mention of who had the authority to determine contested returns.

Finally, since the continuation of the Electoral College as the means by which the president is elected remains the subject of debate, you might cover the arguments typically given for and against it. This debate can produce a lively discussion in class. Those who object to the Electoral College and favor a direct popular election of the president raise the possibility of electing a president who does not receive an absolute majority of the popular vote; the risk of so-called “faithless” elector, who does not vote for his party’s candidate; the possible role of the Electoral College in discouraging voter participation that flows from the fact that each state is entitled to the same number of electoral votes regardless of its voter turnout; and its failure to accurately reflect the national popular will in that rural states are over-represented. Proponents of the Electoral College, on the other hand, defend it on the philosophical grounds that it contributes to the cohesiveness of the country by requiring a distribution of popular support to be elected president; it enhances the status of minority interests; it contributes to the political stability of the nation by encouraging a two-party system; and it maintains a federal system of government and representation.

1. The disputed Hayes-Tilden election of 1876 led to chaos and caused Rutherford Hayes to be dubbed “His Fraudulency.” What happened in this famous contested election?

2. The disputed election of 1876 raised questions about the effectiveness of the Electoral College (U.S. Constitution, Article II, Section 1, Clauses 2, 3) as the system for electing the president. What are the arguments for and against the Electoral College?

3. Why was the Twelfth Amendment not followed to settle the disputed Election of 1876?
4. Given the context in which Hayes was president, is it fair to say that he abandoned Reconstruction? Hayes had spent his whole career seeking to battle against discrimination toward blacks. Should Hayes be faulted for maintaining a hands-off policy toward the South when it became clear that southerners were neither obeying nor enforcing the Reconstruction Amendments?

5. Did Hayes follow the better course by relying on his powers under Article IV, Section 4 of the Constitution to quell the violence associated with the railroad strike of 1877 instead of calling Congress into session (Article II, Section 3) and asking Congress to address the disturbances? A number of Hayes’s advisors recommended that he suspend the writ of habeas corpus as to the striking workers. Should he have followed their advice?

6. Hayes chose to exercise federal authority and commence a full scale offensive against southern moonshiners who refused to pay a federal whiskey tax, but did not intervene in southern affairs to insure the rights of African Americans. How might Hayes have explained why he treated the two matters differently?

7. How important to Hayes’s campaign against polygamy was the Supreme Court’s decision in Reynolds v. United States, which concluded that the practice of polygamy was not protected by the First Amendment free exercise clause.

8. Hayes publicly announced his intention not to run for a second term. What are the benefits to a president of making such a promise? Is there a downside?

9. Hayes is often referred to as the first Gilded Age President. What does that mean?
CHAPTER 20

PART V. THE GILDED AGE
CHAPTER 20. JAMES A. GARFIELD, 1881
PAGES 266-275

KEY ISSUES

The Chapter on James A. Garfield instructs students on the significant presidential power of appointment. The Chapter also teaches students about the hard-fought battle for civil service reform at the federal level.

The president’s power of appointment is found in Article II, Section 2, clause 2 of the Constitution. It is a complicated provision that sets forth procedures for the nomination and appointment of officers of the United States. Students should be instructed that the Appointments Clause divides federal officers into two classes—principal officers (judges, ambassadors, for example) inferior officers. It then specifies a separate and distinct method of appointment for each. The appointment of principal officers requires three sequential acts—the nomination by the president; the advice and consent of the Senate; and the appointment of the official by the President. The appointment of inferior officers may involve the advice and consent of the Senate; but, if Congress so desires, when it creates an office, it my place appointment of an inferior officer in the hands of the president alone or in the courts or in the heads of departments. Thus, under the Appointment Clause, there are four modes of appointment (1) by the president, with the advice and consent of the Senate; (2) by the president; (3) by the courts; or (4) by department heads.

It bears repeating that by the time Garfield assumed the presidency, Congress had come to dominate the processes of filling federal positions. This state of affairs had come about as a result of two traditions: the spoils system and senatorial courtesy. Under the former (made famous by Andrew Jackson), members of Congress rewarded political support with government jobs; under the latter, any senator had a virtual veto over the president’s appointments to offices in his state. Thus, Garfield faced a profound challenge to presidential control of the executive branch from the legislative branch, and as the Chapter describes, he met the challenge head-on when he defied Senator Roscoe Conkling of New York by nominating William H. Robertson as collector of the Port of New York. During the struggle with Conkling, Garfield confided in his diary that he was bound to determine “whether I [as president] was the registering Clerk of the Senate or the Executive of the government.”

Ultimately, you can point out, the demise of patronage and civil service reform came to pass in response to two developments—the growing need for skilled personnel to perform the increasingly complex functions of government and the public’s growing objection to the corruption inherent in the spoils system. Garfield did not live to see civil service reform, which he had come to strongly endorse before he was assassinated. However, he was in a sense a prime mover of the effort. Civil service reform occurred in no small measure as a result of his assassination by a frustrated office-seeker named Charles J. Guiteau. Garfield’s assassination galvanized the public on the issue; Congress could no longer
simply ignore it or maintain the status quo. In addition, the assassination pushed Garfield’s successor, Chester A. Arthur, into supporting the Pendleton Civil Service Reform Act, and signing it into law, even though he, himself, had secured a coveted position as a patronage appointee during the Grant Administration.

QUESTIONS FOR DISCUSSION

1. Immediately after taking office, James A. Garfield was besieged by office-seekers who poured into the White House daily, asking for federal jobs. What provision of the Constitution (if any) gave the president power to make such low-level appointments? (See Article II, Section I; Article II, Section 2, Clause 2). Is there a difference between the president’s power to appoint principal officers such as cabinet officials, and lower-level federal employees such as the Collector of the Port of New York?

2. Explain the difference between those in the Stalwart faction of the Republican Party and those (like Garfield) who opposed their philosophy.

3. Did Garfield enhance the president’s Article II appointment power? How did Garfield buck the trend of the so-called “Gilded Age” presidents by refusing to submit to the wishes of certain Senators when it came to his appointment of the Collector for the Port of New York?

4. Why did Charles Guiteau decide to assassinate Garfield? Why did he believe that he would be hailed as a hero for his deed?

5. How did Garfield’s presidency help to bring about the end of the patronage system? Was it significant that Garfield ordered an investigation of scandal in the Post Office, even though prominent members of his own political party were involved?

6. Does Garfield deserve primary credit for the passage of the Pendleton Act Civil Service Reform Act, which occurred following his death?
KEY ISSUES

The Chapter on Chester A. Arthur provides you with an opportunity to cover the office of the vice president. The Constitution has little of substance to say about the vice presidency. The Constitution gives the vice president only two functions: the ongoing role as president of the Senate (Article I, Section 3, clause 4, (except in the case of presidential impeachment, Article 1, Section 3, clause 6)) and the contingent role of first successor, in the event the president dies, resigns, is removed, or unable to discharge the powers and duties of his office (Article II, Section 1, clause 6, Twenty-fifth Amendment). Additionally, under the Twelfth Amendment, the vice president presides over the joint session of Congress when it convenes to count the vote of the Electoral College. Significantly, the Constitution does not give the vice president any executive power.

You might ask students how important they view the vice president in our American system of government. For much of American history, the office of the vice presidency has been seen as inconsequential. Many of the men who served as vice president were less than enthusiastic about the position. In fact, during his tenure as vice president, John Adams remarked: “My country has in its wisdom contrived for me the most insignificant office that ever the invention of man contrived or his imagination conceived.” Some vice presidents, however, have become important members of the president’s team, at the president’s behest—Al Gore, vice president to Bill Clinton, Dick Cheney, vice president to George W. Bush, and Joe Biden, vice president to Barack Obama—were active and involved vice presidents. In addition, 14 vice presidents have gone on to become president one way or another.

An interesting discussion the present Chapter can generate is whether Chester Arthur’s approach to being the vice president reflected a dereliction of constitutional duty. As the Chapter notes, Arthur was openly hostile to the Garfield Administration. Chester stayed true to Garfield’s political enemy, Senator Roscoe Conkling, and refused to remain in Washington, traveling there only when needed to preside over the Senate. You might ask students to ponder whether Arthur’s conduct rose to a level of constitutional neglect. Students may even be asked to answer the question of whether Arthur should have been impeached and removed from office for his performance as vice president. Given that Arthur appeared to satisfy the bare minimum that the Constitution required of him as vice president, the answer is likely no. Thus, although one might describe Arthur’s conduct as vice president as unethical, it did not constitute a breach of constitutional duty.

QUESTIONS FOR DISCUSSION

1. As vice president, Chester A. Arthur had little active involvement in the Garfield administration. Indeed, he stayed away from Washington except
when presiding over the Senate to show his disapproval of President Garfield's actions that led to the resignation of his political mentor, Senator Conkling. Is this action consistent with a vice president’s duties under the Constitution, as envisioned by the framers?

2. After Garfield’s assassination, Arthur, as president, refrained from replacing Garfield’s political appointees (including Senator Conkling’s arch-rival in New York, William H. Robertson, head of the Customs House). He also became a supporter of the Pendleton Civil Service Reform Act, and signed it into law (even though he, himself had been a patronage appointee of President Grant, getting the plum position of head of the New York Customs House, that really launched his career). Now, he supports the end of patronage. What explains this shift in positions?

3. The Pendleton Act established a Civil Service Commission, required competitive exams, and provided for promotion, based upon merit. What provision of the Constitution (if any) gave Congress the power to regulate the president’s appointments in this fashion?

4. *U. S. v. Harris (the Ku Klux Klan Case)* and the *Civil Rights Cases* constituted a major set-back to the Fourteenth Amendment and civil rights legislation enacted pursuant to it. How so?

5. Arthur burned all of his personal papers prior to his death. Why might a former president wish to destroy all of his records? Why have modern presidents chosen to do the opposite by building elaborate museums dedicated to their administrations? Does this bear any relationship to the evolution of presidential power over time?
KEY ISSUES

Because the veto is a significant power in the president’s toolbox, it should be discussed in some depth. In light of President Grover Cleveland’s extensive use of the veto, you might consider using Chapter 22 as the means for covering the veto power.

A brief review of the terms of Article I, Section VII, clause 2 to confirm that students understand the procedural basics of the veto (regular and pocket) would be helpful. You could explain: The presidential veto exists because Article I requires every bill, order, resolution or other act of legislation by the Congress to be presented to the president for approval. Upon presentment, the president can either sign the bill into law or can veto it, i.e., return it to the originating house of Congress with his objections to it. If the president neither signs nor returns the bill to Congress after having been presented with the bill for ten days (exempting Sundays), the bill becomes law, as long as Congress is in session. If Congress is not in session, a pocket veto occurs and the bill fails to become law. Students should also understand that the veto does not empower the president to amend or alter the content of legislation nor does it allow the president to reject portions of a bill (a “line-item” veto). All the president exercising the veto may do is reject a bill in its entirety.

You might point out how the veto power reflects the Constitution’s foundational principles. By giving the executive branch a role in the legislative process, the veto highlights that the separation of powers doctrine in the Constitution is not absolute. In addition, the veto is an example of the checks and balances system embedded in the Constitution. The president’s capacity to reject a bill passed by the majority votes of both the House and the Senate upon its presentment for signature and thereby prevent it from becoming laws checks Congress. In turn, Congress’s capacity to override a presidential veto with a two-thirds vote forms a balances between the branches.

A review of the use of the veto by presidents over time would also be worthwhile. As with so many other powers enumerated in the Constitution, the veto power has evolved since the nation’s founding. The circumstances of its use by various presidents has given the veto its current shape. At first, the veto was used sparingly, if at all; early presidents and legislators viewed the veto prerogative extremely narrowly. The veto’s purpose was viewed as three-fold: to protect the executive branch from encroachments of the legislature; to give the president the opportunity to reject bills so poorly drafted that they could not be effectively executed; and to prevent the enactment of unconstitutional laws. As time progressed, however, the executive branch began using the veto power more freely as an expression of personal political views and policy goals. Andrew Jackson first began to depart from the early presidents’ reserved use
of the veto. He vetoed more bills (12) than his six predecessors combined. Although Jackson’s veto messages included constitutional justifications, they also contained a subtext that revealed that he had made a political judgment in deciding to veto a bill. Subsequently, the Tyler presidency established that constitutionally, the president operates under no limits as to the number of, or reasons for, vetoes. John Tyler used the veto repeatedly, stating that a president who heeds his convictions must use the veto when circumstances require it. He rejected the idea that majority support in Congress for legislation should constrain the president’s use of the veto. Thereafter, Grover Cleveland vetoed more bills in his two terms than all other presidents combined. The threat, either implicit or explicit, that he would refuse to affix his signature to legislation surely influenced policy outcomes.

The upshot for students is that the presidential veto now has a direct effect on public policy. Congress cannot ignore the president’s opinions regarding its initiatives. Whether Congress agrees with the president or not on policy matters, it has to keep his views in mind when drafting legislation or risk having its bills cut down in their tracks by the veto.

QUESTIONS FOR DISCUSSION

1. Was the Tenure of Office Act of 1867 unconstitutional? Did Grover Cleveland operate outside of his authority as chief executive when he refused to comply with the provisions of that act in order to stage a showdown with Congress? Can the president, as head of the branch that is charged with enforcing the law, unilaterally decide not to abide by a law that he deems to be unconstitutional? If Cleveland had not pressed the issue, would Congress have likely repealed the law?

2. Cleveland exercised his veto power more extensively than all of his predecessors combined. How did that practice help to shape the presidency? Did any preceding president(s) pave the way for Cleveland’s aggressive use of the veto power?
KEY ISSUES

Benjamin Harrison is not among our better known presidents. Nonetheless, his legacy includes two noteworthy accomplishments. Harrison managed to press Congress into passing one of the most significant pieces of legislation in the country’s history, the Sherman Antitrust Act. In addition, he established that the Take Clause of the Constitution (Article II, Section 3) gives the president the power to protect federal officials from harm. Both of these topics provide good fodder for student discussion.

The Sherman Antitrust Act was the first measure enacted by the U.S. Congress to outlaw the “trusts,” then understood to mean corporate monopolies and cartels. Students should understand that although several states had previously enacted similar laws, they were limited to intrastate commerce (i.e., commerce within a state). The Sherman Antitrust Act, by contrast, was based on the constitutional power of Congress in Article I, Section 8 to regulate interstate commerce (i.e., commerce among the states). Students should also recognize that the Act was a response to rapid industrial development and an increasingly interdependent national economy. Various corporate trusts, established in a wide swath of industrial activity (e.g., oil, sugar, tobacco, railroads, steel and meatpacking) became huge economic and political forces. Those who controlled the trusts were able to manipulate price and quality without regard for the laws of supply and demand. Access to greater political power at state and national levels led to further economic benefits for the trusts. As the trusts became ever more powerful and wealth became concentrated in fewer hands, animosity towards the trusts grew. Eventually, the public demanded action. In 1890, the federal government responded; Congress passed the Sherman Antitrust Act and President Harrison signed it into law. You could point out that the debate the Act generated was not so much over whether Congress had the power to oversee the trusts under the Commerce Clause as a general proposition. Rather, the debate was over which trust activities were “Commerce…and among the several States” within the Commerce Clause’s meaning. Soon after the Act’s passage, in United States v. E.C. Knight (1895), the Supreme Court decided that Congress did not have the power under the Commerce Clause to apply the Act to regulate manufacturing plants. The Court reasoned that since manufacturing operations occur entirely in one state, they did not constitute interstate commerce that Congress was authorized to regulate. In other words, the Commerce Clause only permitted federal regulation of state-to-state trade—the buying, selling, and transportation of goods between states. Subsequently, however, Knight was effectively overturned during Franklin D. Roosevelt’s administration after FDR threatened to pack the Supreme Court (see FDR Chapter). In N.L.R.B. v. Jones & Laughlin Steel Corp. (1937), the Court ruled that an in-state commercial activity like manufacturing may be deemed a part of interstate commerce if the activity has a “close and substantial relationship” to interstate commerce. In time, the
Sherman Antitrust Act that Harrison championed became a potent tool in the hands of his Progressive Era successors (both Presidents Roosevelt and Taft) who committed themselves to dissolving the trusts.

A second case, *In re Neagle*, decided by the U.S. Supreme Court during the Harrison Administration, reads like a soap opera. Even so, it concerned two critical constitutional issues—federalism and the scope of executive power—that students should review. Briefly, David Terry was a lawyer practicing in California and Stephen Field was a justice on the U.S. Supreme Court. Terry became involved with Sarah Althea Hill. Hill was embroiled in two court actions, one in the California state courts and the other in federal court; she claimed she was married to Senator William Sharon of Nevada and was entitled to a divorce and a share of community property. The California courts validated Hill’s marriage to Sharon and granted her a divorce; the federal court, however, held that Hill and Sharon (since deceased) were never legally married. Sharon’s estate filed a motion in federal court to enjoin Hill from maintaining the validity of the marriage. Justice Field was assigned to the matter and announced the court’s decision in the estate’s favor. Consumed by revenge, Terry broadcasted his intent to harm Justice Field. Accordingly, President Benjamin Harrison, through his Attorney General, assigned U.S. Marshal Neagle to protect Justice Field. Significantly, there was no statutory authority from Congress authorizing the president to make such an assignment. With Neagle guarding him, Justice Field took a train trip from San Francisco to Los Angeles. Terry and Hill were on board the train too. When Terry made a move to attack Field, Neagle fired two shots killing Terry. Neagle was arrested by a local constable, charged with murder, and imprisoned. He filed a writ of habeas corpus in federal district court from his jail cell, asserting that he had acted within the line of duty in protecting Justice Field’s life, and therefore not guilty of murder. He also argued that, to the extent his actions were undertaken pursuant to federal authority, his case had to be adjudicated in federal court. The district court granted the writ.

On appeal in the U.S. Supreme Court, the grant of the writ was affirmed. With regard to the federalism issue the case raised, the State of California argued that the merits of Neagle’s defense to the murder charge should be decided by a California court. The Supreme Court disagreed. The Court held that under the Supremacy Clause of the Constitution (Article IV), a federal officer who commits acts authorized or required by federal law and does no more than was necessary and proper in pursuit of his duties is immune from prosecution by state authorities. The Court also addressed the boundaries of executive power. The Court held that the president enjoys a residuum of authority under the Take Care Clause that allowed him to take steps to protect the nation and its officials, even if those steps were not spelled out by Congress in a statute. In so doing, the Court concluded that the president could rely on inherent powers not directly rooted in the text of the Constitution to safeguard federal jurists when discharging
CHAPTER 23

CHAPTER 23. BENJAMIN HARRISON, 1889-1893

their duties. How far the president's inherent power in this area extends is an
interesting, unsettled question, and can form the subject of discussion with
students. The Court's ruling in *In re Neagle* was stated broadly, suggesting that
the president has wide discretion under the Take Care to determine under what
circumstances federal officials should be afforded protection.

QUESTIONS FOR DISCUSSION

1. Was Benjamin Harrison correct that Congress possessed the power under
the Commerce Clause, set forth in Article I, Section 8, Clause 3 of the
Constitution, to enact the Sherman Anti-Trust Act? Why was this law so
important in the late 1800's?

2. Harrison tried, but failed, to push for legislation to provide public school
education for African Americans in the South. If he had succeeded, would
this have changed the development of the United States in any way?

3. Harrison dispatched a deputy United States Marshall to act as a bodyguard
for a Supreme Court Justice against whom threats were made. Do you
agree with the Supreme Court's decision in *In re Neagle* that the "Take Care
Clause" of the Constitution (Article II, Section 3) gave the president this
power? If so, is the president free to assign bodyguards to protect all federal
employees (e.g. mail carriers, groundskeepers at national parks, etc.?) if they
receive threats from individuals who have grudges against them?

4. Harrison's Supreme Court appointees later undercut many of his initiatives.
Did he make poor selections for the Court? Should he have vetted his
nominees more carefully?
A notable event in American history that occurred during Grover Cleveland’s second term as president was the Pullman Strike. The actions Cleveland took in response to the Pullman Strike are illustrative of the way presidential power has often expanded since the nation’s founding—a president took unprecedented action to address a crisis, the U. S. Supreme Court gave the president its blessing by declaring his actions constitutional, and Congress acquiesced in what arguably constituted executive branch intrusion into its bailiwick.

After reviewing the basic facts underlying the Pullman Strike, it would be worthwhile to remind students that when Cleveland directed Attorney General Richard Olney to obtain an injunction in federal court to restrain union leaders (and their followers) from striking and then sent federal troops to enforce the injunction and restore the peace, he did so on his own initiative. Because there was no federal statute that made the Pullman Strike illegal and here was no federal statute that authorized the executive to address a labor dispute, even Cleveland, as the Chapter points out, was uncertain of the constitutional basis for these actions. The interests that Cleveland claimed he was protecting—interstate commerce and the U.S. mails—were areas that Article I of the Constitution committed to Congress’s oversight. No state or local official had asked Cleveland for federal assistance or characterized the situation as a disturbance that required federal intervention. In fact, the Governor of Illinois believed that he was quite than capable of maintaining law and order in his state and voiced his vehement objections to what he saw as federal usurpation of the police powers traditionally reserved to the states.

Nonetheless, Cleveland forged ahead. Congress did not object, and ultimately, the Supreme Court upheld his actions. In re Debs, the Court agreed with the Cleveland administration that the Constitution gave the federal government the power to maintain the uninterrupted flow of interstate commerce, keep the mails free of any obstructions and insure the general welfare of the people. Significantly, the Court also concluded and that the executive branch could accomplish these ends on its own or with the aid of a court order.

The injunction obtained in the Pullman Strike became a model for “government by injunction”—a tool the executive branch used to intervene in social and economic problems. Like the actions Lincoln took during the early stages of the Civil War, you can explain to students that Cleveland’s response to the Pullman Strike set a precedent for future presidents to argue that the Constitution impliedly granted the executive branch broad powers to take those steps the president determined were in the best interests of the nation when it faced extraordinary, destabilizing events.
CHAPTER 24

QUESTIONS FOR DISCUSSION

1. Explain what led to the Pullman Strike.

2. Was Grover Cleveland justified in taking the action he took to deal with the Pullman Strike when it turned violent? What provision of the Constitution allows a president to inject himself into a labor controversy involving private parties? What power should Congress have when it comes to this type of labor controversy?

3. Who exactly was Eugene Debs? Discuss the expansion of executive power that occurred as a result of the Supreme Court’s decision in In re Debs. How significant was this case?
The William McKinley Chapter provides an excellent vehicle for discussing the power the executive branch wields by virtue of the fact that the Constitution gives the president the role of commander in chief. During McKinley’s tenure as president, America was at war with Spain. The significance of McKinley’s successful prosecution of the Spanish American War cannot be overstated. As a result of its outcome, Spain’s colonial empire in the Western Hemisphere ended and the U.S. was elevated to the status of major player in world affairs.

A point worth exploring initially with students is why the framers of the Constitution assigned the role of commander in chief of the military to the presidency, a civilian office. One answer is: It was the founding fathers’ solution to an age-old issue of human governance—how does a society keep those who possess the powers of defense in check, and prevent them from tyrannizing their fellow citizens or plunging them into military adventures. In the founders’ view, the placement of a civilian who was elected president at the top of the chain of command insured that the military would serve the governed. The military would defend America, not define or control it. Another point worth mentioning is that although the founders gave Congress the power to declare war, they placed no limitation in the Constitution on the full exercise of military power by the president as commander in chief; that is, the Constitution made the president the sole and final decision-maker of military matters once war was declared.

As the Chapter reveals, William McKinley went to war reluctantly; he hoped that through diplomacy America could avoid a war with Spain. But once diplomatic cards were played, McKinley assumed his role as commander in chief with vigor. He established a war room in the White House to supervise the military effort on a minute by minute basis. With maps of battleground sites and a slew of newly-invented telephones, he personally monitored the military’s progress in the field on a daily basis. You can point out that this constituted the first time that technology allowed a president to change the nature of how war was conducted. (Later examples would be when President Truman dropped the atomic bomb during World War II and when President George H.W. Bush used precision-guided munitions, cruise missiles and stealth fighter bombers during the Persian Gulf War) The Spanish-American War lasted just over three months, with the U.S. prevailing decisively. America’s impressive victory muted any criticism of McKinley’s forceful approach to presidential leadership as a wartime president. It also assisted McKinley in securing the Senate’s approval of the Treaty of Paris, which ended the war and made America an imperial power.

The Treaty also ceded Puerto Rico and Guam to the U.S., authorized the purchase of Philippine Islands by the U.S. for $20 million, and made Cuba a U.S. protectorate. In discussing the Supreme Court’s ruling in the Insular Cases that
the residents of the territories technically became U.S. citizens, but did not enjoy all of the privileges and rights contained in the Constitution, such as the right to vote, it is worth noting that the Court’s interpretation of the Constitution to deny basic rights to residents of these newly-acquired territories coincided with the imperialist outlook of the McKinley Administration and society at large. It certainly indicates that the Court was aware of the ambivalence Americans felt at the time as to whether they wanted constitutional rights to “follow the flag,” and suggests that the Court’s view of the Constitution was not strictly legal and academic, but was also influenced by popular sentiment and politics.

QUESTIONS FOR DISCUSSION

1. Did you find it interesting how William McKinley was elected in 1896? Why was this considered the first “modern presidential campaign” in history?

2. What was so groundbreaking about McKinley’s handling of the Spanish American War? In what ways did he expand presidential authority?

3. The Supreme Court ultimately went along with President McKinley and Congress’ annexation plan, thus allowing the United States to become an imperial power. Was the Court simply acquiescing to a desire to acquire foreign territories that was popular at the time, or were its decisions in DeLima v. Bidwell, Downes v. Bidwell, and Dooley v. United States firmly rooted in the Constitution?

4. Was it proper that residents of the foreign territories acquired by the United States should not enjoy all of the rights and privileges set forth in the U. S. Constitution? Was the United States simply exploiting the people of these territories?

5. Explain the Supreme Court’s decision in E.C. Knight. How did it undercut Congress’s intentions in passing the Sherman Anti-Trust Act? Was it based upon a sound reading of the Commerce Clause contained in Article I, Section 8, Clause 3? Could McKinley have done more to confront the trusts during his presidency, or were his hands tied, as he believed, by that decision?

6. President McKinley is sometimes referred to as the first “National Security President” and as the “Father of American Foreign Policy.” Why? Is either of those titles appropriate for him?

7. What was impact of his assassination? Did that change history?
Asserting that the president is the “steward” of the people and using the presidency as a “bully pulpit,” President Theodore Roosevelt significantly extended presidential influence in the country’s domestic and foreign affairs. The Chapter on TR’s presidency is an excellent chapter to illustrate how the forceful personality of a president can lead to expanded powers for the chief executive. As the Chapter points out, TR was not concerned with justifying each of his actions by pointing to a specific constitutional grant of power that authorized it. Rather, he believed that unless the Constitution forbade it, it was the president’s obligation to act in those ways that advanced the public welfare. TR’s embrace of the Progressive Movement’s agenda, construction of the Panama Canal, and establishment of the Roosevelt Corollary to the Monroe Doctrine illustrate the lasting expansion of executive authority that characterized the Theodore Roosevelt presidency.

Students are likely find some background on the Progressive Movement helpful. It was a response to the social and economic problems that arose out of the rapid industrialization that swept the country in the latter half of the Nineteenth Century. By 1890, these problems were widespread and getting worse. Cities were polluted and overcrowded; an unskilled industrial laboring class, including a large pool of child labor, faced low wages, chronic unemployment and occupational hazards; farmers were at the mercy of railroad trusts; and the gap between the working and middle ranks of society and wealthy capitalists was widening rapidly. The Progressive Movement’s goal was to regulate and place reasonable restraints on big business, industry and capitalism. To achieve these goals, the Progressives looked to an expanded role for the government at all levels, national, state and local.

Teddy Roosevelt became a champion of progressive causes and wielded presidential power to further his vision for the country. You can point that TR gave his agenda a catchy phrase, a tactic we will see emulated by future presidents—the “Square Deal.” Students should understand that the fundamental principle underlying TR’s Square Deal was that the government was to be dedicated to fairness and economic and social justice. On one front, TR took on the trusts. In *Northern Securities Co. v. United States* (1904), his administration successfully persuaded the U.S, Supreme Court to uphold Congress’s power under the Commerce Clause to enact the Sherman Antitrust Act for purposes of regulating the trusts. Putting the case in context will help students appreciate the reach of TR’s position. Northern Securities was a holding company—that is, a company created to “hold” the stock and assets of two other companies. Organized to control the railroads owned by two individuals, Northern Securities was clearly a railroad monopoly. The company brought a lawsuit to counter the monopoly charge, and argued that since it had...
been created by the buying and selling of securities, it did not engage in any commerce covered by the Sherman Antitrust Act. The Court, however, sided with the government and ordered the company’s dismantling. The Court’s conclusions were straightforward: If a company acted to abridge interstate commerce, it could be regulated by Congress under the Act. In other words, the antitrust laws could be constitutionally applied to a transaction in shares of stock that was local in origin and governed by state law. Justice Holmes, in his dissent, raised a point worth pursuing with students. He asserted that if the government was correct, then under the Commerce Clause there was hardly any aspect of everyday life in which the federal government might not intervene.

As a proponent of the Progressive agenda, TR eventually came to view the Supreme Court as a barrier to reform. He was highly critical of the Court’s decision in *Lochner v. New York* (1905). There, based on the principle of “substantive due process,” the Court invalided a New York statute forbidding employment in a bakery for more than 60 hours per week and 10 hours per day because the law interfered with the right of contract between the employer and employee. Students should be able to see that the ruling would thwart state-led legislative efforts to regulate working conditions, which were, in fact, frequently, oppressive and exploitative. For TR, the decision was proof that the judiciary cared more about advancing a laissez-faire economic policy (see Justice Holmes’ dissenting opinion) and securing the power of the affluent than protecting the health and welfare of ordinary Americans. The decision fueled TR’s desire to redefine the federal judiciary and eventually led to his support for the recall of judicial opinions and judges by popular vote. You might advise students that they will later see a similar dynamic—a president’s willingness to go to great lengths to neutralize an uncooperative Supreme Court. TR’s stance foreshadowed Franklin D. Roosevelt’s proposal to “pack” the Supreme Court to prevent a conservative majority from continuing to stand in the way of his New Deal agenda.

Students may not know that they have TR to thank for the country’s national parks and monuments. Under TR’s leadership, for the first time, conservation of the nation’s natural resources became a government mandate. His conservation legacy is found in the 230 million acres of public lands he helped establish during his presidency. TR saw to it that Congress created national forests, national parks, and wildlife refuges. He signed into law the Antiquities Act, which gave the president the authority to designate and set aside public areas as national monuments by executive order and eventually led to the creation of the National Park Service. The provisions in the Constitution that authorized TR’s conservation efforts are not evident. The General Welfare Clause in the Preamble is a likely source. But, as noted, TR was not concerned with finding a constitutional basis for his policies—the fact that the Constitution did not expressly prohibit him from advancing conservation measures was justification
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enough for him. The debate as to whether environmental policy is a federal concern or should be left to the states commenced in earnest during TR’s terms in office. TR argued that environmental issues cross state borders and must be subject to a uniform set of rules that benefit all citizens.

TR also permanently expanded presidential influence in the realm of foreign affairs. He dusted off the Monroe Doctrine and then added to it. Students can be reminded that Monroe Doctrine was largely declarative—it stated that European powers should no longer attempt to increase their influence or recolonize any part of the Western Hemisphere. TR was willing to do more. The U.S., he announced, would serve as the region’s policeman. In the “Roosevelt Corollary” to the Monroe Doctrine, TR made it clear that the U.S. would take affirmative steps, including the use of military force, in Latin American and Caribbean affairs, if necessary to insure stability in the region. The construction of the Panama Canal was a vivid example of how far the Roosevelt Corollary extended. TR believed a canal through the isthmus of Central America, connecting the Atlantic and Pacific Oceans, was essential to U.S. military and economic interests. Panama seemed the best location, but it was a province of Colombia. U.S. attempts to form a treaty with Colombia that would allow it to build and defend the canal came to nothing. Leaning on the Roosevelt Corollary, T.R. used U.S. military forces in the area to prevent Colombia from stopping a Panamanian revolution. When Panama had gained its independence, the U.S. brokered a deal with the French company that owned the rights to build the canal. The deal TR brokered gave the U.S. complete political and military control of the territory where the canal was built. This episode can be used to show students how much a president’s “bully pulpit” can be used to push through a bold agenda, even where the Constitution provides no explicit basis for the president to act.

QUESTIONS FOR DISCUSSION

1. In Shurtleff v. United States, the Supreme Court determined that the president possesses the authority to remove inferior executive officers without giving a reason for his decision or seeking the “advice and consent” of Congress. For practical reasons, should Congress have more of a role in the removal process, if it has a role in appointing the executive branch official in the first place?

2. Were Theodore Roosevelt’s interventions in Columbia and the newly-formed Panama constitutional? Was this a natural extension of the interventionist McKinley presidency? How, if at all, were these presidential actions justified by the Monroe Doctrine?

3. TR was the first president to wade into conservation/environmental issues as president. Is this really a national issue? What gives the president the ability to push into this area?
4. In *Northern Securities Co. v. United States* the majority sided with the Roosevelt Administration and upheld the constitutionality of the Sherman Anti-Trust Act under the Commerce Clause; however, Justice Oliver Wendell Holmes dissented, maintaining that the statute should be more narrowly construed, and suggesting that the Roosevelt Administration’s position would lead to virtually unlimited congressional power under the Commerce Clause. Who had the better argument from a constitutional perspective?

5. Discuss the significance of the Supreme Court’s decision in *Lochner v. New York*. How did this ruling limit state authority under the Constitution? Why were Progressives so frustrated with the decision? Did TR’s desire to redefine the federal judiciary foreshadow the subsequent actions of his cousin, Franklin Roosevelt? (See the “Court Packing Plan” in FDR chapter). In hindsight, was Theodore Roosevelt correct that *Lochner* was blatantly unconstitutional?

6. How successful was TR in circumventing the Constitution, when necessary, in order to accomplish his political goals? Was he able to expand the powers of the presidency as a whole, or did he merely expand his own authority during the time he was in office?
KEY ISSUES

Although William H. Taft was TR’s hand-picked successor, it turned out that Taft had a very different conception of the presidency and the exercise of presidential power than did his mentor. The difference between Taft and TR is worth exploring in class, as it is connected to an issue Americans have debated since the country’s founding—what is the scope of the executive power that Article II of the Constitution vests in the president.

At its most fundamental level, the question relating to the Vesting Clause is: What does it authorize the president to do? Historically, there have been two competing theories: (1) the president may take actions only if the text of the Constitution allows it; or (2) the president may take any action that furthers the public good, unless the Constitution prohibits it. Taft was a proponent of the former; Roosevelt was a proponent of the latter.

Because Taft construed presidential power so narrowly, as compared to TR, he rejected TR’s approach to governance. Taft did not believe that he, as president, had been given a mandate from the people that he could pursue on his own initiative; he did not think it was his place to exercise policy leadership. Moreover, he eschewed the notion that he should use a bully pulpit to court and mold public opinion. Taft’s constitutional outlook and abiding respect for the rule of law was in full view in two events discussed in the Chapter. In fact, students may conclude that Taft’s dedication to the law better suited him for the position he assumed after he left the presidency, that of Chief Justice of the U.S. Supreme Court.

When in Pollock v. Farmers’ Loan and Trust Co., the U.S. Supreme Court struck down the Tax Act of 1894 as beyond Congress’s taxing powers, Taft disagreed with a widely-held view among Progressives that Congress should simply reenact the income tax as is and give the Supreme Court the opportunity to reverse itself. For Taft, the only appropriate course of action after the Pollock decision was to initiate the constitutional amendment process set forth in Article V, in order to give Congress the power that the Supreme Court had ruled it lacked.

Similarly, when Taft was presented with the act granting statehood to the Arizona, he vetoed it because Arizona’s proposed state constitution included a judicial recall provision. As popular as the provision was among Progressives, Taft believed it to be undemocratic and contrary to the fundamental American ideal of restraining majority rule. Taft stood on legal principle; it was only after the Arizona constitutional convention reconvened and struck the recall provision from the state constitution that Taft signed the bill approving Arizona as the 48th state. (In the end, Arizona was admitted to statehood, and it promptly re-inserted the judicial recall provision into its state Constitution!) Students might be asked to comment on whether this sort of dogged adherence by a president to his or
her political philosophy at times only elevates form over substance and should be tempered to get things done.

**QUESTIONS FOR DISCUSSION**

1. What were the philosophical differences between William H. Taft and TR in terms of executive power? Was Taft unfaithful to the Progressive movement based upon his belief in a restrained model of executive governance?

2. How did Taft's prior experience as a federal appeals judge impact his view of Congress's power to regulate trusts and monopolies?

3. When the Supreme Court issued a ruling holding the Progressive initiative relating to creating federal income taxes was unconstitutional, Taft sought to utilize the constitutional amendment process rather than wait for the Court to change its mind. What were the merits of his approach? Was the Supreme Court's decision in *Pollock v. Farmers’ Loan and Trust Company*, invalidating a federal income tax, a sound one?

4. Was Taft justified in vetoing the bill to admit New Mexico and Arizona as states? Ultimately, how did those territories become states?

5. Taft is the first and only president to ever go onto the Supreme Court after serving as president. Was Taft better suited to be Chief Justice of the Supreme Court than to be president? What were his most important constitutional contributions in each role? Is a former president, as a general matter, a good or bad choice to serve on the nation’s highest Court?
CHAPTER 28. WOODROW WILSON, 1913-1921

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KEY ISSUES

The Chapter on President Woodrow Wilson may be used to illustrate what students have seen before (and will see again)—the bright and the dark sides of American policy when the country is at war. With a steady hand, Wilson guided the country to victory in World War I, exercising his powers as commander in chief and head of state effectively and to their fullest. At the same time, however, Wilson’s unwillingness to tolerate opposition during wartime led to the passage of the Espionage and Sedition Acts, pieces of legislation that constituted a frontal attack on free speech in the United States. Through these aspects of the Wilson presidency, students can explore the inevitable tension that arises in a democracy between the interests of national security and civil liberties in times of conflict. In addition, students will learn about Burdick v. United States (1915), a case that later had a profound effect on President Gerald Ford and led him to make one of the more momentous decisions in American history—to grant a pardon to Richard M. Nixon.

World War I was a global conflagration. As such, it presented Wilson with circumstances no president up until then had confronted. So that students appreciate the gravity of the military and political decisions Wilson had to make, you could provide them with the following explanation of the run-up to America’s involvement in the conflict. When in August 1914, World War I erupted across Europe, Wilson hoped that America would be able to stay clear of the conflict. Sensitive to the concerns of communities of Americans with family roots in Germany, France, England, and other combatant countries, Wilson sought to avoid the divisiveness that would occur if Americans began taking sides. He decided that a policy of neutrality was in order; it would enable Americans to put European loyalties aside and unite behind a single American approach to the war. Calling upon the president’s authority to declare neutrality—an issue that had been hotly debated and settled during Washington’s administration—Wilson declared that the United States would remain impartial. However, in February 1917, Germany’s announced willingness to engage in unrestricted submarine warfare, led Wilson to revisit the policy of neutrality he had declared in 1914 and venture into new territory. Wilson decided that American merchant ships would be armed and the America’s stance would become one of “armed neutrality,” a precursor of war. Perhaps aware of the questions regarding presidential authority that Lincoln confronted at the Civil War’s conclusion, Wilson asked Congress for the statutory authority to arm the vessels. When several anti-war Senators led a successful filibuster against the measure, Wilson went ahead and armed the vessels anyway by executive order. He had evidently concluded that he had the constitutional right to do so as commander in chief and the head of state in foreign affairs. Ultimately, on April 2, 1917, after German submarines attacked American ships, Wilson went before a joint session of Congress and requested a declaration of war against Germany. He got it four days later.
Students should appreciate the daunting task the Wilson’s administration faced once America declared war. The country had to be mobilized for a war being waged at a great distance from its shores. The administration established an array of bureaus with powers to regulate the nation’s economy and industrial production. It also appealed to the public’s patriotism and sense of civic duty, encouraging volunteerism in both the public and private sectors. It was America’s responsibility, Wilson said, to make the world “safe for democracy.” In the end, in terms of raising an army and mobilizing Americans to sacrifice and join the war effort, the administration’s efforts were impressive and successful.

Students should also be instructed, however, that there were dark consequences to certain of the administration’s actions, taken during and in the aftermath of the war, most notably in the realm of civil liberties, Wilson was intolerant of dissent and supported legislation that placed profound limits on free speech. Wilson signed the Espionage Act of 1917, which imposed fines and jail sentences for person convicted of aiding the enemy or obstructing the recruitment of soldiers. Later, he signed the Sedition Act, amending the Espionage Act, which criminalized any utterance that undermined the war effort or was deemed scornful of the government or the Constitution. You might remind students that they have seen this scenario before, when John Adams signed the Alien and Sedition Acts during the Quasi-War with France.

A second significant topic in the Wilson Chapter relates to the president’s pardon power and the Supreme Court’s ruling in Burdick v. United States (1915). As noted, Burdick played a critical role in President Gerald Ford’s decision to pardon Nixon. So students see how the dots are connected when it comes to Ford’s pardon of Nixon, they should spend some time discussing Burdick’s facts and legal implications. George Burdick was the city editor of the New York Tribune. When called before a federal grand jury, he refused to answer questions about his sources for certain articles in the paper on the basis that his answers might tend to incriminate him. In an effort to compel his testimony, the U.S. attorney obtained a full and unconditional pardon from Wilson for Burdick, absolving him of any and all the offenses he committed or may have committed against the United States, in connection with the article at issue. When Burdick declined to accept the pardon and again refused to testify, the district court found him in contempt of court. On appeal, the Supreme Court agreed with Burdick and dismissed the proceedings. The Court for the first time stated that a pardon was an imputation of guilt, and acceptance of the pardon was an admission of guilt. Therefore, the Court reasoned, it was Burdick’s right to it. This 1915 case, students will learn, later convinced Ford in 1974 that his decision to pardon Nixon was in the country’s best interests.
QUESTIONS FOR DISCUSSION

1. Woodrow Wilson was a political scientist and President of Princeton. Do academics make good or bad presidents? Wilson was also Governor of N.J. and believed in strong executive authority. While campaigning, he said “If you elect me, I will be an unconstitutional Governor.” What did he mean?

2. Notice that Wilson didn’t want to lead the country into war, but he did. Compare President Wilson’s decision to arm American vessels and engage in “armed neutrality” before the nation’s entrance into World War I, with the actions of other presidents (e.g. Washington, Madison, etc.) who had used neutrality to counter bellicose European powers in the past. What, if anything, made Wilson’s decision different from earlier presidents’ approaches, as a constitutional matter?

3. At the onset of World War I, Wilson stated, “the world must be made safe for democracy.” He then led the United States into a European war and attempted to establish an international organization (the League of Nations) that he hoped would allow democratic governments to flourish around the world. Does the Constitution mandate any of this? Does it grant the president the authority to unilaterally make such determinations?

4. What did the Espionage Act of 1917 and the Sedition Act of 1918 do? Was Wilson’s willingness to curb the First Amendment rights of dissidents during the war—through the passage of the laws—an understandable reaction, given the war-time climate? How was it similar (or different) to the ways in which the Adams or Lincoln administrations had restricted individual rights?

5. In Schenck v. United States, Justice Holmes correctly equated Charles Schenck’s distribution of anti-war leaflets with a man “falsely shouting fire in a crowded theatre and causing a panic?” How might the two situations be different?

6. Tell us what happened in Burdick v. United States—how did Wilson try to extract testimony from Mr. Burdick? What was the legal significance of the Court’s holding in Burdick that the acceptance of a pardon carried with it “an imputation of guilt?” Do you agree that George Burdick should be allowed to refuse a presidential pardon? What if he said nothing, after the president issued the pardon declaration. Would his silence have constituted an “acceptance” of the pardon, or would he have to expressly sign a piece of paper “I accept” before it became valid? [Do you see any potential relevance to the situation in which President Gerald Ford later pardoned Richard Nixon in 1974 for all possible crimes relating to the Watergate scandal?]

7. In 1918, Wilson publicly endorsed the right to vote for women. Why do you
think he ended up supporting women’s suffrage, when he hadn’t been a big
fan of the idea when he first ran for office?

8. How did Wilson’s presidency help to make the United States a world leader?
   Was Wilson’s toleration of stiff restrictions on American citizens’ free speech
   a necessary means to safeguarding the nation? Or was it an extreme reaction
   that undermined the Constitution he was sworn to protect?
CHAPTER 29

KEY ISSUES

Warren G. Harding’s presidency was rocked by corruption and scandal. As a result, Harding is consistently ranked as one of the worst in the nation’s history. That much students are likely to know. They are not likely to know that the Harding administration had its accomplishments. One act that often goes unnoticed, and for which Harding deserves credit, was his decision to commute the sentence of Eugene V. Debs and others who had been prosecuted, convicted and jailed for violations of the Espionage Act.

Since most students might not be acquainted with the circumstances of the Debs pardon, you might briefly review them. Eugene V. Debs was a labor organizer who participated in the Pullman Strike of 1894 which occurred during Grover Cleveland’s second term (See Cleveland Chapter, Term II). In a speech Debs gave in June 1918 in Canton, Ohio, he made positive comments about three local Socialist leaders who had been convicted of providing aid to a person who had resisted the draft. For those statements, Debs was charged with violations of the Espionage Act. He was tried, convicted and sentenced to ten years in prison. Pleas for leniency were made on Debs's behalf, but Woodrow Wilson rejected them all out-of-hand, including a recommendation for a pardon made by his own attorney general. When Harding won the presidency and took office, Debs was serving his sentence in a maximum security federal penitentiary in Atlanta, Georgia. Harding commuted Debs’s sentence on December 25, 1921. Discussing his decision with a friend, Harding observed that he regularly heard members of Congress say “things worse than the utterances” for which Debs was convicted. Later, in the same spirit, Harding commuted the sentences of political prisoners who remained incarcerated.

You might observe that Harding's decision to commute the sentences imposed under the Espionage Act was in keeping with the intent of the Constitution’s framers in granting the power of clemency to the president. As Alexander Hamilton noted in The Federalist No.74, the pardon power was intended to permit the president to make “exceptions in favor of unfortunate guilt” so that American justice would not be too “sanguinary and cruel.” In other words, presidential clemency was not only reserved for the cases in which the innocent had been wrongfully convicted, but was also intended for the guilty, who sometimes deserve “mitigation of the rigor of the law.”

Harding’s commutations served to address deeply problematic aspects of the Espionage Act. As made evident by Debs’s conviction, the statute left far too much room for overzealous enforcement (more than 2,000 people were prosecuted), and provided the federal government with the means to crack down on what the First Amendment was designed to protect—political speech critical of the government—on the flimsiest of grounds. When considered in that...
context, the commutations were an important step forward in the restoration of civil liberties. By exercising his constitutional power of reprieve, Harding placed the president's imprimatur on efforts that had begun to question the excesses of legislation enacted during wartime. In 1921, the Sedition Act amendments to the Espionage Act were repealed.

Finally, students can be asked to discuss the Teapot Dome Scandal that marked the end of Harding's presidency; significantly, the special prosecutor investigation that it unleashed served as the model for later special prosecutors in the Watergate era during the presidency of Bill Clinton.

QUESTIONS FOR DISCUSSION

1. Did you know about the “American Protective League” that had grown up during the Wilson presidency? Does it remind you of anything today?

2. Who was Eugene Debs? Why was he considered such a threat?

3. Compare and Contrast Warren Harding’s approach to civil liberties with that of his predecessor, Woodrow Wilson. How did Harding’s handling of the Debs situation distinguish him from other presidents of this era?

4. William Howard Taft, appointed Chief Justice of the United States Supreme Court by Harding, is the only former president to occupy that position. Are former presidents well-suited, or poorly suited, to serve as Supreme Court justices?

5. What, if anything, did Harding’s pardon of Debs illustrate about his view of the president’s relationship with the Supreme Court? What about his appointment of William Howard Taft to the Supreme Court?

6. Why was Harding, in contrast to former President Woodrow Wilson, able to reach an agreement with Congress that brought about an official end to World War I?

7. Discuss the so-called “Teapot Dome Scandal.” What happened here? Was Harding to blame for his Secretary of the Interior Albert Fall’s misdeeds? Did the Harding administration deserve the reputation for corruption that it gained as a result of that scandal?

8. Although President Harding’s term was cut short due to his untimely death, he had an important impact on the country during his two-and-a-half years in the White House. What do you believe was his most significant legacy? His commutation of political prisoners like Debs? His appointment of Chief Justice Taft?
KEY ISSUES

At this point in the course students should understand that the dynamic between the president and Congress has often been a tug of war for primacy in exercising power. One issue over which the two branches have tussled regularly is the president's power to remove a federal official from office. The impeachment of Andrew Johnson over his refusal to abide by the Tenure in Office Act is one striking illustration of the struggle. Another occurred during Calvin Coolidge's presidency, when the U.S. Supreme Court decided *Myers v. United States*, a case that addressed the parameters of the president's removal power (vis-a-vis Congress) and came down firmly on the president's side. If you would like to explore the presidential power of removal in some detail, the Coolidge Chapter provides you with an excellent vehicle for doing so.

You might introduce the topic by explaining that the text of the Constitution (or more precisely, the lack of text) and its framework of checks and balances has contributed to the clashes between the executive and legislative branches over the president's power to remove. While the Constitution covers the president's power of appointment in Article II, Section 2, and in some cases, conditions it on the Senate's advice and consent, it states nothing about the president's removal power. At the same time the Constitution authorizes Congress under the Necessary and Proper Clause to create executive offices, specify their structure, and assign specific duties to executive branch officers, it obligates the president to execute the laws under the Vesting Clause, thereby giving the president the power to control the functioning of the executive branch offices Congress creates.

With regard to the president's removal power, you might confirm that students understand the precise question that had erupted between the branches from time to time: Whether the Constitution allowed Congress to make the consent of the Senate a condition of removal of appointed officials in the executive branch. In 1872, Congress inserted that condition into a statute respecting the removal of postmasters. It was under this legislation that the *Myers* case arose. In July 1917, Myers was appointed (with the Senate's advice and consent) to serve as first class postmaster at Portland, Oregon, for a term of four years. In 1920, he was removed from office by President Wilson, after he refused to comply with a demand for his resignation. His removal was never approved by the Senate. Myers sued for his salary from the date of removal to the end of his term. Myers lost in the lower court.

The removal power question the *Myers* case raised was ultimately heard by the U.S. Supreme Court. Coolidge's Solicitor General, James Beck, argued the government's side and defended Wilson's removal of Meyers without first obtaining Senate approval. Beck pointed out that from the nation's founding,
removal was recognized as an executive branch function, and that accordingly,
 presidents had consistently refused to accept congressionally-imposed limits
 on the power of removal. Beck argued simply and broadly that the president
 had the constitutional authority to remove any member of the executive branch,
 regardless of legislation to the contrary. The Supreme Court agreed, in a majority
 opinion authored by Chief Justice and former President William Taft. The Court
 held that under the Constitution, officers who performed purely executive
 functions were inherently subject to the president’s exclusive power of removal.
 According to Taft, Congress could not deny the president that power, as it would
 prevent the president from discharging his executive duties and his obligation to
 execute the laws faithfully.

In closing, you could let students know that the breadth of the Myers decision,
 which some argued granted the president complete freedom to remove not
 only postmasters, but also officials throughout the executive branch, would be
 subsequently tested during the administration of President Franklin Roosevelt.
 In Humphrey’s Executor v. United States, decided in 1933, the pendulum would
 swing back in Congress’s favor. The Court would rule that the Constitution
 permitted Congress to restrict the president’s ability to remove federal officials
 who were not purely executive; i.e., officials who performed quasi-legislative
 or quasi-judicial functions. Thus, students will be able to see that the removal
 power issue is not clear cut, and swings back and forth depending upon the type
 (and function) of the officials involved.

QUESTIONS FOR DISCUSSION

1. Did President Coolidge’s fiscal philosophy bear any similarity to that of future
 presidents, most notably Ronald Reagan, who championed decreased federal
 spending and a limited national government?

2. How did the Supreme Court’s decision in Ex Parte Grossman solidify
 and expand presidential power? If the federal judge had succeeded in
 invalidating President Coolidge’s pardon, how would that have impacted
 Coolidge’s ability to deal with the Prohibition issue? How would it have
 impacted future presidents?

3. Why would Coolidge have wanted to pardon someone who violated the
 Prohibition law who had ignored a court order to stop selling liquor. (Judge
 then held in criminal contempt). Doesn’t President have to enforce the law?
 (His pardon meant Grossman only had to pay fine. A symbolic act. A bad law.
 The pardon power, in part, allows the President to help the country get past
 mistakes like this.

4. What was the significance of Myers v. U.S.? What was the significance of
 McGrain v. Daugherty?
5. Explain the significance of the Judiciary Act of 1925. Did it change the Supreme Court’s role in American government? Did it strengthen or weaken the Supreme Court?

6. How did President Coolidge’s appointee to the Supreme Court, Justice Harlan Fiske Stone, impact the development of constitutional law in the United States? Would Coolidge have approved of this legacy?

7. When Calvin Coolidge’s presidency ended, he was immensely popular. Was his favorable reputation with the American people deserved? Should Coolidge bear some blame for the Great Depression, which enveloped the nation shortly after he left office?

8. What impact do you think the death of Coolidge’s son—Calvin Jr.—at age 16, have on Coolidge for his second term?
KEY ISSUES

You might begin discussion of the presidency of Herbert Hoover by pointing out that he cannot take the entire blame for the Great Depression of 1930, the worst economic crisis in the country’s history. Its root causes—the structural weaknesses in American agriculture and industry, the unstable condition of the America’s banking system, the overly speculative nature of the country’s financial sector, and the vulnerabilities of the international economy—had developed gradually over time. However, you can also point out, Hoover has been rightly blamed for the severity of the Great Depression, its duration, and the suffering that Americans sustained. In discussing the Hoover Chapter, you might ask students to decide whether that verdict of history is fair.

As the Chapter points out, Hoover had long-standing beliefs regarding the Constitution. The Constitution was a “working plan” that: (1) preserved “a great Federation of States”; (2) placed the States under a system of representative national government; and (3) protected “the vital principles of the American system of liberty” through the Bill of Rights. Like President Taft, Hoover subscribed to the principle that the national government was confined to act only in those areas and in those ways that the Constitution clearly authorized.

Hoover’s constitutional perspective was evident in the steps he took (or refused to take) in the days before and during the Great Depression. Soon after he assumed office, pursuant to the authority that the president is expressly given in Article II, Section 3 of the Constitution, Hoover called a special session of Congress and recommended a legislative program to address a variety of issues, including measures to confront problems in the nation’s agricultural sector. But, according to some scholars, once the special session was convened, Hoover kept his distance from the legislative process and did not provide the leadership many thought was needed to prod Congress into meaningful action. Evidently, Hoover believed that executive intervention into Congress’s arena would weaken the legislative branch and lead to an encroachment on individual liberty. (See Sidney M. Milkis and Michael Nelson, The American Presidency (Washington, D.C.: CQ Press 2012) 280. As the Great Depression took hold, Hoover’s decisions reflected his views that: the powers of the federal government were narrow and limited; assistance and public works were be handled on a state and local basis; voluntary responses from businesses and labor would be forthcoming and sufficient; and that giving direct financial aid to the unemployed would undermine individual initiative. A fiscal conservative who believed he was obligated to maintain a balanced federal budget, Hoover refused to authorize large-scale federal relief programs and was unwilling to use federal spending to stimulate the economy.

You could ask students to consider whether Hoover’s constitutional philosophy of a limited central government was really his fundamental failing. After all,
his Jeffersonian outlook of restrained federal power was a traditional one and consistent with the view that had largely prevailed among government leaders during the Nineteenth Century. Students should consider whether Hoover’s true failure might have been the same error Martin Van Buren made during the Panic of 1863—his unwillingness to step back from his deeply-held principles and, at the very least, question his unyielding belief that the Constitution required the federal government to exercise rigid restraint, even in the face of a devastating, unprecedented crisis like the Great Depression.

**QUESTIONS FOR DISCUSSION**

1. Herbert Hoover was a geologist and engineer who worked around the world in gold mines. He became an international figure during World War I as the head of the Commission for Relief in Belgium (administering food aid to civilians) and as U.S. Food Administrator (enforcing food rationing to free up supplies for U.S. troops in Europe). He eventually assisted President Wilson as U.S. Relief Administrator in Europe. How did these positions of power shape Hoover’s view of the proper role of government in the economic sphere? He sometimes exercised power without any specific statutory authority, and came to believe that letting business operate on its own along with “citizen volunteers” was the secret to an efficient economy. He believed in “self-reliance,” “business self-regulation,” and “volunteerism.”

2. Herbert Hoover believed that an elected leader did not need to be a lawyer to interpret the U.S. Constitution. Is it preferable for the president to have a legal background?

3. President Hoover called Congress into “special session” to deal with a distressed situation in the farm economy. What gave him the power to do this? (Art. II, Sec. 3). Hoover succeeded, getting a farm bill from Congress by the end of its session. Should presidents do more of this?

4. President Hoover created the Wickersham Commission in response to the public’s concern about organized crime, police conduct, and the ineffective enforcement of Prohibition. How did Hoover stand to benefit from creating the Commission?

5. Was Hoover correct that a president should take no position on a proposed amendment to the U.S. Constitution that would repeal Prohibition? (See footnote 10 and related text).

6. Herbert Hoover began his presidency energetically, calling Congress into session under Article II, Section 3 and asking that the economic problems in the nation’s agricultural sector be addressed. He did not, however, display the same assertiveness when the effects of the Great Depression...
became evident throughout the country, following “Black Tuesday.” Can the difference in approach be explained by the three principles that Hoover believed were at the core of the U.S. Constitution? Did Hoover’s success during and after World War I in administering voluntary relief programs for the poor color his views on how the federal government should respond in times of economic crisis?

7. What is a “pocket veto?” (See Art. 1, Sec. 7). How did the U.S. Supreme Court’s decision in the Pocket Veto Case expand the presidential veto power in Article 1, Section 7?

8. Herbert Hoover was held in extremely low esteem when he left office. He was a big critic of FDR, but eventually found favor with Truman and Eisenhower. Ultimately, his reputation was rehabilitated over time. Was it deserved?
KEY ISSUES

Franklin D. Roosevelt will introduce students to the concept of transformational leadership. A transformational leader is one who, through the strength of his/her vision and personality, inspires others to change their expectations and perceptions and accept a new order. As a result of Roosevelt’s efforts during the 12 years he served as president, the power ratio between the president and Congress radically shifted—the presidency took center stage in the nation’s politics. Under FDR, the federal government intervened in the economic and social affairs of the country like never before. This intervention, which was institutionalized in various federal statutes and programs, continues to this day. In addition, under FDR, from an institutional perspective, the executive branch developed into the force it is today. You should point out to students that the Executive Office of the President (“EOP”) was created in 1939, and provided the president with an organizational apparatus to help him advance his policy agenda and manage the expanding activities of the executive branch. FDR also exercised the president’s wartime powers with more authority than any of his predecessors, setting a new benchmark of presidential leadership in the realm of foreign affairs for his successors.

On the domestic front, FDR pushed through the New Deal—a series of legislative acts, executive orders and proclamations that sought to provide assistance to Americans devastated by the Great Depression and remedy the economic conditions that had led to the crisis. The New Deal sought relief for the needy, economic recovery, and reform of American capitalism. The programs instituted under the New Deal touched the lives of American in many areas, including home loans, farm subsidies, the rights of organized labor, bank deposit insurance, relief payments and jobs, pensions (social security), protection from fraudulent stock and securities practices, unemployment insurance, aid to mothers with dependent children, public works, rural electrification, and western water management. You might ask students to consider what it was about FDR and his approach to governing that enabled him to envision the New Deal and successfully implement it. Their answers might include the idea that FDR was not an ideologue or a traditionalist; he was an innovator, a pragmatist, a reformer. Like his cousin, Theodore Roosevelt, FDR embraced the stewardship theory of presidential power. He believed that as long as the Constitution did not explicitly forbid it, he was authorized to act.

While FDR did not see the Constitution as an obstacle to his vision, he did have concerns about the Supreme Court’s role in defining the contours of the Constitution. Even before Roosevelt took office in 1933, he was fairly certain that a conflict with the high court was inevitable. The Court had been a powerful conservative force in American life since the early 1880s. During his first term, FDR’s watched as the Court repeatedly stymied much of his New
CHAPTER 32

PART VIII. THE NEW DEAL AND WWII

Chapter 32. Franklin Delano Roosevelt, 1933-1945

CHAPTER 32

Deal legislation. The Court declared key New Deal laws unconstitutional on the grounds that neither the Commerce Clause nor the taxing provisions of the Constitution granted the federal government authority to regulate industry or to undertake social and economic reform.

FDR came up with a solution—the so-called “Court Packing Plan.” Students should focus on this saga; it is one of the more famous episodes in American presidential history. In a nutshell, FDR knew that he could not rid the Court of its conservative members, but he realized he could out-number them. Citing the inability of the federal courts to deal with an overwhelming caseload, FDR proposed legislation that would add one justice to the Supreme Court for every one justice who did not retire by age 70-1/2. If the plan passed and no one on the current Court retired, FDR would get to appoint six new justices who would be more congenial to his policies. Students should understand that the legislation FDR proposed to implement the plan was constitutional. The Constitution places the power to determine how many justices sit on the Supreme Court in the hands of Congress, and it states nothing as to their number. However, FDR’s proposal provoked nationwide concern. Many saw FDR’s plan as a blatant effort to politicize the Court. Americans revered the independence of the Court, and many were upset with the president’s assault on the judiciary’s autonomy. FDR, however, remained committed to the plan. The Court eventually appeared to get the message. In the famous “Switch in Time that Saved Nine,” Associate Justice Owen Roberts switched to the majority in cases that upheld New Deal legislation—adopting an extremely broad interpretation of Congress’s powers under the commerce Clause—thereby mooting FDR’s need to pack the Court. Many believe the “Switch in Time” was the result of a strategic calculation on the part of the Court that continued opposition to FDR’s agenda was too risky. Hopefully, students will appreciate that although FRR lost the battle—the legislation he proposed to add to the Court’s number failed—he won the war—the Court began to uphold his New Deal legislation. As the Chapter points out, ironically, time would do what the Court Packing Plan did not. By 1941, four Supreme Court justices had retired—two more had died. In total, seven of the nine justices on the Court were FDR appointees. Just as he reshaped much of American society, ushering in the modern administrative state and vastly increasing the power of the executive, with his appointments, FDR had a lasting impact on the American judiciary.

Politicians, historians, political scientists, and constitutional scholars continue to debate whether the sort of modern presidency ushered in by FDR was intended by the founding fathers. You could ask students to answer that important question for themselves as you discuss the FDR Chapter. On the one hand, FDR’s approach to wielding presidential power certainly appears to be consistent with the vigorous chief executive Alexander Hamilton anticipated the president would be. In Federalist Paper No. 70, Hamilton stated: “Energy in the executive is a
leading character in the definition of good government.” In this same vein, the Brownlow Committee, in recommending the establishment of the EOP, referred to the framers’ vision of the president as a “responsible chief executive at the center of [the nation’s] energy, direction and administrative management.” On the other hand, the opposing arguments that FDR disregarded the founders’ intended constitutional framework of a restrained federal government of limited powers has merit. Yet, that argument raises another question for students to ponder—whether the founding fathers intended the president to follow that general rule even when the country faces an existential threat, like the Civil War, or a devastating crisis, like the Great Depression, or the requirements of waging a successful war. If history is any guide, Americans have answered that question in the negative.

Leading the country through World War II, FDR extended the president’s powers as commander in chief dramatically. FDR took the unparalleled action of issuing an executive order that injected the president into a labor dispute and seized a California company to maintain the production of defense-related airplanes on June 9, 1941—six months before the Japanese attack at Pearl Harbor that would bring the United States into the Second World War. Students should be reminded that no act of Congress had authorized that seizure, and the existing constitutional procedures for condemnation of private property had not been followed. To justify the seizure, FDR instead relied on the constitutional obligation of the president in Article II “to take care that the laws be faithfully executed.” He also relied on the discretion vested in the president by the Constitution to execute the laws, and the authority that comes from the constitutional designation of the president as commander in chief to ensure the continued existence of the nation. FDR also used his commander-in-chief authority to evacuate Japanese American citizens from the West Coast and to move them to internment camps after the bombing of Pearl Harbor; a stark reminder, you can observe, that presidents have often been willing to sacrifice civil liberties when the country is engaged in conflict.

It would be useful to discuss FDR’s approach to foreign affairs and the Supreme Court’s decision in U.S. v. Curtiss-Wright Export Corp (1936). The Court’s opinion cemented the preeminent role the president plays in foreign affairs, declaring that the president was “the sole organ of the federal government in international relations.” (In 2105, the Court narrowed the breadth of the sole-organ doctrine articulated in the Curtiss-Wright case. See Zivotofsky v. Kerry, (2015)). You might ask students whether the Court’s unequivocal declaration in Curtiss-Wright as to the president’s sweeping powers arose out the Court’s desire to avoid restraining the president in the conduct of foreign affairs at a perilous time, when Europe was inching toward war. In addition, the Court’s decisions during and after the Civil War on the constitutionality of the measures Lincoln took are worth mentioning. You might note that while the Civil War was raging, with the
exception of Chief Justice Taney’s opinion in *Ex parte Merryman*, invalidating Lincoln’s suspension of the writ of *habeas corpus* (which Lincoln ignored), the Supreme Court avoided a rebuke of Lincoln’s actions. Only after the Civil War ended did the Court challenge the president’s authority and rule that Lincoln’s substitution of military tribunals for the civil courts was unconstitutional. At the very least, the Court’s decisions suggest that when assessing presidential actions taken during war, the Court is prone to defer to the president.

Another interesting topic for class discussion relates to presidential term limits. Historians agree that the Twenty-second Amendment was adopted in reaction to FDR’s election to the presidency for an unprecedented four terms. The drafters of the amendment sought to prevent the emergence of a president with a tenure as lengthy as Roosevelt’s. You might ask students what they think of constitutionally limiting a president in this fashion. Their responses are likely to reflect the traditional opposing positions. Proponents of presidential term limits argue that they codify the two-term tradition that George Washington so wisely established. For them, presidential term limits serve as a vital check against any one person, or the presidency as a whole, accumulating too much power; they are a reasonable trade-off for the protection of liberty. Moreover, they encourage new and fresh approaches to challenges of governing. Critics of term limits contend that they are anti-democratic; and they deny the electorate their preferred candidate for president solely on the basis of time already served. Further, they weaken presidents in their second terms and deprive the country the tested and experienced executive it may need. You might also ask students to consider how recent history could have changed if modern presidents (after FDR) would have been permitted to run for an indefinite number of terms in office.

**QUESTIONS FOR DISCUSSION**

1. From a presidential powers perspective, was the creation of the New Deal unique? (Included Social Security Act, GI Bill, NLRA, etc.) Was the president ever intended to play such an active role in the creation of the laws under the Constitution? Did FDR’s presidency forever alter the balance of power among the three branches of American government?

2. Discuss the constitutional implications of the Brownlow Committee Bill, which sought to grant the president additional executive powers, and the resulting expansion of presidential authority by acts of Congress and executive orders which occurred thereafter. (Created the Executive Office of the President, new WH Staff, etc.) Does Congress have the ability to create new powers for the president by statute? Should this require a constitutional amendment?

3. Was FDR’s so-called “Court Packing Plan” a blunder or a success? Was the plan constitutional?
4. Did the Supreme Court’s decision in *U.S. v. Curtiss-Wright Export Corp.* give the president virtually unlimited power in the area of foreign affairs? Might the Supreme Court have decided the case differently had the United States not been embroiled in World War II? (Does the Court’s post-Civil War ruling in *Ex Parte Milligan* offer any hints?)

5. What did you think of the decision in the *Korematsu* case? Did the president really have power to move Japanese-American citizens to internment camps? [Later paid reparations].

6. Was FDR’s seizure of the North American Aviation plant constitutional? This occurred before Pearl Harbor and before Congress had officially declared war. What provision of the Constitution gives a president power to seize private property on American soil? Should this seizure of property have been exercised, if at all, by Congress?

7. Was FDR’s 4 terms (almost) in office a good or bad thing for the country, at the time? Was it necessary?

8. Was FDR’s approach to presidential power, particularly during wartime, similar to that of Abraham Lincoln? In what ways did FDR emulate Lincoln? What factors or circumstances set them apart?

9. FDR counted both Theodore Roosevelt and Woodrow Wilson among his political idols. How were the presidencies of the three men similar from a constitutional perspective? How were they different? What did FDR learn from the other two former presidents that helped him to succeed?
PART VIII. THE NEW DEAL AND WWII
CHAPTER 33. HARRY S. TRUMAN, 1945-1953
PAGES 427-440

KEY ISSUES

The political trajectory of Harry S. Truman should remind students that a presidential candidate’s choice of running mate is arguably one of the most important decisions he or she makes. Plucked out of relative political obscurity to run with FDR in the presidential election of 1944, Truman took the oath of office as vice president on January 25, 1945. Just 82 days later, on April 12, 1945, Truman was catapulted into the presidency when FDR died suddenly of a stroke.

You might point out that it was within months of taking office that Truman had to decide to drop the atomic bomb on Hiroshima and Nagasaki. Next, Truman faced the challenge of an emerging Cold War. During this time, the fear of communist expansion by the Soviet Union permeated American foreign policy, leading to the creation of the Truman Doctrine (designed to stop Soviet expansion), the Marshall Plan (designed to give economic aid to rebuild Europe), and the North Atlantic Treaty Organization (a peacetime military alliance). Students should be made aware that this period is responsible for elevating national security as a lasting and major concern for the country, and saw the passage of the National Security Act and the creation of the CIA.

Perhaps, Truman’s most significant exercise of presidential power involved Korea. When North Korea, a Communist regime, invaded South Korea (a U.S. ally), Truman believed the Soviets could swallow up the Near East and Europe. Truman ordered air and naval units into action without consulting Congress. Sixteen nations eventually contributed to the UN “police action,” with the United States providing most of the force and suffering 142,000 casualties. In time, though, without a congressional resolution to justify U.S. military action in Korea, public and congressional support began to wane as the war progressed.

Truman then found himself caught up in constitutional battle, when he sought to seize the nation’s steel mills and use his inherent powers as commander in chief to resolve a conflict between the steel industry and the United Steelworkers of America, believing this was necessary to protect American troops in Korea that relied on steel production for weapons and ammunition. In the famous Steel Seizure Case, the Supreme Court rebuffed Truman, concluding that he had exceeded his constitutional authority as president and usurped Congress’s power in the realm of domestic labor matters (as spelled out in the Taft-Hartley Act). And, the public’s flagging support for the distant war in Korea certainly didn’t help. Justice Robert Jackson, who, as FDR’s Solicitor General, argued vigorously in support of FDR’s seizure of North American Aviation, wrote in his famous concurrence in the Steel Seizure Case that a president’s power was at lowest ebb where there was nothing in the text of the Constitution to support him, and when he was acting contrary to the express or implied will of Congress, as was the case here. (For Justice Jackson, a comparison between the two
seizures was preposterous—the aviation company had a direct contract with the government, which meant that the communist-led strike in 1941, as America was facing the likelihood of entering World War II, was essentially an action against the government.) You might ask students whether, in hindsight, Truman made the right call in seizing the steel mills. There is certainly room for the argument that although Truman lost the case as a matter of constitutional principle in the Supreme Court, he managed to keep the steel mills running at a time when the American military needed them to remain in production and ultimately emerged as a well-respected president for taking the bull by the horns. There is also some merit to the argument that the Supreme Court should have declined to take up the case and should have allowed the political branches to work out the matter themselves.

QUESTIONS FOR DISCUSSION

1. How did the emerging Cold War between the United States and the Soviet Union impact Harry Truman’s presidency? Was the fear over the spread of communism and the “red menace” understandable at the time? In hindsight, was this fear (and the armed conflicts that it produced, such as the Korean and Vietnam Wars) justified?

2. Was Truman’s calling the “Do Nothing Congress” into session during the presidential campaign a political stunt or an effective use of presidential power?

3. Discuss the Supreme Court’s ruling in Youngstown Steel and Tube Co. v. Sawyer. Why was Justice Robert Jackson’s concurrence that categorizes presidential power so important? Why did Justice Jackson place President Truman’s conduct within the third (weakest) category? Why was FDR’s seizure of the North American Aviation plant permissible, while Truman’s seizure of the steel plants was unconstitutional? (Robert Jackson was FDR’s AG at the time!)

4. Did Congress forever diminish its institutional power by allowing President Truman to send massive numbers of U.S. troops to Korea without a declaration of war? Was Truman’s intervention in Korea constitutional? (Was it lawful in light of the United Nations Participation Act of 1945, which restricted the president’s ability to commit troops as part of a United Nations force (which is what Truman did here?)

5. Was General MacArthur’s insubordination during the Korean War—and his effort to expand the war effort into China—a real threat to President Truman’s role as commander in chief? Did Truman have any choice but to dismiss MacArthur?
6. Analyze Truman’s view of the president’s role under the Constitution as he described it in his lectures on presidential power at Columbia University. Do you agree with his assessment that no president has ever acted “outside of the Constitution?” What about his assertion that the president must be given enhanced authority in emergency situations?
CHAPTER 34. DWIGHT D. EISENHOWER, 1953-1961

KEY ISSUES

The Eisenhower Chapter can be used to show students how history may drag a president into a constitutional conflict that he or she would prefer to avoid. The desegregation of the public schools, a milestone in the struggle for civil rights in America, occurred during Dwight D. Eisenhower’s presidency. Yet, Eisenhower was not a fan of forcing integration; rather, he believed in “gradualist” approach. Nonetheless, Eisenhower found it necessary to call in the National Guard to a high school in Little Rock, Arkansas to uphold the U.S. Supreme Court’s integration command. Eisenhower’s decision to do so also shows students the domestic uses to which the president’s commander-in-chief powers have been put — to quell domestic violence and enforce federal law.

In 1954, Brown v. Board of Education (“Brown I”), the U.S. Supreme Court public school segregation was unconstitutional under the equal protection clause of the Fourteenth Amendment. The ruling was greeted with great apprehension, particularly in the South. It posed an existential threat to the South’s segregated way of life, which had been validated in 1896 by the Court’s ruling in Plessy v. Ferguson that “separate but equal” public accommodations were constitutionally permissible. (See Cleveland Chapter, Second Term). In 1955, in Brown II, the Court decided how public school desegregation should be implemented, and directed that it was to occur “with all deliberate speed.” Interestingly, this Chapter reveals that Eisenhower himself actively pressed the Court to adopt this sort of indefinite, relatively weak language. The vague nature of the Court’s direction and the absence of any statute authorizing executive branch action independent of the Court’s decree in Brown I encouraged segregationists in the South to launch a campaign of resistance and delay.

The South’s defiance came to a head in Little Rock, Arkansas, when Governor Orval Faubus prevented African-American students from enrolling at an all-white high school. Eventually, violence erupted and Faubus did nothing to address it. When the mayor of Little Rock asked for help, Eisenhower was forced to send the Arkansas National Guard under federal control and sent U.S. Army paratroopers to restore order and open the way for the students’ admission to the school. Eisenhower explained his decision to the nation: “Whenever normal agencies prove inadequate to the task and it becomes necessary for the Executive Branch of the Federal Government to use its powers and authority to uphold Federal Courts, the President’s responsibility is inescapable.” The significance of Eisenhower’s actions should be made evident to students—it was the first time since Reconstruction that a president had sent military forces into the South to enforce federal law. Also, it ran counter to Eisenhower’s own “gradualist” philosophy.

The interesting question Eisenhower’s decision raises for class discussion is: Was
Eisenhower, as president, constitutionally obligated to act or did he have the discretion to decide against federal intervention. History instructs that presidents have almost always acceded to the judicial judgments of the federal courts. That said, there have been instances in which a president refused to obey, or let it be known that he would refuse to obey a specific judicial directive. (See the Andrew Jackson Chapter regarding *Worcester v. Georgia* and the Abraham Lincoln Chapter regarding *In re Merryman*). In discussing the question, you might ask students to ponder the following two sides: Some scholars conclude that president’s oath to preserve and protect the Constitution qualifies the president’s duty to take care that the laws are faithfully executed. In their view, the oath imposes a duty on the president to interpret and apply the Constitution as he or she sees fit, mandating that he or she defend the laws he or she has concluded are constitutional, but not a law he or she determines is unconstitutional, even if the Supreme Court disagrees. Other scholars emphasize the Supreme Court’s supremacy on matters of law and the finality of its constitutional judgments. In their view, the president is obliged to obey and enforce Supreme Court pronouncements, even if he or she disagrees with the Court’s ruling. These scholars premise their argument on the doctrine of judicial review articulated in *Marbury v. Madison* (see Thomas Jefferson Chapter) and the words of Alexander Hamilton in The Federalist No. 78. There, Hamilton wrote: “The interpretation of the laws is the proper and peculiar province of the courts...It therefore belongs to them to ascertain [the Constitution’s] meaning as well as the meaning of any particular act proceeding from the legislative body.” You can ask students which theory they believe is correct and why.

1. Although President Eisenhower believed that the New Deal reflected federal overreaching in violation of the principle of federalism embodied in the U.S. Constitution, he made a conscious decision as president not to seek to roll it back. Why? Should he have taken a more aggressive approach, given the presidential oath he took to uphold the Constitution?

2. While Eisenhower believed that the federal government was empowered to desegregate the armed forces, he did not believe the federal government had the authority to interfere in the segregationist customs and practices of individual states. What was difference between the two for Eisenhower? Are there constitutional underpinnings for Eisenhower’s position?

3. Senator John W. Bricker of Ohio proposed during the Eisenhower administration an amendment to the Constitution that would have limited the power of the executive branch when it came to entering into treaties. Was Eisenhower correct that such a provision was unwise? That it was an unconstitutional infringement on the foreign policy prerogatives of the president? Can a Constitutional amendment itself be unconstitutional?
4. President Eisenhower and his Attorney General played an active role in the issue presented in Brown II with respect to the matter of implementing desegregation. They strongly pushed for a “gradualist” approach. Should the Eisenhower administration have stayed out of this matter? Was the “with all deliberate speed” standard of Brown II consistent with the language and intent of the Fourteenth Amendment?

5. While Eisenhower had reservations about the legal validity of the Brown I decision, he nonetheless ordered federal troops to Little Rock when the Governor defied a federal court order that the state of Arkansas cease its efforts to interfere with school integration. Did the Constitution obligate Eisenhower to act, or was presidential action a discretionary decision in those circumstances?

6. The Twenty-second Amendment to the U.S. Constitution, ratified in 1951, set term limits to the presidency at two terms. In 1961, Eisenhower became the first U.S. president to be constitutionally prevented from running for re-election to the office, having served the maximum two terms allowed. Was the Twenty-second Amendment wise as a matter of public policy for the challenges the nation faces in the twenty-first century?

7. How would you assess the constitutional legacy of President Eisenhower?
CHAPTER 35
KEY ISSUES

John F. Kennedy came late, and some would say reluctantly, to the civil rights movement. To put the issue for students in context, you could explain that in 1961, when JFK became president, African Americans were denied basic constitutional rights throughout much of the South. “Jim Crow” laws—local and state laws enforcing racial segregation—were firmly in place. African Americans were barred from public facilities, subjected to violence, and could not expect justice from the courts. Despite the Supreme Court’s decision in *Brown v. Board of Education* and federal enforcement of the ruling, only token compliance to desegregating Southern schools was the order of the day. In the North, black Americans also faced discrimination in housing, employment, and education.

Although Kennedy voiced his support of civil rights during the presidential campaign of 1960, once elected, he tried to maintain a distance from the issue. However, like Eisenhower before him, Kennedy learned that civil rights concerns could not be contained and that without federal intervention, the South would continue to defy the law. You might point out that although both Eisenhower and Kennedy were hesitant to give federal assistance to the cause of civil rights, their reasoning differed. Eisenhower believed that national laws and federal court rulings could not alter deep-seated prejudices. Rather, attitudes could only be changed over time by education and exposure to people of different races. Therefore, for Eisenhower, the use federal power would not compel those in the South to follow the law or change their discriminatory ways. Kennedy’s preference for a cautious, moderate approach to civil rights was politically-based. He feared that if he were to fully embrace the issue, he would alienate southern Democrats in Congress and lose the support of southern voters. Kennedy understood that Baptists and Protestants in the South viewed his Catholic faith as one strike against him. He did not want to add another strike by taking an activist stand on civil rights, thus angering southern Baptists and Protestants who might hold the key to his re-election in 1964.

Southern defiance, like the sort that forced Eisenhower’s hand, caused Kennedy to reconsider his stance. When James Meredith, a slave’s grandson, was refused admission to the University in Mississippi and Mississippi’s Governor pledged continued resistance, JFK concluded he had no alternative but to dispatch U.S. Troops to Ole Miss. Then, after riots by segregationists, the murder of innocent blacks in the Deep South, and images of Southern officials turning dogs and water hoses on peaceful protesters horrified the nation, Kennedy abandoned his cautious posture and advocated sweeping civil rights reform. On June 11, 1963, Kennedy gave a nationally broadcast address in which he spoke of the moral imperative the civil rights issue presented and outlined the civil rights legislation he would propose. He followed his address with a legislative proposal that would later form the basis of the Civil Rights Act of 1964.
CHAPTER 35. JOHN F. KENNEDY, 1961-1963

PART IX. THE CIVIL RIGHTS ERA

As the Chapter points out, Kennedy’s assassination greatly contributed to the ultimate passage of the Civil Rights Act of 1964. The president’s death focused Americans on the injustices of its discriminatory practices. Lyndon B. Johnson, Kennedy’s successor, dedicated himself to the issue and pushed Congress to honor the martyred president by passing civil rights legislation. You could remind students that such a dynamic played out earlier in American history, when the assassination of James Garfield provided the impetus for civil service reform. Following Garfield’s death, Americans clamored against the patronage system and made it clear that it was no longer acceptable. In response, Garfield’s successor, Chester Arthur, took up the issue and threw his weight behind passage of the Pendleton Act. Thus, you might ask students whether JFK accomplished more in death, than he would have accomplished if he had lived to serve a second term in the White House.

1. After the Supreme Court’s ruling in *Engel v. Vitale*, there were calls for an amendment to the Constitution to sanction prayer in public schools. When asked about this proposal, JFK avoided the issue by urging citizens to pray more. Would such an amendment to the Constitution, supporting the First Amendment free exercise in the form of school prayer, have collided with the separation of church/state principle in the First Amendment? If so, which provision would then prevail?

2. JFK concluded that because higher education was not compulsory, the First Amendment principle of separation of church did not prevent Congress from giving federal tax dollars to church-related colleges and universities. Do you agree with this logic?

3. In *Baker v. Carr*, Justices Frankfurter and Harlan dissented, arguing that the Court’s majority addressed a “political question;” i.e., a question that should be left to the legislature to decide, rather than the courts. JFK and his Justice Department had taken the opposite position and prevailed. Do you agree that the Constitution permits federal courts to intervene in the way a state legislature draws its voting districts? Does this, however, amount to the Supreme Court meddling in how states run their governments?

4. JFK tried, but failed, to avoid a direct confrontation with a southern governor who defied a federal court order directing school integration. What lessons could he have learned from the similar crisis Eisenhower faced in Little Rock, just a few years earlier?

5. President Kennedy, disturbed by atrocities against blacks in the South, finally pushed for comprehensive civil rights legislation shortly before his death. Would the Civil Rights Act of 1964 have passed if Kennedy had not been assassinated? Does Kennedy deserve primary credit for the civil rights victories of the 1960s?
Much has been written about Lyndon B. Johnson’s style of leadership. He was a brilliant legislative strategist, who was often described as the archetypical politician—as adept at trading favors and flattery, as he was at issuing threats and exploiting weaknesses to get his way. Journalists Rowland Evans and Robert Novak gave a description of how Johnson went about persuading others to his side, which students might enjoy hearing. Referring to it as “The Treatment,” they wrote:

Its tone could be supplication, accusation, cajolery, exuberance, scorn, tears, complaint, the hint of threat. It was all these together. It ran the gamut of human emotions. Its velocity was breathtaking, and it was all in one direction. Interjections from the target were rare. Johnson anticipated them before they could be spoken. He moved in close, his face a scant millimeter from his target, his eyes widening and narrowing, his eyebrows rising and falling. From his pockets poured clippings, memos, statistics. Mimicry, humor, and the genius of analogy made The Treatment an almost hypnotic experience and rendered the target stunned and helpless. *Lyndon B. Johnson: The Exercise of Power* (1966).

No president, except for Franklin D. Roosevelt, oversaw the passage of so much significant domestic legislation. LBJ personally involved himself in the enactment of statutes known collectively as the Great Society. The Great Society statutes included the Civil Rights Act of 1964, which gave minorities access to public facilities and accommodations; the Economic Opportunity Act, which was cornerstone of the War on Poverty, the Voting Rights Act of 1965, which enfranchised literally millions of African Americans precluded from voting by artifices in individual states such as literacy tests and poll taxes; the Fair Housing Act, which provided rent subsidies to the poor and funds to rehabilitate blighted urban areas; Medicare and Medicaid, health insurance program for the elderly and poor; and others.

The interesting question LBJ’s involvement in these statutory accomplishments raises is whether the founding fathers intended the president to play so significant a role in Congress’s functioning. It is hard to say, given the absence of detail in Article II of the Constitution. Article II, Section 3 says no more than the president “shall . . . recommend” to the Congress such measures as “he shall judge necessary and expedient.” It is, however, safe to say that historically, the role Johnson played in establishing public policy was unprecedented. Major policy innovations were conceived in the White House and pushed through Congress by LBJ himself.

From a constitutional standpoint, Johnson’s decision to rely on the Commerce Clause as the predicate for civil rights legislation makes for an interesting
and instructive class discussion. Preliminarily, you can remind students of the major blow the Supreme Court dealt to Congress’s efforts to protect the civil rights of African Americans during the Grant Administration. In the Civil Rights Cases (1883), the Court had declared the Civil Rights Act of 1875 unconstitutional, ruling that Congress did not have the power to pass the Act under the Fourteenth Amendment because racial discrimination in places of public accommodation was private, not the state-sponsored discrimination the Amendment was intended to prevent. Since Congress’s power under the Commerce Clause does not depend on state action, Johnson agreed with Archibald Cox, who had served as Kennedy’s Solicitor General (and who had argued with Bobby Kennedy over the issue) that the Commerce Clause provided a much stronger legal basis for sustaining the Civil Rights Act than did the Fourteenth Amendment. Master politician that he was, Johnson also understood that invocation of the Fourteenth Amendment would rub salt in old wounds and perhaps, spark violence in the South, The Fourteenth Amendment was still widely resented there as a Reconstruction policy that had been imposed by brute force on the defeated and devastated Confederacy. Additionally, Johnson knew that with the Commerce Clause, he could argue that the new laws would benefit all Southerners by expanding commercial activity and growing the region’s economy.

Perhaps no president is harder to categorize than Johnson. His tenure was characterized by the legislative achievements noted above, but it also included the debacle of the Vietnam War. While other presidents had begun America’s involvement in Vietnam, Johnson took it to a new level. Intent on not being remembered as the president who had lost Southeast Asia to Communism, he increased U.S. manpower to a troop strength of in excess of 500,000. Tragically, his assumption that a combination of bombing, ground forces, and aid to the Saigon government would assure the independence of South Vietnam proved to be false, as did Johnson’s repeated assertions that America was winning the war. The conflict cost the United States tens of thousands of lives and billions of dollars. You could ask students to balance these aspects of Johnson’s presidency and decide for themselves what his legacy should be.

You could also ask students which approach is more effective for bringing about needed reform—LBJ’s or Eisenhower’s. While they all will recognize the importance of government and the role it must play in advancing the public welfare, they are likely to disagree on the degree to which the federal government should be involved in the lives of private individuals and whether the government should an engine of social change or should avoid getting ahead of the people on social issues.
CHAPTER 36

QUESTIONS FOR DISCUSSION

1. The Supreme Court has stated: “The Constitution limits [the president’s] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). Article II, Section 3 of the Constitution provides that the president “shall . . . recommend” to the Congress such measures as “he shall judge necessary and expedient.” LBJ was known for his willingness and ability to twist arms, intimidate, and cut deals with those in Congress to get the bills he supported enacted into law. In so doing, did he exceed what the Framers had in mind as to the president’s role in the legislative process?

2. It has been said that LBJ was a pure pragmatist who viewed the Constitution as either a means to an end to be manipulated or an obstacle in his way to be avoided. Yet, legislation which significantly bettered the lives of many Americans was enacted during his administration. Does the latter justify his tactics? What checks and balances in the Constitution restrain a president who, even with the best of intentions, might push too far in the legislative process?

3. Given Supreme Court precedent, LBJ and his Justice Department team decided to forgo reliance on the Fourteenth Amendment as the constitutional basis for the Civil Rights Act of 1964, and rely instead on the Commerce Clause. In historical hindsight, was this constitutional approach the best for the nation?

4. President Eisenhower did not believe that edicts from the federal government were the way to force Americans to renounce established customs of segregation. LBJ disagreed and believed the federal government could and should force desegregation. Whose approach proved to be the better one?

5. Why was the Voting Rights Act of 1965 such a significant victory for advocates of the Civil Rights movement? In 2013, the Supreme Court struck down provisions of that statute which required certain jurisdictions (particularly Southern states) to obtain “preclearance” before changing their voting procedures. Is there any longer a need for the Voting Rights Act now that 50 years have passed since its passage?

6. How would you rank LBJ as a president, in light of his accomplishments as well as his failings while in office
KEY ISSUES

Firmly believing in an expansive use of presidential power, Richard M. Nixon, a Republican, was inclined to pursue his domestic and foreign policies unilaterally by executive fiat. His approach brought him into frequent conflict with lawmakers in Congress, especially the Democrats who controlled both the House and the Senate.

You might focus on Nixon’s application of the presidential tool of impoundment to demonstrate his willingness to circumvent the will of Congress when it differed from his own. Students are not likely to know much about impoundment and will find a brief explanation of its history and mechanics helpful. The Constitution’s Appropriations Clause, Article I, Section 9, clause 7, is the cornerstone of Congress’s power of the purse, giving it the right to decide to what uses public fund will be put. It also provides that no money from the Treasury can be spent without a specific congressional appropriation, which Congress typically does by statute, specifically styled as appropriations acts. The Clause is silent as to whether all the money appropriated by Congress must actually be spent. Impoundment is a budgeting procedure by which the president prevents an executive department or agency from spending part or all of the money Congress has appropriated to it. Impoundment is accomplished by an executive order that forbids the Treasury from transferring the money in question to the department’s or agency’s account. All American presidents since John Adams have asserted the right to impound appropriated funds to some extent; they have used it as a way of making relatively small cuts in federal spending on programs that they deemed unwise or unnecessary.

Nixon, however, made unusually large-scale use of impoundment. In 1971, he withheld $13 billion (about $180 billion today). In 1972, Nixon impounded $202 million (about 2.6 billion today) appropriated for food stamps programs and also announced he would refuse to spend the money Congress had appropriated for the Clean Water Act (enacted over his veto). Lawmakers debated whether Nixon had overstepped constitutional bounds. You might ask students which side they would take. Nixon’s opponents argued that such actions amounted to a violation of the president’s constitutional obligation to faithfully execute the law. They contended that unlike his predecessors, Nixon did not impound funds to achieve economy. Rather, he inappropriately used impoundment to contravene the policies of a Democratic Congress. Nixon’s supporters argued that he had simply exercised an inherent presidential power in the interest of fulfilling his constitutional duty to run the executive branch responsibly.

The Chapter points out that although many lawmakers saw Nixon’s actions as a rebuke of their authority over spending decisions, Congress did nothing. You might ask students to consider what meaning, if any, can be attributed to...
congressional inaction on an issue like this one. In other words, did Congress’s acquiescence render Nixon’s actions constitutional? The bottom line is that neither the Congress nor the president can surrender to the other branch a power the Constitution gives it or take a power that does not belong to it. Whether Congress objected or not, the way Nixon used impoundment was arguably an end-around the Constitution’s legislative and appropriations processes, and thus constitutionally inappropriate. In the end, Congress enacted the Impoundment Control Act of 1974 (the domestic policy version of the War Powers Resolution passed the same year) to curtail what it perceived to be abuses by the Nixon administration. The Act essentially put an end to the practice of presidential impoundment.

Congressional concern about presidential use of the armed forces without congressional authorization came to a head during the Nixon Administration when Congress passed the War Powers Resolution over Nixon’s veto. Students should understand that Congress passed the Resolution in response to the perception that presidents (including Nixon) had assumed more authority to send forces into hostilities than the framers of the Constitution had intended. Therefore, in the Resolution, Congress sought to circumscribe the president’s authority to use armed forces abroad in hostilities or potential hostilities without a declaration of war or other congressional authorization, while providing enough flexibility to permit him to respond to attack or other emergencies. The students should recognize that the War Powers Resolution was controversial because it operated in a realm of powers that the Constitution does not clearly divide between the president and Congress in a definitive fashion. After pointing out that since the enactment of the Resolution, every president has taken the position that it is an unconstitutional infringement on the president’s authority as commander in chief, and Congress has not demanded that the president follow its dictates, students can be asked to consider why neither branch has pushed the issue. One likely answer is that it is politically dangerous for either branch to force the issue, because one side or the other will lose. Moreover, it may be expedient for the matter to remain nebulous. That way, on the one hand, the president can skirt the Resolution’s mandates without consequences if he so chooses; and on the other, Congress can avoid taking a stand and being held accountable by the public on decisions involving military engagement.

For purposes of discussing the Supreme Court’s landmark decision in *United States v. Nixon*, you might highlight the following about the Watergate scandal. In the presidential Election of 1972, Nixon was running for a second term; his Democratic opponent was George McGovern. Toward the end of the campaign, a group of burglars broke into the Democratic Party campaign headquarters in Washington’s Watergate complex. Nixon won reelection in a landslide. Thanks in large measure to investigative reporting, the burglary was linked to the activities of government officials. The Nixon administration denied any wrongdoing, but it...
soon became evident that there had been attempts at the highest levels to cover up the burglary and possibly, Nixon’s involvement in it. Under congressional and public pressure, Nixon appointed a special prosecutor. When it was learned that the president had secretly taped conversations in the Oval Office, the special prosecutor, Archibald Cox, filed a subpoena to secure tapes he believed relevant to the criminal investigation. (Nixon fired Special Prosecutor Cox in the infamous Saturday Night Massacre. His successor, Leon Jaworski, subpoenaed additional White House tapes.). Nixon released edited transcripts of some of the subpoenaed tapes, but he sought to quash the subpoena on the grounds of executive privilege. Past presidents had invoked the privilege, asserting that they had the right to withhold from Congress and the courts information that could jeopardize national security or hamper the working of the executive branch. The District Court denied the motion. The president appealed and the case was heard by the Supreme Court.

In United States v. Nixon, the Supreme Court ruled against Nixon in a landmark decision. Students should understand that the Court addressed two key issues—the power of the Court as the ultimate arbiter of the Constitution, and the claim of the president that, in the name of executive privilege, he had an absolute right to withhold materials germane to a criminal investigation. The Court first reaffirmed the ruling of Marbury v. Madison, that under the Constitution the Supreme Court has the final voice in determining constitutional questions, and that no person, not even the president of the United States, is above the law. The Court maintained that it, not the president, had the power to determine the scope and applicability of the privilege. The Court next recognized that the Constitution implicitly provided for the president’s authority to assert executive privilege, but concluded that the privilege was limited, not absolute. The Court then determined that in Nixon’s case, the interests of justice in a pending criminal matter and right of the people to full disclosure outweighed the president’s right to secrecy.

Although there was some speculation as to whether Nixon would obey the Court, within hours after the decision was handed down, the White House announced it would comply. Transcripts of sixty-four tape recordings were released, including one “smoking gun” particularly damaging in regard to Nixon’s involvement in the Watergate cover-up. Several days later, with his support in Congress almost completely gone, Nixon announced that he would resign. You might remind students that the House had already charged Nixon with an article of impeachment for obstruction in connection with the Watergate scandal. Clearly, if Nixon had refused to obey the Court’s order, he would have likely been impeached for that action as well. You might ask students to reflect upon the lessons of the Nixon presidency. What do they think was the fundamental flaw in Nixon’s character and his approach to the presidency that caused him to become the first American president to resign in disgrace?
CHAPTER 37

QUESTIONS FOR DISCUSSION

1. Is the impoundment of funds consistent with the parameters of the veto power granted to the president in the Constitution? Or, does impoundment essentially permit the president the power of item veto, which he does not have, and deny Congress its constitutional power to override the president’s veto of legislation?

2. When Congress acquiesces repeatedly over the course of many administrations in a presidential action that arguably violates the separation of powers between the executive and legislative branches (as has occurred in fund impoundment), should the action be immune from constitutional challenge?

3. Was the War Powers Act of 1973 constitutional? Why has Congress never pressed the point to ensure full compliance of the Act by presidents?

4. Did President Nixon possess the constitutional authority to fire Watergate Special Prosecutor Archibald Cox in the “Saturday Night Massacre?” Could the president, as chief executive, have shut down the criminal investigation of himself in the Watergate scandal if he wished?

5. President Nixon based his refusal to produce subpoenaed tapes of his recorded conversations to the Watergate Special Prosecutor on the claim of executive privilege. No such privilege is expressly granted to the president in the Constitution. Do you agree with President Nixon and his lawyers that such a privilege exists?

6. Explain the key points of the Supreme Court’s holding in the landmark case of U.S. v. Nixon. Did the Court recognize the existence of an executive privilege? Why did the Court hold that President Nixon had to turn over the Watergate tapes?

7. President Nixon ultimately complied with the Supreme Court’s opinion and order in U.S. v. Nixon. If he had simply refused to obey the Court’s order, citing the principle of separation of powers, could he have been impeached, convicted, and removed from office under Article II, Section 4 of the Constitution for the commission of “high Crimes [or] Misdemeanors?”
KEY ISSUES

As has happened before, in 1974, a person no one expected to become the president did so. Gerald Ford was a member of the House of Representative for 25 years, with no plans for higher office. On the verge of retirement, he was chosen by Richard Nixon to serve as vice president in the swirl of the Watergate scandal—after Spiro T. Agnew abruptly resigned amid allegations of corruption. Within months, Ford found himself occupying the Oval Office when Nixon himself was forced to resign in the wake of the Watergate scandal.

The central event in Ford’s presidency that should be the focus of class discussion was Ford’s pardon of Richard Nixon for any crimes he committed or could have charged with in connection with the Watergate scandal. You might begin class discussion with a review of the presidential power of pardon in Article II, Section 2, clause 1 of the Constitution. Generally speaking, a pardon wipes the slate clean. It undoes the legal effects of a criminal conviction for violation of federal law. A pardon can be issued from the time an offense is committed, and can even be issued after the full sentence has been served. (It cannot, however, be granted before an offense has been committed, as that would amount to the power to waive the laws.) A reprieve, which is encompassed in the pardon were, is the commutation or lessening of a sentence already imposed; it does not affect the legal guilt of a person. The power to pardon is one of the least limited powers granted to the president; its scope is almost plenary. The only limits mentioned in the Constitution are (1) pardons are limited to offenses against the United States (i.e., not civil or state cases), and (2) they cannot be used in connection with the impeachment process. Historically, the pardon power has several purposes. One purpose is to temper justice with mercy in appropriate cases, and to do justice if new or mitigating evidence comes to bear on a person who may have been wrongfully convicted. Another purpose focuses on the broader public-policy purpose of bringing peace following internal conflicts. For example, George Washington granted an amnesty to those who participated in the Whiskey Rebellion; Abraham Lincoln and Andrew Johnson issued amnesties to those involved with the Confederates during the Civil War; and Gerald Ford (and Jimmy Carter) granted amnesties to Vietnam-era draft evaders.

You could help students understand just how dramatic a moment in American history Ford’s pardon of Nixon was by reviewing the circumstances in which it was made. Contemplating a pardon for Nixon, Ford enlisted a young lawyer, Benton Becker, to research the extent of the president’s pardon power under the Constitution. Becker discovered a 1915 U.S. Supreme Court decision—Burdick v. New York—that held that acceptance of a pardon was a legal admission of guilt. (See Woodrow Wilson Chapter). Armed with this precedent, Ford secretly dispatched Becker to San Clemente to meet with Nixon and his lawyer to negotiate a pardon. Ford instructed Becker to walk out of the meeting if Nixon...
did not act reasonably. In addition to negotiating a pardon, Ford sought to protect Nixon’s vast archive of records and tapes that Nixon wanted shipped to California and that constituted key evidence in the Watergate trials of co-conspirators scheduled to take place in months. Although Nixon balked at first at the notion of admitting guilt, he capitulated and accepted the pardon understanding its legal ramifications. He also signed a deed of gift that kept his records and tapes in possession of the government until Congress could act, preserving these important materials (and the records of future presidents) for the American public and history.

After noting that Ford’s pardon of Nixon was unpopular at the time it was given and contributed to Ford’s loss to Jimmy Carter in the presidential Election of 1976, you could ask students what they think of the pardon. Some are likely to reflect what a growing number of scholars and ordinary Americans now believe—that Ford did the right thing in granting the pardon because it enabled the country to move on from the wrenching ordeal of Watergate. Others may voice a contrary view—that the pardon was contrary to the rule of law and undermined the notion that no one in America, not even the president, is above the law.

President Ford was the first commander in chief bound by the War Powers Resolution. You can note the manner by which Ford handled the requirements of the Resolution and point out that Ford set a template of sorts for future presidents. He adroitly sidestepped its requirements, and yet, avoided a confrontation with Congress. Ford informed Congress after-the-fact that he had sent Marines to Cambodia to retrieve the kidnapped crew of the American vessel Mayaguez. Although the president’s compliance with the strict letter of the law might have been open to question, Congress accepted Ford’s actions as consistent with the spirit of the law and therefore good enough.

QUESTIONS FOR DISCUSSION

1. President Gerald R. Ford was the first person in American history to be appointed Vice President pursuant to the newly-ratified Twenty-fifth Amendment. What does that Amendment provide? Does it make sense that the President should be the person who gets to select the Vice President, subject to advice and consent of the Senate? Would it be preferable to have Congress make that selection? To allow the American public to make that selection via a special election?

2. Could President Nixon have been indicted while he was still in office? What problems arise under the Constitution if sitting presidents are subject to criminal indictment? Do you agree with Special Prosecutor Leon Jaworski that, even after Nixon left office, it would be difficult to give him a fair trial if he had been prosecuted for his Watergate crimes?
3. Were you surprised that President Ford sent a young lawyer, Benton Becker, out to California to explain to Nixon face-to-face that pursuant to Burdick v. U.S., acceptance of a pardon constituted an admission of guilt? Is there any chance that Nixon wouldn’t have accepted the pardon?

4. Was President Ford’s pardon of Nixon a wise decision? Did Ford get the admission of guilt from Nixon that the nation wanted? In hindsight, if Ford had not pardoned the disgraced former president, would this have been better for the country?

5. A federal district court ruled that the Constitution gave President Ford the power to pardon President Nixon even though Nixon was not yet indicted for a crime. Does this ruling now establish such a principle as binding precedent?

6. We now know that President Ford sent his lawyer to California not just to work out a deal on a pardon with Nixon, but also to preserve his records and tapes. What do you think would have happened if those records and tapes had been shipped to California as Nixon wished?

7. Many commentators have concluded that Ford flouted the War Powers Resolution when he sent Marines to Cambodia to rescue the Mayaguez sailors without first notifying Congress. What provisions of the Constitution, if any, did Ford violate in so doing?

8. When establishing bodies like the Church Committee and the Pike Committee, the Congress asserted that its oversight of the U.S. intelligence community was an implied constitutional power which was derived from its enumerated powers. What are those enumerated powers?

9. Supreme Court Justices have life-time appointments. How does the tenure of President Ford’s sole appointee—Justice John Paul Stevens—illustrate the unpredictability of such appointments? Do you find it ironic that Justice Stevens—appointed by Ford to replace Justice William O. Douglas, whom Ford had tried to impeach for being too liberal – turned out to be a solidly liberal voice on the Supreme Court? Was the definition of a “liberal” justice different when William O. Douglas sat on the Court as compared to when John Paul Stevens sat on the Court?

10. How would you rank Gerald R. Ford as a president, looking back in hindsight?
CHAPTER 39

KEY ISSUES

Jimmy Carter, a peanut farmer and one-term governor of Georgia, was unknown outside of his home state when he ran for and won the presidency in 1976. The American electorate, disillusioned with government and distrustful of the political class in Washington because of the Vietnam War and the Watergate scandal, appreciated Carter’s outsider status and embraced his message of trustworthiness and competence. At first, Carter’s home-spun, low-key approach was very popular. However, over time, Carter’s straight-forward, but “gloomy outlook” (N.Y. Times) wore thin.

When his mission to insert an elite paramilitary unit in Iran and rescue 52 Americans who had were being held hostage failed miserably, his presidency sustained a blow from which it never recovered. What you might detail is the confrontation between Carter and Congress as to his authority to conduct the mission in the first place and whether the mission triggered his obligations under the War Powers Resolution. When Carter submitted a message to Congress about the failed mission after-the fact, he declared that the Resolution’s requirement that he consult with Congress in advance was inapplicable. Carter justified his actions by citing his constitutional role as commander in chief and his inherent constitutional power to conduct a rescue operation; he also described the mission as one with a “humanitarian” as opposed to a military purpose. Many lawmakers in Congress disagreed. In the end, however, the debate was never resolved. The episode was indicative of the questions that had been raised about the War Powers Resolution since its enactment—would it actually restore Congress’s proper constitutional role to participate in decisions to send U.S. forces into hostilities and would it be honored by presidents more in the breach than in the observance, with the Congress’s apparent acquiescence?

As debilitating as the failed rescue attempt was to Carter’s image of competence and sound judgment, students should appreciate that Carter had a modest victory in one aspect of his handling of the Iran hostage crisis. Carter invoked the International Emergency Economic Powers Act to freeze Iranian assets in the United States and eventually negotiated an executive agreement with Tehran that legal proceedings commenced by U.S. claimants against the Iranian government would be terminated and an independent Claims Tribunal would be created to arbitrate such claims. (The hostages were released on Jan. 20, 1981, on the day Reagan was inaugurated, and the agreement was implemented by the Reagan Administration). In Dames & Moore v. Regan, the U.S. Supreme Court upheld Carter’s actions as constitutional, based on the president’s significant powers in foreign affairs. In addition, relying on its decision in the Steel Seizure Case, the Court determined that because the president had acted pursuant to specific congressional authorizations, his authority had been at its maximum.
Part X. The Watergate Era and Reform
Pages 521-536

Largely due to his handling of the Iran hostage crisis, Carter was denied a second term and has gone down in history as a mediocre president. Nonetheless, Carter's post-presidential legacy deserves mention. He promoted democracy though his work with Habitat for Humanity and earned a Nobel Peace Prize for his international human rights efforts, becoming one of the most successful and respected of former presidents. You might ask students to discuss to what extent a president's contributions after he or she leaves office is—and should be—a part of his or her legacy.

Questions for Discussion

1. Do you agree with the Carter administration that affirmative action, in some form, was a crucial next step in the 1970s, if the guaranty of civil rights for all citizens was to be attained? Would it have been better for the Carter administration to stay out of this battle?

2. Bakke and progeny stand for the proposition that race-based action which furthers a compelling governmental interest does not violate the constitutional guarantee of equal protection under the Fourteenth Amendment, so long as the action is narrowly tailored to accomplish that end. Why did the University of California Medical School admissions plan fail this test? Do you agree with Justice Powell's conclusion that university admissions plans that simply give a “plus” to minority students in order to foster diversity are consistent with the Fourteenth Amendment?

3. According to President Carter, he possessed “an inherent constitutional power” to conduct the Iran hostage rescue operation. Assuming it exists, what was that “inherent” power? What else does the inherent power of the presidency include? In hindsight, should Carter have handled the Iranian Hostage crisis in a different way?

4. Under the executive agreement that accompanied the release of the hostages, certain claims brought in federal courts against Iran were terminated. The Supreme Court ruled that the president had the constitutional authority to terminate or settle the claims. Could a claimant validly argue that the termination of his claim constituted a taking of property under the Fifth Amendment and entitle him to just compensation?

5. President Jimmy Carter has been one of the most activist and admired former Presidents, while his record as President is viewed as somewhat mediocre. Which legacy, in the end, is more important?
Part XI. New Conservatives, New Democrats, and Polarization
Pages 539-556

Key Issues

Ronald Reagan started out as a radio announcer and film actor. When he later entered politics, his relatively undistinguished Hollywood career led detractors to dismiss him as a political lightweight. They turned out to be wrong. President Reagan was, like Franklin Delano Roosevelt, a transformative chief executive. His conservative themes of states’ rights, lower taxes, and a leaner federal bureaucracy changed the thinking of many Americans as to what role the government should occupy in their lives.

Students should understand the focus of the “Reagan Revolution.” Regan believed that the balance of power among the three branches of the federal government had improperly tilted away from the presidency in favor of Congress and the courts, and that the federal government, relative to the states, had become too big, wasteful, and intrusive. With an emphasis on the dual constitutional principles of separation of powers and federalism, Reagan set out to remedy that imbalance and put the federal government back on its proper course. Although the Iran-Contra affair—revealing that Reagan Administration officials had violated U.S. laws and policies by supporting the militant contra rebels in Nicaragua and selling arms to a hostile Iranian government—damaged Reagan’s second term, he reconfigured the landscape of American government and the country’s politics.

You might briefly review Reagan’s victories in the U.S. Supreme Court which delivered major blows to what he perceived as congressional encroachment on the powers of the executive branch. In the watershed case of INS v. Chadha, the U.S. Supreme Court agreed with the Reagan Administration that the legislative vetoes that had been written into numerous statutes enabling Congress to override executive decisions encroached on the powers of the executive branch. Similarly, in Bowsher v. Synar, the administration persuaded the Court that a statute authorizing the comptroller general, an agent of Congress, to direct the president as to what cuts had to be made in federal spending to meet deficit-reduction goals unconstitutionally interfered with the president’s obligation to enforce the law and amounted to a violation of separation of powers. In addition, Reagan’s decision to terminate some 11,000 striking air traffic controllers for violating a federal law that prohibited them from striking illustrates in dramatic fashion the steps he was willing to take to assert the power of the executive branch to enforce the laws.

A discussion of Reagan’s systematic reshaping of the federal bench will help students appreciate how significant a role the federal judiciary plays in advancing a president’s agenda and political ideology. Reagan turned his sights on the federal courts—in his view, they had gone too far, legislating from the bench,
rather than merely interpreting and applying the law. His administration remade the federal judiciary by completely revamping the process of selecting judicial appointees and insuring that vacancies were filled by young, conservative jurists who would hew to the text and the original intent of the framers of the Constitution throughout their lifetime tenures as federal judges, and thus advance his conservative agenda. You might ask students to consider whether selecting jurists based on age and ideology is healthy for the system of justice? Is it what the founders envisioned in vesting the power to nominate jurists to the federal bench in the president?

QUESTIONS FOR DISCUSSION

1. One of Ronald Reagan’s top priorities as president was to restore the proper balance between the federal government and the states. Describe Reagan’s philosophy in this regard. Is such a vision of American federalism still attainable given the growth of the federal government since FDR’s presidency?

2. In the Chadha case, the Reagan administration supported the elimination of a one-house veto mechanism that Congress had created to override decisions of the Immigration and Naturalization Service (INS) in the executive branch. Why did the Supreme Court strike down Congress’s one-house veto as unconstitutional?

3. Explain the significance of the Supreme Court’s decision in Bowsher v. Synar in defining the scope of executive branch authority. Why was it unconstitutional for Congress to place authority in the comptroller general to make budget cuts?

4. Under the separation of powers doctrine, categorizing a federal governmental action as legislative, executive, or judicial is often difficult. How do the Chadha and Synar cases illustrate that point?

5. President Reagan’s firing of the air traffic controllers was extremely controversial and unleashed charges of demagoguery by the fired workers and Reagan’s critics. Does the president, indeed, have power to fire striking airport workers as Ronald Reagan claimed? Under what provision of the Constitution?

6. Was the Reagan administration correct in asserting that the Independent Counsel Law—enacted in the aftermath of Watergate—was unconstitutional? How did that law work? What was arguably the constitutional defect in it? To what extent was the Reagan Administration’s view of the law colored by the fact that it was embroiled in the Iran-Contra scandal, in which an
Independent Counsel was investigating whether President Reagan and top aides had illegally sold arms to fund the Contra rebels in Nicaragua?

7. President Reagan was a proponent of the view that the U.S. Constitution must be interpreted in accordance with the meaning the Framers originally intended to give it. A contrary view sees the Constitution as “living,” such that its meaning evolves over time and adapts to societal changes in values and customs. Which view is more persuasive? How would the Eighth Amendment’s proscription against “cruel and unusual punishment” be interpreted under each of these approaches?

8. Consider the Reagan administration’s aggressive approach to identifying and appointing conservative judges and justices so that the administration’s philosophy would endure for generations. Is this sort of approach to judicial appointments good or bad for the country? Should all presidents pursue it?

9. Based on principles of federalism, President Reagan stated his desire to eliminate the U.S. Department of Education, which his predecessor, Jimmy Carter, had established. The Constitution does not specify that education is an area that the federal government may regulate. Does it follow that education is only for the states to regulate, such that the Department of Education is unconstitutional?
CHAPTER 41. GEORGE H. W. BUSH, 1989-1993

PAGES 557-569

KEY ISSUES

Ronald Reagan was a hard act to follow. From the start, George H.W. Bush, Reagan’s vice president, faced the challenge of defining his own presidency and overcoming the conventional wisdom of the day that he lacked the charisma, vision, and political skill of his predecessor.

Bush’s domestic record in the midst of a flagging economy worsened when he broke his “Read my lips: No new taxes” campaign pledge and brokered a deal with Congress to raise taxes and reduce the national deficit. As to whether the electorate should be able to “recall” a president for breaking a campaign promise, students should recognize that it is preferable for the president to take the action he or she deems best in the circumstances presented, even if that means pursuing a policy that is contrary to the representations he or she made while campaigning. This is likely better than sticking with a policy announced during the campaign out of fear of ejection from office. At any rate, the electorate does have a recall power of sorts—it can vote against a president’s reelection, as was the case with Bush, who was voted out of office after his first term.

Bush left behind an impressive record as commander in chief and head of state in the realm of foreign affairs. With decisiveness and strength, he responded to the threat posed by Iraqi dictator Saddam Hussein when that despot ventured into Kuwait, an U.S. ally situated between Iraq and Saudi Arabia in the Persian Gulf. Bush drummed up international support for military action against Iraq, worked closely with the United Nations to secure authorization for such action, and deployed a U.S. fighting force to Saudi Arabia. Using technology that redefined modern warfare (Patriot missiles, laser-guided Stealth bombers, infrared equipment), Bush scored an impressive military victory, quickly defeating the Iraqi forces. You could remind students that not since President William McKinley used new technology to conduct the Spanish War remotely from the White House, and President Truman dropped the atom bomb on Japan to end World War II, had a president deployed new technology so effectively to change the nature of war.

Student should be able to see that Bush’s approach to the Iraq conflict is yet another illustration of a president’s reluctance to significantly involve the legislative branch in this war-making process. Before initiating the military buildup, Bush did not seek a resolution of support from Congress. When questioned about the president’s power to unilaterally order such a deployment, Bush declared that congressional approval was unnecessary since America was not waging war, but rather, was defending Saudi Arabia from further Iraqi aggression. Ultimately, Congress passed a resolution authorizing the use of
military force against Iraq. Although Congress played a role in the decision to go to war, Bush maintained that he possessed the inherent constitutional authority to move against Iraq with or without congressional approval.

In fact, when Bush signed the relevant resolution he added a signing statement that made two points: he, as president, had singular authority over the use of the armed forces; and the constitutionality of the War Powers Resolution was open to question. As students might be unfamiliar with signing statements, you might provide some basic instruction. A signing statement is a written pronouncement issued by a president when he signs a bill into law. James Monroe was the first president to issue a signing statement. Originally, signing statements were a rare occurrence; but their usage increased gradually over time. They became especially prevalent during the Reagan Administration and all four presidents since Reagan have issued them. Signing statements are designed to serve three purposes: (1) interpretive—to clarify what the president believes the bill means; (2) political—to comment on the substance of the bill and point out its positive or negative aspects; and (3) constitutional—to announce the president’s view of the constitutionality of the bill. Students should understand that the Constitution states nothing about presidential signing statements; it neither permits nor prohibits them. Further, their increased use has generated a debate over their propriety and precedential value, if any. Some supporters argue that they reflect the intention of the executive branch as a co-equal branch of government, and therefore have precedential weight in the future. Others believe that since a signing statement is not part of the legislative process, it has no legal effect and is thus innocuous. Still others, however, express concern, especially over those signing statements which declare an aspect of a particular bill unconstitutional and suggest that it will not be enforced. They consider signing statements of this sort to be a line-item veto, which is a tool the president does not have under the Constitution. They also see them as unconstitutional encroachments upon Congress’s ability to make the law and the courts’ ability to interpret it. In their view, the Constitution gives the president only two choices when presented with a bill—he may veto the legislation or faithfully and fully execute it.

In Texas v. Johnson (1989), one of the more high-profile decisions handed down by the Supreme Court during Bush’s term, Bush’s willingness to cross the Supreme Court was tested. This is a good case for students to discuss. The Court ruled that the burning of an American flag was protected as symbolic speech by the First Amendment. Bush had long expressed his great respect for the American flag and voiced his strong disagreement with the decision. (In hindsight, some would say Bush laid the groundwork for a more ardent appeal to patriotism a decade later, when his son George W. Bush, occupied the Oval Office.) Nonetheless, when Bush was later presented with a bill
criminalizing defacement of the flag, he did not sign it, knowing that the law was constitutionally indefensible. He urged, instead, the proper course—a constitutional amendment to ban flag burning. The case raises interesting questions you might pose to students. Why does the Constitution protect disrespectful and non-patriotic conduct like flag-burning? Moreover, why does flag-burning even amount to speech? Was Bush right in refusing to sign a bill criminalizing defacement of the flag, even though he personally agreed with the bill?

**QUESTIONS FOR DISCUSSION**

1. President Bush nominated the relatively-inexperienced Clarence Thomas to replace Justice Thurgood Marshall on the Supreme Court, a nomination that erupted into controversy over sexual harassment charges. President Bush asserted that Thomas was “the best qualified (nominee) at this time.” Do you think race entered into his selection? Thomas’s political ideology?

2. As reflected in the U.S. district court’s decision in *Dellums v. Bush*, the federal judiciary may not be able to become involved in disputes between the president and Congress regarding foreign affairs and war powers due to obstacles related to timing—e.g., at the time of suit, military operations may not yet have been taken or may be completed. Do such obstacles arise out of Article III of the U.S. Constitution, or are they mere procedural hurdles that the courts have chosen to impose?

3. Was Bush’s signing statement to Congress’ resolution authorizing military action in Kuwait, in which he asserted he was under no obligation to seek Congress’ authorization, constitutionally significant? Did the signing statement settle that Congress’ authorization was not required?

4. President Bush concluded that, in light of the Supreme Court’s holding in *Texas v. Johnson*, the Flag Protection Act was violative of the First Amendment. What happened in *Texas v. Johnson* and what did the Court decide? Why did Bush refrain from vetoing the new Act and, instead, allow it to become law without his signature?

5. Would a constitutional amendment giving Congress the power to ban the desecration of American flags—of the sort Bush advocated—be a positive or negative addition to the U. S. Constitution?

6. Bush, who campaigned on a pledge of “Read my lips – no new taxes!” disappointed many who voted for him for president when he raised taxes while in office. The Constitution gave these voters no recourse during Bush’s elected term of four years. Should there be a “recall” provision to remove presidents from office who do not honor their campaign promises?
Chapter 42. William Clinton, 1993-2001

Pages 570-586

Key Issues

President William Jefferson Clinton, the first baby boomer to occupy the White House, took office with a group of political foes viewing him as an unworthy president from the start. Clinton was dogged by several scandals. High-profile constitutional issues linked to those scandals emerged during his presidency.

One such scandal involved Paula Jones, a former purchasing assistant for the Arkansas Industrial Development Commission, who filed a federal sexual harassment lawsuit against Clinton in Arkansas. *Clinton v. Jones* raised the novel constitutional issue of whether a president could be subjected to civil suit while in office, consistent with the separation-of-powers principle. Clinton argued that even if the chief executive was not entitled to blanket immunity from civil suits, the concept of executive privilege—which protected the office of president from undue interference by other branches of government—certainly permitted the president to delay depositions and trial until he left office. The Supreme Court’s unanimous opinion, however, concluded that the Constitution did not give the president immunity from this sort of civil suit while the executive was in office. Moreover, the Court found nothing in the Constitution that required courts to postpone civil proceedings until after a president left office, particularly when the civil suit was unconnected to the president’s official duties. The Court’s perspective sparked great debate; you may use this as a topic of discussion with students. Many found the decision out-of-touch and naïve for concluding that Clinton could fulfill his significant responsibilities as chief executive and, at the same time, absorb the burdens of litigation. Others criticized the decision for failing to realize its lasting pernicious effect—that those who are politically motivated to disrupt the administration of a disfavored incumbent will be incentivized to file suit. Students can be asked to comment on which position they find most persuasive.

Next, the subject of impeachment creates an opportunity for a lively class discussion. Clinton was the first president since Andrew Johnson to be impeached and stand trial in the Senate. In connection with Clinton’s relationship with Monica Lewinsky, the House of Representatives approved Articles of Impeachment, alleging that Clinton had lied to the grand jury, had perjured himself in a deposition in the Paula Jones case, had obstructed justice, and had misused the office of the presidency, Whether Clinton’s conduct constituted an impeachable offense under Article II, Section 4 of the Constitution is an excellent question. Some students are likely to contend that our system is founded on the notion that no one, and most especially the powerful among us, is above the law (See Nixon Chapter). The president takes an oath to defend the Constitution and faithfully enforce the laws. If the president commits perjury...
and obstructs justice, he is not fit for office and deserves to be removed; lesser punishments will not suffice. Other students are likely to assert that the Constitution’s impeachment/removal process was not designed to punish individual wrongdoing. Rather, it was designed to protect us against a president who uses his official powers in a way that harms the nation’s interests and poses a threat to the welfare of the government itself. Therefore, the process must focus on public acts, performed in the president’s public capacity. In Clinton’s case, the underlying behavior for which he was impeached—falsehoods about an affair—was personal and private; it was as much attempt to protect himself and his family from embarrassment, as anything else. You might also ask students to assess Gerald Ford’s utterance—that “an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.” Was Ford correct? Certainly, the impeachment process is political in nature. The House has sole authority over impeachment; if it votes articles of impeachment, on whatever basis, the president is impeached and must stand trial in the Senate. Yet, in another sense, Ford was not entirely correct. The framers of the Constitution did not give Congress the unfettered discretion to remove the president for any reason it might deem sufficient at any given point in time. Rather, the framers set a standard that the House must honor by defining an impeachable offense as “treason, bribery, or other High crimes and misdemeanors.” The Constitution requires that the House vote for impeachment in only those cases that concern such acts. The additional questions students might ponder are: Did Clinton’s conduct rise to this level and satisfy the constitutional definition of an impeachable offense? Was the Senate correct in voting for acquittal?

You might have students consider the question the Clinton Chapter raises regarding the need for special prosecutors and the eventual demise of the independent counsel law: Can the public can trust the executive branch of government—the president and his appointed officials, including the attorney general—to investigate itself fully and fairly? The independent counsel statute, passed in the wake of the Watergate scandal, was designed to assure the American people that high-placed executive branch officials would be held accountable for misconduct and abuses of the power. Under the statute, the prosecutor was appointed by a special panel of the United States Court of Appeals for the D.C. Circuit and authorized to investigate allegations of any misconduct. He or she had with an unlimited budget and no deadline, and could be dismissed only by the attorney general for “good cause” or by the special panel of the court when the independent counsel’s task was completed. Yet many people came to believe that the independent counsel law was itself susceptible to abuses of power and was being used for political witch hunts. Following the expiration of the independent counsel statute in 1999, Congress
continued to debate possible replacement legislation to deal with scandals in the executive branch. You might ask students to discuss the benefits of appointing neutral special prosecutors to investigate alleged wrongdoing at the top of the executive pyramid; and the dangers inherent in such a process.

QUESTIONS FOR DISCUSSION

1. Should events that took place long before a president assumes office—such as the Whitewater matter dating back to the early days of Bill Clinton’s political career in Arkansas—form a legitimate basis for a later investigation (by Congress or federal prosecutors) of a chief executive in the White House?

2. Members of Congress of both parties at times have pushed for the appointment of special prosecutors to ferret out misconduct in the executive branch, dating back to the Teapot Dome scandal of the Harding administration and the Watergate scandal of the Nixon era. What is the philosophy behind appointing special prosecutors? In general, is this practice a sound one, or should such investigations be left to the attorney general and the Department of Justice?

3. What was the nature of the immunity that President Clinton sought in the Paula Jones lawsuit? Was the Supreme Court correct in declaring in Clinton v. Jones that nothing in the Constitution allows the president to delay depositions or civil trials until after he leaves office? What would be the harm in postponing such actions? Was it politically naïve for the Court to conclude that it was unlikely that such civil suits would be used as political weapons against sitting presidents?

4. In Clinton v. Jones, did the Supreme Court conclude that the federal courts cannot take into account the burdens of the president’s office when handling civil lawsuits in which the president is a defendant?

5. Should the three-judge panel overseeing the Whitewater investigation have been permitted to replace Robert Fiske with Ken Starr? Do you believe this decision was politically motivated?

6. The Line Veto Act would have given the president the authority to “cancel” an item of spending. Under the Act, President Clinton sought to cancel two appropriation measures. In Clinton v. City of New York, the Supreme Court declared the Act unconstitutional on the grounds that the president does not have the power to repeal or amend a statute, without further action by Congress. Does this argument persuade you? Should the Constitution be amended to give future presidents the authority to strike appropriation measures that he or she finds objectionable?
7. Under Article II, Section 4 of the U.S. Constitution, a president is to be removed from office on impeachment for and conviction of treason, bribery, or “other high Crimes or Misdemeanors.” If the president lies under oath on a personal matter—such as Clinton’s denial of an extramarital affair with Monica Lewinsky—has he committed an impeachable offense? What exactly was the relevance of the affair with Ms. Lewinsky in the Paula Jones case?

8. In 1970, then Representative Gerald R. Ford stated that an impeachable offense is whatever a majority of the U.S. House of Representatives considers it to be at a given point in time, and that conviction in the Senate results from whatever offenses two-thirds of that body considers sufficiently serious to warrant a president’s removal. Does the outcome of the Clinton impeachment and trial support or undermine this assertion?

9. Does the Clinton impeachment vote and trial suggest that the Framers of the U.S. Constitution made a mistake when they gave the power to remove the president to elected members of Congress? Do you believe that Clinton should have been impeached for lying under oath about his affair with Ms. Lewinsky?

10. After Clinton left office, could he have been indicted? Should he have been indicted?

11. Was it a positive development that the Independent Counsel Law was allowed to expire after the contentious Clinton impeachment proceedings in 1999? What mechanism can be used to investigate possible criminal conduct at the highest levels of the executive branch, if future scandals involving presidents or their top aides arise?
KEY ISSUES

George W. Bush, the son of the 41st president, George H.W. Bush, won the presidency in one of the most controversial elections in American history, dividing the country anew after the polarizing Clinton impeachment. A dispute over ballot counting in Florida landed the two main contestants in court against one another. Vice President Al Gore, the Democratic candidate, won the popular vote. Yet Bush was clinging to a narrow lead in the state of Florida where his brother, Jeb, was governor; a win in Florida would hand Bush a victory in the Electoral College. As Bush’s lead shrunk each day because of an ongoing recount of votes ordered by the Florida Supreme Court, Bush’s campaign challenged the legality of the recount in an effort to halt it. The resulting legal battle quickly landed before the U.S. Supreme Court in *Bush v. Gore*. A deeply divided Court ended the recount in Florida and, by doing so, effectively delivered the election to George W. Bush. To this day, many still ask why the Court inserted itself into the dispute. The Electoral Count Act, passed after the disputed Hayes-Tilden election to sharpen the rules by which the House of Representatives would select the president in case of such disputes, was available. As an aside, you might point out that permitting the House to resolve the disputed election in this case most likely would not have changed the result since Republicans maintained a clear majority in the House and—pursuant to Article II, Section 1, clause 3—they would have had the power to pick Bush.

Students should understand that above all things, Bush sought to build a new, more powerful presidency. His opportunity to expand presidential power came in the defining moment of his presidency, on September 11, 2001. On that day, al Qaeda, an Islamic militant terrorist group, attacked America, flying planes into the New York World Trade Center and the Pentagon and crashing a plane bound for the White House or the Capitol building in Pennsylvania. Bush became a wartime president, pushing through the Authorization for Use of Military Force Resolution, the USA Patriot Act, and the Homeland and Security Act, giving the president sweeping powers to wage an unprecedented “war on terror.” Bush and his vice president, Dick Cheney, pushed executive powers to new heights—secretly wiretapping American citizens, using “extraordinary interrogation techniques” to extract information from captured al Qaeda terrorists, and indefinitely imprisoning and subjecting “enemy combatants” to humiliating conditions in the military prison at Guantanamo Bay and CIA “black-sites.”

Both much of the nation and the Supreme Court—which seemed prepared to give Bush extraordinary authority to protect the nation after 9/11—concluded that he went too far. The fear engendered by the threat of another terrorist attack had been sufficient to justify, in the public’s mind, nearly anything that the president wished to do to prevent and combat this threat. Indeed, in the days immediately following 9-11, Bush demonstrated true leadership, extolling
Americans for their strength and courage and inspiring them to stand together against the “evil doers.”

Eventually, however, the notion that the U.S. president would authorize spying on unsuspecting Americans, water-boarding, torture, and even to deny basic rights to suspected terrorists became unacceptable. In four landmark decisions discussed in the Chapter—Hamdi, Rasul, Hamdan, and Boumediene, all of which came as a complete surprise to the Bush White House—the Court concluded that any American citizen had the due process right to challenge his designation as an enemy combatant, the writ of habeas corpus applied to noncitizen enemy combatants held in Guantanamo Bay, and the procedures used by administration’s military tribunals violated American laws of war. Students may be surprised to learn that the Bush administration did not publicly take issue with the decisions. One reason for such restraint might lie in the fact that even the conservative justices on the Court, to whom the administration looked for support, concluded that constitutional protections had been violated.

If asked, some students will likely state that the counter-terrorism measures Bush instituted following the 9-11 attacks were essentially no different from Lincoln’s suspension of the writ of habeas corpus on the eve of the Civil War, or from Franklin D. Roosevelt’s decision to order the opened-ended internment of Japanese-Americans during World War II. They might argue that, like his predecessors, Bush properly relied on his broad executive powers to guide the country through the trauma of a war. Bush, like Lincoln and FDR, concluded that it was better to err on the side of doing too much to protect Americans than not doing enough. On the other hand, some students may argue that history is beside the point. The past provides no excuse for Bush’s decision to turn his back on important founding principles, such as the rule of law, the presumption of innocence and the protection of civil liberties in the name of national security. They may also argue that Bush took political advantage of 9/11; that it was always his intent to arrogate institutional power to the presidency, and 9/11 gave him the perfect opportunity to do so.

The Iraq War should not go unmentioned. The Bush Administration sustained a significant loss of credibility by invading Iraq in 2003 to depose its dictator Saddam Hussein. Hussein had continued to defy UN weapons inspectors, leading many to believe that the dictator possessed deadly weapons of mass destruction (WMD). The White House alluded to a vague connection between al Qaeda and the Iraqi government in making its case to Congress. Yet evidence that Saddam actually possessed WMD, as well as the existence of a link between his secular regime and the religious extremists of al Qaeda, was scant at best. When WMD were never found and a bloody civil war in Iraq broke out, Bush’s approval ratings sank and contributed to his mixed legacy. Students might discuss whether a president who intentionally or unintentionally overstates a
military threat in getting Congress to approve military engagement should face some consequences for this faulty information? Does it render congressional approval void?

QUESTIONS FOR DISCUSSION

1. Should the Supreme Court have injected itself into resolving the election dispute at all, in the controversial Bush v. Gore decision in 2000? What were its alternatives? Do you believe the Court made a political decision in wading into this case?

2. Should the Bush administration and Vice President Dick Cheney have been required to turn over information concerning its Energy Task Force meetings, including who attended, subjects discussed, etc.? What exactly was the executive branch interest that was being safeguarded by keeping this information from being made public?

3. Did President Bush exceed his constitutional authority in the period following the attacks on September 11, 2001? In retrospect, did Bush take advantage of the nation’s feeling of vulnerability to gather up too much power as president? In hindsight, did Bush lose his perspective and attempt to arrogate institutional power to the presidency, even when the country was prepared to give him enormous leeway in protecting the country after 9-11?

4. Was President Bush’s use of secret NSA wiretaps to seize emails and monitor telephone calls between individuals in the U. S. and others overseas justified in waging the war on terror? Using Justice Jackson’s test in the Steel Seizure Case, at what level was President Bush’s authority in taking this action? Was Bush waging a war on terror at home or abroad? How long would this war last?

5. From a constitutional perspective, were the counter-terrorism measures Bush instituted following the 9-11 attacks any different from Lincoln’s suspension of the writ of habeas corpus on the eve of the Civil War, or from Franklin D. Roosevelt’s decision to order the opened-ended internment of Japanese-Americans during World War II?

6. Does the Constitution prohibit the president from ordering the use of torture in interrogating non-citizens during times of war? Was President Bush justified in taking such extraordinary measures as part of the war on terror?

7. As a constitutional matter, what was the significance of President Bush’s “signing statements” in approving legislation on the subject of torture and other matters? Should such signing statements carry any weight when the Supreme Court interprets the meaning of a piece of legislation?
8. Discuss the Supreme Court’s decisions in *Hamdi* and *Rasul*. Should the Supreme Court be able to second-guess the president’s use of commander-in-chief powers in dealing with individuals deemed to be “enemy combatants”? Did these cases significantly curtail the use of power by future presidents, by requiring the executive branch to follow procedural rules applicable in civilian courts even during times of emergency and war-time?

9. This chapter points out that despite the adverse rulings in *Hamdi*, *Rasul*, *Hamdan*, and *Boumediene*, “the Bush administration never dared publicly to deny the authority of the [U.S. Supreme] Court in these matters in the same way that it denied the authority of Congress.” Why did the Bush administration publicly treat Congress and the Court differently? Why might any president exercise restraint when the Supreme Court issues a decision which is antithetical to the position his or her administration has taken?
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KEY ISSUES

President Barack Obama was the first African American chief executive in the history of the United States. Elected to highest office in a country that at its inception, included the Three Fifths Clause in its Constitution, Obama will be viewed as a transformational leader. He ran on a pledge to change the highly partisan, toxic culture in the nation’s capital and usher in a spirit of cooperation and common purpose. As his presidency drew to a close, however, Obama himself reflected on the bitter dysfunction in Congress that so often frustrated his agenda and expressed regret that he had been unable to do more to bridge America’s yawning political divide. Obama illustrates what students have encountered repeatedly—that the person who is elected president inevitably faces challenges unique to his or her moment in history and issues that he or she never anticipated.

The Obama’s administration’s signature piece of legislation was the Affordable Care Act (ACA). Otherwise known as “Obamacare,” the statute expanded health care to all Americans. The Act was, however, perhaps the most polarizing aspect of the Obama presidency. To get it passed, Obama had to engage in a costly political fight almost as soon as he took office. Students should recognize that the ACA, like FDR’s New Deal reforms, engendered both ardent support and fierce opposition along similar lines. The ACA’s supporters argued that every American, regardless of economic station, should have access to affordable, health care insurance. In their view, providing access to health care coverage and treatment is an essential public responsibility that the federal government must assume. The ACA’s opponents, however, viewed the ACA as a threat to economic prosperity, an intrusion on personal liberty, and a violation of the principles of federalism at the heart of our system of government. Obama’s efforts were vindicated in large measure, when the U.S. Supreme Court affirmed the constitutionality and legality of the Act in two cases. First, in National Federation of Independent Business v. Sebelius, the Court upheld an essential element of the law—the individual mandate that requires the purchase of health care insurance or suffer a penalty—as a proper exercise of Congress’s power to tax. Second, in King v. Burwell, the Court ruled that federal subsidies that assist millions of people to purchase care insurance were authorized under the Act. Students should discuss whether these decisions were correct, or whether the Court unnecessarily stretched the meaning of the Constitution and the ACA to reach a result.

Another controversial issue worth discussion relates to same-sex marriage. The Defense of Marriage Act (DOMA) was passed during the Clinton presidency in 1996. The statute mandated that the federal government not recognize same-sex marriages and that states not be forced to recognize same-sex marriages from other states. It also denied certain federal spousal benefits to married same-
sex couples. Subsequently, the constitutionality of the statute was challenged in court. In 2011, President Obama concluded that DOMA violated the Fifth Amendment’s guarantee of equal protection and instructed the Department of Justice to cease defending the Act as constitutional. Obama’s instruction raises a thorny question for class discussion: Was Obama’s instruction a dereliction of his constitutional duties? Put another way, is a president obligated to defend a law he or she believes is unconstitutional? One view is that the failure to enforce a federal statute violates the president’s duties under the Take Care Clause and amounts to a presidential effort to repeal by fiat a validly enacted statute. Those who hold this view believe that presidential objections to constitutionality are to be registered by exercise of the veto, but that once a law is enacted—whether over a veto or not—constitutional concerns must be set aside, and the law must be defended and enforced. The other view, however, is that in addition to his obligations under the Take Care Clause, the president takes an oath to preserve, protect and defend the Constitution. The president is duty-bound to form his own opinion as to the constitutionality of a statute and has a coordinate, indeed equal role in interpreting the Constitution. Therefore, where is there is no binding judicial precedent that requires otherwise, the president is on firm ground in refusing to defend a statute he determines is unconstitutional. Students should be encouraged to discuss these opposing views.

Obama exercised executive powers aggressively, especially in the final stretch of his presidency. Stymied by congressional inaction, Obama advanced many of his policy goals through executive action. On the domestic side, for example, by executive order, Obama refused to deport and instead granted quasi-legal status to millions of undocumented immigrants—including those who had children who were U.S. citizens or residents. (Obama’s earlier program was aimed at so-called ‘Dreamers”—young adults who were brought to this country as children.) Obama’s action became the subject of a lawsuit when several states sued the Obama administration for overreaching, a case that made its way to the U.S. Supreme Court. It also provoked many in Congress to complain vociferously and assert that Obama did not have the authority to advance his immigration measures unilaterally in the absence of congressional action. Others, however, contended that Obama was simply doing his job to make the immigration system more rational, more efficient and more humane in the face of Congress’s failure to pass immigration reform. The legality of Obama’s executive action makes for an interesting discussion. The answer is far from clear, given the powers the Constitution grants the executive and legislative branches, respectively; the immigration statutes; and the actions taken by past presidents. While Article II vests the president with “[t]he executive Power” and further establishes that the President shall “take Care that the Laws be faithfully executed,” Article I gives Congress the power “to establish a uniform Rule of Naturalization.” In the immigration statutes, Congress gave the executive branch a fair amount
of discretion in carrying statutory mandates. Additionally, past presidents have set a precedent of issuing executive actions on immigration, including granting deportation relief. For example, in 1987, the Reagan administration took executive action to limit deportations for Nicaraguan exiles, even those who had been turned down for asylum. Similarly, President George H.W. Bush in 1990 limited the deportation of Chinese students and in 1991 kept hundreds of Kuwait citizens from being deported. You can ask students whether, given this background, President Obama exceeded his powers or simply followed past precedent?

In foreign affairs, by executive order, Obama took the historic step to chart a new course in America’s relationship with Cuba. He re-instated diplomatic relations with Cuba, severed since 1961, re-established an embassy in Havana, and announced ongoing discussions with Cuba in matters of mutual concern. Obama also provoked the ire of the Republican-led Senate when he entered an executive agreement on nuclear arms with Iran. As the administration was negotiating the deal, a group of Republican senators went so far as to publicly challenge Obama’s authority to do so in an open letter to the Islamic leaders of Iran. Despite vigorous debate about whether the letter unconstitutionally encroached on the president’s powers to direct foreign policy, there was little dispute that the letter was without precedent. You might point out that time will tell whether the letter reflects a reordering of the tradition of presidential preeminence and congressional nonintervention when it came to the nation’s diplomatic negotiations and foreign affairs. Students might discuss whether Congress’s action in this matter went too far, and what the long-term ramifications of this approach might be if utilized regularly by Congress.

Finally, the subject of targeted killing and drones is ideal for class discussion. As commander in chief, Obama used an elite team of Navy SEALS to conduct a daring raid on a compound in Pakistan where Osama bin Laden, the al Qaeda leader who masterminded the 9-11 attack, was hiding. In a late-night appearance, Obama declared that “justice had been done” as he disclosed that Bin Laden had been killed as he resisted capture. The news touched off an extraordinary outpouring of emotion and support from Americans. Yet, Obama was criticized for using drones to kill American citizens on foreign soil. Opponents of the practice of “targeted killing” asserted that it violates Fifth Amendment guarantees afforded to all U.S. citizens, including the right not to be deprived of life without due process of law. They also complained that the Obama Administration’s process of deciding who will be targeted is based on vague legal standards and takes place through a closed executive process in which judicial oversight is entirely absent. You might ask students to consider whether there any circumstances in which the president might legally authorize the military to use such force against Americans on American soil? To sharpen the point, you might ask whether the president may target an American in the
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country in order to protect against an attack like the ones suffered in Pearl Harbor or on 9/11? President Obama was also taken to task for continuing his predecessor’s use of NSA bulk data collection to gather intelligence in the fight against terror. At this point in the course, students should realize that the nation returned to a question that has lingered throughout much of its history: How much liberty are Americans willing to sacrifice in the name of national security?

QUESTIONS FOR DISCUSSION

1. Given the history of American presidents from George Washington until modern times, how significant was it that the nation elected Barack Obama as the first African-American president? Was his election transformational in any way? Explain.

2. The Affordable Care Act, implementing health care reform in the United States, sparked enormous political debate. Yet, it constituted a signature legislative achievement for President Obama. Is this piece of legislation comparable to FDR’s expansion of the federal bureaucracy during the New Deal? How will the Act be viewed in 50 years?

3. On what basis did Chief Justice Roberts—writing for the majority of the Court—uphold the mandate provision of the Affordable Care Act as constitutional? Was this primarily a legal or a political decision?

4. Was the Obama administration justified in declaring that it would no longer deport illegal immigrants who entered the United States as children, and that it would not defend the constitutionality of the Defense of Marriage Act (DOMA)? Does the president’s executive power give him the authority to refuse to enforce acts of Congress or federal policies he finds objectionable?

5. In United States v. Windsor, __ U.S. __, 133 S.Ct. 2675 (2013), the Supreme Court struck down DOMA as unconstitutional on the theory that marriage and family issues are primarily left to the states. The same day, in Hollingsworth v. Perry, __ U.S. __, 133 S.Ct. 2652 (2013), the Court dismantled California’s Proposition 8 banning same-sex marriage, finding that the litigants defending the ban lacked standing. In 2015, the Court in Obergefell v. Hodges definitively ruled that the 14th Amendment due process clause requires states to license same-sex marriages and to recognize the marriage of two people of the same sex when lawfully licensed out of state. (Based upon the “fundamental right to marry.”) Will these cases be viewed as landmark decisions in the same way as the historic civil rights cases of the 1950s and 1960s?

6. In NLRB v. Canning, __ U.S. __, 134 S.Ct. 2550 (2014), the Supreme Court concluded that President Obama’s recess appointments made in a three-
day period between two pro forma sessions of Congress were not valid. Can Congress avoid the president’s recess appointments simply by never adjourning formally?

7. During the “Fast and Furious” episode, Attorney General Eric Holder became the first cabinet officer in American history to be held in contempt of Congress. Does Congress have the power to hold a top executive branch official in contempt when he/she does not comply with Congress’s demands? Could the House of Representatives have jailed Attorney General Holder?

8. Did President Obama have the authority under the Constitution to capture and kill Osama Bin Laden? Under what provision? Did President Obama have the authority to use drones to kill two American citizens in Yemen? Could he have used drone strikes to kill the same two individuals on American soil? Under what provision of the Constitution?
THE PRESIDENTS AND THE CONSTITUTION
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Proclamation of Neutrality

April 22, 1793.

Whereas it appears that a state of war exists between Austria, Prussia, Sardinia, Great Britain, and the United Netherlands, of the one part, and France on the other; and the duty and interest of the United States require, that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerant Powers;

I have therefore thought fit by these presents to declare the disposition of the United States to observe the conduct aforesaid towards those Powers respectfully; and to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition.

And I do hereby also make known, that whatsoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding, or abetting hostilities against any of the said Powers, or by carrying to any of them those articles which are deemed contraband by the modern usage of nations, will not receive the protection of the United States, against such punishment or forfeiture; and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the law of nations, with respect to the Powers at war, or any of them.

In testimony whereof, I have caused the seal of the United States of America to be affixed to these presents, and signed the same with my hand. Done at the city of Philadelphia, the twenty-second day of April, one thousand seven hundred and ninety-three, and of the Independence of the United States of America the seventeenth.

GEORGE WASHINGTON.
June 29, 1793

...The objections in question fall under three heads—

1. That the Proclamation was without authority.

2. That it was contrary to our treaties with France.

3. That it was contrary to the gratitude which is due from this to that country; for the succours rendered us in our own Revolution.

4. That it was out of time & unnecessary...

The true nature & design of such an act is—to make known to the powers at War and to the Citizens of the Country, whose Government does the Act that such country is in the condition of a Nation at Peace with the belligerent parties, and under no obligations of Treaty, to become an associate in the war with either of them; that this being its situation its intention is to observe a conduct comfortable with it and to perform towards each the duties of neutrality; and as a consequence of this state of things, to give warning to all within its jurisdiction to abstain from acts that shall contravene those duties, under the penalties which the laws of the land (of which the law of Nations is a part) annexes to acts of contravention.

This, and no more, is conceived to be the true import of a Proclamation of Neutrality...

It will not be disputed that the management of the affairs of this country with foreign nations is confided to the Government of the UStates.

It can as little be disputed, that a Proclamation of Neutrality, where a Nation is at liberty to keep out of a War in which other Nations are engaged and means so to do, is a usual and a proper measure. Its main object and effect are to prevent the Nation being immediately responsible for acts done by its citizens, without the privity or connivance of the Government, in contravention of the principles of neutrality...

The inquiry then is--what department of the Government of the UStates is the prop[er] one to make a declaration of Neutrality in the cases in which the engagements [of] the Nation permit and its interests require such a declaration.

A correct and well informed mind will discern at once that it can belong neit[her] to the Legislature nor Judicial Department and of course must belong to the Executive.

The Legislative Department is not the organ of intercourse between the United States and foreign Nations. It is charged neither with making nor interpreting
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Treaties. It is therefore not naturally that Organ of the Government, which is to pronounce the existing condition of the Nation, with regard to foreign Powers, or to admonish the Citizens of their obligations and duties as founded upon that condition of things. Still less is it charged with execution and observance of those obligations and those duties.

It is equally obvious that the act in question is foreign to the Judiciary Department of Government. The province of that Department is to decide litigations in particular cases. It is indeed charged with the interpretation of treaties; but it exercises this function only in the litigated cases; that is where contending parties bring before it a specific controversy. It has no concern with pronouncing upon the external political relations of Treaties between Government and Government. This position is too plain to need being insisted upon.

It must then of necessity belong to the Executive Department to exercise the function in Question—when a proper case for the exercise of it occurs.

It appears to be connected with that department in various capacities, as the organ of intercourse between the Nation and foreign Nations—as the interpreter of the National Treaties, in those cases in which the Judiciary is not competent, that is in the cases between Government and Government—as the power, which is charged with the Execution of the Laws, of which Treaties form a part—as that Power which is charged with the command and application of the Public Force.

This view of the subject is so natural and obvious—so analogous to general theory and practice—that no doubt can be entertained of its justness, unless such doubt can be deduced from particular provisions of the Constitution of the United States.

Let us see then if cause for such doubt is to be found in that constitution.

The second Article of the Constitution of the United States, section 1st, establishes this general Proposition, That “The EXECUTIVE POWER shall be vested in a President of the United States of America.”

The same article in a succeeding Section proceeds to designate particular cases of Executive Power. It declares among other things that 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, that he shall have power by and with the advice of the Senate to make treaties; that it shall be his duty to receive ambassadors and other public Ministers and to take care that the laws be faithfully executed.

It would not consist with the rules of sound construction to consider this enumeration of particular authorities as derogating from the more
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comprehensive grant contained in the general clause, further than as it may be coupled with express restrictions or qualifications...The different mode of expression employed in the constitution in regard to the two powers the Legislative and the Executive serves to confirm this inference. In the article which grants the legislative powers of the Government, the expressions are—“All Legislative powers herein granted shall be vested in a Congress of the UStates;” in that which grants the Executive Power the expressions are, as already quoted “The EXECUTIVE POWER shall be vested in a President of the UStates of America.”

The enumeration ought rather therefore to be considered as intended by way of greater caution, to specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power, interpreted in conformity to other parts of the constitution and to the principles of free government.

The general doctrine of our Constitution is that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument.

Two of these have been already noticed— the participation of the Senate in the appointment of Officers and in the making of Treaties. A third remains to be mentioned the right of the Legislature “to declare war and grant letters of marque and reprisal.”

With these exceptions the EXECUTIVE POWER of the Union is completely lodged in the President. This mode of construing the Constitution has indeed been recognized by Congress in formal acts, upon full consideration and debate. The power of removal from office is an important instance.

And since upon general principles for reasons already given, the issuing of a proclamation of neutrality is merely an Executive Act; since also the general Executive Power of the Union is vested in the President, the conclusion is, that the step, which has been taken by him, is liable to no just exception on the score of authority...

If the Legislature have a right to make war on one hand—it is on the other the duty of the Executive to preserve Peace till war is declared; and in fulfilling that duty, it must necessarily possess a right of judging what is the nature of the obligations which the treaties of the Country impose on the Government; and when in pursuance of this right it has concluded that there is nothing in them inconsistent with a state of neutrality, it becomes both its province and its duty to enforce the laws incident to that state of the Nation. The Executive is charged with the execution of all laws, the law of Nations as well as the Municipal law, which recognises and adopts those laws. It is consequently bound, by faithfully executing the laws of neutrality, when that is the state of the Nation, to avoid
It deserves to be remarked, that as the participation of the senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general “Executive Power” vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution...

In this distribution of powers the wisdom of our constitution is manifested. It is the province and duty of the Executive to preserve to the Nation the blessings of peace. The Legislature alone can interrupt those blessings, by placing the Nation in a state of War...

That clause of the constitution which makes it his duty to “take care that the laws be faithfully executed” might alone have been relied upon...

The President is the constitutional EXECUTOR of the laws. Our Treaties and the laws of Nations form a part of the law of the land. He who is to execute the laws must first judge for himself of their meaning. In order to the observance of that conduct, which the laws of nations combined with our treaties prescribed to this country, in reference to the present War in Europe, it was necessary for the President to judge for himself whether there was any thing in our treaties incompatible with an adherence to neutrality. Having judged that there was not, he had a right, and if in his opinion the interests of the Nation required it, it was his duty, as Executor of the laws, to proclaim the neutrality of the Nation, to exhort all persons to observe it, and to warn them of the penalties which would attend its non observance.

The Proclamation has been represented as enacting some new law. This is a view of it entirely erroneous. It only proclaims a fact with regard to the existing state of the Nation, informs the citizens of what the laws previously established require of them in that state, & warns them that these laws will be put in execution against the Infractors of them.

PACIFICUS.
Several pieces with the signature of PACIFICUS were lately published, which have been read with singular pleasure and applause, by the foreigners and degenerate citizens among us, who hate our republican government, and the French revolution...

The basis of the reasoning is, we perceive, the extraordinary doctrine, that the powers of making war and treaties, are in their nature executive; and therefore comprehended in the general grant of executive power, where not specially and strictly excepted out of the grant.

Let us examine this doctrine; and that we may avoid the possibility of mistating the writer, it shall be laid down in his own words: a precaution the more necessary, as scarce any thing else could outweigh the improbability, that so extravagant a tenet should be hazarded, at so early a day, in the face of the public.

His words are—“Two of these (exceptions and qualifications to the executive powers) have been already noticed—the participation of the Senate in the appointment of officers, and the making of treaties. A third remains to be mentioned—the right of the legislature to declare war, and grant letters of marque and reprisal.”

Again—“It deserves to be remarked, that as the participation of the Senate in the making treaties, and the power of the legislature to declare war, are exceptions out of the general executive power, vested in the President, they are to be construed strictly, and ought to be extended no farther than is essential to their execution.”

If there be any countenance to these positions, it must be found either 1st, in the writers, of authority, on public law; or 2d, in the quality and operation of the powers to make war and treaties; or 3d, in the constitution of the United States.

It would be of little use to enter far into the first source of information, not only because our own reason and our own constitution, are the best guides; but because a just analysis and discrimination of the powers of government, according to their executive, legislative and judiciary qualities are not to be expected in the works of the most received jurists, who wrote before a critical attention was paid to those objects, and with their eyes too much on monarchial governments, where all powers are confounded in the sovereignty of the prince. It will be found however, I believe, that all of them, particularly Wolfius,
Burlamaqui and Vattel, speak of the powers to declare war, to conclude peace, and to form alliances, as among the highest acts of the sovereignty; of which the legislative power must at least be an integral and preeminent part...

If we consult for a moment, the nature and operation of the two powers to declare war and make treaties, it will be impossible not to see that they can never fall within a proper definition of executive powers. The natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws. All his acts therefore, properly executive, must presuppose the existence of the laws to be executed. A treaty is not an execution of laws: it does not pre-suppose the existence of laws. It is, on the contrary, to have itself the force of a law, and to be carried into execution, like all other laws, by the executive magistrate. To say then that the power of making treaties which are confessedly laws, belongs naturally to the department which is to execute laws, is to say, that the executive department naturally includes a legislative power. In theory, this is an absurdity—in practice a tyranny.

The power to declare war is subject to similar reasoning. A declaration that there shall be war, is not an execution of laws: it does not suppose preexisting laws to be executed: it is not in any respect, an act merely executive. It is, on the contrary, one of the most deliberative acts that can be performed; and when performed, has the effect of repealing all the laws operating in a state of peace...

Although the executive may be a convenient organ of preliminary communications with foreign governments, on the subjects of treaty or war; and the proper agent for carrying into execution the final determinations of the competent authority; yet it can have no pretensions from the nature of the powers in question compared with the nature of the executive trust, to that essential agency which gives validity to such determinations.

It must be further evident that, if these powers be not in their nature purely legislative, they partake so much more of that, than of any other quality, that under a constitution leaving them to result to their most natural department, the legislature would be without a rival in its claim...

It remains to be enquired whether there be any thing in the constitution itself which shews that the powers of making war and peace are considered as of an executive nature, and as comprehended within a general grant of executive power.

It will not be pretended that this appears from any direct position to be found in the instrument...

Does the doctrine then result from the actual distribution of powers among the
several branches of the government? Or from any fair analogy between the powers of war and treaty and the enumerated powers vested in the executive alone?...

In the general distribution of powers, we find that of declaring war expressly vested in the Congress...

[The constitution cannot be supposed to have placed either any power legislative in its nature, entirely among executive powers, or any power executive in its nature, entirely among legislative powers, without charging the constitution, with that kind of intermixture and consolidation of different powers, which would violate a fundamental principle in the organization of free governments...

The power of treaties is vested jointly in the President and in the Senate, which is a branch of the legislature...

[T]reaties when formed according to the constitutional mode, are confessedly to have the force and operation of laws, and are to be a rule for the courts in controversies between man and man, as much as any other laws. They are even emphatically declared by the constitution to be “the supreme law of the land.”...

“He shall take care that the laws shall be faithfully executed and shall commission all officers of the United States.” To see the laws faithfully executed constitutes the essence of the executive authority. But what relation has it to the power of making treaties and war, that is, of determining what the laws shall be with regard to other nations? No other certainly than what subsists between the powers of executing and enacting laws...

Thus it appears that by whatever standard we try this doctrine, it must be condemned as no less vicious in theory than it would be dangerous in practice. It is countenanced neither by the writers on law; nor by the nature of the powers themselves; nor by any general arrangements or particular expressions, or plausible analogies, to be found in the constitution...

I shall content myself with an extract from a work which entered into a systematic explanation and defence of the constitution, and to which there has frequently been ascribed some influence in conciliating the public assent to the government in the form proposed...The passage relates to the power of making treaties; that of declaring war, being arranged with such obvious propriety among the legislative powers, as to be passed over without particular discussion...

“Tho’ several writers on the subject of government place that power (of making treaties) in the class of Executive authorities, yet this is evidently an arbitrary disposition. For if we attend carefully, to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them...” [Federalist No. 75]
It will not fail to be remarked on this commentary, that whatever doubts may be started as to the correctness of its reasoning against the legislative nature of the power to make treaties: it is clear, consistent and confident, in deciding that the power is plainly and evidently not an executive power.

HELVIDIUS.

Helvidius No. 2

31 August 1793

...The declaring of war is expressly made a legislative function. The judging of the obligations to make war, is admitted to be included as a legislative function...And no other department can be *in the execution of its proper functions*, if it should undertake to decide such a question...

The power to judge of the causes of war as involved in the power to declare war, is expressly vested where all other legislative powers are vested, that is, in the Congress of the United States. It is consequently determined by the constitution to be a *Legislative power*. Now omitting the enquiry here in what respects a compound power may be partly legislative, and partly executive, and accordingly vested *partly* in the one, and *partly* in the other department, or *jointly* in both; a remark used on another occasion is equally conclusive on this, that the same power, cannot belong *in the whole*, to *both* departments, or be properly so vested as to operate *separately* in each. Still more evident is it, that the same *specific function or act*, cannot possibly belong to the two departments and be separately exerciseable by each...

If the legislature and executive have both a right to judge of the obligations to make war or not, it must sometimes happen, though not at present, that they will judge differently. The executive may proceed to consider the question to-day, may determine that the United States are not bound to take part in a war, and *in the execution of its functions* proclaim that determination to all the world. To-morrow, the legislature may follow in the consideration of the same subject, may determine that the obligations impose war on the United States, and *in the execution of its functions*, enter into a *constitutional declaration*, expressly contradicting the *constitutional proclamation*.

In what light does this present the constitution to the people who established it? In what light would it present to the world, a nation, thus speaking, thro’ two different organs, equally constitutional and authentic, two opposite languages, on the same subject and under the same existing circumstances?...

HELVIDIUS.
...The other of the two arguments reduces itself into the following form: The Executive has the right to receive public Ministers; this right includes the right of deciding, in the case of a revolution, whether the new government sending the Minister, ought to be recognized or not; and this again, the right to give or refuse operation to pre-existing treaties.

The power of the Legislature to declare war and judge of the causes for declaring it, is one of the most express and explicit parts of the Constitution. To endeavor to abridge or effect it by strained inferences, and by hypothetical or singular occurrences, naturally warns the reader of some lurking fallacy...

The words of the Constitution are “he (the President) shall receive Ambassadors, other public Ministers and Consuls.”... [L]ittle if any thing more was intended by the clause, than to provide for a particular mode of communication, almost grown into a right among modern nations; by pointing out the department of the government, most proper for the ceremony of admitting public Ministers, of examining their credentials, and of authenticating their title to the privileges annexed to their character by the law of nations. This being the apparent design of the Constitution, it would be highly improper to magnify the function into an important prerogative, even where no rights of other departments could be affected by it...

[How does it follow from the function to receive Ambassadors and other public Ministers that so consequential a prerogative may be exercised by the Executive? When a foreign Minister presents himself, two questions immediately arise: Are his credentials from the existing and acting government of his country? Are they properly authenticated? These questions belong of necessity to the Executive; but they involve no cognizance of the question, whether those exercising the government have the right along with the possession. This belongs to the nation, and to the nation alone, on whom the government operates. The questions before the Executive are merely questions of fact...

For allowing it to be, as contended, that a suspension of treaties might happen from a consequential operation of a right to receive public ministers, which is an express right vested by the constitution; it could be no proof, that the same or a similar effect could be produced by the direct operation of a constructive power...

HELVIDIUS.
CHAPTER 2

2. John Adams
THE ALIEN AND SEDITION ACTS

The Alien and Sedition Acts

An Act to Establish a Uniform Rule of Naturalization
(“Naturalization Act”)

June – July, 1798.

SEC. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no alien shall be admitted to become a citizen of the United States, or of any state, unless in the manner prescribed by the act, intituled “An act to establish an uniform rule of naturalization;”... he shall have declared his intention to become a citizen of the United States, five years, at least, before his admission, and shall, at the time of his application to be admitted, declare and prove, to the satisfaction of the court having jurisdiction in the case that he has resided within the United States fourteen years, at least, and within the state or territory where, or for which such court is at the time held, five years, at least, besides conforming to the other residence within the United States, and five years in the state, &c. where he applies...

And provided also, that no alien, who shall be a native, citizen, denizen or subject of any nation or state with whom the United States shall be at war, at the time of his application, shall be then admitted to become a citizen of the United States...

APPROVED, June 18, 1798.

An Act Concerning Aliens
(“Aliens Friends Act”)

SEC. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for the President of the United States at any time during the continuance of this act, to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States, within such time as shall be expressed in such order... And in case any alien, so ordered to depart, shall be found at large within the United States after the time limited in such order for his departure, and not having obtained a license from the President to reside therein, or having obtained such license shall not have conformed thereto, every such alien shall, on conviction thereof, be imprisoned for a term not exceeding three years, and shall never after be admitted to become a citizen of the United States. Provided always, and be it further enacted, that if any alien so ordered to depart shall...
prove to the satisfaction of the President, by evidence to be taken before such person or persons as the President shall direct, who are for that purpose hereby authorized to administer oaths, that no injury or danger to the United States will arise from suffering such alien to reside therein, the President may grant a license to such alien to remain within the United States for such time as he shall judge proper, and at such place as he may designate…

SEC. 2. *And be it further enacted*, That it shall be lawful for the President of the United States, whenever he may deem it necessary for the public safety, to order to be removed out of the territory thereof, any alien who may or shall be in prison in pursuance of this act; and to cause to be arrested and sent out of the United States such of those aliens as shall have been ordered to depart therefrom and shall not have obtained a license as aforesaid, in all cases where, in the opinion of the President, the public safety requires a speedy removal…

SEC. 6. *And be it further enacted*, That this act shall continue and be in force for and during the term of two years from the passing thereof.

APPROVED, June 25, 1798.

**An Act Respecting Alien Enemies**

(“Alien Enemies Act”)

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That whenever there shall be a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion shall be perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government, and the President of the United States shall make public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies. And the President of the United States shall be, and he is hereby authorized, in any event, as aforesaid, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, towards the aliens who shall become liable, as aforesaid; the manner and degree of the restraint to which they shall be subject, and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those, who, not being permitted to reside within the United States, shall refuse or neglect to depart therefrom; and to establish any other regulations which shall be found necessary in the premises and for the public safety…

APPROVED, July 6, 1798.
2. John Adams  
The Alien and Sedition Acts

An Act for the Punishment of Certain Crimes against the United States  
(“Sedition Act”)

SEC. 1. Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That if any persons shall unlawfully combine or conspire together, with intent to oppose any measure or measures of the government of the United States, which are or shall be directed by proper authority, or to impede the operation of any law of the United States, or to intimidate or prevent any person holding a place or office in or under the government of the United States, from undertaking, performing, or executing his trust or duty: and if any person or persons, with intent as aforesaid, shall counsel, advise, or attempt to procure any insurrection, riot, unlawful assembly, or combination, whether such conspiracy, threatening, counsel, advice, or attempt shall have the proposed effect or not, he or they shall be deemed guilty of a high misdemeanor, and on conviction before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding five thousand dollars, and by imprisonment during a term of not less than six months, nor exceeding five years; and further, at the discretion of the court, may be holden to find sureties for his good behaviour, in such sum, and for such time, as the said court may direct.

SEC. 2. And be it further enacted, That if any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered, or published, or shall knowingly and willingly assist or aid in writing, printing, uttering, or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either House of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either House of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States; or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the Constitution of the United States; or to resist, oppose, or defeat any such law or act; or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

SEC. 3. And be it further enacted and declared, That if any person shall be prosecuted under this act for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defence, the truth of the matter contained in the publication charged as a libel.
2. John Adams
The Alien and Sedition Acts

And the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

SEC. 4. And be it further enacted, That this act shall continue and be in force until the third day of March, one thousand eight hundred and one, and no longer...

APPROVED, July 14, 1798.
March 7, 1800.

[T]he case of Thomas Nash, as stated to the President, was completely within the 27th article of the Treaty of Amity, Commerce, and Navigation, entered into between the United States of America and Great Britain...

The casus foederis of this article occurs when a person, having committed murder or forgery within the jurisdiction of one of the contracting parties, and having sought an asylum in the country of the other, is charged with the crime, and his delivery demanded, on such proof of guilt as, according to the laws of the place where he shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed.

The case stated is, that Thomas Nash, having committed murder on board of a British frigate, navigating the high seas under a commission from His Britannic Majesty, had sought an asylum within the United States; on this case his delivery was demanded by the Minister of the King of Great Britain.

It is manifest that the case stated, if supported by proof, is within the letter of the article, provided a murder committed in a British frigate, on the high seas, be committed within the jurisdiction of that nation... The principle is, that the jurisdiction of a nation extends to the whole of its territory, and to its own citizens in every part of the world. The laws of a nation in every situation where those laws are really extended to them...

According to the practice of the world, then, and the opinions of writers on the law of nations, the murder committed on board of a British frigate navigating the high seas, was a murder committed within the jurisdiction of the British nation...

[T]he murder with which Thomas Nash was charged, was not committed within the jurisdiction of the United States, and, consequently, that the case stated was completely within the letter and spirit of the twenty-seventh article of the treaty between the two nations. If the necessary evidence was produced, he ought to have been delivered up to justice. It was an act to which the American nation was bound by a most solemn compact. To have tried him for the murder would have been mere mockery. To have condemned and executed him, the court having no jurisdiction, would have been murder. To have acquitted and discharged him would have been a breach of faith, and a violation of national duty.

But it has been contended that, although Thomas Nash ought to have been delivered up to the British Minister, on the requisition made by him in the name of his Government, yet, the interference of the President was improper...
[T]o what department was the power in question allotted?

The gentleman from New York had relied on the second section of the third article of the Constitution, which enumerates the cases to which the Judicial power of the United States extends, as expressly including that now under consideration... By the Constitution, the Judicial power of the United States is extended to all cases in law and equity, arising under the Constitution, laws, and treaties of the United States... A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision. If the Judicial power extended to every question under the Constitution, it would involve almost every subject proper for Legislative discussion and decision; if, to every question under the laws and treaties of the United States, it would involve almost every subject on which the Executive could act. The division of power which the gentleman had stated, could exist no longer, and the other departments would be swallowed up by the Judiciary...

By extending the Judicial power to all cases in law and equity, the Constitution had never been understood to confer on that department any political power whatever. To come within this description, a question must assume a legal form for forensic litigation and judicial decision. There must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit.

A case in law or equity proper for judicial decision may arise under a treaty, where the rights of individuals acquired or secured by a treaty are to be asserted or defended in court... But the Judicial power cannot extend to political compacts; as the establishment of the boundary line between the American and British dominions; the case of the late guarantee in our Treaty with France, or the case of the delivery of a murderer under the twenty-seventh article of our present Treaty with Britain...

What power does a court possess to seize any individual and determine that he shall be adjudged by a foreign tribunal? Surely our courts possess no such power...

It is a full authority to show that, in the opinion always held by the American Government, a case like that of Thomas Nash is a case for Executive and not Judicial decision...

It has already been shown that the courts of the United States were incapable of trying the crime for which Thomas Nash was delivered up to justice. The question to be determined was, not how his crime should be tried and punished, but whether he should be delivered up to a foreign tribunal, which was alone capable of trying and punishing him. A provision for the trial of crimes in the
courts of the United States is clearly not a provision for the performance of a national compact for the surrender to a foreign Government of an offender against that Government...

The gentleman from Pennsylvania and the gentleman from Virginia have both contended that this was a case proper for the decision of the courts, because points of law occurred, and points of law must have been decided in its determination.

The points of law which must have been decided, are stated by the gentleman from Pennsylvania to be, first, a question whether the offence was committed within the British jurisdiction; and, secondly, whether the crime charged was comprehended within the treaty.

It is true, sir, these points of law must have occurred, and must have been decided; but it by no means follows that they could only have been decided in court. A variety of legal questions must present themselves in the performance of every part of Executive duty, but these questions are not therefore to be decided in court...

The question whether vessels captured within three miles of the American coast, or by privateers fitted out in the American ports, were legally captured or not, and whether the American Government was bound to restore them, if in its power, were questions of law; but they were questions of political law, proper to be decided, and they were decided by the Executive, and not by the courts...

So the casus foederis, under the twenty-seventh article of the treaty with Great Britain, is a question of law, but of political law. The question to be decided is, whether the particular case proposed be one in which the nation has bound itself to act, and this is a question depending on principles never submitted to courts.

If a murder should be committed within the United States, and the murderer should seek an asylum in Britain, the question whether the casus foederis of the twenty-seventh article has occurred, so that his delivery ought to be demanded, would be a question of law, but no man would say it was a question which ought to be decided in the courts...

The case was in its nature a national demand made upon the nation. The parties were the two nations. They cannot come into court to litigate their claims, nor can a court decide on them. Of consequence, the demand is not a case for judicial cognizance.

The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him.
He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.

He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he, and he alone, possesses the means of executing it.

The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person...

The treaty, stipulating that a murderer shall be delivered up to justice, is as obligatory as an act of Congress making the same declaration...

The Executive is not only the Constitutional department, but seems to be the proper department to which the power in question may most wisely and more safely be confided.

The department which is entrusted with the whole foreign intercourse of the nation, with the negotiation of all its treaties, with the power of demanding a reciprocal performance of the article, which is accountable for the nation for the violation of its engagements with foreign nations, and for the consequences resulting from such violation, seems the proper department to be entrusted with the execution of a national contract like that under consideration.

If, at any time, policy may temper the strict execution of the contract, where may that political discretion be placed so safely as in the department whose duty it is to understand precisely the state of the political intercourse and connexion between the United States and foreign nations, to understand the manner in which the particular stipulation is explained and performed by foreign nations, and to understand completely the state of the Union?...

It is then demonstrated, that, according to the principles of the American Government, the question whether the nation has or has not bound itself to deliver up any individual, charged with having committed murder or forgery within the jurisdiction of Britain, is a question the power to decide which rests alone with the Executive department.

It remains to inquire whether, in exercising this power, and in performing the duty it enjoins, the President has committed an unauthorized and dangerous interference with judicial decisions...

It is not the privilege, it is the sad duty of courts to administer criminal judgment.
2. **John Adams**  
Representative John Marshall’s Defense of President Adams

It is a duty to be performed at the demand of the nation, and with which the nation has a right to dispense. If judgment of death is to be pronounced, it must be at the prosecution of the nation, and the nation may at will stop that prosecution. In this respect the President expresses constitutionally the will of the nation; and may rightfully, as was done in the case at Trenton, enter a _nolle prosequi_, or direct that the criminal be prosecuted no farther. This is no interference with judicial decisions, nor any invasion, of the province of a court. It is the exercise of an indubitable and a Constitutional power… If the President determined that Thomas Nash ought to have been delivered up to the British Government for a murder committed on board a British frigate, provided evidence of the fact was adduced, it was a question which duty obliged him to determine, and which he determined rightly. If, in consequence, of this determination, he arrested the proceedings of a court on a national prosecution, he had a right to arrest and to stop them, and the exercise of this right was a necessary consequence of the determination of the principal question…

It has then been demonstrated—

1st. That the case of Thomas Nash, as stated to the President, was completely within the twenty-seventh article of the treaty between the United States and Great Britain;

2d. That this question was proper for Executive, and not for Judicial, decision; and,

3d. That in deciding it, the President is not chargeable with an interference with Judicial decisions.
August 12, 1803.

DEAR SIR

...It gives me occasion to write a word to you on the subject of Louisiana, which being a new one, an interchange of sentiments may produce correct ideas before we are to act on them...

This treaty must of course be laid before both Houses, because both have important functions to exercise respecting it. They, I presume, will see their duty to their country in ratifying & paying for it, so as to secure a good which would otherwise probably be never again in their power. But I suppose they must then appeal to the nation for an additional article to the Constitution, approving & confirming an act which the nation had not previously authorized. The constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union. The Executive in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution. The Legislature in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify & pay for it, and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves had they been in a situation to do it. It is the case of a guardian, investing the money of his ward in purchasing an important adjacent territory; & saying to him when of age, I did this for your good; I pretend to no right to bind you: you may disavow me, and I must get out of the scrape as I can: I thought it my duty to risk myself for you. But we shall not be disavowed by the nation, and their act of indemnity will confirm & not weaken the Constitution, by more strongly marking out its lines...

THOMAS JEFFERSON.
3. Thomas Jefferson
Marbury v. Madison

Supreme Court of the United States

Marbury
v.
Madison

5 U.S. 137 (1803).

MARSHALL.

Opinion of the court.

At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to shew cause why a mandamus should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

No cause has been shewn, and the present motion is for a mandamus...

The first object of inquiry is,

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

His right originates in an act of congress passed in February 1801, concerning the district of Columbia.

After dividing the district into two counties, the 11th section of this law, enacts, “that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office for five years.

It appears, from the affidavits, that in compliance with this law, a commission for William Marbury as a justice of peace for the county of Washington, was signed by John Adams, then president of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out...

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the President. He is to affix the seal of the United States to the commission, and is to record it...

Mr. Marbury, then, since his commission was signed by the President, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of this country.
To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which is,

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

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection...

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It behoves us then to enquire whether there be in its composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress...

It is then the opinion of the court,

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

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

It remains to be inquired whether,

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

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

2dly. The power of this court.

1st. The nature of the writ.

Blackstone, in the 3d volume of his commentaries, page 110, defines a mandamus to be, “a command issuing in the king’s name from the court of king’s
bench, and directed to any person, corporation, or inferior court of judicature within the king’s dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king’s bench has previously determined, or at least supposes, to be consonant to right and justice.”

Lord Mansfield, in 3d Burrows 1266, in the case of the King v. Baker, et al. states with much precision and explicitness the cases in which this writ may be used.

“Whenever,” says that very able judge, “there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern, or attended with profit) and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government.”…

These circumstances certainly concur in this case.

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy…

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

Whether it can issue from this court.

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

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

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.
In the distribution of this power it is declared that “the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction.”

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

To enable this court then to issue a mandamus, it must be shewn to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction...

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

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

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

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

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall,
3. Thomas Jefferson

Marbury v. Madison

however, receive a more attentive consideration.

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

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

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

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

The rule must be discharged.
4. James Madison
Veto Message on Internal Improvements Bill

Veto Message on Internal Improvements Bill

March 3, 1817.

To the House of Representatives of the United States:

Having considered the bill this day presented to me entitled “An act to set apart and pledge certain funds for internal improvements,” and which sets apart and pledges funds “for constructing roads and canals, and improving the navigation of water courses, in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defense,” I am constrained by the insuperable difficulty I feel in reconciling the bill with the Constitution of the United States to return it with that objection to the House of Representatives, in which it originated.

The legislative powers vested in Congress are specified and enumerated in the eighth section of the first article of the Constitution, and it does not appear that the power proposed to be exercised by the bill is among the enumerated powers, or that it falls by any just interpretation within the power to make laws necessary and proper for carrying into execution those or other powers vested by the Constitution in the Government of the United States.

“The power to regulate commerce among the several States” can not include a power to construct roads and canals, and to improve the navigation of water courses in order to facilitate, promote, and secure such a commerce without a latitude of construction departing from the ordinary import of the terms strengthened by the known inconveniences which doubtless led to the grant of this remedial power to Congress.

To refer the power in question to the clause “to provide for the common defense and general welfare” would be contrary to the established and consistent rules of interpretation, as rendering the special and careful enumeration of powers which follow the clause nugatory and improper. Such a view of the Constitution would have the effect of giving to Congress a general power of legislation instead of the defined and limited one hitherto understood to belong to them, the terms “common defense and general welfare” embracing every object and act within the purview of a legislative trust. It would have the effect of subjecting both the Constitution and laws of the several States in all cases not specifically exempted to be superseded by laws of Congress, it being expressly declared “that the Constitution of the United States and laws made in pursuance thereof shall be the supreme law of the land, and the judges of every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.” Such a view of the Constitution, finally, would have the effect of excluding the judicial authority of the United States from its participation in
guarding the boundary between the legislative powers of the General and the State Governments, inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision.

A restriction of the power “to provide for the common defense and general welfare” to cases which are to be provided for by the expenditure of money would still leave within the legislative power of Congress all the great and most important measures of Government, money being the ordinary and necessary means of carrying them into execution.

If a general power to construct roads and canals, and to improve the navigation of water courses, with the train of powers incident thereto, be not possessed by Congress, the assent of the States in the mode provided in the bill can not confer the power. The only cases in which the consent and cession of particular States can extend the power of Congress are those specified and provided for in the Constitution.

I am not unaware of the great importance of roads and canals and the improved navigation of water courses, and that a power in the National Legislature to provide for them might be exercised with signal advantage to the general prosperity. But seeing that such a power is not expressly given by the Constitution, and believing that it can not be deduced from any part of it without an inadmissible latitude of construction and a reliance on insufficient precedents; believing also that the permanent success of the Constitution depends on a definite partition of powers between the General and the State Governments, and that no adequate landmarks would be left by the constructive extension of the powers of Congress as proposed in the bill, I have no option but to withhold my signature from it, and to cherishing the hope that its beneficial objects may be attained by a resort for the necessary powers to the same wisdom and virtue in the nation which established the Constitution in its actual form and providently marked out in the instrument itself a safe and practicable mode of improving it as experience might suggest.

JAMES MADISON.
CHAPTER 5

5. James Monroe
McCullough v. Maryland

Supreme Court of United States
McCullough
v.
Maryland

17 U.S. 316 (1819).

MARSHALL, Ch. J., delivered the opinion of the court.

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government...

The first question made in the cause is--has congress power to incorporate a bank?...

This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted...

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, ‘anything in the constitution or laws of any state to the contrary notwithstanding.’

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described...

Although, among the enumerated powers of government, we do not find the word ‘bank’ or ‘incorporation,’ we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended, that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended,
that a government, intrusted with such ample powers, on the due execution of
which the happiness and prosperity of the nation so vitally depends, must also
be intrusted with ample means for their execution. The power being given, it is
the interest of the nation to facilitate its execution...

The government which has a right to do an act, and has imposed on it, the duty
of performing that act, must, according to the dictates of reason, be allowed to
select the means; and those who contend that it may not select any appropriate
means, that one particular mode of effecting the object is excepted, take upon
themselves the burden of establishing that exception...

The power of creating a corporation is never used for its own sake, but for
the purpose of effecting something else. No sufficient reason is, therefore,
perceived, why it may not pass as incidental to those powers which are expressly
given, if it be a direct mode of executing them.

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

To employ the means necessary to an end, is generally understood as employing
any means calculated to produce the end, and not as being confined to those
single means, without which the end would be entirely unattainable...

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

If a corporation may be employed, indiscriminately with other means, to carry
into execution the powers of the government, no particular reason can be
assigned for excluding the use of a bank, if required for its fiscal operations.
To use one, must be within the discretion of congress, if it be an appropriate
mode of executing the powers of government. That it is a convenient, a useful,
and essential instrument in the prosecution of its fiscal operations, is not now a
subject of controversy...
After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land...

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

2. Whether the state of Maryland may, without violating the constitution, tax that branch?...

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve: 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve: 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme...

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied...

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void...
5. **James Monroe**  
The Monroe Doctrine

**The Monroe Doctrine**  

December 2, 1823.

At the proposal of the Russian Imperial Government, made through the minister of Emperor residing here, a full power and instructions have been transmitted to the Minister of the United States at St. Petersburgh to arrange, by amicable negotiation, the respective rights and interests of the two nations on the northwest coast of this continent. A similar proposal has been made by His Imperial Majesty to the Government of Great Britain, which has likewise been acceded to. The Government of the United States has been desirous, by this friendly proceeding, of manifesting the great value which they have invariably attached to the friendship of the Emperor, and their solicitude to cultivate the best understanding with his Government. In the discussions to which this interest has given rise, and in the arrangements by which they may terminate the occasion has been judged proper for asserting, as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers.

It was stated at the commencement of the last session that a great effort was then making in Spain and Portugal to improve the condition of the people of those countries, and that it appeared to be conducted with extraordinary moderation. It need scarcely be remarked that the result has been so far very different from what was then anticipated. Of events in that quarter of the globe, with which we have so much intercourse and from which we derive our origin, we have always been anxious and interested spectators. The citizens of the United States cherish sentiments the most friendly in favor of the liberty and happiness of their fellowmen on that side of the Atlantic. In the wars of the European powers in matters relating to themselves we have never taken any part, nor does it comport with our policy so to do. It is only when our rights are invaded or seriously menaced that we resent injuries or make preparation for our defense. With the movements in this hemisphere we are of necessity more immediately connected, and by causes which must be obvious to all enlightened and impartial observers. The political system of the allied powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective Governments; and to the defense of our own, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted. We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace...
5. James Monroe
The Monroe Doctrine

and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the Governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power in any other light than as the manifestation of an unfriendly disposition toward the United States. In the war between those new Governments and Spain we declared our neutrality at the time of their recognition, and to this we have adhered and shall continue to adhere, provided no change shall occur which, in the judgment of the competent authorities of this Government, shall make a corresponding change on the part of the United States indispensable to their security.

The late events in Spain and Portugal show that Europe is still unsettled. Of this important fact no stronger proof can be adduced than that the allied powers should have thought it proper, on any principle satisfactory to themselves, to have interposed by force in the internal concerns of Spain. To what extent such interposition may be carried, on the same principle, is a question in which all independent powers whose governments differ from theirs are interested, even those most remote, and surely none more so than the United States. Our policy in regard to Europe, which was adopted at an early stage of the wars which have so long agitated that quarter of the globe, nevertheless remains the same, which is, not to interfere in the internal concerns of any of its powers; to consider the government de facto as the legitimate government for us; to cultivate friendly relations with it, and to preserve those relations by a frank, firm, and manly policy, meeting in all instances the just claims of every power, submitting to injuries from none. But in regard to these continents circumstances are eminently and conspicuously different.

It is impossible that the allied powers should extend their political system to any portion of either continent without endangering our peace and happiness, nor can anyone believe that our southern brethren, if left to themselves, would adopt it of their own accord. It is equally impossible, therefore that we should behold such interposition in any form with indifference. If we look to the comparative strength and resources of Spain and those new Governments, and their distance from each other, it must be obvious that she can never subdue them. It is still the true policy of the United States to leave the parties to themselves, in the hope that other powers will pursue the same course.
6. John Quincy Adams
First Annual Message to Congress

December 6, 1825.

Fellow Citizens of the Senate and of the House of Representatives:

...Among the powers specifically granted to Congress by the Constitution are those of establishing uniform laws on the subject of bankruptcies throughout the United States... [N]o systems have yet been devised for fulfilling to the satisfaction of the community the duties prescribed by these grants of power.

To conciliate the claim of the individual citizen to the enjoyment of personal liberty, with the effective obligation of private contracts, is the difficult problem to be solved by a law of bankruptcy. These are objects of the deepest interest to society, affecting all that is precious in the existence of multitudes of persons, many of them in the classes essentially dependent and helpless, of the age requiring nurture, and of the sex entitled to protection from the free agency of the parent and the husband...

It were, indeed, a vain and dangerous illusion to believe that in the present or probable condition of human society a commerce so extensive and so rich as ours could exist and be pursued in safety without the continual support of a military marine -- the only arm by which the power of this Confederacy can be estimated or felt by foreign nations, and the only standing military force which can never be dangerous to our own liberties at home. A permanent naval peace establishment, therefore, adapted to our present condition, and adaptable to that gigantic growth with which the nation is advancing in its career, is among the subjects which have already occupied the foresight of the last Congress, and which will deserve your serious deliberations...

[T]he want of a naval school of instruction, corresponding with the Military Academy at West Point, for the formation of scientific and accomplished officers, is felt with daily increasing aggravation...

Upon this first occasion of addressing the Legislature of the Union, with which I have been honored, in presenting to their view the execution so far as it has been effected of the measures sanctioned by them for promoting the internal improvement of our country, I can not close the communication without recommending to their calm and persevering consideration the general principle in a more enlarged extent. The great object of the institution of civil government is the improvement of the condition of those who are parties to the social compact, and no government, in what ever form constituted, can accomplish the lawful ends of its institution but in proportion as it improves the condition of those over whom it is established. Roads and canals, by multiplying and facilitating the communications and intercourse between distant regions and...
multitudes of men, are among the most important means of improvement. But moral, political, intellectual improvement are duties assigned by the Author of Our Existence to social no less than to individual man.

For the fulfillment of those duties governments are invested with power, and to the attainment of the end—the progressive improvement of the condition of the governed— the exercise of delegated powers is a duty as sacred and indispensable as the usurpation of powers not granted is criminal and odious.

Among the first, perhaps the very first, instrument for the improvement of the condition of men is knowledge, and to the acquisition of much of the knowledge adapted to the wants, the comforts, and enjoyments of human life public institutions and seminaries of learning are essential. So convinced of this was the first of my predecessors in this office, now first in the memory, as, living, he was first in the hearts, of our country-men, that once and again in his addresses to the Congresses with whom he cooperated in the public service he earnestly recommended the establishment of seminaries of learning, to prepare for all the emergencies of peace and war—a national university and a military academy...

In assuming her station among the civilized nations of the earth it would seem that our country had contracted the engagement to contribute her share of mind, of labor, and of expense to the improvement of those parts of knowledge which lie beyond the reach of individual acquisition, and particularly to geographical and astronomical science. Looking back to the history only of the half century since the declaration of our independence, and observing the generous emulation with which the Governments of France, Great Britain, and Russia have devoted the genius, the intelligence, the treasures of their respective nations to the common improvement of the species in these branches of science, is it not incumbent upon us to inquire whether we are not bound by obligations of a high and honorable character to contribute our portion of energy and exertion to the common stock... 

We have been partakers of that improvement and owe for it a sacred debt, not only of gratitude, but of equal or proportional exertion in the same common cause...

In inviting the attention of Congress to the subject of internal improvements upon a view thus enlarged it is not my desire to recommend the equipment of an expedition for circumnavigating the globe for purposes of scientific research and inquiry. We have objects of useful investigation nearer home, and to which our cares may be more beneficially applied. The interior of our own territories has yet been very imperfectly explored... I would suggest the expediency of connecting the equipment of a public ship for the exploration of the whole north-west coast of this continent...
Connected with the establishment of an university, or separate from it, might be undertaken the erection of an astronomical observatory, with provision for the support of an astronomer, to be in constant attendance of observation upon the phenomena of the heavens, and for the periodical publication of his observances. [I]t is with no feeling of pride as an American that the remark may be made that on the comparatively small territorial surface of Europe there are existing upward of 130 of these light-houses of the skies, while throughout the whole American hemisphere there is not one…

The naval armaments, which at an early period forced themselves upon the necessities of the Union, soon led to the establishment of a Department of the Navy. But the Departments of Foreign Affairs and of the Interior, which early after the formation of the Government had been united in one, continue so united to this time, to the unquestionable detriment of the public service. The multiplication of our relations with the nations and Governments of the Old World has kept pace with that of our population and commerce, while within the last 10 years a new family of nations in our own hemisphere has arisen among the inhabitants of the earth, with whom our intercourse, commercial and political, would of itself furnish occupation to an active and industrious department…

The laws relating to the administration of the Patent Office are deserving of much consideration and perhaps susceptible of some improvement. The grant of power to regulate the action of Congress upon this subject has specified both the end to be obtained and the means by which it is to be effected, “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”. If an honest pride might be indulged in the reflection that on the records of that office are already found inventions the usefulness of which has scarcely been transcended in the annals of human ingenuity, would not its exultation be allayed by the inquiry whether the laws have effectively insured to the inventors the reward destined to them by the Constitution -- even a limited term of exclusive right to their discoveries?...

The Constitution under which you are assembled is a charter of limited powers. After full and solemn deliberation upon all or any of the objects which, urged by an irresistible sense of my own duty, I have recommended to your attention should you come to the conclusion that, however desirable in themselves, the enactment of laws for effecting them would transcend the powers committed to you by that venerable instrument which we are all bound to support, let no consideration induce you to assume the exercise of powers not granted to you by the people.

But if the power to exercise exclusive legislation in all cases what so ever over the District of Columbia; if the 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; if the power to regulate commerce with foreign nations and among the several States and with the Indian tribes, to fix the standard of weights and measures, to establish post offices and post roads, to declare war, to raise and support armies, to provide and maintain a navy, to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, and to make all laws which shall be necessary and proper for carrying these powers into execution -- if these powers and others enumerated in the Constitution may be effectually brought into action by laws promoting the improvement of agriculture, commerce, and manufactures, the cultivation and encouragement of the mechanic and of the elegant arts, the advancement of literature, and the progress of the sciences, ornamental and profound, to refrain from exercising them for the benefit of the people themselves would be to hide in the earth the talent committed to our charge -- would be treachery to the most sacred of trusts...

While foreign nations less blessed with that freedom which is power than ourselves are advancing with gigantic strides in the career of public improvement, were we to slumber in indolence or fold up our arms and proclaim to the world that we are palsied by the will of our constituents, would it not be to cast away the bounties of Providence and doom ourselves to perpetual inferiority?...

Finally, fellow citizens, I shall await with cheering hope and faithful cooperation the result of your deliberations, assured that, without encroaching upon the powers reserved to the authorities of the respective States or to the people, you will, with a due sense of your obligations to your country and of the high responsibilities weighing upon yourselves, give efficacy to the means committed to you for the common good. And may He who searches the hearts of the children of men prosper your exertions to secure the blessings of peace and promote the highest welfare of your country.

JOHN QUINCY ADAMS.
Supreme Court of the United States

Worcester
v.
State of Georgia

31 U.S. 515 (1832).

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

...The defendant is a state, a member of the union, which has exercised the powers of government over a people who deny its jurisdiction, and are under the protection of the United States.

The plaintiff is a citizen of the state of Vermont, condemned to hard labour for four years in the penitentiary of Georgia; under colour of an act which he alleges to be repugnant to the constitution, laws, and treaties of the United States...

The indictment charges the plaintiff...with the offence of ‘residing within the limits of the Cherokee nation without a license,’ and ‘without having taken the oath to support and defend the constitution and laws of the state of Georgia.’

The defendant in the state court appeared in proper person, and filed the following plea:

‘...Samuel A. Worcester...comes and says, that this court ought not to take further cognizance of the action...because...he was, and still is, a resident in the Cherokee nation; and that the said supposed crime or crimes...were committed...in the said Cherokee nation, out of the jurisdiction of this court, and not in the county Gwinnett, or elsewhere, within the jurisdiction of this court: and this defendant saith, that he is a citizen of the state of Vermont...and that he entered the...Cherokee nation in the capacity of a duly authorised missionary..., under the authority of the president of the United States,...that he was, at the time of his arrest, engaged in preaching the gospel to the Cherokee Indians,...with the permission and approval of the said Cherokee nation, and in accordance with the humane policy of the government of the United States for the civilization and improvement of the Indians...and this defendant further saith...that several treaties have, from time to time, been entered into between the United States and the Cherokee nation of Indians...and, by which treaties, the United States of America acknowledge the said Cherokee nation to be a sovereign nation, authorised to govern themselves, and all persons who have settled within their territory, free from any right of legislative interference by the several states...in reference to acts done within their own territory; and, by which treaties, the whole of the territory now occupied by the Cherokee
nation...has been solemnly guarantied to them...

By these treaties...the aforesaid territory is acknowledged to lie without the jurisdiction of the several states composing the union of the United States; and, it is thereby specially stipulated, that the citizens of the United States shall not enter the aforesaid territory, even on a visit, without a passport from the governor of a state, or from some one duly authorised thereto, by the president of the United States...And this defendant saith, that the several acts charged in the bill of indictment were done...within the said territory so recognized as belonging to the said nation, and so...under the guarantee of the United States: that, for those acts, the defendant is not amenable to the laws of Georgia, nor to the jurisdiction of the courts of the said state; and that the laws of the state of Georgia...and, in particular, the act on which this indictment against this defendant is grounded...are repugnant to the aforesaid treaties; which, according to the constitution of the United States, compose a part of the supreme law of the land; and that these laws of Georgia are, therefore, unconstitutional, void, and of no effect...and that, therefore, this court has no jurisdiction...to try and punish this defendant for the said supposed offence...

We must inquire and decide whether the act of the legislature of Georgia, under which the plaintiff in error has been prosecuted and condemned, be consistent with, or repugnant to, the constitution, laws and treaties of the United States.

It has been said at the bar, that the acts of the legislature of Georgia seize on the whole Cherokee country, parcel it out among the neighbouring counties of the state, extend her code over the whole country, abolish its institutions and its laws, and annihilate its political existence.

If this be the general effect of the system, let us inquire into the effect of the particular statute and section on which the indictment is founded.

It enacts that ‘all white persons, residing within the limits of the Cherokee nation...without a license or permit from his excellency the governor...and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanour, and, upon conviction thereof, shall be punished by confinement to the penitentiary, at hard labour, for a term not less than four years.’...

The extra-territorial power of every legislature being limited in its action, to its own citizens or subjects, the very passage of this act is an assertion of jurisdiction over the Cherokee nation, and of the rights and powers consequent on jurisdiction.

The first step, then, in the inquiry, which the constitution and laws impose on this
CHAPTER 7

7. Andrew Jackson
Worcester v. State of Georgia

court, is an examination of the rightfulness of this claim...

After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing.

Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?

But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin...

From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts...manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.

In 1819, congress passed an act for promoting those humane designs of civilizing the neighbouring Indians, which had long been cherished by the executive. It enacts, ‘that, for the purpose of providing against the further decline and final extinction of the Indian tribes adjoining to the frontier settlements of the United States, and for introducing among them the habits and arts of civilization, the president of the United States shall be, and he is hereby authorized, in every case where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced with their own consent, to employ capable persons, of good moral character, to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing and arithmetic; and for performing such other duties as may be enjoined, according to such instructions and rules as the president may give and prescribe for the regulation of their conduct in the discharge of their duties.’

This act avowedly contemplates the preservation of the Indian nations as an object sought by the United States, and proposes to effect this object by
civilizing and converting them from hunters into agriculturists. Though the Cherokees had already made considerable progress in this improvement, it cannot be doubted that the general words of the act comprehend them. Their advance in the ‘habits and arts of civilization,’ rather encouraged perseverance in the laudable exertions still farther to meliorate their condition. This act furnishes strong additional evidence of a settled purpose to fix the Indians in their country by giving them security at home.

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.

Is this the rightful exercise of power, or is it usurpation?...

[The constitution] confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions...

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term ‘nation,’ so generally applied to them, means ‘a people distinct from others.’ The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words ‘treaty’ and ‘nation’ are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense...

[T]he king of Great Britain, at the treaty of peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties; extending to them, first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak
state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state...

The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

The act of the state of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity...

If the review which has been taken be correct, and we think it is, the acts of Georgia are repugnant to the constitution, laws, and treaties of the United States.

They interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union.

They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself...

The forcible seizure and abduction of the plaintiff in error, who was residing in the nation with its permission, and by authority of the president of the United States, is also a violation of the acts which authorise the chief magistrate to exercise this authority.

Will these powerful considerations avail the plaintiff in error? We think they will. He was seized, and forcibly carried away, while under guardianship of treaties guarantying the country in which he resided, and taking it under the protection of the United States. He was seized while performing, under the sanction of the chief magistrate of the union, those duties which the humane policy adopted by congress had recommended. He was apprehended, tried, and condemned, under colour of a law which has been shown to be repugnant to the constitution, laws, and treaties of the United States...

It is the opinion of this court that the judgment of the superior court for the county of Gwinnett, in the state of Georgia, condemning Samuel A. Worcester...
to hard labour, in the penitentiary of the state of Georgia, for four years, was pronounced by that court under colour of a law which is void, as being repugnant to the constitution, treaties, and laws of the United States, and ought, therefore, to be reversed and annulled...
CHAPTER 8

8. Martin Van Buren
The Amistad Case

The Amistad Case

40 U.S. 518 (1841).

Mr. Justice Story delivered the opinion of the Court.

This is the case of an appeal from the decree of the Circuit Court of the District of Connecticut, sitting in admiralty. The leading facts, as they appear upon the transcript of the proceedings, are as follows: On the 27th of June, 1839, the schooner L’Amistad, being the property of Spanish subjects, cleared out from the port of Havana, in the island of Cuba, for Puerto Principe, in the same island. On board of the schooner were the captain, Ransom Ferrer, and Jose Ruiz, and Pedro Montez, all Spanish subjects. The former had with him a negro boy, named Antonio, claimed to be his slave. Jose Ruiz had with him forty-nine negroes, claimed by him as his slaves, and stated to be his property, in a certain pass or document, signed by the Governor General of Cuba. Pedro Montez had with him four other negroes, also claimed by him as his slaves, and stated to be his property, in a similar pass or document, also signed by the Governor General of Cuba. On the voyage, and before the arrival of the vessel at her port of destination, the negroes rose, killed the captain, and took possession of her. On the 26th of August, the vessel was discovered by Lieutenant Gedney, of the United States brig Washington, at anchor on the high seas, at the distance of half a mile from the shore of Long Island. A part of the negroes were then on shore at Culloden Point, Long Island; who were seized by Lieutenant Gedney, and brought on board. The vessel, with the negroes and other persons on board, was brought by Lieutenant Gedney into the district of Connecticut, and there libelled for salvage in the District Court of the United States. A libel for salvage was also filed by Henry Green and Pelatiah Fordham, of Sag Harbour, Long Island. On the 18th of September, Ruiz and Montez filed claims and libels, in which they asserted their ownership of the negroes as their slaves, and of certain parts of the cargo, and prayed that the same might be “delivered to them, or to the representatives of her Catholic majesty, as might be most proper.” On the 19th of September, the Attorney of the United States, for the district of Connecticut, filed an information or libel, setting forth, that the Spanish minister had officially presented to the proper department of the government of the United States, a claim for the restoration of the vessel, cargo, and slaves, as the property of Spanish subjects, which had arrived within the jurisdictional limits of the United States, and were taken possession of by the said public armed brig of the United States; under such circumstances as made it the duty of the United States to cause the same to be restored to the true proprietors, pursuant to the treaty between the United States and Spain: and praying the Court, on its being made legally to appear that the claim of the Spanish minister was well founded, to make such order for the disposal of the vessel, cargo, and slaves, as would best enable the United States to comply with their treaty stipulations. But if it should
appear, that the negroes were persons transported from Africa, in violation of the laws of the United States, and brought within the United States contrary to the same laws; he then prayed the Court to make such order for their removal to the coast of Africa, pursuant to the laws of the United States, as it should deem fit…

On the 7th of January, 1840, the negroes, Cinque and others, with the exception of Antonio, by their counsel, filed an answer, denying that they were slaves, or the property of Ruiz and Montez, or that the Court could, under the Constitution or laws of the United States, or under any treaty, exercise any jurisdiction over their persons, by reason of the premises; and praying that they might be dismissed. They specially set forth and insist in this answer, that they were native born Africans; born free, and still of right ought to be free and not slaves; that they were, on or about the 15th of April, 1839, unlawfully kidnapped, and forcibly and wrongfully carried on board a certain vessel on the coast of Africa, which was unlawfully engaged in the slave trade, and were unlawfully transported in the same vessel to the island of Cuba, for the purpose of being there unlawfully sold as slaves; that Ruiz and Montez, well knowing the premises, made a pretended purchase of them: that afterwards, on or about the 28th of June, 1839, Ruiz and Montez, confederating with Ferrer, (captain of the Amistad,) caused them, without law or right, to be placed on board of the Amistad, to be transported to some place unknown to them, and there to be enslaved for life; that, on the voyage, they rose on the master, and took possession of the vessel, intending to return therewith to their native country, or to seek an asylum in some free state; and the vessel arrived, about the 26th of August, 1839, off Montauk Point, near Long Island; a part of them were sent on shore, and were seized by Lieutenant Gedney, and carried on board; and all of them were afterwards brought by him into the district of Connecticut…

On the 23d day of January, 1840, the District Court made a decree… [I]t rejected the claims of Ruiz and Montez for the delivery of the negroes… it rejected the claim made by the Attorney of the United States on behalf of the Spanish minister, for the restoration of the negroes under the treaty; but it decreed that they should be delivered to the President of the United States, to be transported to Africa, pursuant to the act of 3d March, 1819.

From this decree the District Attorney, on behalf of the United States, appealed to the Circuit Court… The Circuit Court, by a mere pro forma decree, affirmed the decree of the District Court… And from that decree the present appeal has been brought to this Court…

On the part of the United States, it has been contended, 1. That due and sufficient proof concerning the property has been made to authorize the restitution of the vessel, cargo, and negroes to the Spanish subjects on whose behalf they are claimed pursuant to the treaty with Spain, of the 27th of October, 1795…
The parties before the Court on the other side as appellees... the negroes, (Cinque, and others,) asserting themselves, in their answer, not to be slaves, but free native Africans, kidnapped in their own country, and illegally transported by force from that country; and now entitled to maintain their freedom...

The main controversy is, whether these negroes are the property of Ruiz and Montez, and ought to be delivered up; and to this, accordingly, we shall first direct our attention.

It has been argued on behalf of the United States, that the Court are bound to deliver them up; according to the treaty of 1795, with Spain, which has in this particular been continued in full force, by the treaty of 1819... The ninth article provides, “that all ships and merchandise, of what nature soever, which shall be rescued out of the hands of any pirates or robbers, on the high seas, shall be brought into some port of either state, and shall be delivered to the custody of the officers of that port, in order to be taken care of and restored entire to the true proprietor, as soon as due and sufficient proof shall be made concerning the property thereof.” This is the article on which the main reliance is placed on behalf of the United States, for the restitution of these negroes. To bring the case within the article, it is essential to establish, First, That these negroes, under all the circumstances, fall within the description of merchandise, in the sense of the treaty...

It is plain beyond controversy, if we examine the evidence, that these negroes never were the lawful slaves of Ruiz or Montez, or of any other Spanish subjects. They are natives of Africa, and were kidnapped there, and were unlawfully transported to Cuba, in violation of the laws and treaties of Spain, and the most solemn edicts and declarations of that government. By those laws, and treaties, and edicts, the African slave trade is utterly abolished; the dealing in that trade is deemed a heinous crime; and the negroes thereby introduced into the dominions of Spain, are declared to be free...

Upon the whole, our opinion is, that the decree of the Circuit Court, affirming that of the District Court, ought to be affirmed, except so far as it directs the negroes to be delivered to the President, to be transported to Africa, in pursuance of the act of the 3d of March, 1819; and, as to this, it ought to be reversed: and that the said negroes be declared to be free, and be dismissed from the custody of the Court, and go without day.
March 14, 1901.

To the People of the United States.

Benjamin Harrison, President of the United States from 1889 to 1893, died yesterday at 4:45 P.M., at his home in Indianapolis. In his death the country has been deprived of one of its greatest citizens. A brilliant soldier in his young manhood, he gained fame and rapid advancement by his energy and valor. As a lawyer he rose to be a leader of the bar. In the Senate he at once took and retained high rank as an orator and legislator; and in the high office of President he displayed extraordinary gifts as administrator and statesman. In public and in private life he set a shining example for his countrymen.

In testimony of the respect in which his memory is held by the Government and people of the United States, I do hereby direct that the flags on the Executive Mansion and the several Departmental buildings be displayed at half staff for a period of thirty days; and that suitable military and naval honors, under the orders of the Secretaries of War and of the Navy, be rendered on the day of the funeral.

Done at the city of Washington this 14th day of March, A.D. 1901, and of the Independence of the United States of America the one hundred and twenty-fifth.

WILLIAM MCKINLEY

By the President:

JOHN HAY,

Secretary of State.
10. Benjamin Harrison
Luther v. Borden

Supreme Court of the United States

Luther

v.

Borden

48 U.S. 1 (1849).

Mr. Chief Justice TANLEY delivered the opinion of the court.

This case has arisen out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842.

It is an action of trespass brought by Martin Luther... against Luther M. Borden and others, in the Circuit Court of the United States for the District of Rhode Island, for breaking and entering the plaintiff's house. The defendants justify upon the ground that large numbers of men were assembled in different parts of the State for the purpose of overthrowing the government by military force, and were actually levying war upon the State; that, in order to defend itself from this insurrection, the State was declared by competent authority to be under martial law; that the plaintiff was engaged in the insurrection; and that the defendants, being in the military service of the State, by command of their superior officer, broke and entered the house and searched the rooms for the plaintiff, who was supposed to be there concealed, in order to arrest him, doing as little damage as possible...

The existence and authority of the government under which the defendants acted was called in question; and the plaintiff insists, that, before the acts complained of were committed, that government had been displaced and annulled by the people of Rhode Island, and that the plaintiff was engaged in supporting the lawful authority of the State, and the defendants themselves were in arms against it...

The evidence shows that the defendants...acted under the authority of the government which was established in Rhode Island at the time of the Declaration of Independence, and which is usually called the charter government. For when the separation from England took place, Rhode Island did not, like the other States, adopt a new constitution, but continued the form of government established by the charter of Charles the Second in 1663...[I]t continued to be the established and unquestioned government of the State until the difficulties took place which have given rise to this action.

In this form of government no mode of proceeding was pointed out by which amendments might be made. It authorized the legislature to prescribe the qualification of voters, and in the exercise of this power the right of suffrage was confined to freeholders, until the adoption of the constitution of 1843...
Many of the citizens became dissatisfied with the charter government, and particularly with the restriction upon the right of suffrage. Memorials were addressed to the legislature upon this subject, urging the justice and necessity of a more liberal and extended rule. But they failed to produce the desired effect. And thereupon meetings were held and associations formed by those who were in favor of a more extended right of suffrage, which finally resulted in the election of a convention to form a new constitution to be submitted to the people for their adoption or rejection. The persons chosen as above mentioned came together and framed a constitution, by which the right of suffrage was extended to every male citizen of twenty-one years of age, who had resided in the State for one year, and in the town in which he offered to vote for six months, next preceding the election. The convention also prescribed the manner in which this constitution should be submitted to the decision of the people,—permitting every one to vote on that question who was an American citizen, twenty-one years old, and who had a permanent residence or home in the State...

Upon the return of the votes, the convention declared that the constitution was adopted and ratified by a majority of the people of the State, and was the paramount law and constitution of Rhode Island. And it communicated this decision to the governor under the charter government, for the purpose of being laid before the legislature; and directed elections to be held for a governor, members of the legislature, and other officers under the new constitution. These elections accordingly took place, and the governor, lieutenant-governor, secretary of state, and senators and representatives thus appointed assembled at the city of Providence on May 3d, 1842, and immediately proceeded to organize the new government, by appointing the officers and passing the laws necessary for that purpose.

The charter government did not, however, admit the validity of these proceedings, nor acquiesce in them. On the contrary, in January, 1842, when this new constitution was communicated to the governor, and by him laid before the legislature, it passed resolutions declaring all acts done for the purpose of imposing that constitution upon the State to be an assumption of the powers of government, in violation of the rights of the existing government and of the people at large; and that it would maintain its authority and defend the legal and constitutional rights of the people...

It was supported by a large number of the citizens of the State, claiming to be a majority, who regarded the proceedings of the adverse party as unlawful and disorganizing, and maintained that, as the existing government had been established by the people of the State, no convention to frame a new constitution could be called without its sanction; and that the times and places of taking the votes, and the officers to receive them, and the qualification of the voters, must be previously regulated and appointed by law...
To maintain its authority, Thomas W. Dorr, who had been elected governor under the new constitution, prepared to assert the authority of that government by force, and many citizens assembled in arms to support him. The charter government thereupon passed an act declaring the State under martial law, and at the same time proceeded to call out the militia, to repel the threatened attack and to subdue those who were engaged in it. In this state of the contest, the house of the plaintiff, who was engaged in supporting the authority of the new government, was broken and entered in order to arrest him. The defendants were, at the time, in the military service of the old government, and in arms to support its authority.

It appears, also, that the charter government at its session of January, 1842, took measures to call a convention to revise the existing form of government; and after various proceedings...a new constitution was formed by a convention elected under the authority of the charter government, and afterwards adopted and ratified by the people...This new government went into operation in May, 1843, at which time the old government formally surrendered all its powers; and this constitution has continued ever since to be the admitted and established government of Rhode Island...

After an unsuccessful attempt made by Mr. Dorr in May, 1842, at the head of a military force, to get possession of the State arsenal at Providence, in which he was repulsed, and an assemblage of some hundreds of armed men under his command at Chepatchet in the June following, which dispersed upon the approach of the troops of the old government, no further effort was made to establish it; and until the constitution of 1843 went into operation the charter government continued to assert its authority and exercise its powers...

The plaintiff contends that the charter government was displaced, and ceased to have any lawful power, after the organization, in May, 1842, of the government which he supported...[H]e insists that it was the lawful and established government, upon the ground that it was ratified by a large majority of the male people of the State of the age of twenty-one and upwards, and also by a majority of those who were entitled to vote for general officers under the then existing laws of the State...

In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision. In Rhode Island, the question has been directly decided. Prosecutions were there instituted against some of the persons who had been active in the forcible opposition to the old government. And in more than one of the cases evidence was offered on the part of the
defence... for the purpose of showing that the proposed constitution had been adopted by the people of Rhode Island, and had, therefore, become the established government, and consequently that the parties accused were doing nothing more than their duty in endeavouring to support it.

But the courts uniformly held that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the State, without the aid of oral evidence or the examination of witnesses; that, according to the laws and institutions of Rhode Island, no such change had been recognized by the political power; and that the charter government was the lawful and established government of the State during the period in contest, and that those who were in arms against it were insurgents, and liable to punishment... Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it...

The point, then, raised here has been already decided by the courts of Rhode Island. The question relates, altogether, to the constitution and laws of that State; and the well settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State...

Undoubtedly the courts of the United States have certain powers under the Constitution and laws of the United States which do not belong to the State courts. But the power of determining that a State government has been lawfully established, which the courts of the State disown and repudiate, is not one of them. Upon such a question the courts of the United States are bound to follow the decisions of the State tribunals, and must therefore regard the charter government as the lawful established government during the time of this contest.

Besides, if the Circuit Court had entered upon this inquiry, by what rule could it have determined the qualification of voters upon the adoption or rejection of the proposed constitution, unless there was some previous law of the State to guide it? It is the province of a court to expound the law, not to make it. And certainly it is no part of the judicial functions of any court of the United States to prescribe the qualification of voters in a State, giving the right to those to whom it is denied by the written and established constitution and laws of the State, or taking it away from those to whom it is given...
Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal...

So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfil this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the act of February 28, 1795, provided, that, ‘in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection.’

By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide...
which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress...

Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over...

The remaining question is whether the defendants, acting under military orders issued under the authority of the government, were justified in breaking and entering the plaintiff’s house... Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the State authorities. And, unquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority...The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority... And in that state of things the officers engaged in its military service might lawfully arrest any one, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed...
“Spot Resolutions” on Mexican War

Offered in the United States House of Representatives

December 22, 1847.

Whereas the President of the United States, in his message of May 11, 1846, has declared that “the Mexican Government not only refused to receive him, [the envoy of the United States,] or listen to his propositions, but, after a long-continued series of menaces, has at last invaded our territory and shed the blood of our fellow-citizens on our own soil.”

And again, in his message of December 8, 1846, that “we had ample cause of war against Mexico long before the breaking out of hostilities; but even then we forbore to take redress into our own hands until Mexico herself became the aggressor, by invading our soil in hostile array, and shedding the blood of our citizens.”

And yet again, in his message of December 7, 1847, that “the Mexican Government refused even to hear the terms of adjustment which he [our minister of peace] was authorized to propose, and finally, under wholly unjustifiable pretexts, involved the two countries in war, by invading the territory of the State of Texas, striking the first blow, and shedding the blood of our citizens on our own soil.”

And whereas this House is desirous to obtain a full knowledge of all the facts which go to establish whether the particular spot on which the blood of our citizens was so shed was or was not at that time our own soil; therefore,

Resolved By the House of Representatives, That the President of the United States be respectfully requested to inform this House --

1st. Whether the spot on which the blood of our citizens was shed, as in his messages declared, was or was not within the territory of Spain, at least after the treaty of 1819, until the Mexican revolution.

2d. Whether that spot is or is not within the territory which was wrested from Spain by the revolutionary Government of Mexico.

3d. Whether that spot is or is not within a settlement of people, which settlement has existed ever since long before the Texas revolution, and until its inhabitants fled before the approach of the United States army.

4th. Whether that settlement is or is not isolated from any and all other settlements by the Gulf and the Rio Grande on the south and west, and by wide uninhabited regions on the north and east.
5th. Whether the people of that settlement, or a majority of them, or any of them, have ever submitted themselves to the government or laws of Texas or the United States, by consent or compulsion, either by accepting office, or voting at elections, or paying tax, or serving on juries, or having process served upon them, or in any other way.

6th. Whether the people of that settlement did or did not flee from the approach of the United States army, leaving unprotected their homes and their growing crops, before the blood was shed, as in the messages stated; and whether the first blood, so shed, was or was not shed within the enclosure of one of the people who had thus fled from it.

7th. Whether our citizens, whose blood was shed, as in his message declared, were or were not, at that time, armed officers and soldiers, sent into that settlement by the military order of the President, through the Secretary of War.

8th. Whether the military force of the United States was or was not sent into that settlement after General Taylor had more than once intimated to the War Department that, in his opinion, no such movement was necessary to the defense or protection of Texas.
12. Zachary Taylor
Prigg v. Pennsylvania

Supreme Court of the United States

Prigg
v.
Pennsylvania

41 U.S. 539 (1842).

STORY, Justice, delivered the opinion of the court.

... The plaintiff in error was indicted... for having, with force and violence, taken and carried away from that county, to the state of Maryland, a certain negro woman, named Margaret Morgan, with a design and intention of selling and disposing of, and keeping her, as a slave or servant for life, contrary to a statute of Pennsylvania, passed on the 26th of March 1826. That statute... provides, that if any person or persons shall... by force and violence, take and carry away... and shall, by fraud or false pretence, seduce... or shall attempt to take, carry away or seduce, any negro or mulatto, from any part of that commonwealth, with a design and intention of selling and disposing of... or of keeping and detaining... such negro or mulatto, as a slave or servant for life, or for any term whatsoever; every such person or persons... shall, on conviction thereof, be deemed guilty of felony...

[The jury found... that the negro woman, Margaret Morgan, was a slave for life, and held to labor and service under and according to the laws of Maryland, to a certain Margaret Ashmore, a citizen of Maryland; that the slave escaped and fled from Maryland, into Pennsylvania, in 1832; that the plaintiff in error, being legally constituted the agent and attorney of the said Margaret Ashmore, in 1837, caused the said negro woman to be taken and apprehended as a fugitive from labor, by a state constable, under a warrant from a Pennsylvania magistrate; that the said negro woman was thereupon brought before the said magistrate, who refused to take further cognisance of the case; and thereupon, the plaintiff in error did remove... the said negro woman and her children, out of Pennsylvania, into Maryland, and did deliver the said negro woman and her children into the custody and possession of the said Margaret Ashmore...]

The counsel for the plaintiff in error have contended, that the statute of Pennsylvania is unconstitutional; first, because congress has the exclusive power of legislation upon the subject-matter, under the constitution of the United States, and under the act of the 12th of February 1793, ch. 51, which was passed in pursuance thereof; secondly, that if this power is not exclusive in congress, still the concurrent power of the state legislatures is suspended by the actual exercise of the power of congress; and thirdly, that if not suspended, still the statute of Pennsylvania, in all its provisions applicable to this case, is in direct collision with the act of congress, and therefore, is unconstitutional and void.
The counsel for Pennsylvania maintain the negative of all those points... There are two clauses in the constitution upon the subject of fugitives... They are both contained in the second section of the fourth article, and are in the following words: '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.'

The object of this clause was to secure to the citizens of the slave-holding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude...

The clause contains a positive and unqualified recognition of the right of the owner in the slave... Under and in virtue of the constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it, without any breach of the peace or any illegal violence. In this sense, and to this extent, this clause of the constitution may properly be said to execute itself, and to require no aid from legislation, state or national...

Many cases must arise, in which, if the remedy of the owner were confined to the mere right of seizure and recapture, he would be utterly without any adequate redress. He may not be able to lay his hands upon the slave. He may not be able to enforce his rights against persons, who either secrete or conceal, or withhold the slave... The local legislation may be utterly inadequate to furnish the appropriate redress, by authorizing no process in rem, or no specific mode of repossessing the slave, leaving the owner, at best, not that right which the constitution designed to secure, a specific delivery and repossession of the slave, but a mere remedy in damages; and that, perhaps, against persons utterly insolvent or worthless...

And this leads us to the consideration of the other part of the clause, which implies at once a guarantee and duty. It says, ‘but he (the slave) shall be delivered up, on claim of the party to whom such service or labor may be due.’ Now, we think it exceedingly difficult, if not impracticable, to read this language, and not to feel, that it contemplated some further remedial redress than that which might be administered at the hands of the owner himself. A claim is to be made! What is a claim? It is, in a just jurisdical sense, a demand of some matter, as of right, made by one person upon another, to do or to forbear to
do some act or thing as a matter of duty... They require the aid of legislation, to protect the right, to enforce the delivery, and to secure the subsequent possession of the slave. If, indeed, the constitution guaranties the right, and if it requires the delivery upon the claim of the owner (as cannot well be doubted), the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it. The fundamental principle, applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist, on the part of the functionaries to whom it is intrusted... [T]he natural, if not the necessary, conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution...

As early as the year 1791, the attention of congress was drawn to it (as we shall hereafter more fully see), in consequence of some practical difficulties arising under the other clause, respecting fugitives from justice escaping into other states. The result of their deliberations was the passage of the act of the 12th of February 1793, ch. 51, which... proceeds, in the third section, to provide, that when a person held to labor or service in any of the United States, shall escape into any other of the states or territories, the person to whom such labor or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor, and take him or her before any judge of the circuit or district courts of the United States, residing or being within the state, or before any magistrate of a county, city or town corporate, wherein such seizure or arrest shall be made; and upon proof, to the satisfaction of such judge or magistrate, either by oral evidence or affidavit, &c., that the person so seized or arrested, doth, under the laws of the state or territory from which he or she fled, owe service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate, to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labor, to the state or territory from which he or she fled...

The very act of 1793, now under consideration, affords the most conclusive proof, that congress... has supposed, that the right as well as the duty of legislation on the subject of fugitives from justice, and fugitive slaves, was within the scope of the constitutional authority conferred on the national legislature... Yet the right and the duty are dependent, as to their mode of execution, solely on the act of congress; and but for that, they would remain a nominal right and passive duty, the execution of which being intrusted to and required of no one in particular, all persons might be at liberty to disregard it...

So far as the judges of the courts of the United States have been called upon
to enforce it, and to grant the certificate required by it, it is believed, that it has been uniformly recognised as a binding and valid law, and as imposing a constitutional duty...

We hold the act to be clearly constitutional, in all its leading provisions, and, indeed, with the exception of that part which confers authority upon state magistrates, to be free from reasonable doubt and difficulty, upon the grounds already stated. As to the authority so conferred upon state magistrates, while a difference of opinion has existed, and may exist still, on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this court, that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation.

The remaining question is, whether the power of legislation upon this subject is exclusive in the national government, or concurrent in the states, until it is exercised by congress. In our opinion, it is exclusive...

[I]t belongs to the legislative department of the national government, to which it owes its origin and establishment. It would be a strange anomaly, and forced construction, to suppose, that the national government meant to rely for the due fulfilment of its own proper duties, and the rights it intended to secure, upon state legislation, and not upon that of the Union...

[T]he nature of the provision and the objects to be attained by it, require that it should be controlled by one and the same will, and act uniformly by the same system of regulations throughout the Union...

The owner has the same security, and the same remedial justice, and the same exemption from state regulation and control, through however many states he may pass with his fugitive slave in his possession, in transitû to his own domicile...

[W]e are of opinion, that the act of Pennsylvania upon which this indictment is founded, is unconstitutional and void. It purports to punish as a public offence against that state, the very act of seizing and removing a slave, by his master, which the constitution of the United States was designed to justify and uphold...
Supreme Court of the United States

Strader
v.
Graham

51 U.S. 82 (1850).

Mr. Chief Justice TANEY delivered the opinion of the court.

...The defendant in error is a citizen of the state of Kentucky, and three negro men whom he claimed and held as his slaves were received on board the steamboat Pike, at Louisville, without his knowledge or consent, and transported to Cincinnati; and from that place escaped to Canada, and were finally lost to him.

The proceedings before us were instituted under a statute of Kentucky, in the Louisville Chancery Court, against the plaintiffs in error, to recover the value of the slaves which had thus escaped, and, in default of payment by them, to charge the boat itself with the damages sustained. Strader and Gorman were the owners of the boat, and Armstrong the master.

The plaintiffs in error, among other defences, insisted that the negroes claimed as slaves were free; averring that, some time before they were taken on board the steamboat, they had been sent, by the permission of the defendant in error, to the state of Ohio, to perform service as slaves; and that, in consequence thereof, they had acquired their freedom, and were free when received on board the boat.

It appears by the evidence, that these men were musicians, and had gone to Ohio, on one or more occasions, to perform at public entertainments; that they had been taken there for this purpose, with the permission of the defendant in error...

Every state has an undoubted right to determine the status, or domestic and social condition, of the persons domiciled within its territory; except in so far as the powers of the states in this respect are restrained, or duties and obligations imposed upon them, by the Constitution of the United States. There is nothing in the Constitution of the United States that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of that state, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine for itself whether their employment in another state should or should not make them free on their return. The Court of Appeals have determined, that by the laws of the state they continued to be slaves. And
their judgment upon this point is, upon this writ of error, conclusive upon this court, and we have no jurisdiction over it.

But it seems to be supposed in the argument, that the law of Ohio upon this subject has some peculiar force by virtue of the Ordinance of 1787, for the government of the Northwestern Territory, Ohio being one of the states carved out of it.

One of the articles of this Ordinance provides, that ‘there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment for crimes whereof the party shall have been duly convicted: Provided always, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.’

The argument assumes that the six articles which that Ordinance declares to be perpetual are still in force in the states since formed within the territory, and admitted into the Union.

If this proposition could be maintained, it would not alter the question... The Ordinance in question, if still in force, could have no more operation than the laws of Ohio in the state of Kentucky, and could not influence the decision upon the rights of the master or the slaves in that state, nor give this court jurisdiction upon the subject.

But it has been settled by judicial decision in this court, that this Ordinance is not in force...

[It ceased to be in force upon the adoption of the Constitution, and cannot now be the source of jurisdiction of any description in this court.

In every view of the subject, therefore, this court has no jurisdiction of the case, and the writ of error must on that ground be dismissed.
An Act to Organize the Territories of Nebraska and Kansas

May 30, 1854.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all that part of the territory of the United States included within the following limits, except such portions thereof as are hereinafter expressly exempted from the operations of this act, to wit: beginning at a point in the Missouri River where the fortieth parallel of north latitude crosses the same; thence west on said parallel to the east boundary of the Territory of Utah, on the summit of the Rocky Mountains; thence on said summit northward to the forty-ninth parallel of north latitude; thence east on said parallel to the western boundary of the territory of Minnesota; thence down the main channel of said river to the place of beginning, be, and the same is hereby, created into a temporary government by the name of the Territory of Nebraska; and when admitted as a State or States, the said Territory, or any portion of the same, shall be received into the Union with or without slavery, as their constitution may prescribe at the time of their admission …

SEC. 2. And be it further enacted, That the executive power and authority in and over said Territory of Nebraska shall be vested in a Governor, who shall hold his office for four years, and until his successor shall be appointed and qualified, unless sooner removed by the President of the United States …

SEC. 3. And be it further enacted, That there shall be a Secretary of said Territory, who shall reside therein, and hold his office for five years, unless sooner removed by the President of the United States; he shall record and preserve all the laws and proceedings of the Legislative Assembly hereinafter constituted, and all the acts and proceedings of the Governor in his executive department …

SEC. 4. And be it further enacted, That the legislative power and authority of said Territory shall be vested in the Governor and a Legislative Assembly. The Legislative Assembly shall consist of a Council and House of Representatives. The Council shall consist of thirteen members, having the qualifications of voters, as hereinafter prescribed, whose term of service shall continue two years. The House of Representatives shall, at its first session, consist of twenty-six members, possessing the same qualifications as prescribed for members of the Council, and whose term of service shall continue one year. The number of representatives may be increased by the Legislative Assembly, from time to time, in proportion to the increase of qualified voters … An apportionment shall be made, as nearly equal as practicable, among the several counties or districts, for the election of the council and representatives, giving to each section of the Territory representation in the ratio of its qualified voters as nearly as may be … Previous to the first election, the Governor shall cause a census, or enumeration
of the inhabitants and qualified voters of the several counties and districts of the Territory, to be taken by such persons and in such mode as the governor shall designate and appoint … And the first election shall be held at such time and places, and be conducted in such manner, both as to the persons who shall superintend such election and the returns thereof, as the Governor shall appoint and direct; and he shall at the same time declare the number of members of the Council and House of Representatives to which each of the counties or districts shall be entitled under this act. The persons having the highest number of legal votes in each of said council districts for members of the Council, shall be declared by the Governor to be duly elected to the Council; and the persons having the highest number of legal votes for the House of Representatives, shall be declared by the Governor to be duly elected members of said house … but thereafter, the time, place, and manner of holding and conducting all elections by the people, and the apportioning the representation in the several counties or districts to the Council and House of Representatives, according to the number of qualified voters, shall be prescribed by law, as well as the day of the commencement of the regular sessions of the Legislative Assembly …

SEC. 5. And be it further enacted, That every free white male inhabitant above the age of twenty-one years who shall be an actual resident of said Territory, and shall possess the qualifications hereinafter prescribed, shall be entitled to vote at the first election, and shall be eligible to any office within the said Territory; but the qualifications of voters, and of holding office, at all subsequent elections, shall be such as shall be prescribed by the Legislative Assembly: Provided, That the right of suffrage and of holding office shall be exercised only by citizens of the United States and those who shall have declared an oath their intention to become such, and shall have taken an oath to support the Constitution of the United States and the provisions of this act …

SEC. 6. And it be further enacted, That the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act …

SEC. 7. And it be further enacted, That all township, district, and county officers, not herein otherwise provided for, shall be appointed or elected, as the case may be, in such manner as shall be provided by the Governor and Legislative Assembly of the Territory of Nebraska…

SEC. 9. And be it further enacted, That the judicial power of said Territory shall be vested in a Supreme Court, District Courts, Probate Courts, and in Justices of the Peace…

SEC. 10. And be it further enacted, That the provisions of an act entitled “An act respecting the fugitives from justice, and persons escaping from the service of their masters,” approved February twelve, seventeen hundred and ninety-three,
and the provisions of the act entitled “An act to amend, and supplementary to, the aforesaid act,” approved September eighteen, eighteen hundred and fifty, be, and the same are hereby, declared to extend to and be in full force within the limits of said Territory of Nebraska.

SEC. 11. And be it further enacted, That there shall be appointed an Attorney for said Territory, who shall continue in office for four years, and until his successor shall be appointed and qualified, unless sooner removed by the President…

SEC. 12. And be it further enacted, That the Governor, Secretary, Chief Justice, and Associate Justices, Attorney and Marshal, shall be nominated, and, by and with the advice and consent of the Senate, appointed by the President of the United States…

SEC. 14. And be it further enacted, That a delegate to the House of Representatives of the United States, to serve for the term of two years, who shall be a citizen of the United States, may be elected by the voters qualified to elect members of the Legislative Assembly, who shall be entitled to the same rights and privileges as are exercised and enjoyed by the delegates from the several other Territories of the United States to the said House of Representatives… The person having the greatest number of votes shall be declared by the Governor to be duly elected; and a certificate thereof shall be given accordingly. That the Constitution, and all Laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory of Nebraska as elsewhere within the United States, except the eighth section of the act preparatory to the admission of Missouri into the Union, approved March sixth, eighteen hundred and twenty, which, being inconsistent with the principle of non-intervention by Congress with slavery in the States and Territories, as recognized by the legislation of eighteen hundred and fifty, commonly called the Compromise Measures, is hereby declared inoperative and void; it being the true intent and meaning of this act not to legislate slavery into any Territory or State, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States: Provided, That nothing herein contained shall be construed to revive or put in force any law or regulation which may have existed prior to the act of sixth March, eighteen hundred and twenty, either protecting, establishing, prohibiting, or abolishing slavery…

SEC. 19. And be it further enacted, That all that part of the Territory of the United States included within the following limits, except such portions thereof as are hereinafter expressly exempted from the operations of this act, to wit, beginning at a point on the western boundary of the State of Missouri, where the thirty-seventh parallel of north latitude crosses the same; thence west on said
parallel to the eastern boundary of New Mexico; thence north on said boundary to latitude thirty-eight; thence following said boundary westward to the east boundary of the Territory of Utah, on the summit of the Rocky Mountains; thence northward on said summit to the fortieth parallel of latitude; thence east on said parallel to the western boundary of said State to the place of beginning, be, and the same is hereby, created into a temporary government by the name of the Territory of Kansas; and whom admitted as a State or States, the said Territory, or any portion of the same, shall be received into the Union with or without slavery, as their Constitution may prescribe at the time of their admission…

SEC. 20. And be it further enacted, That the executive power and authority in and over said Territory of Kansas shall be vested in a Governor, who shall hold his office for four years, and until his successor shall be appointed and qualified, unless sooner removed by the President of the United States …

SEC. 21. And be it further enacted, That there shall be a Secretary of said Territory, who shall reside therein, and hold his office for five years, unless sooner removed by the President of the United States; he shall record and preserve all the laws and proceedings of the Legislative Assembly hereinafter constituted, and all the acts and proceedings of the Governor in his Executive Department …

SEC. 22. And be it further enacted, That the legislative power and authority of said Territory shall be vested in the Governor and a Legislative Assembly. The Legislative Assembly shall consist of a Council and House of Representatives. The Council shall consist of thirteen members, having the qualifications of voters, as hereinafter prescribed, whose term of service shall continue two years. The House of Representatives shall, at its first session, consist of twenty-six members, possessing the same qualifications as prescribed for members of the Council, and whose term of service shall continue one year. The number of representatives may be increased by the Legislative Assembly, from time to time, in proportion to the increase of qualified voters… An apportionment shall be made, as nearly equal as practicable, among the several counties or districts, for the election of the Council and Representatives, giving to each section of the Territory representation in the ratio of its qualified voters as nearly as may be… Previous to the first election, the Governor shall cause a census or enumeration of the inhabitants and qualified voters of the several counties and districts of the Territory, to be taken by such persons and in such mode as the Governor shall designate and appoint… And the first election shall be held at such time and places, and be conducted in such manner, both as to the persons who shall superintend such election and the returns thereof, as the Governor shall appoint and direct; and he shall at the same time declare the number of members of the Council and House of Representatives to which each of the counties or districts shall be entitled under this act. The persons having the highest number of legal votes in each of said Council Districts for members of the Council, shall be
declared by the Governor to be duly elected to the Council; and the persons having the highest number of legal votes for the House of Representatives, shall be declared by the Governor to be duly elected members of said house...

SEC. 23. And be it further enacted, That every free white male inhabitant above the age of twenty-one years, who shall be an actual resident of said Territory, and shall possess the qualifications hereinafter prescribed, shall be entitled to vote at the first election, and shall be eligible to any office within the said Territory; but the qualifications of voters, and of holding office, at all subsequent elections, shall be such as shall be prescribed by the Legislative Assembly: Provided, That the right of suffrage and of holding office shall be exercised only by citizens of the United States, and those who shall have declared, on oath, their intention to become such, and shall have taken an oath to support the Constitution of the United States and the provisions of this act...

SEC. 24. And be it further enacted, That the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act...

SEC. 25. And be it further enacted, That all township, district, and county officers, not herein otherwise provided for, shall be appointed or elected as the case may be, in such manner as shall be provided by the Governor and Legislative Assembly of the Territory of Kansas.

SEC. 27. And be it further enacted, That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace.

SEC. 28. And be it further enacted, That the provisions of the act entitled “An act respecting fugitives from justice, and persons escaping from the service of their masters,” approved February twelfth, seventeen hundred and ninety-three, and the provisions of the act entitled “An act to amend, and supplementary to, the aforesaid act,” approved September eighteenth, eighteen hundred and fifty, be, and the same are hereby, declared to extend to and be in full force within the limits of the said Territory of Kansas.

SEC. 29. And be it further enacted, That there shall be appointed an attorney for said Territory, who shall continue in office for four years, and until his successor shall be appointed and qualified, unless sooner removed by the President...

SEC. 30. And be it further enacted, That the Governor, Secretary, Chief Justice, and Associate Justices, Attorney, and Marshal, shall be nominated, and, by and with the advice and consent of the Senate, appointed by the President of the United States...

SEC. 32. And be it further enacted, That a delegate to the House of
Representatives of the United States, to serve for the term of two years, who shall be a citizen of the United States, may be elected by the voters qualified to elect members of the Legislative Assembly, who shall be entitled to the same rights and privileges as are exercised and enjoyed by the delegates from the several other Territories of the United States to the said House of Representatives... The person having the greatest number of votes shall be declared by the Governor to be duly elected, and a certificate thereof shall be given accordingly. That the Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory of Kansas as elsewhere within the United States, except the eighth section of the act preparatory to the admission of Missouri into the Union, approved March sixth, eighteen hundred and twenty, which, being inconsistent with the principle of non-intervention by Congress with slavery in the States and Territories, as recognized by the legislation of eighteen hundred and fifty, commonly called the Compromise Measures, is hereby declared inoperative and void; it being the true intent and meaning of this act not to legislate slavery into any Territory or State, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States: Provided, That nothing herein contained shall be construed to revive or put in force any law or regulation which may have existed prior to the act of sixth of March, eighteen hundred and twenty, either protecting, establishing, prohibiting, or abolishing slavery...

Approved, May 30, 1854.
Mr. Chief Justice TANEY delivered the opinion of the court.

...There are two leading questions presented by the record:

1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And

2. If it had jurisdiction, is the judgment it has given erroneous or not?

The plaintiff in error…was, with his wife and children, held as slaves by the defendant, in the State of Missouri; and he brought this action in the Circuit Court of the United States for that district, to assert the title of himself and his family to freedom...

[If the plaintiff claims a right to sue in a Circuit Court of the United States, under that provision of the Constitution which gives jurisdiction in controversies between citizens of different States, he must distinctly aver in his pleading that they are citizens of different States; and he cannot maintain his suit without showing that fact in the pleadings...]

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution...

The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States...

The words ‘people of the United States’ and ‘citizens’ are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the ‘sovereign people,’ and every citizen is one of this people, and
a constituent member of this sovereignty. The question before us is, whether the class of persons described... compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them...

It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it...

And upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case...

Now, if the removal of which he speaks did not give them their freedom, then by his own admission he is still a slave; and whatever opinions may be entertained in favor of the citizenship of a free person of the African race, no one supposes that a slave is a citizen of the State or of the United States. If, therefore, the acts done by his owner did not make them free persons, he is still a slave, and certainly incapable of suing in the character of a citizen...

[A] court can give no judgment for either party, where it has no jurisdiction; and if, upon the showing of Scott himself, it appeared that he was still a slave, the case ought to have been dismissed...

We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom...

The plaintiff was a negro slave, belonging to Dr. Emerson, who was a surgeon in the army of the United States. In the year 1834, he took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post...
15. James Buchanan
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at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling, from said last-mentioned date until the year 1838.

In the year 1835, Harriet...was the negro slave of Major Taliaferro, who belonged to the army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post, situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave, at said Fort Snelling, unto the said Dr. Emerson hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836, the plaintiff and Harriet intermarried, at Fort Snelling, with the consent of Dr. Emerson, who then claimed to be their master and owner. Eliza and Lizzie...are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat Gipsey, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet, and their said daughter Eliza, from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, and Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them, and each of them, as slaves.

In considering this part of the controversy, two questions arise: 1. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States hereinbefore mentioned? And 2. If they were not, is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, as stated in the above admissions?

We proceed to examine the first question.

The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the difficulty which meets us at the threshold of this part of the inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution...
A reference to a few of the provisions of the Constitution will illustrate this proposition.

For example, no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances...

These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law...

The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial Government, as well as that covered by States...And if Congress itself cannot do this—if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them. It could confer no power on any local Government, established by its authority, to violate the provisions of the Constitution.

It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writings of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which Governments may exercise over it, have been dwelt upon in the argument...

[N]o laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government, or take from the citizens the rights they have reserved. And if the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether
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it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government...

[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words—too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.

We have so far examined the case, as it stands under the Constitution of the United States, and the powers thereby delegated to the Federal Government.

But there is another point in the case which depends on State power and State law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States; and being so made free, he was not again reduced to a state of slavery by being brought back to Missouri...

As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his status, as free or slave, depended on the laws of Missouri, and not of Illinois.

It has, however, been urged in the argument, that by the laws of Missouri he was free on his return... [W]e are satisfied, upon a careful examination of all the cases decided in the State courts of Missouri referred to, that it is now firmly settled by the decisions of the highest court in the State, that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendant; and that the Circuit Court of the United States had no jurisdiction, when, by the laws of the State, the plaintiff was a slave, and not a citizen...
Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction.

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TANEN, Circuit Justice.

The application in this case for a writ of habeas corpus is made to me under the 14th section of the judiciary act of 1789, which renders effectual for the citizen the constitutional privilege of the writ of habeas corpus. That act gives to the courts of the United States, as well as to each justice of the supreme court, and to every district judge, power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment...

The petitioner resides in Maryland, in Baltimore county; while peaceably in his own house, with his family, it was at two o’clock on the morning of the 25th of May 1861, entered by an armed force, professing to act under military orders; he was then compelled to rise from his bed, taken into custody, and conveyed to Fort McHenry, where he is imprisoned by the commanding officer, without warrant from any lawful authority...

The case, then, is simply this: a military officer, residing in Pennsylvania, issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears; under this order, his house is entered in the night, he is seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement; and when a habeas corpus is served on the commanding officer, requiring him to produce the prisoner before a justice of the supreme court, in order that he may examine into the legality of the imprisonment, the answer of the officer, is that he is authorized by the president to suspend the writ of habeas corpus at his discretion, and in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.

As the case comes before me, therefore, I understand that the president not only claims the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him...

I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of congress...
CHAPTER 16

16. ABRAHAM LINCOLN

Ex parte Merryman

constitution, a proper respect for the high office he fills, requires me to state
plainly and fully the grounds of my opinion, in order to show that I have not
ventured to question the legality of his act, without a careful and deliberate
examination of the whole subject.

The clause of the constitution, which authorizes the suspension of the privilege
of the writ of habeas corpus, is in the 9th section of the first article. This article
is devoted to the legislative department of the United States, and has not the
slightest reference to the executive department. It begins by providing ‘that
all legislative powers therein granted, shall be vested in a congress of the
United States, which shall consist of a senate and house of representatives.’
And after prescribing the manner in which these two branches of the legislative
department shall be chosen, it proceeds to enumerate specifically the legislative
powers which it thereby grants [and legislative powers which it expressly
prohibits]; and at the conclusion of this specification, a clause is inserted giving
congress ‘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.’

The power of legislation granted by this latter clause is, by its words, carefully
confined to the specific objects before enumerated... [T]his clause is immediately
followed by an enumeration of certain subjects, to which the powers of
legislation shall not extend. The great importance which the framers of the
constitution attached to the privilege of the writ of habeas corpus, to protect the
liberty of the citizen, is proved by the fact, that its suspension, except in cases
of invasion or rebellion, is first in the list of prohibited powers; and even in these
cases the power is denied, and its exercise prohibited, unless the public safety
shall require it...

[C]ongress is, of necessity, the judge of whether the public safety does or does
not require it; and their judgment is conclusive...

It is the second article of the constitution that provides for the organization
of the executive department, enumerates the powers conferred on it, and
prescribes its duties. And if the high power over the liberty of the citizen now
claimed, was intended to be conferred on the president, it would undoubtedly
be found in plain words in this article; but there is not a word in it that can furnish
the slightest ground to justify the exercise of the power...

The only power, therefore, which the president possesses, where the ‘life, liberty
or property’ of a private citizen is concerned, is the power and duty prescribed
in the third section of the second article, which requires ‘that he shall take care
that the laws shall be faithfully executed.’ He is not authorized to execute them
himself, or through agents or officers, civil or military, appointed by himself,
but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the constitution... I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law...

It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the president of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation to ‘take care that the laws be faithfully executed,’ to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

A review in class of the terms of Article IV, Section 3 might help students more readily understand that as between the president and Congress, the Constitution gives primary authority to Congress on the matters of admitting new states into the Union and governing territories. Under Article IV, Section 3, “[n]ew states may be admitted by the Congress into this union.” The only restriction Article IV placed upon Congress is that a new state not be carved out of an existing state without its consent. Article IV also states: “Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or any other Property belonging to the United States.” As students may not be familiar with the process by which new states are admitted, you might explain that under historic practice, Congress passes an enabling act prescribing the process by which the people of a United States territory may draft and adopt a state constitution. Enabling acts may contain restrictions. The applicant state submits its proposed constitution to Congress, which either accepts it or requires changes. Congress passes a bill of statehood, which the president signs; or the president may issue a proclamation certifying the entry of the new state into the United States.
Mr. Justice GRIER.

...Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the Government, on the principles of international law, as known and acknowledged among civilized States?...

Let us enquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force.

War has been well defined to be, ‘That state in which a nation prosecutes its right by force.’

The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents, claims sovereign rights as against the other.

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents--the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason...

As a civil war is never publicly proclaimed, eo nomine, against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know.

The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: ‘When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, civil war exists and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land.’
By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is 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 has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to called out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be ‘unilateral.’

This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an ‘insurrection’ by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations...

Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. ‘He must determine what degree of force the crisis demands.’ The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case...
If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress ‘ex majore cautela’ and in anticipation of such astute objections, passing an act ‘approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., as if they had been issued and done under the previous express authority and direction of the Congress of the United States.’

Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law, ‘omnis ratihabitio retrotrahitur et mandato equiparatur,’ this ratification has operated to perfectly cure the defect...

[W]e are of the opinion that the President had a right, jure belli, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard...
17. ANDREW JOHNSON
ARTICLES OF IMPEACHMENT

Articles of Impeachment

March 4, 1868.

Article I. That said Andrew Johnson, President of the United States, on the 21st day of February, in the year of our Lord, 1868, at Washington, in the District of Columbia, unmindful of the high duties of his oath of office and of the requirements of the Constitution, that he should take care that the laws be faithfully executed, did unlawfully, in violation of the Constitution and laws of the United States, issue an order in writing for the removal of Edwin M. Stanton from the office of Secretary of the Department of War, said Edwin M. Stanton having been, therefor, duly appointed and commissioned by and with the advice and consent of the Senate of the United States as such Secretary; and said Andrew Johnson, President of the United States, on the 12th day of August, in the year of our Lord 1867, and during the recess of said Senate, having suspended by his order Edwin M. Stanton from said office, and within twenty days after the first day of the next meeting of said Senate, on the 12th day of December, in the year last aforesaid, having reported to said Senate such suspension, with the evidence and reasons for his action in the case, and the name of the person designated to perform the duties of such office temporarily, until the next meeting of the Senate, and said Senate therafterward, on the 13th day of January, in the year of our Lord 1868, having duly considered the evidence and reasons reported by said Andrew Johnson for said suspension, did refuse to concur in said suspension; whereby and by force of the provisions of an act entitled “An act regulating the tenure of certain civil offices,” passed March 2, 1867, said Edwin M. Stanton did forthwith resume the functions of his office, whereof the said Andrew Johnson had then and there notice, and the said Edwin M. Stanton, by reason of the premises, on said 21st day of February, was lawfully entitled to hold said office of Secretary for the Department of War, which said order for the removal of said Edwin M. Stanton is, in substance, as follows, that is to say:

...By virtue of the power and authority vested in me, as President, by the Constitution and laws of the United States, you are hereby removed from the office of Secretary for the Department of War, and your functions as such will terminate upon receipt of their communication. You will transfer to Brevet Major-General L. Thomas, Adjutant-General of the Army, who has this day been authorized and empowered to act as Secretary of War ad interim, all books, paper and other public property now in your custody and charge...

Which order was unlawfully issued, and with intent then are there to violate the act entitled “An act regulating the tenure of certain civil offices,” passed March 2, 1867, and contrary to the provisions of said act, and in violation thereof, and contrary to the provisions of the Constitution of the United States, and without the advice and consent of the Senate of the United States, the said Senate then
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17. Andrew Johnson
Articles of Impeachment

and there being in session, to remove said E. M. Stanton from the office of Secretary for the Department of War, whereby said Andrew Johnson, President of the United States, did then and there commit, and was guilty of a high misdemeanor in office.

Article II. That on the 21st day of February ... said Andrew Johnson ... did appoint one L. Thomas to be Secretary of War ad interim, by issuing to said Lorenzo Thomas a letter of authority...

Article III. That said Andrew Johnson ... did appoint one Lorenzo Thomas to be Secretary for the Department of War, ad interim, without the advice and consent of the Senate, and in violation of the Constitution of the United States, no vacancy having happened in said office of Secretary for the Department of War during the recess of the Senate, and no vacancy existing in said office at the time...

Article IV. That said Andrew Johnson ... did unlawfully conspire with one Lorenzo Thomas, and with other persons to the House of Representatives unknown, with intent, by intimidation and threats, to hinder and prevent Edwin M. Stanton, then and there, the Secretary for the Department of War, duly appointed under the laws of the United States, from holding said office of Secretary for the Department of War, contrary to and in violation of the Constitution of the United States, and of the provisions of an act entitled “An act to define and punish certain conspiracies,” approved July 31, 1861, whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of high crime in office.

Article V. That said Andrew Johnson ... did unlawfully conspire with one Lorenzo Thomas, and with other persons in the House of Representatives unknown, by force to prevent and hinder the execution of an act entitled “An act regulating the tenure of certain civil offices,” passed March 2, 1867, and in pursuance of said conspiracy, did attempt to prevent E. M. Stanton, then and there being Secretary for the Department of War, duly appointed and commissioned under the laws of the United States, from holding said office, whereby the said Andrew Johnson, President of the United States, did then and there commit and was guilty of high misdemeanor in office.

Article VI. That Andrew Johnson ... did unlawfully conspire with one Lorenzo Thomas, by force to seize, take and possess the property of the United States in the Department of War, contrary to the provisions of an act entitled “An act to define and punish certain conspiracies,” approved July 31, 1861, and with intent to violate and disregard an act entitled “An act regulating the tenure of certain civil offices,” passed March 2, 1867, whereby said Andrew Johnson, President of the United States, did then and there commit a high crime in office.
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Article VII. That said Andrew Johnson…on the 21st day of February, in the year of our Lord 1868…did unlawfully conspire with one Lorenzo Thomas with intent unlawfully to seize, take, and possess the property of the United States in the Department of War, in the custody and charge of Edwin M. Stanton, Secretary of said Department, with intent to violate and disregard the act entitled “An act regulating the tenure of certain civil offices,” passed March 2, 1867, whereby said Andrew Johnson, President of the United States, did then and there commit a high misdemeanor in office.

Article VIII. That said Andrew Johnson,…with intent unlawfully to control the disbursements of the moneys appropriated for the military service and for the Department of War, on the 21st day of February, in the year of our Lord 1868…did unlawfully and contrary to the provisions of an act entitled “An act regulating the tenure of certain civil offices,” passed March 2, 1867, and in violation of the Constitution of the United States, and without the advice and consent of the Senate of the United States, and while the Senate was then and there in session, there being no vacancy in the office of Secretary for the Department of War, with intent to violate and disregard the act aforesaid, then and there issue and deliver to one Lorenzo Thomas a letter of authority in writing, in substance as follows, that is to say:

…[Y]ou are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office....

Whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

Article IX. That said Andrew Johnson…on the 22nd day of February, in the year of our Lord 1868…as Commander-in-Chief, did bring before himself, then and there, William H. Emory, a Major-General by brevet in the Army of the United States, actually in command of the Department of Washington, and the military forces therefor, and did and there, as Commander-in-Chief, declare to, and instruct said Emory, that part of the law of the United States, passed March 2, 1867, entitled “an act for making appropriations for the support of the army for the year ending June 30, 1868, and for other purposes,” especially the second section thereof, which provides, among other things, that all orders and instructions relating to military operations issued by the President and Secretary of War, shall be issued through the General of the Army, and in case of his inability, through the next in rank was unconstitutional, and in contravention of the commission of Emory, and therefore not binding on him, as an officer in the Army of the United States, which said provisions of law had been therefore duly and legally promulgated by General Order for the government and direction of the Army of the United States, as the said Andrew Johnson then and there...
well knew, with intent thereby to induce said Emory, in his official capacity as Commander of the Department of Washington, to violate the provisions of said act, and to take and receive, act upon and obey such orders as he, the said Andrew Johnson, might make and give, and which should not be issued through the General of the Army of the United States, according to the provisions of said act, whereby said Andrew Johnson, President of the United States, did then and there commit, and was guilty of a high misdemeanor in office; and the House of Representatives, by protestation, saving to themselves the liberty of exhibition, at any time hereafter, any further articles of their accusation or impeachment against the said Andrew Johnson, President of the United States, and also or replying to his answers, which will make up the articles herein preferred against him, and of offering proof to the same and every part thereof, and to all and every other article, accusation or impeachment which shall be exhibited by them as the case shall require, do demand that the said Andrew Johnson may be put to answer the high crimes and misdemeanors in office herein charged against him, and that such proceedings, examinations, trials and judgments may be thereupon had and given had and given as may be agreeable to law and justice.

**Article X.** That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and the dignity and proprieties thereof, and of the harmony and courtesies which ought to exist and be maintained between the executive and legislative branches of the Government of the United States, designing and intending to set aside the rightful authorities and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt and reproach the Congress of the United States, and the several branches thereof, to impair and destroy the regard and respect of all the good people of the United States for the Congress and legislative power thereof, (which all officers of the government ought inviolably to preserve and maintain,) and to excite the odium and resentment of all good people of the United States against Congress and the laws by it duly and constitutionally enacted; and in pursuance of his said design and intent, openly and publicly and before divers[e] assemblages of citizens of the United States, convened in divers[e] parts thereof, to meet and receive said Andrew Johnson as the Chief Magistrate of the United States, did, on the 18th day of August, in the year of our Lord 1866, and on divers[e] other days and times, as well before as afterward, make and declare, with a loud voice certain intemperate, inflammatory, and scandalous harangues, and therein utter loud threats and bitter menaces, as well against Congress as the laws of the United States duly enacted thereby, amid the cries, jeers and laughter of the multitudes then assembled in hearing, which are set forth in the several specifications hereinafter written, in substance and effect, that is to say:

**Specification First.** In this, that at Washington, in the District of Columbia, in the Executive Mansion, to a committee of citizens who called upon the President of the United States, speaking of and concerning the Congress of the United
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Articles of Impeachment

States, heretofore, to wit: On the 18th day of August, in the year of our Lord, 1866, in a loud voice, declare in substance and effect, among other things, that is to say:

“So far as the Executive Department of the government is concerned, the effort has been made to restore the Union... but as the work progresses, as reconstruction seemed to be taking place, and the country was becoming reunited, we found a disturbing and moving element opposing it...

“We have witnessed in one department of the government every endeavor to prevent the restoration of peace, harmony and union. We have seen hanging upon the verge of the government, as it were, a body called or which assumes to be the Congress of the United States, while in fact it is a Congress of only part of the States. We have seen this Congress pretend to be for the Union, when its every step and act tended to perpetuate disunion and make a disruption of States inevitable.

“We have seen Congress gradually encroach, step by step, upon constitutional rights, and violate day after day, and month after month, fundamental principles of the government. We have seen a Congress that seemed to forget that there was a limit to the sphere and scope of legislation. We have seen a Congress in a minority assume to exercise power which, if allowed to be consummated, would result in despotism or monarchy itself.”

Specification Second. In this, that at Cleveland, in the State of Ohio, heretofore to wit: On the third day of September, in the year of our Lord, 1866, before a public assemblage of citizens and others, said Andrew Johnson, President of the United States, speaking of and concerning the Congress of the United States, did, in a loud voice, declare in substance and effect, among other things, that is to say:

“...[W]hat has Congress done? Have they done anything to restore the union of the States? No: On the contrary, they had done everything to prevent it: and because he stood now where he did when the rebellion commenced, he had been denounced as a traitor. Who had run greater risks or made greater sacrifices than himself? But Congress, factions and domineering, had undertaken to poison the minds of the American people.”

Specification Third. In this case, that at St. Louis, in the State of Missouri, heretofore to wit: On the 8th day of September, in the year of our Lord 1866, before a public assemblage of citizens and others, said Andrew Johnson, President of the United States, speaking of acts concerning the Congress of the United States, did, in a loud voice, declare in substance and effect, among other things, that is to say:
“… I know that I have been traduced and abused. I know it has come in advance of me here, as elsewhere, that I have attempted to exercise an arbitrary power in resisting laws that were intended to be forced upon the government; that I had exercised that power; that I had abandoned the party that elected me, and that I was a traitor, because I exercised the veto power in attempting, and did arrest for a time, that which was called a “Freedmen’s Bureau” bill. Yes, that I was a traitor. And I have been traduced; I have been slandered; I have been maligned…”

“…God willing, with your help, I will veto their measures whenever any of them come to me.”

Which said utterances, declarations, threats and harangues, highly censurable in any, are peculiarly indecent and unbecoming in the Chief Magistrate of the United States, by means whereof the said Andrew Johnson has brought the high office of the President of the United States into contempt, ridicule and disgrace, to the great scandal of all good citizens, whereby said Andrew Johnson, President of the United States, did commit, and was then and there guilty of a high misdemeanor in office.

Article XI. That the said Andrew Johnson...did, heretofore, to wit: On the 18th day of August, 1866, at the city of Washington, and in the District of Columbia, by public speech, declare and affirm in substance, that the Thirty-Ninth Congress of the United States was not a Congress of the United States authorized by the Constitution to exercise legislative power under the same; but, on the contrary, was a Congress of only part of the States, thereby denying and intending to deny, that the legislation of said Congress was valid or obligatory upon him, the said Andrew Johnson, except in so far as he saw fit to approve the same, and also thereby denying the power of the said Thirty-Ninth Congress to propose amendments to the Constitution of the United States. And in pursuance of said declaration, the said Andrew Johnson, President of the United States, afterwards, to wit: On the 21st day of February, 1868, at the city of Washington, D.C., did... attempt to prevent the execution of an act entitled “An act regulating the tenure of certain civil offices,” passed March 2, 1867, by unlawfully devising and contriving and attempting to devise and contrive means by which he should prevent Edwin M. Stanton from forthwith resuming the functions of the office of Secretary for the Department of War, notwithstanding the refusal of the Senate to concur in the suspension therefore made by the said Andrew Johnson of said Edwin M. Stanton from said office of Secretary for the Department of War; and also by further unlawfully devising and contriving, and attempting to devise and contrive, means then and there to prevent the execution of an act entitled “An act making appropriations for the support of the army for the fiscal year ending June 30, 1868, and for other purposes,” approved March 2, 1867. And also to prevent the execution of an act entitled “An act to provide for the more efficient
government of the rebel States,” passed March 2, 1867. Whereby the said
Andrew Johnson, President of the United States, did then, to wit: on the 21st
day of February, 1868, at the city of Washington, commit and was guilty of a high
misdemeanor in office.
Mr. Justice MILLER, now, April 14th, 1873, delivered the opinion of the court.

These cases... arise out of the efforts of the butchers of New Orleans to resist the Crescent City Live-Stock Landing and Slaughter-House Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the legislature of that State...

[T]he plaintiffs... asserted... that the grant of privileges in the charter of defendant... was a violation of the most important provisions of the thirteenth and fourteenth articles of amendment of the Constitution of the United States...

The statute thus assailed as unconstitutional was passed March 8th, 1869, and is entitled ‘An act to protect the health of the city of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company.’

The first section forbids the landing or slaughtering of animals whose flesh is intended for food, within the city of New Orleans and other parishes and boundaries named and defined, or the keeping or establishing any slaughter-houses or abattoirs within those limits except by the corporation thereby created, which is also limited to certain places afterwards mentioned...

The third and fourth sections authorize the company to establish and erect within certain territorial limits, therein defined, one or more stock-yards, stock-landings, and slaughter-houses, and imposes upon it the duty of erecting... one grand slaughter-house of sufficient capacity for slaughtering five hundred animals per day...

[T]he company... shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the act, and that all such animals shall be landed at the stock-landings and slaughtered at the slaughter-houses of the company, and nowhere else...

Section five orders the closing up of all other stock-landings and slaughter-houses...

This statute is denounced not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans, but it is asserted that it deprives a large and meritorious class of citizens—the whole of the butchers of the city—of
the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families, and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city...

The wisdom of the monopoly granted by the legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily service in preparing food, or how this statute, with the duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit.

The power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States...

‘Unwholesome trades, slaughter-houses, operations offensive to the senses... may all,’ says Chancellor Kent, ‘be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community.’ This is called the police power...

The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power...

It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city, the noxious slaughter-houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city, and to locate them where the convenience, health, and comfort of the people require they shall be located. And it must be conceded that the means adopted by the act for this purpose are appropriate, are stringent, and effectual. But it is said that in creating a corporation for this purpose, and conferring upon it exclusive privileges—privileges which it is said constitute a monopoly—the legislature has exceeded its power...

Unless, therefore, it can be maintained that the exclusive privilege granted by this charter to the corporation, is beyond the power of the legislature of Louisiana, there can be no just exception to the validity of the statute. And in this respect we are not able to see that these privileges are especially odious or objectionable. The duty imposed as a consideration for the privilege is well defined, and its enforcement well guarded. The prices or charges to be made by the company are limited by the statute, and we are not advised that they are on
the whole exorbitant or unjust.

The proposition is, therefore, reduced to these terms: Can any exclusive privileges be granted to any of its citizens, or to a corporation, by the legislature of a State?...

[T]he authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the constitution of that State or in the amendments to the Constitution of the United States...

The plaintiffs...allege that the statute is a violation of the Constitution of the United States in these several particulars...

That it abridges the privileges and immunities of citizens of the United States...

[O]n the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him...

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction... [I]t is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the States...

[T]o establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed.

‘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.’...

It declares that persons may be citizens of the United States without regard to their citizenship of a particular State... That its main purpose was to establish the
citizenship of the negro can admit of no doubt...

[T]he distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual...

[T]he next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States...

The language is, ‘No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.’ It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment...

Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of Corfield v. Coryell, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823.

‘The inquiry,’ he says, ‘is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those
privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate...'

Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government...

[T]he privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government...

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its National character, its Constitution, or its laws...

The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State...

[W]e are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration...

Under the pressure of all the excited feeling growing out of the war, our...
statemen have still believed that the existence of the State with powers for
 domestic and local government, including the regulation of civil rights—the
 rights of person and of property—was essential to the perfect working of our
 complex form of government, though they have thought proper to impose
 additional limitations on the States, and to confer additional power on that of the
 Nation...
MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This case... presents for our consideration an indictment containing sixteen counts... based upon sect. 6 of the Enforcement Act of May 31, 1870. That section is as follows:——

‘That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court...’

The question... is stated to be, whether ‘the said sixteen counts of said indictment are severally good and sufficient in law, and contain charges of criminal matter indictable under the laws of the United States.’

The general charge in the first eight counts is that of ‘banding,’ and in the second eight, that of ‘conspiring’ together to injure, oppress, threaten, and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges ‘granted and secured’ to them ‘in common with all other good citizens of the United States by the constitution and laws of the United States.’

The offences provided for by the statute in question do not consist in the mere ‘banding’ or ‘conspiring’ of two or more persons together, but in their banding or conspiring with the intent, or for any of the purposes, specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any act of Congress...

The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments
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will be different from those he has under the other...

The duty of a government to afford protection is limited always by the power it possesses for that purpose....

[T]he people of the United States, ‘in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty’ to themselves and their posterity, ordained and established the government of the United States, and defined its powers by a constitution, which they adopted as its fundamental law, and made its rule of action...

Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the States; but beyond, it has no existence...

The people of the United States resident within any State are subject to two governments: one State, and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions...

The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States.

We now proceed to an examination of the indictment, to ascertain whether the several rights, which it is alleged the defendants intended to interfere with, are such as had been in law and in fact granted or secured by the constitution or laws of the United States.

The first and ninth counts state the intent of the defendants to have been to hinder and prevent the citizens named in the free exercise and enjoyment of their ‘lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose.’ The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government...

As no direct power over it was granted to Congress, it remains, according to the ruling in Gibbons v. Ogden, subject to State jurisdiction. Only such existing rights were committed by the people to the protection of Congress as came within the general scope of the authority granted to the national government.

The first amendment to the Constitution prohibits Congress from abridging ‘the
right of the people to assemble and to petition the government for a redress of grievances.’ This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone...

The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States...

The second and tenth counts are equally defective. The right there specified is that of ‘bearing arms for a lawful purpose.’ This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in The City of New York v. Miln, the ‘powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police,’ ‘not surrendered or restrained’ by the Constitution of the United States.

The third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, ‘of their respective several lives and liberty of person without due process of law.’ This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. ‘To secure these rights,’ says the Declaration of Independence, ‘governments are instituted among men, deriving their just powers from the consent of the governed.’ The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these ‘unalienable rights with which they were endowed by their Creator.’ Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.

The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional
guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in Bank of Columbia v. Okely, it secures ‘the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.’ These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the amendment.

The fourth and twelfth counts charge the intent to have been to prevent and hinder the citizens named, who were of African descent and persons of color, in ‘the free exercise and enjoyment of their several right and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Louisiana and by the United States; and then and there, at that time, being in force in the said State and District of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed at and within said State and District of Louisiana by white persons, being citizens of said State of Louisiana and the United States, for the protection of the persons and property of said white citizens.’ There is no allegation that this was done because of the race or color of the persons conspired against. When stripped of its verbiage, the case as presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the State and of the United States.

The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add any thing to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty...

We are, therefore, of the opinion that the... counts do not contain charges of a criminal nature made indictable under the laws of the United States, and that consequently they are not good and sufficient in law. They do not show that it was the intent of the defendants, by their conspiracy, to hinder or prevent the enjoyment of any right granted or secured by the Constitution...
MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The assignements of error, when grouped, present the following questions—...

5. Should the accused have been acquitted if he married the second time, because he believed it to be his religious duty?...

On the trial, the plaintiff in error, the accused, proved that at the time of his alleged second marriage he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that church ‘that it was the duty of male members of said church, circumstances permitting, to practise polygamy;...that this duty was enjoined by different books which the members of said church believed that to be of divine origin, and among others the Holy Bible, and also that the members of the church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said church; that the failing or refusing to practice polygamy by such male members of said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come.’ He also proved ‘that he had received permission from the recognized authorities in said church to enter into polygamous marriage...’

Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition...

Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people...
We think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law...

In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Here the accused knew he had been once married, and that his first wife was living. He also knew that his second marriage was forbidden by law. When, therefore, he married the second time, he is presumed to have intended to break the law. And the breaking of the law is the crime. Every act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed... It matters not that his belief was a part of his professed religion: it was still belief, and belief only...

Judgment affirmed.
Inaugural Address

March 4, 1881.

Fellow Citizens:

We stand today upon an eminence which overlooks a hundred years of national life—a century crowded with perils, but crowned with the triumphs of liberty and law. Before continuing the onward march let us pause on this height for a moment to strengthen our faith and renew our hope by a glance at the pathway along which our people have traveled.

It is now three days more than a hundred years since the adoption of the first written constitution of the United States—the Articles of Confederation and Perpetual Union. The new Republic was then beset with danger on every hand. It had not conquered a place in the family of nations. The decisive battle of the war for independence, whose centennial anniversary will soon be gratefully celebrated at Yorktown, had not yet been fought. The colonists were struggling not only against the armies of a great nation, but against the settled opinions of mankind; for the world did not then believe that the supreme authority of government could be safely intrusted to the guardianship of the people themselves.

We can not overestimate the fervent love of liberty, the intelligent courage, and the sum of common sense with which our fathers made the great experiment of self-government. When they found, after a short trial, that the confederacy of States, was too weak to meet the necessities of a vigorous and expanding republic, they boldly set it aside, and in its stead established a National Union, founded directly upon the will of the people, endowed with full power of self-preservation and ample authority for the accomplishment of its great object.

Under this Constitution the boundaries of freedom have been enlarged, the foundations of order and peace have been strengthened, and the growth of our people in all the better elements of national life has indicated the wisdom of the founders and given new hope to their descendants... Under this Constitution twenty-five States have been added to the Union, with constitutions and laws, framed and enforced by their own citizens, to secure the manifold blessings of local self-government.

The jurisdiction of this Constitution now covers an area fifty times greater than that of the original thirteen States and a population twenty times greater than that of 1780...

And now, at the close of this first century of growth, with the inspirations of its history in their hearts, our people have lately reviewed the condition of the nation, passed judgment upon the conduct and opinions of political
parties, and have registered their will concerning the future administration of
the Government. To interpret and to execute that will in accordance with the
Constitution is the paramount duty of the Executive.

Even from this brief review it is manifest that the nation is resolutely facing to the
front, resolved to employ its best energies in developing the great possibilities
of the future. Sacredly preserving whatever has been gained to liberty and good
government during the century, our people are determined to leave behind them
all those bitter controversies concerning things which have been irrevocably
settled, and the further discussion of which can only stir up strife and delay the
onward march...

Enterprises of the highest importance to our moral and material well-being unite
us and offer ample employment of our best powers. Let all our people, leaving
behind them the battlefields of dead issues, move forward and in their strength
of liberty and the restored Union win the grander victories of peace...

The civil service can never be placed on a satisfactory basis until it is regulated
by law. For the good of the service itself, for the protection of those who are
intrusted with the appointing power against the waste of time and obstruction
to the public business caused by the inordinate pressure for place, and for the
protection of incumbents against intrigue and wrong, I shall at the proper time
ask Congress to fix the tenure of the minor offices of the several Executive
Departments and prescribe the grounds upon which removals shall be made
during the terms for which incumbents have been appointed.

Finally, acting always within the authority and limitations of the Constitution,
invading neither the rights of the States nor the reserved rights of the people,
it will be the purpose of my Administration to maintain the authority of the
nation in all places within its jurisdiction; to enforce obedience to all the laws
of the Union in the interests of the people; to demand rigid economy in all the
expenditures of the Government, and to require the honest and faithful service
of all executive officers, remembering that the offices were created, not for the
benefit of incumbents or their supporters, but for the service of the Government.

And now, fellow-citizens, I am about to assume the great trust which you have
committed to my hands. I appeal to you for that earnest and thoughtful support
which makes this Government in fact, as it is in law, a government of the people.

I shall greatly rely upon the wisdom and patriotism of Congress and of those
who may share with me the responsibilities and duties of administration, and,
above all, upon our efforts to promote the welfare of this great people and their
Government I reverently invoke the support and blessings of Almighty God.
Supreme Court of the United States

The Civil Rights Cases

109 U.S. 3 (1883).

These cases are all founded on the first and second sections of the act of Congress known as the ‘Civil Rights Act,’ passed March 1, 1875, entitled ‘An Act to protect all citizens in their civil and legal rights.’…

The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theaters; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. In other words, it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theaters, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. Its effect is to declare that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement, as are enjoyed by white citizens; and vice versa. The second section makes it a penal offense in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments. The power is sought, first, in the Fourteenth Amendment…

The first section of the Fourteenth Amendment,—which is the one relied on,—after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that: ‘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.’

It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of
the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws…

[T]he last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State law and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment…

And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity, for the prohibitions of the amendment are against State laws and acts done under State authority…

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the states. It is not predicated on any such view. It proceeds ex directo to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed…In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the state or its authorities…

[C]ivil rights, such as are guarantied by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress…
The law in question, without any reference to adverse State legislation on the subject, declares that all persons shall be entitled to equal accommodation and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement...What we have to decide is, whether such plenary power has been conferred upon Congress by the Fourteenth Amendment, and, in our judgment, it has not...

[T]he power of Congress to adopt direct and primary, as distinguished from corrective, legislation on the subject in hand, is sought, in the second place, from the Thirteenth Amendment, which abolishes slavery. This amendment declares ‘that 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;’ and it gives Congress power to enforce the amendment by appropriate legislation...

[I]t is claimed that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances, and places of public amusement; the argument being that the denial of such equal accommodations and privileges is in itself a subjection to a species of servitude within the meaning of the amendment. Conceding the major proposition to be true, that Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery, with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theater, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the Thirteenth Amendment...

Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens... [A]t that time (in 1866) Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.
We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different: the former simply abolished slavery; the latter prohibited the States from abridging the privileges or immunities of citizens of the United States, from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different...

Under the Thirteenth Amendment the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings.

The only question under the present head, therefore, is, whether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by an individual, and without any sanction or support from any State law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country? Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery...The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery. The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws...

Can the act of a mere individual, the owner of the inn, the public conveyance, or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the state, and presumably subject to redress by those laws until the contrary appears?...

[W]e are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State; or, if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws, or State action, prohibited by the Fourteenth Amendment. It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business...
On the whole, we are of opinion that no countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several States is concerned…

HARLAN, J., dissenting.

The opinion in these cases proceeds, as it seems to me, upon grounds entirely too narrow and artificial… Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law. By this I do not mean that the determination of these cases should have been materially controlled by considerations of mere expediency or policy. I mean only, in this form, to express an earnest conviction that the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted…

[D]id the freedom thus established involve nothing more than exemption from actual slavery? Was nothing more intended than to forbid one man from owning another as property? Was it the purpose of the nation simply to destroy the institution, and then remit the race, theretofore held in bondage, to the several states for such protection, in their civil rights, necessarily growing out of freedom, as those States, in their discretion, choose to provide?…

[T]he power of Congress under the Thirteenth Amendment is not necessarily restricted to legislation against slavery as an institution upheld by positive law, but may be exerted to the extent at least of protecting the liberated race against discrimination, in respect of legal rights belonging to freemen, where such discrimination is based upon race…

It remains now to consider these cases with reference to the power Congress has possessed since the adoption of the Fourteenth Amendment…

The assumption that this amendment consists wholly of prohibitions upon State laws and State proceedings in hostility to its provisions, is unauthorized by its language…In its application to the colored race, previously liberated, it created and granted, as well citizenship of the United States, as citizenship of the State in which they respectively resided…

It does not seem to me that the fact that, by the second clause of the first
section of the Fourteenth Amendment, the States are expressly prohibited from making or enforcing laws abridging the privileges and immunities of citizens of the United States, furnishes any sufficient reason for holding or maintaining that the amendment was intended to deny Congress the power, by general, primary, and direct legislation, of protecting citizens of the several States, being also citizens of the United States, against all discrimination, in respect to their rights as citizens, which is founded on race, color, or previous condition of servitude.

Such an interpretation of the amendment is plainly repugnant to its fifth section, conferring upon Congress power, by appropriate legislation, to enforce, not merely the provisions containing prohibitions upon the States, but all of the provisions of the amendment, including the provisions, express and implied, in the first clause of the first section of the article granting citizenship…It was perfectly well known that the great danger to the equal enjoyment by citizens of their rights, as citizens, was to be apprehended, not altogether from unfriendly State legislation, but from the hostile action of corporations and individuals in the States. And it is to be presumed that it was intended, by that section, to clothe Congress with power and authority to meet that danger...

The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of the legal right of the black race to take that rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained… If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against freemen and citizens because of their race, color, or previous condition of servitude. To that decree—for the due enforcement of which, by appropriate legislation, Congress has been invested with express power—every one must bow, whatever may have been, or whatever now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect...
February 11, 1887.

To the House of Representatives:

I herewith return without my approval House bill No. 10457, entitled “An act for the relief of dependent parents and honorably discharged soldiers and sailors who are now disabled and dependent upon their own labor for support.”

This is the first general bill that has been sanctioned by the Congress since the close of the late civil war permitting a pension to the soldiers and sailors who served in that war upon the ground of service and present disability alone, and in the entire absence of any injuries received by the casualties or incidents of such service.

While by almost constant legislation since the close of this war there has been compensation awarded for every possible injury received as a result of military service in the Union Army, and while a great number of laws passed for that purpose have been administered with great liberality and have been supplemented by numerous private acts to reach special cases, there has not until now been an avowed departure from the principle thus far adhered to respecting Union soldiers, that the bounty of the Government in the way of pensions is generously bestowed when granted to those who, in this military service and in the line of military duty, have to a greater or less extent been disabled...

The war of the Rebellion terminated nearly twenty-two years ago; the number of men furnished for its prosecution is stated to be 2,772,408. No corresponding number of statutes have ever been passed to cover every kind of injury or disability incurred in the military service of any war. Under these statutes 561,571 pensions have been granted from the year 1861 to June 30, 1886, and more than 2,600 pensioners have been added to the rolls by private acts passed to meet cases, many of them of questionable merit, which the general laws did not cover.

On this 1st day of July, 1886, 365,763 pensioners of all classes were upon the pension rolls, of whom 305,605 were survivors of the War of the Rebellion and their widows and dependents. For the year ending June 30, 1887, $75,000,000 have been appropriated for the payment of pensions, and the amount expended for that purpose from 1861 to July 1, 1886, is $808,624,811.51.

While annually paying out such a vast sum for pensions already granted, it is now proposed by the bill under consideration to award a service pension to the soldiers of all wars in which the United States has been engaged, including of
course the War of the Rebellion, and to pay those entitled to the benefits of the act the sum of $12 per month.

So far as it relates to the soldiers of the late civil war, the bounty it affords them is given thirteen years earlier than it has been furnished the soldiers of any other war, and before a large majority of its beneficiaries have advanced in age beyond the strength and vigor of the prime of life.

It exacts only a military or naval service of three months, without any requirement of actual engagement with an enemy in battle, and without a subjection to any of the actual dangers of war.

The pension it awards is allowed to enlisted men who have not suffered the least injury, disability, loss, or damage of any kind, incurred in or in any degree referable to their military service, including those who never reached the front at all and those discharged from rendezvous at the close of the war, if discharged three months after enlistment…

The section allowing this pension does, however, require, besides a service of three months and an honorable discharge, that those seeking the benefit of the act shall be such as “are now or may hereafter be suffering from mental or physical disability, not the result of their own vicious habits or gross carelessness, which incapacitates them for the performance of labor in such a degree as to render them unable to earn a support, and who are dependent upon their daily labor for support.”

It provides further that such persons shall, upon making proof of the fact, “be placed on the list of invalid pensioners of the United States, and be entitled to receive for such total inability to procure their subsistence by daily labor $12 per month; and such pension shall commence from the date of the filing of the application in the Pension Office, upon proof that the disability then existed, and continue during the existence of the same in the degree herein provided…”

Upon a careful consideration of the language of the section of this bill above given it seems to me to be so uncertain and liable to such conflicting constructions and to be subject to such unjust and mischievous application as to alone furnish sufficient ground for disapproving the proposed legislation.

Persons seeking to obtain the pension provided by this section must be now or hereafter--

1. “Suffering from mental or physical disability.”

2. Such disability must not be “the result of their own vicious habits or gross carelessness.”
3. Such disability must be such as “incapacitates them for the performance of labor in such a degree as to render them unable to earn a support.”

4. They must be “dependent upon their daily labor for support.”

5. Upon proof of these conditions they shall “be placed on the lists of invalid pensioners of the United States, and be entitled to receive for such total inability to procure their subsistence by daily labor $12 per month.”

It is not probable that the words last quoted, “such total inability to procure their subsistence by daily labor,” at all qualify the conditions prescribed in the preceding language of the section. The “total inability” spoken of must be “such” inability—that is, the inability already described and constituted by the conditions already detailed in the previous parts of the section...

The mental and physical disability spoken of has a distinct meaning in the practice of the Pension Bureau and includes every impairment of bodily or mental strength and vigor. For such disabilities there are now paid 131 different rates of pension, ranging from $1 to $100 per month.

This disability must not be the result of the applicant’s “vicious habits or gross carelessness.” Practically this provision is not important. The attempt of the Government to escape the payment of a pension on such a plea would of course in a very large majority of instances, and regardless of the merits of the case, prove a failure...

It will be observed that there is no limitation or definition of the incapacitating injury or ailment itself. It need only be such a degree of disability from any cause as renders the claimant unable to earn a support by labor. It seems to me that the “support” here mentioned as one which can not be earned is a complete and entire support, with no diminution on account of the least impairment of physical or mental condition...

What is a support? Who is to determine whether a man earns it, or has it, or has it not? Is the Government to enter the homes of claimants for pension and after an examination of their surroundings and circumstances settle those questions? Shall the Government say to one man that his manner of subsistence by his earnings is a support and to another that the things his earnings furnish are not a support? Any attempt, however honest, to administer this law in such a manner would necessarily produce more unfairness and unjust discrimination and give more scope for partisan partiality, and would result in more perversion of the Government’s benevolent intentions, than the execution of any statute ought to permit...

It must be borne in mind that in no case is there any grading of this proposed pension...
Another condition required of claimants under this act is that they shall be “dependent upon their daily labor for support.”

I am of the opinion that it may fairly be contended that under the provisions of this section any soldier whose faculties of mind or body have become impaired by accident, disease, or age, irrespective of his service in the Army as a cause, and who by his labor only is left incapable of gaining the fair support he might with unimpaired powers have provided for himself, and who is not so well endowed with this world’s goods as to live without work may claim to participate in its bounty; that it is not required that he should be without property, but only that labor should be necessary to his support in some degree; nor is it required that he should be now receiving support from others.

Recent personal observation and experience constrain me to refer to another result which will inevitably follow the passage of this bill. It is sad, but nevertheless true, that already in the matter of procuring pensions there exists a widespread disregard of truth and good faith, stimulated by those who as agents undertake to establish claims for pensions heedlessly entered upon by the expectant beneficiary, and encouraged, or at least not condemned, by those unwilling to obstruct a neighbor’s plans.

In the execution of this proposed law under any interpretation a wide field of inquiry would be opened for the establishment of facts largely within the knowledge of the claimants alone, and there can be no doubt that the race after the pensions offered by this bill would not only stimulate weakness and pretended incapacity for labor, but put a further premium on dishonesty and mendacity.

While cost should not be set against a patriotic duty or the recognition of a right, still when a measure proposed is based upon generosity or motives of charity it is not amiss to meditate somewhat upon the expense which it involves. Experience has demonstrated, I believe, that all estimates concerning the probable future cost of a pension list are uncertain and unreliable and always fall far below actual realization.

If none should be pensioned under this bill except those utterly unable to work, I am satisfied that the cost stated in the estimate referred to would be many times multiplied, and with a constant increase from year to year; and if those partially unable to earn their support should be admitted to the privileges of this bill, the probable increase of expense would be almost appalling.

I am not willing to approve a measure presenting the objections to which this bill is subject, and which, moreover, will have the effect of disappointing the expectation of the people and their desire and hope for relief from war taxation in time of peace.
I do not think that the objects, the conditions, and the limitations thus suggested are contained in the bill under consideration.

I adhere to the sentiments thus heretofore expressed. But the evil threatened by this bill is, in my opinion, such that, charged with a great responsibility in behalf of the people, I can not do otherwise than to bring to the consideration of this measure my best efforts of thought and judgment and perform my constitutional duty in relation thereto, regardless of all consequences except such as appear to me to be related to the best and highest interests of the country.

GROVER CLEVELAND.
CHAPTER 23

Benjamin Harrison

In re Neagle

Supreme Court of the United States

In re Neagle

135 U.S. 1 (1890).

MILLER, J.

This is an appeal by Cunningham, sheriff of the county of San Joaquin, in the state of California, from a judgment of the circuit court of the United States for the northern district of California, discharging David Neagle from the custody of said sheriff, who held him a prisoner on a charge of murder...

The main allegation of this petition is that Neagle, as United States deputy-marshall, acting under the orders of Marshal Franks, and in pursuance of instructions from the attorney general of the United States, had, in consequence of an anticipated attempt at violence on the part of Terry against the Honorable Stephen J. Field, a justice of the supreme court of the United States, been in attendance upon said justice, and was sitting by his side at a breakfast table when a murderous assault was made by Terry on Judge Field, and in defense of the life of the judge the homicide was committed for which Neagle was held by Cunningham. The allegation is very distinct that Justice Field was engaged in the discharge of his duties as circuit justice of the United States for the circuit, having held court at Los Angeles, one of the places at which the court is by law held, and, having left the court, was on his way to San Francisco for the purpose of holding the circuit court at that place. The allegation is also very full that Neagle was directed by Marshal Franks to accompany him for the purpose of protecting him, and that these orders of Franks were given in anticipation of the assault which actually occurred. It is also stated, in more general terms, that Marshal Neagle, in killing Terry under the circumstances, was in the discharge of his duty as an officer of the United States, and was not, therefore, guilty of a murder, and that his imprisonment under the warrant held by Sheriff Cunningham is in violation of the laws and constitution of the United States, and that he is in custody for an act done in pursuance of the laws of the United States...

If Neagle is held in custody in violation of the constitution or a law of the United States, or for an act done or omitted in pursuance of a law of the United States, he must be discharged...

The evidence is abundant that both Terry and wife contemplated some attack upon Judge Field during his official visit to California in the summer of 1889, which they intended should result in his death. Many of these matters were published in the newspapers, and the press of California was filled with the conjectures of a probable attack by Terry on Justice Field as soon as it became known that he was going to attend the circuit court in that year...
[T]here exists no authority in the courts of the United States to discharge the prisoner while held in custody by the state authorities for this offense, unless there be found in aid of the defense of the prisoner some element of power and authority asserted under the government of the United States. This element is said to be found in the facts that Mr. Justice Field, when attacked, was in the immediate discharge of his duty as judge of the circuit courts of the United States within California; that the assault upon his grew out of animosity of Terry and wife, arising out of the previous discharge of his duty as circuit judge in the case, for which they were committed for contempt of court; and that the deputy-marshal of the United States who killed Terry in defense of Field’s life, was charged with a duty, under the law of the United States, to protect Field from the violence which Terry was inflicting, and which was intended to lead to Field’s death…

We have no doubt that Mr. Justice Field, when attacked by Terry, was engaged in the discharge of his duties as circuit justice of the ninth circuit, and was entitled to all the protection, under those circumstances, which the law could give him.

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and, indeed, no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties; and that the language of section 753 of the Revised Statutes, that the party seeking the benefit of the writ of habeas corpus must, in this connection, show that he is ‘in custody for an act done or omitted in pursuance of a law of the United States,’ makes it necessary that upon this occasion it should be shown that the act for which Neagle is imprisoned was done by virtue of an act of congress. It is not supposed that any special act of congress exists which authorizes the marshals or deputy-marshal of the United States, in express terms, to accompany the judges of the supreme court through their circuits, and act as a bodyguard to them, to defend them against malicious assaults against their persons. But we are of opinion that this view of the statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of habeas corpus to persons imprisoned for the performance of their duty; and we are satisfied that, if it was the duty of Neagle, under the circumstances,—a duty which could only arise under the laws of the United States,—to defend Mr. Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited… It would be a great reproach to the system of government of the United States, declared to be within its sphere of sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably…

Where, then, are we to look for the protection which we have shown Justice
23. BENJAMIN HARRISON
IN RE NEAGLE

Field was entitled to when engaged in the discharge of his official duties?... The constitution, § 3, art. 2, declares that the president ‘shall take care that the laws be faithfully executed;’ and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States... These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called; and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that ‘he shall take care that the laws be faithfully executed.’...

We cannot doubt the power of the president to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death; and we think it clear that where this protection is to be afforded through the civil power, the department of justice is the proper one to set in motion the necessary means of protection...

[I]t is urged against the relief sought by this writ of habeas corpus that the question of the guilt of the prisoner of the crime of murder is a question to be determined by the laws of California, and to be decided by its courts, and that there exists no power in the government of the United States to take away the prisoner from the custody of the proper authorities of the state of California...

[T]he act of February 5, 1867...declares that ‘the said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and, if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty.’...

If the duty of the United States to protect its officers from violence, even to death, in discharge of the duties which its laws impose upon them, be established, and congress has made the writ of habeas corpus one of the means by which this protection is made efficient, and if the facts of this case show that the prisoner was acting both under the authority of law and the directions of his superior officers of the department of justice, we can see no reason why this writ should not be made to serve its purpose in the present case...

To the objection, made in argument, that the prisoner is discharged by this writ from the power of the state court to try him for the whole offense, the reply is that if the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the state of California. When these things are shown, it is established that
he is innocent of any crime against the laws of the state, or of any other authority whatever. There is no occasion for any further trial in the state court, or in any court...

The result at which we have arrived upon this examination is that, in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that, without prompt action on his part, the assault of Terry upon the judge would have ended in the death of the latter; that, such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction. We therefore affirm the judgment of the circuit court authorizing his discharge from the custody of the sheriff of San Joaquin county.
Mr. Justice BREWER... delivered the opinion of the court.

...The United States, finding that the interstate transportation of persons and property, as well as the carriage of the mails, is forcibly obstructed, and that a combination and conspiracy exists to subject the control of such transportation to the will of the conspirators, applied to one of their courts, sitting as a court of equity, for an injunction to restrain such obstruction and prevent carrying into effect such conspiracy. Two questions of importance are presented: First. Are the relations of the general government to interstate commerce and the transportation of the mails such as authorized a direct interference to prevent a forcible obstruction thereof? Second. If authority exists, as authority in governmental affairs implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty?

1. What are the relations of the general government to interstate commerce and the transportation of the mails? They are those of direct supervision, control, and management. While, under the dual system which prevails with us, the powers of government are distributed between the state and the nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the state...

‘We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.’…

Among the powers expressly given to the national government are the control of interstate commerce and the creation and management of a post-office system for the nation. Article 1, § 8, of the constitution provides that ‘the congress shall have power: * * * Third, to regulate commerce with foreign nations and among the several states, and with the Indian tribes. * * * Seventh, to establish post offices and post roads.’

Congress has exercised the power granted in respect to interstate commerce in a variety of legislative acts...

Under the power vested in congress to establish post offices and post roads,
congress has, by a mass of legislation, established the great post-office system of the country, with all its detail of organization, its machinery for the transaction of business, defining what shall be carried and what not, and the prices of carriage, and also prescribing penalties for all offenses against it.

Obviously, these powers given to the national government over interstate commerce, and in respect to the transportation of the mails, were not dormant and unused. Congress had taken hold of these two matters, and, by various and specific acts, had assumed and exercised the powers given to it, and was in the full discharge of its duty to regulate interstate commerce and carry the mails...

If a state, with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that state has a power which the state itself does not possess?

As, under the constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and congress, by virtue of such grant, has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. But how shall this be accomplished? Doubtless, it is within the competency of congress to prescribe by legislation that any interferences with these matters shall be offenses against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it. By article 3, § 2, cl. 3, of the federal constitution, it is provided: ‘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 crime shall have been committed.’ If all the inhabitants of a state, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offenses had in such a community would be doomed in advance to failure. And if the certainty of such failure was known, and the national government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single state.

But there is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation, to compel obedience to its laws.
But, passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the army the only instrument by which rights of the public can be enforced, and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated, either at the instance of the authorities, or by any individual suffering private damage therefrom. The existence of this right of forcible abatement is not inconsistent with, nor does it destroy, the right of appeal, in an orderly way, to the courts for a judicial determination, and an exercise of their powers, by writ of injunction and otherwise, to accomplish the same result...

So, in the case before us, the right to use force does not exclude the right of appeal to the courts for a judicial determination, and for the exercise of all their powers of prevention. Indeed, it is more to the praise than to the blame of the government that, instead of determining for itself questions of right and wrong...it submitted all those questions to the peaceful determination of judicial tribunals, and invoked their consideration and judgment as to the measure of its rights and powers, and the correlative obligations of those against whom it made complaint...

Every government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrongdoing of one, resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court...

It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the constitution are entrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.

The national government, given by the constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always...
been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control...

That the bill filed in this case alleged special facts calling for the exercise of all the powers of the court is not open to question. The picture drawn in it of the vast interests involved, not merely of the city of Chicago and the state of Illinois, but of all the states, and the general confusion into which the interstate commerce of the country was thrown; the forcible interference with that commerce; the attempted exercise by individuals of powers belonging only to government, and the threatened continuance of such invasions of public right, presented a condition of affairs which called for the fullest exercise of all the powers of the courts. If ever there was a special exigency, one which demanded that the courts should do all that courts can do, it was disclosed by this bill...

Again, it is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes... There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law...

...[I]n the throes of rebellion or revolution, the processes of civil courts are of little avail, for the power of the courts rests on the general support of the people, and their recognition of the fact that peaceful remedies are the true resort for the correction of wrongs...

The right of any laborer, or any number of laborers, to quit work was not challenged. The scope and purpose of the bill was only to restrain forcible obstructions of the highways along which interstate commerce travels and the mails are carried...

Summing up our conclusions, we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that, while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that, while it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and
if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority; that such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law; that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in the course of such violation; that the complaint filed in this case clearly showed an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mail,—an obstruction not only temporarily existing, but threatening to continue; that under such complaint the circuit court had power to issue its process of injunction; that, it having been issued and served on these defendants, the circuit court had authority to inquire whether its orders had been disobeyed, and, when it found that they had been, then to proceed under section 725, Rev. St., which grants power ‘to punish, by fine or imprisonment, *** disobedience, *** by any party *** or other person, to any lawful writ, process, order, rule, decree, or command,’ and enter the order of punishment complained of; and, finally, that the circuit court having full jurisdiction in the premises, its finding of the fact of disobedience is not open to review on habeas corpus in this or any other court...

The petition for a writ of habeas corpus is denied.
Supreme Court of the United States

Plessy
v.
Ferguson

163 U.S. 537 (1896).

Mr. Justice BROWN... delivered the opinion of the court.

This case turns upon the constitutionality of an act of the general assembly of the state of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races.

The first section of the statute enacts ‘that all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: provided, that this section shall not be construed to apply to street railroads. No person or persons shall be permitted to occupy seats in coaches, other than the ones assigned to them, on account of the race they belong to.’…

The information filed in the criminal district court charged, in substance, that Plessy, being a passenger between two stations within the state of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong…

The constitutionality of this act is attacked upon the ground that it conflicts both with the thirteenth amendment of the constitution, abolishing slavery, and the fourteenth amendment, which prohibits certain restrictive legislation on the part of the states.

1. That it does not conflict with the thirteenth amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude,--a state of bondage; the ownership of mankind as a chattel, or, at least, the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services…

A statute which implies merely a legal distinction between the white and colored races--a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color--has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude…
By the fourteenth amendment, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are made citizens of the United States and of the state wherein they reside; and the states are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty, or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws...

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power...

The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters, and railway carriages has been frequently drawn by this court...

[I]t is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men’s houses to be painted white, and colored men’s black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class...

So far, then, as a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of
the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it... The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits, and a voluntary consent of individuals... Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane...
Mr. Chief Justice FULLER delivered the opinion of the court:

...[T]he constitution divided federal taxation into two great classes,—the class of direct taxes, and the class of duties, imposts, and excises,—and prescribed two rules which qualified the grant of power as to each class.

The power to lay direct taxes, apportioned among the several states in proportion to their representation in the popular branch of congress,—representation based on population as ascertained by the census,—was plenary and absolute, but to lay direct taxes without apportionment was forbidden. The power to lay duties, imposts, and excises was subject to the qualification that the imposition must be uniform throughout the United States.

Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct, or not, in the meaning of the constitution; and the court went no further, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived,—that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while, as to the income from municipal bonds, that could not be taxed, because of want of power to tax the source, and no reference was made to the nature of the tax, as being direct or indirect.

We are now permitted to broaden the field of inquiry, and to determine to which of the two great classes a tax upon a person’s entire income—whether derived from rents or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property—belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner’s real or personal property, in the manner prescribed, is so different from a tax upon the property itself that it is not a direct, but an indirect, tax, in the meaning of the constitution...

We know of no reason for holding otherwise than that the words ‘direct taxes,’ on the one hand, and ‘duties, imposts and excises,’ on the other, were used in the constitution in their natural and obvious sense. Nor, in arriving at what those terms embrace, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the
constitution framed and ratified...

[W]e regard the conclusion reached as inevitable, when the circumstances which surrounded the convention and controlled its action, and the views of those who framed and those who adopted the constitution, are considered...

In the light of the struggle in the convention as to whether or not the new nation should be empowered to levy taxes directly on the individual until after the states had failed to respond to requisitions... it would seem beyond reasonable question that direct taxation, taking the place, as it did, of requisitions, was purposely restrained to apportionment according to representation in order that the former system as to ratio might be retained, while the mode of collection was changed...

The reasons for the clauses of the constitution in respect of direct taxation are not far to seek. The states... retained the power of direct taxation, and to that they looked as their chief resource; but even in respect of that they granted the concurrent power, and, if the tax were placed by both governments on the same subject, the claim of the United States had preference. Therefore they did not grant the power of direct taxation without regard to their own condition and resources as states, but they granted the power of apportioned direct taxation,—a power just as efficacious to serve the needs of the general government, but securing to the states the opportunity to pay the amount apportioned, and to recoup from their own citizens in the most feasible way, and in harmony with their systems of local self-government...The constitution ordains affirmatively that representatives and direct taxes shall be apportioned among the several states according to numbers, and negatively that no direct tax shall be laid unless in proportion to the enumeration.

The founders anticipated that the expenditures of the states, their counties, cities, and towns, would chiefly be met by direct taxation on accumulated property, while they expected that those of the federal government would be for the most part met by indirect taxes. And in order that the power of direct taxation by the general government should not be exercised except on necessity, and, when the necessity arose, should be so exercised as to leave the states at liberty to discharge their respective obligations, and should not be so exercised unfairly and discriminatingly, as to particular states or otherwise, by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden, the qualified grant was made. Those who made it knew that the power to tax involved the power to destroy, and that, in the language of Chief Justice Marshall, ‘the only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.’ And they retained this security by
providing that direct taxation and representation in the lower house of congress should be adjusted on the same measure...

It is said that a tax on the whole income of property is not a direct tax in the meaning of the constitution, but a duty, and, as a duty, leviable without apportionment, whether direct or indirect. We do not think so...

A tax upon one's whole income is a tax upon the annual receipts from his whole property, and as such falls within the same class as a tax upon that property, and is a direct tax, in the meaning of the constitution...

The constitution prohibits any direct tax, unless in proportion to numbers as ascertained by the census, and in the light of the circumstances to which we have referred, is it not an evasion of that prohibition to hold that a general unapportioned tax, imposed upon all property owners as a body for or in respect of their property, is not direct, in the meaning of the constitution, because confined to the income therefrom?

Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership, and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

There can be but one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property and the property itself.

Nor can we perceive any ground why the same reasoning does not apply to capital in personality held for the purpose of income, or ordinarily yielding income, and to the income therefrom. All the real estate of the country, and all its invested personal property, are open to the direct operation of the taxing power, if an apportionment be made according to the constitution. The constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax cannot be laid and assessed, as Mr. Gallatin said in his report when secretary of the treasury in 1812, 'upon the same objects of taxation on which the direct taxes levied
Personal property of some kind is of general distribution, and so are incomes, though the taxable range thereof might be narrowed through large exemptions…

Nor are we impressed with the contention that, because in the four instances in which the power of direct taxation has been exercised, congress did not see fit, for reasons of expediency, to levy a tax upon personality, this amounts to such a practical construction of the constitution that the power did not exist, that we must regard ourselves bound by it…

The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real-estate tax, or a crop tax, or a bond tax; that it is an assessment upon the taxpayer on account of his money-spending power, as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and, although once not taxable, have become transmuted, in their new form, into taxable subject-matter,—in other words, that income is taxable, irrespective of the source from whence it is derived...

We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the states and on their instrumentalities to borrow money, and consequently repugnant to the constitution. But if, as contended, the interest, when received, has become merely money in the recipient's pocket, and taxable as such, without reference to the source from which it came, the question is immaterial whether it could have been originally taxed at all or not. This was admitted by the attorney general, with characteristic candor; and it follows that if the revenue derived from municipal bonds cannot be taxed, because the source cannot be, the same rule applies to revenue from any other source not subject to the tax, and the lack of power to levy any but an apportional tax on real and personal property equally exists as to the revenue therefrom.

Admitting that this act taxes the income of property, irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax, in the meaning of the constitution…

[O]ur province is to determine whether this income tax on the revenue from property does or does not belong to the class of direct taxes. If it does, it is, being unapportioned, in violation of the constitution, and we must so declare…

If it be true that the constitution should have been so framed that a tax of this kind could be laid, the instrument defines the way for its amendment. In no part of it was greater sagacity displayed. Except that no state, without its consent,
can be deprived of its equal suffrage in the senate, the constitution may be amended upon the concurrence of two-thirds of both houses, and the ratification of the legislatures or conventions of the several states, or through a federal convention when applied for by the legislatures of two-thirds of the states, and upon like ratification...

We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.

Being of opinion that so much of the sections of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections as a whole...

According to the census, the true valuation of real and personal property in the United States in 1890 was $65,037,091,197, of which real estate with improvements thereon made up $39,544,544,333. Of course, from the latter must be deducted, in applying these sections, all unproductive property and all property whose net yield does not exceed $4,000; but, even with such deductions, it is evident that the income from realty formed a vital part of the scheme for taxation embodied therein. If that be stricken out, and also the income from all invested personal property, bonds, stocks, investments of all kinds, it is obvious that by far the largest part of the anticipated revenue would be eliminated, and this would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain, in substance, a tax on occupations and labor. We cannot believe that such was the intention of congress. We do not mean to say that an act laying by apportionment a direct tax on all real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations. But this is not such an act, and the scheme must be considered as a whole. Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated, except in connection with the taxation considered as an entirety, we are constrained to conclude that sections 27 to 37, inclusive, of the act,...are wholly inoperative and void.

Our conclusions may therefore be summed up as follows:

First. We adhere to the opinion already announced,—that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes.
Second. We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes.

Third. The tax imposed by sections 27 to 37, inclusive, of the act of 1894, so far as it falls on the income of real estate, and of personal property, being a direct tax, within the meaning of the constitution, and therefore unconstitutional and void, because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid…
Mr. Chief Justice FULLER...delivered the opinion of the court.

By the purchase of the stock of the four Philadelphia refineries with shares of its own stock the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several states and with foreign nations, contrary to the act of congress of July 2, 1890.

The relief sought was the cancellation of the agreements under which the stock was transferred, the redelivery of the stock to the parties respectively, and an injunction against the further performance of the agreements and further violations of the act...That ground here was the existence of contracts to monopolize interstate or international trade or commerce, and to restrain such trade or commerce which, by the provisions of the act, could be rescinded, or operations thereunder arrested...

The fundamental question is whether, conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of congress in the mode attempted by this bill.

It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, ‘the power to govern men and things within the limits of its dominion,’ is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive. The relief of the citizens of each state from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the states to deal with, and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen,-- in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community,-- is subject to regulation by state legislative...
power. On the other hand, the power of congress to regulate commerce among the several states is also exclusive. The constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free, except as congress might impose restraints. Therefore it has been determined that the failure of congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states, and if a law passed by a state in the exercise of its acknowledged powers comes into conflict with that will, the congress and the state cannot occupy the position of equal opposing sovereignties, because the constitution declares its supremacy, and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme. ‘Commerce undoubtedly is traffic,’ said Chief Justice Marshall, ‘but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.’ That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state.

The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government, in the exercise of the power to regulate commerce, may repress such monopoly directly, and set aside the instruments which have created it. But this argument cannot be confined to necessaries of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, and not the primary, sense; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce.

It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more
serious consequences by resort to expedients of even doubtful constitutionality.

It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the states, or put in the way of transit, may be regulated; but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce...

[In Kidd v. Pearson... Mr. Justice Lamar remarked: 'No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation, -- the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling, and the transportation incidental thereto, constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. * * * If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that congress would be invested, to the exclusion of the states, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock-raising, domestic fisheries, mining; in short, every branch of human industry...

[STATE legislation which, in a great variety of ways, affected interstate commerce and persons engaged in it, has been frequently sustained because the interference was not direct...

Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition. Slight reflection will show that, if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control.

It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with
monopoly directly as such; or to limit and restrict the rights of corporations created by the states or the citizens of the states in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted. Aside from the provisions applicable where congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations... It is true that the bill alleged that the products of these refineries were sold and distributed among the several states, and that all the companies were engaged in trade or commerce with the several states and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function... [I]t does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt... to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked... [T]he act of congress only authorized the circuit courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce...
Mr. Justice Brown delivered the opinion of the court:

This case raises the single question whether territory acquired by the United States by cession from a foreign power remains a ‘foreign country’ within the meaning of the tariff laws...

Whether these cargoes of sugar were subject to duty depends solely upon the question whether Porto Rico was a ‘foreign country’ at the time the sugars were shipped, since the tariff act of July 24, 1897, commonly known as the Dingley act, declares that ‘there shall be levied, collected, and paid upon all articles imported from foreign countries’ certain duties therein specified...

The status of Porto Rico was this: The island had been for some months under military occupation by the United States as a conquered country, when, by the 2d article of the treaty of peace between the United States and Spain, signed December 10, 1898, and ratified April 11, 1899, Spain ceded to the United States the island of Porto Rico, which has ever since remained in our possession, and has been governed and administered by us... [i]t is earnestly insisted by the government that it never could have been the intention of Congress to admit Porto Rico into a customs union with the United States, and that, while the island may be to a certain extent domestic territory, it still remains a ‘foreign country’ under the tariff laws, until Congress has embraced it within the general revenue system...

[Section] 2 of the Foraker act makes a distinction between foreign countries and Porto Rico, by enacting that the same duties shall be paid upon ‘all articles imported into Porto Rico from ports other than those of the United States, which are required by law to be collected upon articles imported into the United States from foreign countries.’...

By article 2, § 2, of the Constitution, the President is given power, ‘by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur;’ and by article 6, ‘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.’ It will be observed that no distinction is made as to the question
of supremacy between laws and treaties, except that both are controlled by the Constitution. A law requires the assent of both houses of Congress, and, except in certain specified cases, the signature of the President. A treaty is negotiated and made by the President, with the concurrence of two thirds of the senators present, but each of them is the supreme law of the land.

As was said by Chief Justice Marshall in United States v. The Peggy: ‘Where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of Congress.’… So in Whitney v. Robertson: ‘By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing.’…

One of the ordinary incidents of a treaty is the cession of territory. It is not too much to say it is the rule, rather than the exception, that a treaty of peace, following upon a war, provides for a cession of territory to the victorious party…

It follows from this that by the ratification of the treaty of Paris the island became territory of the United States, although not an organized territory in the technical sense of the word…

[W]hatever be the source of this power, its uninterrupted exercise by Congress for a century, and the repeated declarations of this court, have settled the law that the right to acquire territory involves the right to govern and dispose of it… In the more recent case of National Bank v. Yankton County, 101 U. S. 129, 25 L. ed. 1046, it was said by Mr. Chief Justice Waite that Congress ‘has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the states.’… It is an authority which arises, not necessarily from the territorial clause of the Constitution, but from the necessities of the case, and from the inability of the states to act upon the subject. Under this power Congress may deal with territory acquired by treaty; may administer its government as it does that of the District of Columbia; it may organize a local territorial government; it may admit it as a state upon an equality with other states; it may sell its public lands to individual citizens, or may donate them as homesteads to actual settlers. In short, when once acquired by treaty, it belongs to the United States, and is subject to the disposition of Congress.

Territory thus acquired can remain a foreign country under the tariff laws only upon one or two theories: Either that the word ‘foreign’ applies to such countries as
were foreign at the time the statute was enacted, notwithstanding any subsequent change in their condition, or that they remain foreign under the tariff laws until Congress has formally embraced them within the customs union of the states. The first theory is obviously untenable. While a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope, and ceases to apply to such as thereafter fall without its scope...

So, when the Constitution of the United States declares in art. 1, § 10, that the state shall not do certain things, this declaration operates, not only upon the thirteen original states, but upon all who subsequently become such; and when Congress places certain restrictions upon the powers of a territorial legislature, such restrictions cease to operate the moment such territory is admitted as a state. By parity of reasoning a country ceases to be foreign the instant it becomes domestic...

The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the customs union presupposes that a country may be domestic for one purpose and foreign for another... This theory also presupposes that territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic territory; that laws may be enacted and enforced by officers of the United States sent there for that purpose; that insurrections may be suppressed, wars carried on, revenues collected, taxes imposed; in short, that everything may be done which a government can do within its own boundaries, and yet that the territory may still remain a foreign country...

If an act of Congress be necessary to convert a foreign country into domestic territory, the question at once suggests itself, What is the character of the legislation demanded for this purpose? Will an act appropriating money for its purchase be sufficient? Apparently not. Will an act appropriating the duties collected upon imports to and from such country for the benefit of its government be sufficient? Apparently not. Will acts making appropriations for its postal service, for the establishment of lighthouses, for the maintenance of quarantine stations, for erecting public buildings, have that effect? Will an act establishing a complete local government, but with the reservation of a right to collect duties upon commerce, be adequate for that purpose? None of these, nor all together, will be sufficient, if the contention of the government be sound, since acts embracing all these provisions have been passed in connection with Porto Rico, and it is insisted that it is still a foreign country within the meaning of the tariff laws. We are unable to acquiesce in this assumption that a territory may be at the same time both foreign and domestic...

We are therefore of opinion that at the time these duties were levied Porto Rico was not a foreign country within the meaning of the tariff laws, but a territory of the United States, that the duties were illegally exacted, and that the plaintiffs are...
CHAPTER 25

25. William McKinley

Insular Cases: Downes v. Bidwell

Supreme Court of the United States

Insular Cases

Downes

v.

Bidwell

182 U.S. 244 (1901).

Statement by Mr. Justice Brown:

This was an action begun...by Downes, doing business under the firm name of S. B. Downes & Co., against the collector of the port of New York, to recover back duties to the amount of $659.35 exacted and paid under protest upon certain oranges consigned to the plaintiff at New York, and brought thither from the port of San Juan in the island of Porto Rico during the month of November, 1900, after the passage of the act temporarily providing a civil government and revenues for the island of Porto Rico, known as the Foraker act...

Mr. Justice Brown announced the conclusion and judgment of the court:

This case involves the question whether merchandise brought into the port of New York from Porto Rico since the passage of the Foraker act is exempt from duty, notwithstanding the 3d section of that act which requires the payment of 15 per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries.‘...

In the case of De Lima v. Bidwell just decided, we held that, upon the ratification of the treaty of peace with Spain, Porto Rico ceased to be a foreign country, and became a territory of the United States, and that duties were no longer collectible upon merchandise brought from that island. We are now asked to hold that it became a part of the United States within that provision of the Constitution which declares that ‘all duties, imposts, and excises shall be uniform throughout the United States.’ Art. 1, § 8. If Porto Rico be a part of the United States, the Foraker act imposing duties upon its products is unconstitutional, not only by reason of a violation of the uniformity clause, but because by § 9 ‘vessels bound to or from one state’ cannot ‘be obliged to enter, clear, or pay duties in another.’

The case also involves the broader question whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories...

[A] new Constitution was formed in 1787 by ‘the people of the United States’ ‘for the United States of America,’ as its preamble declares. All legislative powers were vested in a Congress consisting of representatives from the several states, but no provision was made for the admission of delegates from the territories,
and no mention was made of territories as separate portions of the Union, except that Congress was empowered ‘to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.’

[I]t can nowhere be inferred that the territories were considered a part of the United States. The Constitution was created by the people of the United States, as a union of states, to be governed solely by representatives of the states; and even the provision relied upon here, that all duties, imposts, and excises shall be uniform ‘throughout the United States,’ is explained by subsequent provisions of the Constitution, that ‘no tax or duty shall be laid on articles exported from any state,’ and ‘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.’ In short, the Constitution deals with states, their people, and their representatives...

To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time of place, and such as are operative only ‘throughout the United States’ or among the several states.

Thus, when the Constitution declares that ‘no bill of attainder or ex post facto law shall be passed,’ and that ‘no title of nobility shall be granted by the United States,’ it goes to the competency of Congress to pass a bill of that description. Perhaps the same remark may apply to the 1st Amendment, that ‘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 to peacefully assemble and to petition the government for a redress of grievances.’ We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application.

Upon the other hand, when the Constitution declares that all duties shall be uniform ‘throughout the United States,’ it becomes necessary to inquire whether there be any territory over which Congress has jurisdiction which is not a part of the ‘United States,’ by which term we understand the states whose people united to form the Constitution, and such as have since been admitted to the Union upon an equality with them...

In determining the meaning of the words of article 1, section 8, ‘uniform throughout the United States,’ we are bound to consider, not only the provisions forbidding preference being given to the ports of one state over those of another (to which attention has already been called), but the other clauses declaring
25. William McKinley

Insular Cases: Downes v. Bidwell

that no tax or duty shall be laid on articles exported from any state, and that no state shall, without the consent of Congress, lay any imposts or duties upon imports or exports, nor any duty on tonnage. The object of all of these was to protect the states which united in forming the Constitution from discriminations by Congress, which would operate unfairly or injuriously upon some states and not equally upon others…

Indeed, the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall so direct. Notwithstanding its duty to ‘guarantee to every state in this Union a republican form of government’ (art. 4, § 4), by which we understand, according to the definition of Webster, ‘a government in which the supreme power resides in the whole body of the people, and is exercised by representatives elected by them,’ Congress did not hesitate, in the original organization of the territories of Louisiana, Florida, the Northwest Territory, and its subdivisions of Ohio, Indiana, Michigan, Illinois, and Wisconsin and still more recently in the case of Alaska, to establish a form of government bearing a much greater analogy to a British Crown colony than a republican state of America, and to vest the legislative power either in a governor and council, or a governor and judges, to be appointed by the President. It was not until they had attained a certain population that power was given them to organize a legislature by vote of the people. In all these cases, as well as in territories subsequently organized west of the Mississippi, Congress thought it necessary either to extend the Constitution and laws of the United States over them, or to declare that the inhabitants should be entitled to enjoy the right of trial by jury, of bail, and of the privilege of the writ of habeas corpus, as well as other privileges of the bill of rights.

We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the ‘American empire.’ There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States. In all its treaties hitherto the treaty-making power has made special provision for this subject…

Whatever may be finally decided by the American people as to the status of these islands and their inhabitants,—whether they shall be introduced into the
sisterhood of states or be permitted to form independent governments,—it does not follow that in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property...We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect.

Large powers must necessarily be entrusted to Congress in dealing with these problems, and we are bound to assume that they will be judiciously exercised...

This subject was carefully considered by the Senate committee in charge of the Foraker bill, which found, after an examination of the facts, that property in Porto Rico was already burdened with a private debt amounting probably to $30,000,000; that no system of property taxation was or ever had been in force in the island, and that it probably would require two years to inaugurate one and secure returns from it; that the revenues had always been chiefly raised by duties on imports and exports, and that our internal revenue laws, if applied in that island, would prove oppressive and ruinous to many people and interests; that to undertake to collect our heavy internal revenue tax, far heavier than Spain ever imposed upon their products and vocations, would be to invite violations of the law so innumerable as to make prosecutions impossible, and to almost certainly alienate and destroy the friendship and good will of that people for the United States...

There is a provision that ‘new states may be admitted by the Congress into this Union.’ These words, of course, carry the Constitution with them, but nothing is said regarding the acquisition of new territories or the extension of the Constitution over them. The liberality of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the Constitution itself, and little in the interpretation put upon it, to confirm that impression...In short, there is absolute silence upon the subject. The executive and legislative departments of the government have for more than a century interpreted this silence as precluding the idea that the Constitution attached to these territories as soon as acquired, and unless such interpretation be manifestly contrary to the letter or spirit of the Constitution, it should be followed by the judicial department.

Patriotic and intelligent men may differ widely as to the desireableness of this or that acquisition, but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should
be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demand it. A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire. Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.

We are therefore of opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.
25. William McKinley
Insular Cases: Dooley v. United States

Supreme Court of the United States

Insular Cases

Dooley
v.
United States

182 U.S. 222 (1901).

Statement by Mr. Justice Brown:

This was an action begun... by the firm of Dooley, Smith, & Co., engaged in trade and commerce between Porto Rico and New York, to recover back certain duties to the amount of $5,374.68, exacted and paid under protest at the port of San Juan, Porto Rico, upon several consignments of merchandise imported into Porto Rico from New York between July 26, 1898, and May 1, 1900 [including from February 1, 1899, to May 1, 1900, under the amended tariff customs promulgated January 20, 1899, by order of the President.

It thus appears that the duties were collected...prior to the taking effect of the Foraker act. The revenues thus collected were used by the military authorities for the benefit of the provisional government.

Mr. Justice Brown delivered the opinion of the court:

... Different considerations apply with respect to duties levied after the ratification of the treaty and the cession of the island to the United States. Porto Rico then ceased to be a foreign country, and, as we have just held in De Lima v. Bidwell, the right of the collector of New York to exact duties upon imports from that island ceased with the exchange of ratifications. We have no doubt, however, that, from the necessities of the case, the right to administer the government of Porto Rico continued in the military commander after the ratification of the treaty and until further action by Congress. At the same time, while the right to administer the government continued, the conclusion of the treaty of peace and the cession of the island to the United States were not without their significance. By that act Porto Rico ceased to be a foreign country, and the right to collect duties upon imports from that island ceased. We think the correlative right to exact duties upon importations from New York to Porto Rico also ceased. The spirit as well as the letter of the tariff laws admits of duties being levied by a military commander only upon importations from foreign countries; and, while his power is necessarily despotic, this must be understood rather in an administrative than in a legislative sense. While in legislating for a conquered country he may disregard the laws of that country, he is not wholly above the laws of his own...
Without questioning at all the original validity of the order imposing duties upon goods imported into Porto Rico from foreign countries, we think the proper construction of that order is that it ceased to apply to goods imported from the United States from the moment the United States ceased to be a foreign country with respect to Porto Rico, and that, until Congress otherwise constitutionally directed, such merchandise was entitled to free entry...

In our opinion the authority of the President as Commander in Chief to exact duties upon imports from the United States ceased with the ratification of the treaty of peace, and her right to the free entry of goods from the ports of the United States continued until Congress should constitutionally legislate upon the subject...
26. **Theodore Roosevelt**  
**Shurtleff v. United States**

_Supreme Court of the United States_  
_Shurtleff_  
_v._  
_United States_

189 U.S. 311 (1903).

Statement by Mr. Justice Peckham:

The appellant seeks to review a judgment of the court of claims denying his right to be paid the salary pertaining to the office of a general appraiser of merchandise and accruing between May 15 and November 1, 1899...

[The appellant was nominated on July 17, 1890, to be one of the general appraisers of merchandise under the act of June 10, 1890, chapter 407, and that nomination was consented to on the following day by the Senate, and the appellant was thereupon commissioned to be such general appraiser of merchandise. He accepted that office and took the oath required on July 24, 1890, and remained in such office and was paid the salary attached thereto up to May 15, 1899. On May 3 of that year he received the following communication from the President:

Executive Mansion,  

Sir:--

You are hereby removed from the office of general appraiser of merchandise, to take effect upon the appointment and qualification of your successor.

William McKinley.

The appellant never resigned his office nor acquiesced in any attempted removal therefrom, and he was never notified or informed of any charges made against him...

Since May 15, 1899, he has been ready and willing and offered to discharge the duties of the office, and has not been paid any salary since that date...

Mr. Justice Peckham, after making the foregoing statement of facts, delivered the opinion of the court:

The office of general appraiser of merchandise was created by the 12th section of the act of Congress approved June 10, 1890... The material portion of that section reads as follows:
Sec. 12 that there shall be appointed by the President, by and with the advice and consent of the Senate, nine general appraisers of merchandise, each of whom shall receive a salary of seven thousand dollars a year... They... may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office...

Under the provision that the officer might be removed from office at any time for efficiency, neglect of duty, or malfeasance in office, we are of opinion that if the removal is sought to be made for those causes, or either of them, the officer is entitled to notice and a hearing...

It must be presumed that the President did not make the removal for any cause assigned in the statute, because there was given to the officer no notice or opportunity to defend. The question then arises, Can the President exercise the power of removal for any other causes than those mentioned in the statute? In other words, Is he restricted to a removal for those causes alone, or can he exercise his general power of removal without such restriction?...

It cannot now be doubted that, in the absence of constitutional or statutory provision, the President can, by virtue of his general power of appointment, remove an officer, even though appointed by and with the advice and consent of the Senate. To take away this power of removal in relation to an inferior office created by statute, although the statute provided for an appointment thereto by the President and confirmation by the Senate, would require very clear and explicit language. It should not be held to be taken away by mere inference or implication...

The appellant contends that, because the statute specified certain causes for which the officer might be removed, it thereby impliedly excluded and denied the right to remove for any other cause, and that the President was therefore by the statute prohibited from any removal excepting for the causes, or some of them, therein defined...

The right of removal would exist if the statute had not contained a word upon the subject. It does not exist by virtue of the grant, but it inheres in the right to appoint, unless limited by constitution or statute. It requires plain language to take it away...

In making removals from office it must be assumed that the President acts with reverence to his constitutional duty to take care that the laws are faithfully executed, and we think it would be a mistaken view to hold that the mere specification in the statute of some causes for removal thereby excluded the right of the President to remove for any other reason which he, acting with a due sense of his official responsibility, should think sufficient...
We are not unmindful of the force of the contention that, if the power of removal is not limited to the causes specified in the statute, that then those words providing for a removal for inefficiency, neglect of duty, or malfeasance in office fulfil no function, because without them the President has unlimited power of removal, and with them he still has the same power.

It may be said, however, that there is some use for the provision for removal for the causes named in the statute. A removal for any of those causes can only be made after notice and an opportunity to defend; and therefore, if a removal is made without such notice, there is a conclusive presumption that the officer was not removed for any of those causes, and his removal cannot be regarded as the least imputation on his character for integrity or capacity. Other causes for removal may, however, exist, and be demanded by the interests of the service, in order that the office may be better conducted, although the officer may not be proved guilty of conduct coming within the statute as a cause for removal. It is true that, under this construction, it is possible that officers may be removed for causes unconnected with the proper administration of the office. That is the case with most of the other officers in the government. The only restraint in cases such as this must consist in the responsibility of the President, under his oath of office, to so act as shall be for the general benefit and welfare...

We are asked not alone to interpret the language actually used, but to infer or imply therefrom a further meaning as to its effect, which does not necessarily flow from the language itself, and, if adopted, results in the creation of a tenure of this particular office, not attached to a single other civil office in the government, with the exception of judges of the courts of the United States. We cannot bring ourselves to the belief that Congress ever intended this result while omitting to use language which would put that intention beyond doubt...

The claim made by the appellant, it will be seen, is for salary accruing prior to the appointment and confirmation of his successor by the President and Senate; but holding, as we do, that the President had the power to remove on other grounds than those mentioned in the act, he exercised the power by appointing the appellant’s successor...

We are of the opinion that the judgment of the Court of Claims should be affirmed.
Mr. Chief Justice White delivered the opinion of the court:

The Standard Oil Company of New Jersey and thirty-three other corporations, John D. Rockefeller, William Rockefeller, and five other individual defendants, prosecute this appeal to reverse a decree of the court below. Such decree was entered upon a bill filed by the United States under authority of § 4 of the act of July 2, 1890, known as the antitrust act, and had for its object the enforcement of the provisions of that act…

The bill…sought relief upon the theory that the various defendants were engaged in conspiring ‘to restrain the trade and commerce in petroleum, commonly called ‘crude oil,’ in refined oil, and in the other products of petroleum, among the several states and territories of the United States and the District of Columbia and with foreign nations, and to monopolize the said commerce.’ The conspiracy was alleged to have been formed in or about the year 1870…

To establish this charge it was averred that John D. and William Rockefeller and several other named individuals, who, prior to 1870, composed three separate partnerships engaged in the business of refining crude oil and shipping its products in interstate commerce, organized in the year 1870 a corporation known as the Standard Oil Company of Ohio, and transferred to that company the business of the said partnerships, the members thereof becoming stockholders in the corporation…[B]y the year 1872, the combination had acquired substantially all but three or four of the thirty-five or forty oil refineries located in Cleveland, Ohio…[M]any, if not virtually all, competitors were forced either to become members of the combination or were driven out of business; and thus…during the period in question, the following results were brought about: (a) That the combination…acquired a large number of refineries of crude petroleum, situated in New York, Pennsylvania, Ohio, and elsewhere… (b) That the combination had obtained control of the pipe lines available for transporting oil from the oil fields to the refineries in Cleveland, Pittsburgh[h], Titusville, Philadelphia, New York, and New Jersey. (c) That the combination during the period named had obtained a complete mastery over the Oil industry, controlling 90 per cent of the business of producing, shipping, refining, and selling petroleum and its products, and thus was able to fix the price of crude and refined petroleum, and to restrain and monopolize all interstate commerce
in those products...

[Between 1882 and 1899] ‘...the defendants entered into a contract and trust agreement, by which various independent firms, corporations, limited partnerships, and individuals engaged in purchasing, transporting, refining, shipping, and selling oil and the products thereof among the various states, turned over the management of their said business, corporations, and limited partnerships to nine trustees...’

The trust agreement...was made in January, 1882. By its terms the stock of forty corporations, including the Standard Oil Company of Ohio, and a large quantity of various properties which had been previously acquired by the alleged combination...for the benefit of the members of the combination, was vested in the trustees...

[T]he said trustees caused to be transferred to themselves the stocks of all corporations and limited partnerships named in said trust agreement, and caused various of the individuals and copartnerships who owned...properties employed in the business of refining and transporting and selling oil in and among said various states...to transfer their property...to the respective Standard Oil Companies of said states of New York, New Jersey, Pennsylvania, and Ohio...

‘...[D]uring the third period of said conspiracy...the said individual defendants operated through the Standard Oil Company of New Jersey...which corporation obtained and acquired the majority of the stocks of the various corporations engaged in purchasing, transporting, refining, shipping, and selling oil into and among the various states...and thereby managed and controlled the same, in violation of the laws of the United States’...

Thus, on the one hand... it is insisted that the facts establish that the assailed combination took its birth in a purpose to unlawfully acquire wealth by oppressing the public and destroying the just rights of others...On the other hand... it is insisted that they demonstrate that the origin and development of the vast business which the defendants control was but the result of lawful competitive methods, guided by economic genius of the highest order... but at the same time serving to stimulate and increase production,...thus proving to be at one and the same time a benefaction to the general public as well as of enormous advantage to individuals...

First. The text of the act and its meaning...

‘Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal...’
CHAPTER 27

27. William Howard Taft
Standard Oil Co. v. United States

‘Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor…’

[T]he main cause which led to the legislation was…the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization…that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally...

There can be no doubt that the sole subject with which the 1st section deals is restraint of trade as therein contemplated, and that the attempt to monopolize and monopolization is the subject with which the 2d section is concerned...

As to the 1st section, the words to be interpreted are: ‘Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal.’...

[T]he statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class...all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense...

[I]t was deemed essential...to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation...

And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts...the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated... [I]t follows that it was intended that the standard of reason which had been applied at the common law...was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.

And a consideration of the text of the 2d section serves to establish that it was intended to supplement the 1st, and to make sure that by no possible guise could the public policy embodied in the 1st section be frustrated or evaded. The prohibition of the 2d embrace ‘every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations . . .’ [I]t is certain that the word ‘person’ clearly implies a
corporation as well as an individual.

The commerce referred to by the words ‘in part,’...includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.’...

[H]aving by the 1st section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the 2d section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the 1st section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the 1st section. And, of course, when the 2d section is thus harmonized with and made, as it was intended to be, the complement of the 1st, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason guided by...the plain duty to enforce the prohibitions of the act, and thus the public policy which its restrictions were obviously enacted to subserv...

[B]ecause, as the acts which may come under the classes stated in the 1st section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether...its nature or effect causes it to be a restraint of trade...The merely generic enumeration... was expressly designed not to unduly limit the application of the act by precise definition, but...to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute...

So far as the objections of the appellants are concerned, they are all embraced under two headings: ———

That the act, even if the averments of the bill be true, cannot be constitutionally applied, because to do so would extend the power of Congress to subjects dehors the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of production of commodities within the states...The view, however... [has] been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the anti-trust act, and [has] been so necessarily and expressly decided to be unsound, as to cause the contentions to be plainly foreclosed and to require no express notice...

Many arguments...in substance amount to contending that the statute cannot be applied under the facts of this case without impairing rights of property
CHAPTER 24

and destroying the freedom of contract or trade... But the ultimate foundation of all these arguments is the assumption that reason may not be resorted to in interpreting and applying the statute... As the premise is demonstrated to be unsound by the construction we have given the statute, of course the propositions which rest upon that premise need not be further noticed...

The vast amount of property and the possibilities of far-reaching control which resulted from the facts... are shown by the statement... concerning the parties to the trust agreement of 1882, and the corporations whose stock was held by the trustees under the trust, and which came therefore to be held by the New Jersey corporation...

Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the prima facie presumption of intent and purpose to maintain the dominancy over the oil industry... by new means of combination which were resorted to in order that greater power might be added... with the purpose of excluding others from the trade, and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.

Because the prima facie presumption of intent to restrain trade, to monopolize and to bring about monopolization, resulting from the act of expanding the stock of the New Jersey corporation and vesting it with such vast control of the oil industry, is made conclusive by considering (1) the conduct of the persons or corporations who were mainly instrumental in bringing about the extension of power in the New Jersey corporation before the consummation of that result and prior to the formation of the trust agreements of 1879 and 1882; (2) by considering the proof as to what was done under those agreements and the acts which immediately preceded the vesting of power in the New Jersey corporation, as well as by weighing the modes in which the power vested in that corporation has been exerted and the results which have arisen from it.

Recurring to the acts done by the individuals or corporations who were mainly instrumental in bringing about the expansion of the New Jersey corporation... including those agreements... solely as an aid for discovering intent and purpose, we think no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that... intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which, on
the contrary, necessarily involved the intent to drive others from the field and to exclude them from their right to trade... The exercise of the power which resulted from that organization fortifies the foregoing conclusions, since the development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, the system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination, and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention...

To meet the situation with which we are confronted the application of remedies two-fold in character becomes essential: 1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about...
Mr. Justice McKenna delivered the opinion of the court:

Error to review a judgment for contempt against Burdick upon presentment of the Federal grand jury for refusing to answer certain questions put to him in an investigation then pending before the grand jury into alleged custom frauds...

Burdick first appeared before the grand jury and refused to answer questions as to the directions he gave and the sources of his information concerning certain articles in the New York Tribune regarding the frauds under investigation... He declined to answer, claiming upon his oath, that his answers might tend to criminate him. Thereupon he was remanded to appear at a later day, and upon so appearing he was handed a pardon which he was told had been obtained for him upon the strength of his testimony before the other grand jury. The following is a copy of it:

'Woodrow Wilson, President of the United States of America, to all to whom these presents shall come, Greeting:

'Whereas George Burdick, an editor of the New York Tribune, has declined to testify before a Federal grand jury... in a proceeding entitled, 'United States v. John Doe and Richard Roe,' as to the sources of the information which he had in the New York Tribune office, or in his possession, or under his control...on the ground that it would tend to incriminate him to answer the questions; and,

'Whereas, the United States attorney for the southern district of New York desires to use the said George Burdick as a witness before the said grand jury in the said proceeding for the purpose of determining whether any employee of the Treasury Department at the customhouse, New York city, has been betraying information that came to such person in an official capacity; and,

'Whereas, it is believed that the said George Burdick will again refuse to testify in the said proceeding on the ground that his testimony might tend to incriminate himself;

'Now, therefore, be it known, that I, Woodrow Wilson, President of the United States of America,...do hereby grant unto the said George Burdick a full and unconditional pardon for all offenses against the United States which he, the
said George Burdick, has committed or may have committed, or taken part in, in connection with the securing, writing about, or assisting in the publication of the information so incorporated in the aforementioned article, and in connection with any other article, matter, or thing concerning which he may be interrogated in the said grand jury proceeding, thereby absolving him from the consequences of every such criminal act…”

He declined to accept the pardon or answer questions as to the sources of his information, or whether he furnished certain reporters information, giving the reason, as before, that the answers might tend to criminate him. He was presented by the grand jury to the district court for contempt, and adjudged guilty thereof and to pay a fine of $500, with leave, however, to purge himself by testifying fully as to the sources of the information sought of him, ‘and in event of his refusal or failure to so answer, a commitment may issue in addition until he shall so comply,’ the court deciding that the President has power to pardon for a crime of which the individual has not been convicted and which he does not admit, and that acceptance is not necessary to toll the privilege against incrimination.

Burdick again appeared before the grand jury, again was questioned as before, again refused to accept the pardon, and again refused to answer upon the same grounds as before. A final order of commitment was then made and entered, and he was committed to the custody of the United States marshal until he should purge himself of contempt, or until the further order of the court...

The question in the case is the effect of the unaccepted pardon. The Solicitor General…contends (1) that the President has power to pardon an offense before admission or conviction of it, and (2) the acceptance of the pardon is not necessary to its complete exculpating effect. The conclusion is hence deduced that the pardon removed from Burdick all danger of accusation or conviction of crime, and that, therefore, the answers to the questions put to him could not tend to or accomplish his incrimination...

[T]he case may be brought to the narrow question, Is the acceptance of a pardon necessary? We are relieved from much discussion of it by United States v. Wilson. Indeed, all of the principles upon which its solution depends were there considered and the facts of the case gave them a peculiar and interesting application...

That a pardon by its mere issue has automatic effect resistless by him to whom it is tendered, forcing upon him by mere executive power whatever consequences it may have or however he may regard it, which seems to be the contention of the government in the case at bar, was rejected by the court with particularity and emphasis. The decision is unmistakable. A pardon was denominated as the ‘private’ act, the ‘private deed,’ of the executive magistrate, and the denomination was adviseously selected to mark the incompleteness of the act or deed without its acceptance.
Indeed, the grace of a pardon, though good its intention, may be only in pretense or seeming; in pretense, as having purpose not moving from the individual to whom it is offered; in seeming, as involving consequences of even greater disgrace than those from which it purports to relieve. Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected,--preferring to be the victim of the law rather than its acknowledged transgressor,--preferring death even to such certain infamy. This, at least theoretically, is a right, and a right is often best tested in its extreme. ‘It may be supposed,’ the court said in United States v. Wilson, ‘that no being condemned to death would reject a pardon; but the rule must be the same in capital cases and in misdemeanors. A pardon may be conditional; and the condition may be more objectionable than the punishment inflicted by the judgment.’

The principles declared in United States v. Wilson have endured for years; no case has reversed or modified them.

United States v. Wilson, however, is attempted to be removed as authority by the contention that it dealt with conditional pardons... In support of the contentions there is an intimation of analogy between pardon and amnesty...

May plaintiff in error, having the means of immunity at hand, that is, the pardon of the President, refuse to testify on the ground that his testimony may have an incriminating effect?...

[T]he power of the President under the Constitution to grant pardons and the right of a witness must be kept in accommodation. Both have sanction in the Constitution, and it should, therefore, be the anxiety of the law to preserve both,--to leave to each its proper place. In this as in other conflicts between personal rights and the powers of government, technical--even nice--distinctions are proper to be regarded. Granting, then, that the pardon was legally issued and was sufficient for immunity, it was Burdick’s right to refuse it, as we have seen; and it, therefore, not becoming effective, his right under the Constitution to decline to testify remained to be asserted; and the reasons for his action were personal...

This brings us to the differences between legislative immunity and a pardon. They are substantial. The latter carries an imputation of guilt; acceptance a confession of it. The former has no such imputation or confession. It is tantamount to the silence of the witness. It is noncommittal. It is the unobtrusive act of the law given protection against a sinister use of his testimony, not like a pardon, requiring him to confess his guilt in order to avoid a conviction of it.

Judgment reversed, with directions to dismiss the proceedings in contempt, and discharge Burdick from custody.
Socialist Leader, All Smiles, Waves His Hat and Cane to Inmates Left Behind.

GOES TO WASHINGTON FIRST.

Says Freedom is Conditioned on Seeing Daugherty, but Later Denies Need of Haste.

TRAVELS IN A DAY COACH.

Donates Saving on Pullman Fare to Russian Relief—Issues No Statement on His Future.

Special to The New York Times.

ATLANTA, Dec. 25.—Beaming his pleasure at release, with the ovation of the crowd outside and the shouts of approbation of a thousand prisoners in his ears, Eugene V. Debs, Socialist leader and several times a candidate for President, walked out of the United States penitentiary here at 11:30 o’clock this morning into the Christmas sunlight, free again after serving two and a half years of a ten-year sentence for violation of the Espionage law. His liberation was an act of executive clemency on the part of President Harding, who commuted his sentence, effective Christmas Day.

At 12:30 o’clock the prisoner, his brother, Theodore Debs, and a party of others, including Miss Lucy Robbins of the American Federation of Labor and Miss Celia Rotter of the Debs Freedom Conference, who had awaited his release, boarded a train for Washington “to confer with Attorney General Daugherty, which was a condition of my release,” Debs said.

“They then I am going to my dear little wife in Terre Haute as fast as the train will take me,” he said.

Waves Hat to Prisoners.

When the iron doors swung closed behind the Socialist chief and he walked down the steps and toward the outer gates between Warden J. E. Dyche and Deputy Warden L. J. Fletcher, a roar of cheers swept out from the prisoners. Debs raised his hat in one hand and his cane in the other and wave[d] back at them. He continued to wave while they continued to cheer him until he reached the gates, where a battery of movie cameras was in action.

Debs smiled and chatted and acted like a schoolboy going home on vacation.
At the prison gates he gripped hands fervently and kissed the women and men alike who had gathered to welcome him to liberty.

Debs was apparently in the best of health. He had jocularly remarked a few minutes before, when somebody told him he looked well kept, that “the Warden didn’t want my appearance to be a reflection on his institution.”

At the gates Debs willingly posed for the camera men. They also had been cranking away furiously as his friends rushed to meet him and received warm handclaps and joyful kisses from their leader. Mrs. H. J. Flanagan, her husband and two children, who live near the prison, were among the first to reach him. He kissed them and then kissed them again at the request of the movie men while cameras clicked.

**Extra Fare to Russian Relief.**

Debs then entered an automobile with the Warden and was driven to the terminal station. There Debs declared the party would ride in a day coach to Washington and the Pullman fare would be devoted to the Russian Relief Fund.

At dawn this morning newspaper men and photographers renewed a vigil started two days ago, when Debs’s release was expected hourly. Until the last the prison officials had maintained strict secrecy as to the hour of his release and thus led to two amusing incidents, as others emerging from the prison were mistaken for Debs.

As the morning wore on it was whispered in the waiting room that Debs had secretly been taken out by a rear exit and was even then speeding home. His attorney, Sam Castleton, and newspaper men refused to credit this story. Suddenly the doors were swung open, a group descended to a waiting car and sped out of the grounds. A roar of cheering went up from the inmates.

“That’s Debs,” somebody shouted. Castleton, who had been waiting with others in his own car, threw in the clutch and gave chase. He finally caught the warden’s flying automobile only to find that it was another released prisoner going away.

By the time this excitement subsided the doors opened to permit the departure of another group, who started toward the gate on foot.

“You can’t fool me,” yelled one of the watchers. “I’ve seen him a hundred times. That’s Debs in front.” Movie machines played on the party and the newspaper men rushed to the gate.

“No. I’m not Debs,” explained the man in front when he met the crowd.

“My name is W. M. Jones of 311 Pulliam Street. I have been accused of looking like Lincoln, but nobody ever told me before that I resembled Debs. I am a
29. Warren G. Harding
Debs is Released, Prisoners Joining Crowd in Ovation

teacher in Sunday school at the First Christian Church. These gentlemen with me are members of various denominations of the city, and we were holding religious services in the prison."

Debs Makes No Statement.

A few minutes preceding the release of Debs, orders were issued by Warden Dyche permitting newspaper men to enter the prison and meet him, but he stated that they would not be allowed to get interviews.

Warden Dyche first conducted newspaper men through the big dining room of the institution, beautifully decorated in Christmas green and red, and the kitchen, where savory odors told of the Christmas dinner in the ovens. A painted Santa Claus and team of reindeers, nearly life-size, hung on the wall of the dining room. The warden said this was the work of a prisoner. Other Christmas works of art adorning the walls, he said, were done by inmates.

Debs, when seen by the newspaper men, said he had no statement to make at the present time, either regarding his future or any further move for the release of all the so-called “political” prisoners, though he expressed sympathy with the movement. Later, at the terminal before boarding a train for Washington, he remarked that “I left 2,300 men back there in prison and they all should be given their liberty.”

Just before leaving Atlanta, Debs told newspaper men that he had intended visiting the grave of Mrs. Mary L. McClendon, one of Georgia’s most famous women and a leader in W. C. T. U. and equal suffrage movements. While he was in prison, he said, Mrs. McClendon had sent him a bouquet of roses, and he had intended to place a wreath of flowers on her grave. This he would be unable to do, he said, on account of the fact that he had to go to Washington to see Attorney General Daugherty, rather than to Terre Haute, as first planned.

Debs had been confined in the penitentiary here since June 13, 1919. He was convicted in the Federal Court at Cleveland, Ohio, Sept. 8, 1918, on a charge of violating the Espionage act. He was sentenced to serve a term of ten years and was first sent to the Federal prison at Moundville, W. Va., and later transferred to Atlanta.

WASHINGTON, Dec. 25.—Attorney General Daugherty said tonight he expected Eugene V. Debs, who was released from the Atlanta Penitentiary today, to call at the Department of Justice to discuss the commutation of his sentence by President Harding.

When Debs was in Washington recently it was decided, Mr. Daugherty said, that in the event Debs was released or his sentence commuted it might be well for him to come to Washington for a final conference. There was no reason,
however, the Attorney General added, that Debs should be formally obliged to come here, as was indicated by the released Socialist leader when he stepped from the prison in Atlanta.

Supreme Court of the United States
CHAPTER 30

Supreme Court of the United States

Myers
v.
United States

272 U.S. 52 (1926).

Mr. Chief Justice TAFT delivered the opinion of the Court.

This case presents the question whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate.

Myers...was on July 21, 1917, appointed by the President, by and with the advice and consent of the Senate, to be a postmaster of the first class at Portland, Or., for a term of four years. On January 20, 1920, Myers’ resignation was demanded. He refused the demand. On February 2, 1920, he was removed from office by order of the Postmaster General, acting by direction of the President. February 10th, Myers sent a petition to the President and another to the Senate committee on post offices, asking to be heard, if any charges were filed. He protested to the department against his removal, and continued to do so until the end of his term. He pursued no other occupation and drew compensation for no other service during the interval. On April 21, 1921, he brought this suit in the Court of Claims for his salary from the date of his removal, which... amounted to $8,838.71. In August, 1920, the President made a recess appointment of one Jones, who took office September 19, 1920...

The Senate did not consent to the President’s removal of Myers during his term... The government maintains that the requirement is invalid, for the reason that under article 2 of the Constitution the President’s power of removal of executive officers appointed by him with the advice and consent of the Senate is full and complete without consent of the Senate. If this view is sound, the removal of Myers by the President without the Senate’s consent was legal...

The question where the power of removal of executive officers appointed by the President by and with the advice and consent of the Senate was vested, was presented early in the first session of the First Congress. There is no express provision respecting removals in the Constitution, except as section 4 of article 2...provides for removal from office by impeachment...

In the House of Representatives of the First Congress, on Tuesday, May 18, 1789, Mr. Madison moved in the committee of the whole that there should be established three executive departments, one of Foreign Affairs, another of the Treasury, and a third of War, at the head of each of which there should be a Secretary, to be appointed by the President by and with the advice and consent
of the Senate, and to be removable by the President. The committee agreed to the establishment of a Department of Foreign Affairs, but a discussion ensued as to making the Secretary removable by the President… ‘The question was now taken and carried, by a considerable majority, in favor of declaring the power of removal to be in the President.’

Accordingly, the Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires…

As [the President] is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible…

The requirement of the second section of article 2 that the Senate should advise and consent to the presidential appointments, was to be strictly construed… The executive power was given in general terms strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed, and the fact that no express limit was placed on the power of removal by the executive was convincing indication that none was intended…

The history of the clause by which the Senate was given a check upon the President’s power of appointment makes it clear that it was not prompted by any desire to limit removals… [T]he important purpose of those who brought about the restriction was to lodge in the Senate, where the small states had equal representation with the larger states, power to prevent the President from making too many appointments from the larger states… The formidable opposition to the Senate’s veto on the President’s power of appointment indicated that in construing its effect, it should not be extended beyond its express application to the matter of appointments…

A veto by the Senate—a part of the legislative branch of the government—upon removals is a much greater limitation upon the executive branch, and a much more serious blending of the legislative with the executive, than a rejection of
30. Calvin Coolidge
Myers v. United States

a proposed appointment. It is not to be implied... The Senate has full power
to reject newly proposed appointees whenever the President shall remove the
incumbents. Such a check enables the Senate to prevent the filling of offices with
bad or incompetent men, or with those against whom there is tenable objection.

The power to prevent the removal of an officer who has served under the
President is different from the authority to consent to or reject his appointment.
When a nomination is made, it may be presumed that the Senate is, or may
become, as well advised as to the fitness of the nominee as the
President,
but in the nature of things the defects in ability or intelligence or loyalty in
the administration of the laws of one who has served as an officer under the
President are facts as to which the President, or his trusted subordinates, must be
better informed than the Senate... The power of removal is incident to the power
of appointment, not to the power of advising and consenting to appointment...

Made responsible under the Constitution for the effective enforcement of the
law, the President needs as an indispensable aid to meet it the disciplinary
influence upon those who act under him of a reserve power of removal...

We come now to a period in the history of the government when both houses
of Congress attempted to reverse this constitutional construction, and to
subject the power of removing executive officers appointed by the President
and confirmed by the Senate to the control of the Senate, indeed finally to the
assumed power in Congress to place the removal of such officers anywhere in
the government...

This reversal grew out of the serious political difference between the two houses
of Congress and President Johnson. There was a two-thirds majority of the
Republican party, in control of each house of Congress, which resented what
it feared would be Mr. Johnson’s obstructive course in the enforcement of the
reconstruction measures in respect to the states whose people had lately been at
war against the national government. This led the two houses to enact legislation
to curtail the then acknowledged powers of the President...

[T]he chief legislation in support of the reconstruction policy of Congress was the
Tenure of Office Act of March 2, 1867, providing that all officers appointed by
and with the consent of the Senate should hold their offices until their successors
should have in like manner been appointed and qualified; that certain heads of
departments, including the Secretary of War, should hold their offices during the
term of the President by whom appointed and one month thereafter, subject
to removal by consent of the Senate. The Tenure of Office Act was vetoed, but
it was passed over the veto. The House of Representatives preferred articles
of impeachment against President Johnson for refusal to comply with, and for
conspiracy to defeat, the legislation above referred to, but he was acquitted for
lack of a two-thirds vote for conviction in the Senate...
The extreme provisions of all this legislation were a full justification for the considerations, so strongly advanced by Mr. Madison and his associates in the First Congress, for insisting that the power of removal of executive officers by the President alone was essential in the division of powers between the executive and the legislative bodies. It exhibited in a clear degree the paralysis to which a partisan Senate and Congress could subject the executive arm, and destroy the principle of executive responsibility, and separation of the powers sought for by the framers of our government, if the President had no power of removal save by consent of the Senate. It was an attempt to redistribute the powers and minimize those of the President.

After President Johnson’s term ended, the injury and invalidity of the Tenure of Office Act in its radical innovation were immediately recognized by the executive and objected to. General Grant, succeeding Mr. Johnson in the presidency, earnestly recommended in his first message the total repeal of the act, saying:

‘It may be well to mention here the embarrassment possible to arise from leaving on the statute books the so-called ‘Tenure of Office Acts,’ and to earnestly recommend their total repeal. It could not have been the intention of the framers of the Constitution, when providing that appointments made by the President should receive the consent of the Senate, that the latter should have the power to retain in office persons placed there by federal appointment against the will of the President. The law is inconsistent with a faithful and efficient administration of the government. What faith can an executive put in officials forced upon him, and those, too, whom he has suspended for reason? How will such officials be likely to serve an administration which they know does not trust them?’…

When on the merits we find our conclusion strongly favoring the view which prevailed in the First Congress, we have no hesitation in holding that conclusion to be correct; and it therefore follows that the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so.

For the reasons given, we must therefore hold that the provision of the law of 1876 by which the unrestricted power of removal of first-class postmasters is denied to the President is in violation of the Constitution and invalid…
Mr. Justice BRANDEIS delivered the opinion of the Court.

This petition, in the name of the United States...in deference to the desire of the United States Senate to have presented for judicial decision the question whether George Otis Smith holds lawfully the office of member and chairman of the Federal Power Commission...

On December 3, 1930, the President of the United States transmitted to the Senate the nomination of George Otis Smith to be a member of the Federal Power Commission for a term expiring June 22, 1935. On December 20, 1930, the Senate...advised and consented to the appointment of Smith to the office...

On the same day, the Senate ordered that the resolution of confirmation be forwarded to the President. This order was entered late in the evening of Saturday, December 20th; and still later on the same day the Senate adjourned to January 5, 1931. On Monday, December 22, 1930, the Secretary of the Senate notified the President of the United States of the resolution of confirmation, the communication being delivered by the official messenger of the Senate. Subsequently, and on the same day, the President signed and, through the Department of State, delivered to Smith a commission purporting to appoint him a member of the Federal Power Commission and designating him as chairman thereof. Smith then, on the same day, took the oath of office and undertook forthwith to discharge the duties of a commissioner.

On January 5, 1931, which was the next day of actual executive session of the Senate after the date of confirmation, a motion to reconsider the nomination of Smith was duly made by a Senator who had voted to confirm it, and also a motion to request the President to return the resolution of confirmation which had passed into his possession. Both motions were adopted and the President was notified in due course. On January 10, 1931, the President informed the Senate by a message in writing that he had theretofore appointed Smith to the office in question, after receiving formal notice of confirmation, and that, for this reason, he refused to accede to the Senate’s request...

No fact is in dispute. The sole question presented is one of law. Did the Senate have the power, on the next day of executive session, to reconsider its vote advising and consenting to the appointment of George Otis Smith, although meanwhile, pursuant to its order, the resolution of consent had been
Communicated to the President, and thereupon the commission had issued, Smith had taken the oath of office and had entered upon the discharge of his duties? The answer to this question depends primarily upon the applicable Senate rules...The pivotal provisions are paragraphs 3 and 4 of Rule XXXVIII, which read:

‘3. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate; but if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate...

‘4. Nomination confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending unless otherwise ordered by the Senate.’

The contention on behalf of the Senate is that it did not advise and consent to the appointment of George Otis Smith to the office of member of the Federal Power Commission, because, by action duly and regularly taken upon reconsideration in accordance with its standing rules, it refused such consent, and gave to the President formal notice of its refusal.

The argument is that the action of the Senate in assenting to the nomination of Smith on December 20, 1930, and ordering that the President be notified, was taken subject to its rules and had only the effect provided for by them; that the rules empowered the Senate, in plain and unambiguous terms, to entertain, at any time prior to the expiration of the next two days of actual executive session, a motion to reconsider its vote advising and consenting to the appointment, although it had previously ordered a copy of the resolution of consent to be forwarded forthwith to the President; that the Senate’s action cannot be held to be final so long as it retained the right to reconsider; that the Senate did not by its order of notification waive its right to reconsider or intend that the President should forthwith commission Smith; that the rules did not make the right of reconsideration dependent upon compliance by the President with its request that the resolution of consent be returned; that the rules were binding upon the President and all other persons dealing with the Senate in this matter; that, as the President was charged with knowledge of the rules, his signing of the commission prior to the expiration of the period within which the Senate might entertain a motion to reconsider had no conclusive legal effect; and that the nominee who had not been legally confirmed could not by his own acts in
accepting the commission, taking an oath of office, and beginning the discharge of his duties, vest himself with any legal rights…

First. The question primarily at issue relates to the construction of the applicable rules… Article 1, s 5, cl. 2, of the Constitution provides that ‘each House may determine the Rules of its Proceedings.’…

As the construction to be given to the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one. Smith asserts that he was duly appointed to office, in the manner prescribed by the Constitution. The Senate disputes the claim. In deciding the issue, the Court must give great weight to the Senate’s present construction of its own rules; but so far, at least, as that construction was arrived at subsequent to the events in controversy, we are not concluded by it.

Second. Obviously, paragraph 3 of Senate Rule XXXVIII contemplates circumstances under which the Senate may still reconsider a vote confirming or rejecting a nomination, although notification of its original action has already been sent to the President. Otherwise, the provision for a motion to request the return of a resolution would be meaningless. But paragraph 4 of the same rule contemplates that normally such notification shall be withheld, until the expiration of the time limited for making a motion to reconsider, and, if a motion be made, until the disposition thereof; for it declares that notification shall be so withheld ‘unless otherwise ordered by the Senate.’ In this case the Senate did so order otherwise; and the question is as to the meaning and effect of this special procedure…

The question at issue is whether, under the Senate’s rules, an order of notification empowers the President to make a final and indefeasible appointment, if he acts before notice of reconsideration; or whether, despite the notification, he is powerless to complete the appointment until two days of executive session shall have passed without the entry of a motion to reconsider.

Third. The natural meaning of an order of notification to the President is that the Senate consents that the appointment be forthwith completed, and that the appointee take office. This is the meaning which, under the rules, a resolution bears when it is sent in normal course after the expiration of the period for reconsideration. Notification before that time is an exceptional procedure, which may be adopted only by unanimous consent of the Senate. We think it a strained and unnatural construction to say that such extraordinary, expedited, notification signifies less than final action, or bears a different meaning than notification sent in normal course pursuant to the rules…

The construction urged by the Senate would prevent the President from proceeding in any case upon notification of advice and consent, without first...
determining through unofficial channels whether the resolution had been forwarded in compliance with an order of immediate notification or by the Secretary in the ordinary course of business; for the resolution itself bears only the date of its adoption. If the President determined that the resolution had been sent within the time limited for making a motion to reconsider, he would have then to inform himself when that period expired. If the motion were made, he would be put upon notice of it by receipt of a request to return the resolution. But, under the view urged by the Senate, that reconsideration may proceed, even though the resolution be not returned, he would receive no formal advice as to the disposition of the motion, save in the case of a final vote of rejection or confirmation. The uncertainty and confusion which would be engendered by such a construction repel its adoption.

The Senate has offered no adequate explanation of the meaning of an order of immediate notification, if it has not the meaning which Smith contends should be attached to it...

Fourth. We find nothing in the history of the rules which lends support to the contention of the Senate; and much in their history to the contrary. The present rules relating to the reconsideration of votes confirming or rejecting nominations are substantially those of March 25, 1868...

Prior to 1867, it had been continuously recognized that the President was authorized to commission a nominee upon receiving notification of the advice and consent of the Senate, and that the signing of a commission cut short the power of reconsideration. The Senate so concedes. No explicit change in this respect was made either in the rules of 1867 or of 1868. The inference that no change was intended is strengthened by the fact that under the latter rules, for the first time, the sending of notification ordinarily coincided with the lapse of power in the Senate to reconsider its action, under any circumstances. The proviso, ‘unless otherwise ordered by the Senate,’ made possible the sending of notification before the expiration of the period provided for reconsideration. But there is no indication that the Senate intended thereby to introduce a complete departure from past practice. The natural inference is to the contrary. The proviso for immediate notification must be read in connection with the clause permitting motions to request the return of a resolution, which would be in order only in cases in which the Senate had acted under the proviso. A motion to request the return of a resolution was a familiar device, employed by the Senate on repeated occasions. There is no reason to suppose that such a motion was now intended to have a different effect than that which, by common understanding, it had had in the past. The common understanding had been that a motion to request the return of a resolution was without effect if the President before receiving it had completed the appointment.
Fifth. This construction of the rules is confirmed by the precedents in the Senate arising since 1868...

Even in the view most favorable to the Senate’s contention they fall far short of clear recognition of the power, never heretofore asserted by the Senate itself, to reconsider a vote of confirmation, after an appointee has actually assumed office and entered upon the discharge of his duties...

Sixth. To place upon the standing rules of the Senate a construction different from that adopted by the Senate itself when the present case was under debate is a serious and delicate exercise of judicial power. The Constitution commits to the Senate the power to make its own rules; and it is not the function of the Court to say that another rule would be better. A rule designed to insure due deliberation in the performance of the vital function of advising and consenting to nominations for public office, moreover, should receive from the Court the most sympathetic consideration. But the reasons, above stated, against the Senate’s construction seem to us compelling. We are confirmed in the view we have taken by the fact that, since the attempted reconsideration of Smith’s confirmation, the Senate itself seems uniformly to have treated the ordering of immediate notification to the President as tantamount to authorizing him to proceed to perfect the appointment...
[An indictment was returned in the court below, the first count of which charges that appellees...conspired to sell in the United States certain arms of war, namely, fifteen machine guns, to Bolivia, a country then engaged in armed conflict in the Chaco, in violation of the Joint Resolution of Congress approved May 28, 1934, and the provisions of a proclamation issued on the same day by the President of the United States pursuant to authority conferred by section 1 of the resolution...

First. It is contended that by the Joint Resolution the going into effect and continued operation of the resolution was conditioned (a) upon the President's judgment as to its beneficial effect upon the re-establishment of peace between the countries engaged in armed conflict in the Chaco; (b) upon the making of a proclamation, which was left to his unfettered discretion, thus constituting an attempted substitution of the President's will for that of Congress; (c) upon the making of a proclamation putting an end to the operation of the resolution, which again was left to the President's unfettered discretion; and (d) further, that the extent of its operation in particular cases was subject to limitation and exception by the President, controlled by no standard. In each of these particulars, appellees urge that Congress abdicated its essential functions and delegated them to the Executive.

Whether, if the Joint Resolution had related solely to internal affairs, it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs. The determination which we are called to make, therefore, is whether the Joint Resolution, as applied to that situation, is vulnerable to attack under the rule that forbids a delegation of the lawmaking power. In other words, assuming (but not deciding) that the challenged delegation, if it were confined to internal affairs, would be invalid, may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory?

It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign
or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.

The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. That this doctrine applies only to powers which the states had is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the Colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, ‘the Representatives of the United States of America’ declared the United (not the several) Colonies to be free and independent states, and as such to 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.’

As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America...

The Union existed before the Constitution, which was ordained and established among other things to form ‘a more perfect Union.’ Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be ‘perpetual,’ was the sole possessor of external sovereignty, and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise. The Framers’ Convention was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one...

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. Neither the Constitution
nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens; and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign...

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, ‘The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.’ The Senate Committee on Foreign Relations at a very early day in our history (February 15, 1816), reported to the Senate, among other things, as follows:

‘The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee considers this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.’

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord
to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results...

When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action—or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed...

In the light of the foregoing observations, it is evident that this court should not be in haste to apply a general rule which will have the effect of condemning legislation like that under review as constituting an unlawful delegation of legislative power...

Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs...

[Both upon principle and in accordance with precedent, we conclude there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the re-establishment of peace in the affected countries; whether he shall make proclamation to bring the resolution into operation; whether and when the resolution shall cease to operate and to make proclamation accordingly; and to prescribe limitations and exceptions to which the enforcement of the resolution shall be subject...
Mr. Chief Justice HUGHES delivered the opinion of the Court.

This case presents the question of the constitutional validity of the minimum wage law of the state of Washington.

The act, entitled ‘Minimum Wages for Women,’ authorizes the fixing of minimum wages for women and minors. It provides:

‘Section 1. The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The State of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

‘Sec. 2. It shall be unlawful to employ women or minors in any industry or occupation within the State of Washington under conditions of labor detrimental to their health or morals; and it shall be unlawful to employ women workers in any industry within the State of Washington at wages which are not adequate for their maintenance.

‘Sec. 3. There is hereby created a commission to be known as the ‘Industrial Welfare Commission’ for the State of Washington, to establish such standards of wages and conditions of labor for women and minors employed within the State of Washington…’

Further provisions required the commission to ascertain the wages and conditions of labor of women and minors within the state. Public hearings were to be held… Special licenses were authorized for the employment of women who were ‘physically defective or crippled by age or otherwise,’…

The appellant conducts a hotel. The appellee Elsie Parrish was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The minimum wage was $14.50 per week of 48 hours. The appellant challenged the act as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States…

The appellant relies upon the decision of this Court in Adkins v. Children’s Hospital, which held invalid the District of Columbia Minimum Wage Act which
was attacked under the due process clause of the Fifth Amendment...

The Supreme Court of Washington has upheld the minimum wage statute of that state. It has decided that the statute is a reasonable exercise of the police power of the state. In reaching that conclusion, the state court has invoked principles long established by this Court in the application of the Fourteenth Amendment. The state court has refused to regard the decision in the Adkins Case as determinative...We are of the opinion that this ruling of the state court demands on our part a re-examination of the Adkins Case. The importance of the question, in which many states having similar laws are concerned, the close division by which the decision in the Adkins Case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the state must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration...

Throughout this entire period the Washington statute now under consideration has been in force...

The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the states, as the due process clause invoked in the Adkins Case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process...

This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable...

In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression...

It is manifest that this established principle is peculiarly applicable in relation to
the employment of women in whose protection the state has a special interest…

[We] are unable to conclude that in its minimum wage requirement the state has passed beyond the boundary of its broad protective power.

The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees, and the public. It may be assumed that the minimum wage is fixed in consideration of the services that are performed in the particular occupations under normal conditions. Provision is made for special licenses at less wages in the case of women who are incapable of full service…

We think that the views thus expressed are sound and that the decision in the Adkins Case was a departure from the true application of the principles governing the regulation by the state of the relation of employer and employed. Those principles have been reenforced by our subsequent decisions…

With full recognition of the earnestness and vigor which characterize the prevailing opinion in the Adkins Case, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The Legislature of the state was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The Legislature was entitled to adopt measures to reduce the evils of the ‘sweating system,’ the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The Legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection…Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the Legislature is entitled to its judgment…

Our conclusion is that the case of Adkins v. Children’s Hospital should be, and it is, overruled. The judgment of the Supreme Court of the state of Washington is affirmed…
Mr. Justice BLACK delivered the opinion of the Court.

We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation’s steel mills. The mill owners argue that the President’s order amounts to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President. The Government’s position is that the order was made on findings of the President that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation’s Chief Executive and the Commander in Chief of the Armed Forces of the United States...

The President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure...

Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes...

The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that “the executive Power shall be vested in a President * *”; that “he shall take Care that the Laws be faithfully executed”; and that he “shall be Commander in Chief of the Army and Navy of the United States.”

The order cannot properly be sustained as an exercise of the President’s military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though ‘theater of war’ be an expanding concept, we
cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker...

The judgment of the District Court is affirmed...

Mr. Justice JACKSON, concurring in the judgment and opinion of the Court.

...Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim
to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Into which of these classifications does this executive seizure of the steel industry fit? It is eliminated from the first by admission, for it is conceded that no congressional authorization exists for this seizure. That takes away also the support of the many precedents and declarations which were made in relation, and must be confined, to this category.

Can it then be defended under flexible tests available to the second category? It seems clearly eliminated from that class because Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure...

None of these were invoked. In choosing a different and inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress to legislate upon the occasions, grounds and methods for seizure of industrial properties.

This leaves the current seizure to be justified only by the severe tests under the third grouping, where it can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject. In short, we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress...

The Solicitor General seeks the power of seizure in three clauses of the Executive Article, the first reading, “The executive Power shall be vested in a President of the United States of America.”...

The clause on which the Government next relies is that “The President shall be Commander in Chief of the Army and Navy of the United States ***.” These cryptic words have given rise to some of the most persistent controversies in our constitutional history. Of course, they imply something more than an empty title. But just what authority goes with the name has plagued Presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends. It undoubtedly puts the Nation’s armed forces under Presidential command. Hence, this loose appellation is sometimes advanced as support for any Presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy.

That seems to be the logic of an argument tendered at our bar—that the President having, on his own responsibility, sent American troops abroad derives from that act ‘affirmative power’ to seize the means of producing a supply of steel for them...
CHAPTER 33

33. Harry S. Truman
Youngstown Sheet & Tube Co. v. Sawyer

Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation’s armed forces to some foreign venture...

Assuming that we are in a war de facto, whether it is or is not a war de jure, does that empower the Commander-in-Chief to seize industries he thinks necessary to supply our army? The Constitution expressly places in Congress power ‘to raise and support Armies’ and “to provide and maintain a Navy.” This certainly lays upon Congress primary responsibility for supplying the armed forces. Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement. I suppose no one would doubt that Congress can take over war supply as a Government enterprise...

The third clause in which the Solicitor General finds seizure powers is that “he shall take Care that the Laws be faithfully executed ***.” That authority must be matched against words of the Fifth Amendment that “No person shall be *** deprived of life, liberty, or property, without due process of law ***.” One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.

The Solicitor General lastly grounds support of the seizure upon nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations. The plea is for a resulting power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law...

In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute. Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction...

The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights...
Mr. Justice BURTON, concurring in both the opinion and judgment of the Court.

...The Constitution has delegated to Congress power to authorize action to meet a national emergency of the kind we face.1 Aware of this responsibility, Congress has responded to it. It has provided at least two procedures for the use of the President.

It has outlined one in the Labor Management Relations Act, 1947, better known as the Taft-Hartley Act...

For the purposes of this case the most significant feature of that Act is its omission of authority to seize an affected industry. The debate preceding its passage demonstrated the significance of that omission. Collective bargaining, rather than governmental seizure, was to be relied upon. Seizure was not to be resorted to without specific congressional authority. Congress reserved to itself the opportunity to authorize seizure to meet particular emergencies...

The controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency. Congress has reserved to itself the right to determine where and when to authorize the seizure of property in meeting such an emergency. Under these circumstances, the President's order of April 8 invaded the jurisdiction of Congress. It violated the essence of the principle of the separation of governmental powers. Accordingly, the injunction against its effectiveness should be sustained...

Mr. Justice CLARK, concurring in the judgment of the Court.

...I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation. I cannot sustain the seizure in question because here Congress had prescribed methods to be followed by the President in meeting the emergency at hand...

Mr. Justice DOUGLAS, concurring.

...A determination that sanctions should be applied, that the hand of the law should be placed upon the parties, and that the force of the courts should be directed against them, is an exercise of legislative power. In some nations that power is entrusted to the executive branch as a matter of course or in case of emergencies. We chose another course. We chose to place the legislative power of the Federal Government in the Congress. The language of the Constitution is not ambiguous or qualified. It places not some legislative power in the Congress; Article I, Section 1 says "All legislative Powers herein granted shall be vested in
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a Congress of the United States, which shall consist of a Senate and House of Representatives. “…

The President might seize and the Congress by subsequent action might ratify the seizure. But until and unless Congress acted, no condemnation would be lawful. The branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President had effected...

We pay a price for our system of checks and balances, for the distribution of power among the three branches of government. It is a price that today may seem exorbitant to many. Today a kindly President uses the seizure power to effect a wage increase and to keep the steel furnaces in production. Yet tomorrow another President might use the same power to prevent a wage increase, to curb trade unionists, to regiment labor as oppressively as industry thinks it has been regimented by this seizure...

Mr. Justice FRANKFURTER, concurring.

...A proposal that the President be given powers to seize plants to avert a shutdown where the ‘health or safety’ of the nation was endangered, was thoroughly canvassed by Congress and rejected...

It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress...

Mr. Chief Justice VINSON, with whom Mr. Justice REED and Mr. Justice MINTON join, dissenting.

...In passing upon the question of Presidential powers in this case, we must first consider the context in which those powers were exercised.

Those who suggest that this is a case involving extraordinary powers should be mindful that these are extraordinary times. A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more terrifying global conflict...

The steel mills were seized for a public use. The power of eminent domain, invoked in that case, is an essential attribute of sovereignty and has long been
recognized as a power of the Federal Government…

A review of executive action demonstrates that our Presidents have on many occasions exhibited the leadership contemplated by the Framers when they made the President Commander in Chief, and imposed upon him the trust to “take Care that the Laws be faithfully executed.” With or without explicit statutory authorization, Presidents have at such times dealt with national emergencies by acting promptly and resolutely to enforce legislative programs, at least to save those programs until Congress could act. Congress and the courts have responded to such executive initiative with consistent approval…

Without declaration of war, President Lincoln took energetic action with the outbreak of the War Between the States. He summoned troops and paid them out of the Treasury without appropriation therefor. He proclaimed a naval blockade of the Confederacy and seized ships violating that blockade. Congress, far from denying the validity of these acts, gave them express approval. The most striking action of President Lincoln was the Emancipation Proclamation, issued in aid of the successful prosecution of the War Between the States, but wholly without statutory authority.

In an action furnishing a most apt precedent for this case, President Lincoln without statutory authority directed the seizure of rail and telegraph lines leading to Washington…

President Cleveland also used the troops in the Pullman Strike of 1895 and his action is of special significance. No statute authorized this action. No call for help had issued from the Governor of Illinois; indeed Governor Altgeld disclaimed the need for supplemental forces. But the President’s concern was that federal laws relating to the free flow of interstate commerce and the mails be continuously and faithfully executed without interruption. To further this aim his agents sought and obtained the injunction upheld by this Court in In re Debs. The Court scrutinized each of the steps taken by the President to insure execution of the ‘mass of legislation’ dealing with commerce and the mails and gave his conduct full approval. Congress likewise took note of this use of Presidential power to forestall apparent obstacles to the faithful execution of the laws…

During World War I, President Wilson established a War Labor Board without awaiting specific direction by Congress. With William Howard Taft and Frank P. Walsh as co-chairmen, the Board had as its purpose the prevention of strikes and lockouts interfering with the production of goods needed to meet the emergency. Effectiveness of War Labor Board decision was accomplished by Presidential action, including seizure of industrial plants. Seizure of the Nation’s railroads was also ordered by President Wilson…
Some six months before Pearl Harbor, a dispute at a single aviation plant at Inglewood, California, interrupted a segment of the production of military aircraft. In spite of the comparative insignificance of this work stoppage to total defense production as contrasted with the complete paralysis now threatened by a shutdown of the entire basic steel industry, and even though our armed forces were not then engaged in combat, President Roosevelt ordered the seizure of the plant “pursuant to the powers vested in (him) by the Constitution and laws of the United States, as President of the United States of America and Commander in Chief of the Army and Navy of the United States.”

This is but a cursory summary of executive leadership. But it amply demonstrates that Presidents have taken prompt action to enforce the laws and protect the country whether or not Congress happened to provide in advance for the particular method of execution. At the minimum, the executive actions reviewed herein sustain the action of the President in this case. And many of the cited examples of Presidential practice go far beyond the extent of power necessary to sustain the President’s order to seize the steel mills...

Focusing now on the situation confronting the President on the night of April 8, 1952, we cannot but conclude that the President was performing his duty under the Constitution to “take Care that the Laws be faithfully executed”...

The broad executive power granted by Article II to an officer on duty 365 days a year cannot, it is said, be invoked to avert disaster. Instead, the President must confine himself to sending a message to Congress recommending action. Under this messenger-boy concept of the Office, the President cannot even act to preserve legislative programs from destruction so that Congress will have something left to act upon...

Faced with the duty of executing the defense programs which Congress had enacted and the disastrous effects that any stoppage in steel production would have on those programs, the President acted to preserve those programs by seizing the steel mills. There is no question that the possession was other than temporary in character and subject to congressional direction—either approving, disapproving or regulating the manner in which the mills were to be administered and returned to the owners. The President immediately informed Congress of his action and clearly stated his intention to abide by the legislative will. No basis for claims of arbitrary action, unlimited powers or dictatorial usurpation of congressional power appears from the facts of this case. On the contrary, judicial, legislative and executive precedents throughout our history demonstrate that in this case the President acted in full conformity with his duties under the Constitution. Accordingly, we would reverse the order of the District Court.
Mr. Chief Justice WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they have been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called ‘separate but equal’ doctrine announced by this Court in Plessy v. Ferguson. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not ‘equal’ and cannot be made ‘equal,’ and that hence they are deprived of the equal protection of the laws...

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of “separate but equal” did not make its appearance in this court until 1896 in the case of Plessy v. Ferguson, involving not education but transportation. American courts have since labored with the doctrine for over half a century...

Here...there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to
the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does...

To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

‘Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.’

Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected.
We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment...

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity... In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument...
Mr. Justice BRENNAN delivered the opinion of the Court.

This civil action was brought under 42 U.S.C. ss 1983 and 1988 to redress the alleged deprivation of federal constitutional rights. The complaint, alleging that by means of a 1901 statute of Tennessee apportioning the members of the General Assembly among the State’s 95 counties, ‘these plaintiffs and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes,’ was dismissed by a three-judge court...

The General Assembly of Tennessee consists of the Senate with 33 members and the House of Representatives with 99 members. The Tennessee Constitution provides in Art. II as follows:

‘Sec. 3. Legislative authority—Term of office.—The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people; who shall hold their offices for two years from the day of the general election.

‘Sec. 4. Census.—An enumeration of the qualified voters, and an apportionment of the Representatives in the General Assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years.

‘Sec. 5. Apportionment of representatives.—The number of Representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each; and shall not exceed seventy-five, until the population of the State shall be one million and a half, and shall never exceed ninety-nine; Provided, that any county having two-thirds of the ratio shall be entitled to one member.

‘Sec 6. Apportionment of senators.—The number of Senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the Senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members to the House of Representatives, shall be made up to such county or counties in the Senate, as near as may be
practicable. When a district is composed of two or more counties, they shall be adjoining; and no county shall be divided in forming a district.’

Thus, Tennessee’s standard for allocating legislative representation among her counties is the total number of qualified voters resident in the respective counties, subject only to minor qualifications. Decennial reapportionment in compliance with the constitutional scheme was effected by the General Assembly each decade from 1871 to 1901... In 1901 the General Assembly abandoned separate enumeration in favor of reliance upon the Federal Census and passed the Apportionment Act here in controversy. In the more than 60 years since that action, all proposals in both Houses of the General Assembly for reapportionment have failed to pass.

Between 1901 and 1961, Tennessee has experienced substantial growth and redistribution of her population. In 1901 the population was 2,020,616, of whom 487,380 were eligible to vote. The 1960 Federal Census reports the State’s population at 3,567,089, of whom 2,092,891 are eligible to vote. The relative standings of the counties in terms of qualified voters have changed significantly. It is primarily the continued application of the 1901 Apportionment Act to this shifted and enlarged voting population which gives rise to the present controversy.

Indeed, the complaint alleges that the 1901 statute, even as of the time of its passage, ‘made no apportionment of Representatives and Senators in accordance with the constitutional formula * * *, but instead arbitrarily and capriciously apportioned representatives in the Senate and House without reference * * * to any logical or reasonable formula whatever.’ It is further alleged that ‘because of the population changes since 1900, and the failure of the Legislature to reapportion itself since 1901,’ the 1901 statute became ‘unconstitutional and obsolete.’ Appellants also argue that, because of the composition of the legislature effected by the 1901 Apportionment Act, redress in the form of a state constitutional amendment to change the entire mechanism for reapportioning, or any other change short of that, is difficult or impossible. The complaint concludes that ‘these plaintiffs and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes.’ They seek a declaration that the 1901 statute is unconstitutional and an injunction restraining the appellees from acting to conduct any further elections under it. They also pray that unless and until the General Assembly enacts a valid reapportionment, the District Court should either decree a reapportionment by mathematical application of the Tennessee constitutional formulae to the most recent Federal Census figures, or direct the appellees to conduct legislative elections, primary and general, at large...
In light of the District Court’s treatment of the case, we hold today only (a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the Tennessee apportionment statutes. Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial...

Article III, s 2, of the Federal Constitution provides that ‘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 ***.’ It is clear that the cause of action is one which ‘arises under’ the Federal Constitution. The complaint alleges that the 1901 statute effects an apportionment that deprives the appellants of the equal protection of the laws in violation of the Fourteenth Amendment...

Since the complaint plainly sets forth a case arising under the Constitution, the subject matter is within the federal judicial power defined in Art. III, s 2, and so within the power of Congress to assign to the jurisdiction of the District Courts...

We hold that the District Court has jurisdiction of the subject matter of the federal constitutional claim asserted in the complaint...

We hold that this challenge to an apportionment presents no nonjusticiable ‘political question.’...

Appellants’ claim that they are being denied equal protection is justiciable, and if ‘discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.’ ...

[I]n the...’political question’ cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary’s relationship to the States, which gives rise to the ‘political question.’...

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality
Chapter 35

35. John F. Kennedy
Baker v. Carr

of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question’s presence...

But it is argued that this case shares the characteristics of cases concerning the Constitution's guaranty, in Art. IV, s 4, of a republican form of government... Guaranty Clause claims involve those elements which define a ‘political question,’ and for that reason and no other, they are nonjusticiable...[T]he nonjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization...

We come, finally, to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable ‘political question’ bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.

This case does, in one sense, involve the allocation of political power within a State, and the appellants might conceivably have added a claim under the Guaranty Clause. Of course, as we have seen, any reliance on that clause would be futile. But because any reliance on the Guaranty Clause could not have succeeded it does not follow that appellants may not be heard on the equal protection claim which in fact they tender...

[I]t is the involvement in Guaranty Clause claims of the elements thought to define ‘political questions,’ and no other feature, which could render them nonjusticiable. Specifically, we have said that such claims are not held nonjusticiable because they touch matters of state governmental organization...

When challenges to state action respecting matters of ‘the administration of the affairs of the State and the officers through whom they are conducted’ have rested on claims of constitutional deprivation which are amenable to judicial
correction, this Court has acted upon its view of the merits of the claim…

We conclude that the complaint’s allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment…
CHAPTER 36

36. **Lyndon B. Johnson**

Heart of Atlanta Motel v. United States

Supreme Court of the United States

Heart of Atlanta Motel

v.

United States


Mr. Justice CLARK delivered the opinion of the Court.

This is a declaratory judgment action attacking the constitutionality of Title II of the Civil Rights Act of 1964…

Appellant owns and operates the Heart of Atlanta Motel which has 216 rooms available to transient guests… It is readily accessible to interstate highways 75 and 85 and state highways 23 and 41. Appellant solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation; it maintains over 50 billboards and highway signs within the State, soliciting patronage for the motel; it accepts convention trade from outside Georgia and approximately 75% of its registered guests are from out of State. Prior to passage of the Act the motel had followed a practice of refusing to rent rooms to Negroes, and it alleged that it intended to continue to do so. In an effort to perpetuate that policy this suit was filed.

The appellant contends that Congress in passing this Act exceeded its power to regulate commerce under Art. I, s 8, cl. 3, of the Constitution of the United States…

The appellees counter that the unavailability to Negroes of adequate accommodations interferes significantly with interstate travel, and that Congress, under the Commerce Clause, has power to remove such obstructions and restraints…

Since Title II is the only portion under attack here, we confine our consideration to those public accommodation provisions…

This Title is divided into seven sections beginning with s 201(a) which provides that:

‘All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.’

There are listed in s 201(b) four classes of business establishments, each of which ‘serves the public’ and ‘is a place of public accommodation’ within the meaning of s 201(a) ‘if its operations affect commerce, or if discrimination or segregation
by it is supported by State action.’ The covered establishments are:

‘(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence…’

Section 201(c)... declares that ‘any inn, hotel, motel, or other establishment which provides lodging to transient guests’ affects commerce per se...

It is admitted that the operation of the motel brings it within the provisions of s 201(a) of the Act and that appellant refused to provide lodging for transient Negroes because of their race or color and that it intends to continue that policy unless restrained.

The sole question posed is, therefore, the constitutionality of the Civil Rights Act of 1964 as applied to these facts. The legislative history of the Act indicates that Congress based the Act on…its power to regulate interstate commerce under Art. I, s 8, cl. 3, of the Constitution.

The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’ At the same time, however, it noted that such an objective has been and could be readily achieved ‘by congressional action based on the commerce power of the Constitution.’ Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power in this regard...

[T]he record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce...

This testimony included the fact that our people have become increasingly mobile with millions of people of all races traveling from State to State; that Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight; and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself ‘dramatic testimony to the difficulties’ Negroes encounter in travel. These exclusionary practices were found to be nationwide, the Under Secretary of Commerce testifying that there is ‘no question that this discrimination in the North still exists to a large degree’ and in the West and Midwest as well. This testimony indicated a qualitative as well as quantitative effect on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler’s pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this...
uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community...We shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel...

The power of Congress to deal with these obstructions depends on the meaning of the Commerce Clause...

In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is 'commerce which concerns more States than one' and has a real and substantial relation to the national interest. Let us now turn to this facet of the problem...

In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong...

Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may—as it has—prohibit racial discrimination by motels serving travelers, however ‘local’ their operations may appear...

We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years. It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not with the courts. How obstructions in commerce may be removed—what means are to be employed—is within the sound and exclusive discretion of the Congress. It is subject only to one caveat—that the means chosen by it must be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more...
Mr. Chief Justice BURGER delivered the opinion of the Court.

...On March 1, 1974, a grand jury of the United States District Court for the
District of Columbia returned an indictment charging seven named individuals
with various offenses, including conspiracy to defraud the United States and to
obstruct justice. Although he was not designated as such in the indictment, the
grand jury named the President, among others, as an unindicted coconspirator.
On April 18, 1974, upon motion of the Special Prosecutor, a subpoena...was
issued pursuant to Rule 17(c) to the President by the United States District Court
and made returnable on May 2, 1974. This subpoena required the production,
in advance of the September 9 trial date, of certain tapes, memoranda, papers,
transcripts or other writings relating to certain precisely identified meetings
between the President and others. The Special Prosecutor was able to fix the
time, place, and persons present at these discussions because the White House
daily logs and appointment records had been delivered to him. On April 30, the
President publicly released edited transcripts of 43 conversations; portions of 20
conversations subject to subpoena in the present case were included. On May
1, 1974, the President’s counsel, filed a ‘special appearance’ and a motion to
quash the subpoena under Rule 17(c). This motion was accompanied by a formal
claim of privilege. At a subsequent hearing, further motions to expunge the
grand jury’s action naming the President as an unindicted coconspirator and for
protective orders against the disclosure of that information were filed or raised
orally by counsel for the President.

On May 20, 1974, the District Court denied the motion to quash and the
motions to expunge and for protective orders. It further ordered ‘the President
or any subordinate officer, official, or employee with custody or control of the
documents or objects subpoenaed,’ to deliver to the District Court, on or
before May 31, 1974, the originals of all subpoenaed items, as well as an index
and analysis of those items, together with tape copies of those portions of the
subpoenaed recordings for which transcripts had been released to the public by
the President on April 30...

Having determined that the requirements of Rule 17(c) were satisfied, we
turn to the claim that the subpoena should be quashed because it demands
‘confidential conversations between a President and his close advisors that it
would be inconsistent with the public interest to produce.’ The first contention

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is a broad claim that the separation of powers doctrine precludes judicial review of a President’s claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena...

No holding of the Court has defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential Presidential communications for use in a criminal prosecution, but other exercises of power by the Executive Branch and the Legislative Branch have been found invalid as in conflict with the Constitution... Since this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has authority to interpret claims with respect to powers alleged to derive from enumerated powers.

Our system of government ‘requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.’...

Notwithstanding the deference each branch must accord the others, the ‘judicial Power of the United States’ vested in the federal courts by Art. III, s 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. We therefore reaffirm that it is the province and duty of this Court ‘to say what the law is’ with respect to the claim of privilege presented in this case.

In support of his claim of absolute privilege, the President’s counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings...
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The second ground asserted by the President’s counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere…insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications.

However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President’s need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide...

To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of ‘a workable government’ and gravely impair the role of the courts under Art. III...

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities...

No case of the Court, however, has extended this high degree of deference to a President’s generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based...

In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President’s responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in
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the context of a criminal prosecution.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President’s acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President’s broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

We have earlier determined that the District Court did not err in authorizing the issuance of the subpoena. If a President concludes that compliance with a subpoena would be injurious to the public interest he may properly, as was done here, invoke a claim of privilege on the return of the subpoena. Upon receiving a claim of privilege from the Chief Executive, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged and to require the Special Prosecutor to demonstrate that the Presidential material was ‘essential to the justice of the [pending criminal] case.’ Here the District Court treated the material as presumptively privileged, proceeded to find that the Special Prosecutor had made a sufficient showing to rebut the presumption, and ordered an in camera examination of the subpoenaed material. On the basis of our examination of the record we are unable to conclude that the District Court erred in ordering the inspection. Accordingly we affirm the order of the District Court that subpoenaed materials be transmitted to that court...

The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment. We have no doubt that the District Judge will at all times accord to Presidential records [a] high degree of deference…and will discharge his responsibility to see to it that until released to the Special Prosecutor no in camera material is revealed to anyone...
Proclamation 4311
Granting Pardon to Richard Nixon

September 8, 1974.

By the President of the United States of America.

Richard Nixon became the thirty-seventh President of the United States on January 20, 1969 and was reelected in 1972 for a second term by the electors of forty-nine of the fifty states. His term in office continued until his resignation on August 9, 1974.

Pursuant to resolutions of the House of Representatives, its Committee on the Judiciary conducted an inquiry and investigation on the impeachment of the President extending over more than eight months. The hearings of the Committee and its deliberations, which received wide national publicity over television, radio, and in printed media, resulted in votes adverse to Richard Nixon on recommended Articles of Impeachment.

As a result of certain acts or omissions occurring before his resignation from the Office of President, Richard Nixon has become liable to possible indictment and trial for offenses against the United States. Whether or not he shall be so prosecuted depends on findings of the appropriate grand jury and on the discretion of the authorized prosecutor. Should an indictment ensue, the accused shall then be entitled to a fair trial by an impartial jury, as guaranteed to every individual by the Constitution.

It is believed that a trial of Richard Nixon, if it became necessary, could not fairly begin until a year or more has elapsed. In the meantime, the tranquility to which this nation has been restored by the events of recent weeks could be irreparably lost by the prospects of bringing to trial a former President of the United States. The prospects of such trial will cause prolonged and divisive debate over the propriety of exposing to further punishment and degradation a man who has already paid the unprecedented penalty of relinquishing the highest elective office of the United States.

Now, Therefore, I, Gerald R. Ford, President of the United States, pursuant to the pardon power conferred upon me by Article II, Section 2, of the Constitution, have granted and by these presents do grant a full, free, and absolute pardon unto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974.

In Witness Whereof, I have hereunto set my hand this eighth day of
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September, in the year of our Lord nineteen hundred and seventy-four, and of the Independence of the United States of America the one hundred and ninety-ninth.

GERALD R. FORD
Justice REHNQUIST delivered the opinion of the Court.

...We are confined to a resolution of the dispute presented to us. That dispute involves various Executive Orders and regulations by which the President nullified attachments and liens on Iranian assets in the United States, directed that these assets be transferred to Iran, and suspended claims against Iran that may be presented to an International Claims Tribunal. This action was taken in an effort to comply with an Executive Agreement between the United States and Iran...

On November 4, 1979, the American Embassy in Tehran was seized and our diplomatic personnel were captured and held hostage. In response to that crisis, President Carter, acting pursuant to the International Emergency Economic Powers Act (hereinafter IEEPA), declared a national emergency on November 14, 1979, and blocked the removal or transfer of “all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States...”. President Carter authorized the Secretary of the Treasury to promulgate regulations carrying out the blocking order. On November 15, 1979, the Treasury Department’s Office of Foreign Assets Control issued a regulation providing that “[u]nless licensed or authorized...any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since [November 14, 1979,] there existed an interest of Iran.”...

On November 26, 1979, the President granted a general license authorizing certain judicial proceedings against Iran but which did not allow the “entry of any judgment or of any decree or order of similar or analogous effect....”

On December 19, 1979, petitioner Dames & Moore filed suit...against the Government of Iran, the Atomic Energy Organization of Iran, and a number of Iranian banks. In its complaint, petitioner alleged that its wholly owned subsidiary, Dames & Moore International...was a party to a written contract with the Atomic Energy Organization... [T]he Atomic Energy Organization terminated the agreement for its own convenience on June 30, 1979. Petitioner contended, however, that it was owed $3,436,694.30 plus interest for services performed under the contract prior to the date of termination. The District Court issued
orders of attachment directed against property of the defendants, and the property of certain Iranian banks was then attached to secure any judgment that might be entered against them.

On January 20, 1981, the Americans held hostage were released by Iran pursuant to an Agreement entered into the day before…The Agreement stated that “[i]t is the purpose of [the United States and Iran]…to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration.” In furtherance of this goal, the Agreement called for the establishment of an Iran-United States Claims Tribunal which would arbitrate any claims not settled within six months. Awards of the Claims Tribunal are to be “final and binding” and “enforceable…in the courts of any nation in accordance with its laws.”…

On January 19, 1981, President Carter issued a series of Executive Orders implementing the terms of the agreement. These Orders revoked all licenses permitting the exercise of “any right, power, or privilege” with regard to Iranian funds, securities, or deposits; “nullified” all non-Iranian interests in such assets acquired subsequent to the blocking order of November 14, 1979; and required those banks holding Iranian assets to transfer them “to the Federal Reserve Bank of New York, to be held or transferred as directed by the Secretary of the Treasury.”

On February 24, 1981, President Reagan issued an Executive Order in which he “ratified” the January 19th Executive Orders. Moreover, he “suspended” all “claims which may be presented to the … Tribunal” and provided that such claims “shall have no legal effect in any action now pending in any court of the United States.” The suspension of any particular claim terminates if the Claims Tribunal determines that it has no jurisdiction over that claim; claims are discharged for all purposes when the Claims Tribunal either awards some recovery and that amount is paid, or determines that no recovery is due.

Meanwhile, on January 27, 1981, petitioner moved for summary judgment in the District Court against the Government of Iran and the Atomic Energy Organization, but not against the Iranian banks. The District Court granted petitioner’s motion and awarded petitioner the amount claimed under the contract plus interest…However…the District Court stayed execution of its judgment pending appeal by the Government of Iran and the Atomic Energy Organization. The District Court also ordered that all prejudgment attachments obtained against the Iranian defendants be vacated and that further proceedings against the bank defendants be stayed in light of the Executive Orders discussed above.

On April 28, 1981, petitioner filed this action in the District Court for declaratory
and injunctive relief against the United States and the Secretary of the Treasury, seeking to prevent enforcement of the Executive Orders and Treasury Department regulations implementing the Agreement with Iran. In its complaint, petitioner alleged that the actions of the President and the Secretary of the Treasury implementing the Agreement with Iran were beyond their statutory and constitutional powers and, in any event, were unconstitutional to the extent they adversely affect petitioner’s final judgment against the Government of Iran and the Atomic Energy Organization, its execution of that judgment in the State of Washington, its prejudgment attachments, and its ability to continue to litigate against the Iranian banks. On May 28, 1981, the District Court denied petitioner’s motion for a preliminary injunction and dismissed petitioner’s complaint…

On June 3, 1981, petitioner filed a notice of appeal from the District Court’s order…On June 4, the Treasury Department amended its regulations to mandate “the transfer of bank deposits and certain other financial assets of Iran in the United States to the Federal Reserve Bank of New York by noon, June 19.”…

The Government…has principally relied on § 203 of the IEEPA, as authorization for these actions. Section 1702(a)(1) provides in part:

“At the times and to the extent specified in section 1701 of this title, the President may…

“(A) investigate, regulate, or prohibit—

“(i) any transactions in foreign exchange,

“(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

“(iii) the importing or exporting of currency or securities, and

“(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;

“by any person, or with respect to any property, subject to the jurisdiction of the United States.”

The Government contends that the acts of “nullifying” the attachments and ordering the “transfer” of the frozen assets are specifically authorized by the
plain language of the above statute...

Petitioner contends that we should ignore the plain language of this statute because an examination of its legislative history as well as the history of § 5(b) of the Trading With the Enemy Act (hereinafter TWEA), from which the pertinent language of § 1702 is directly drawn, reveals that the statute was not intended to give the President such extensive power over the assets of a foreign state during times of national emergency. According to petitioner, once the President instituted the November 14, 1979, blocking order, § 1702 authorized him “only to continue the freeze or to discontinue controls.”

We do not agree and refuse to read out of § 1702 all meaning to the words “transfer,” “compel,” or “nullify.” Nothing in the legislative history of either § 1702 or § 5(b) of the TWEA requires such a result. To the contrary, we think both the legislative history and cases interpreting the TWEA fully sustain the broad authority of the Executive when acting under this congressional grant of power...

This Court has previously recognized that the congressional purpose in authorizing blocking orders is “to put control of foreign assets in the hands of the President....”. Such orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a “bargaining chip” to be used by the President when dealing with a hostile country...

Because the President's action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is “supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”...Under the circumstances of this case, we cannot say that petitioner has sustained that heavy burden...

Although we have concluded that the IEEPA constitutes specific congressional authorization to the President to nullify the attachments and order the transfer of Iranian assets, there remains the question of the President's authority to suspend claims pending in American courts...

The Hostage Act, passed in 1868, provides:

“Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government...the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative
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thereto shall as soon as practicable be communicated by the President to Congress."

We are reluctant to conclude that this provision constitutes specific authorization to the President to suspend claims in American courts... The legislative history indicates that the Act was passed in response to a situation unlike the recent Iranian crisis...

Concluding that neither the IEEPA nor the Hostage Act constitutes specific authorization of the President’s action suspending claims, however, is not to say that these statutory provisions are entirely irrelevant to the question of the validity of the President’s action. We think both statutes highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case...[T]he IEEPA delegates broad authority to the President to act in times of national emergency with respect to property of a foreign country. The Hostage Act similarly indicates congressional willingness that the President have broad discretion when responding to the hostile acts of foreign sovereigns...

[W]e cannot ignore the general tenor of Congress’ legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress... Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act... On the contrary, the enactment of legislation closely related to the question of the President’s authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to “invite” “measures on independent presidential responsibility”... At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President...

[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries...[T]here has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate. Under such agreements, the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures...

Congress has implicitly approved the practice of claim settlement by executive agreement. This is best demonstrated by Congress’ enactment of the International Claims Settlement Act of 1949... By creating a procedure to implement future settlement agreements, Congress placed its stamp of approval on such agreements...
In addition to congressional acquiescence in the President's power to settle claims, prior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate...

In light of all of the foregoing—the inferences to be drawn from the character of the legislation Congress has enacted in the area, such as the IEEPA and the Hostage Act, and from the history of acquiescence in executive claims settlement—we conclude that the President was authorized to suspend pending claims pursuant to Executive Order... In light of the fact that Congress may be considered to have consented to the President's action in suspending claims, we cannot say that action exceeded the President's powers...

Just as importantly, Congress has not disapproved of the action taken here. Though Congress has held hearings on the Iranian Agreement itself, Congress has not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement. Quite the contrary, the relevant Senate Committee has stated that the establishment of the Tribunal is “of vital importance to the United States.” We are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority...

[W]here, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President’s action, we are not prepared to say that the President lacks the power to settle such claims...
Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari [to resolve] a challenge to the constitutionality of the provision in § 244(c)(2) of the Immigration and Nationality Act, authorizing one House of Congress, by resolution, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General of the United States, to allow a particular deportable alien to remain in the United States.

Chadha is an East Indian who was born in Kenya and holds a British passport. He was lawfully admitted to the United States in 1966 on a nonimmigrant student visa. His visa expired on June 30, 1972. On October 11, 1973, the District Director of the Immigration and Naturalization Service ordered Chadha to show cause why he should not be deported for having “remained in the United States for a longer time than permitted.” Pursuant to § 242(b) of the Immigration and Nationality Act, a deportation hearing was held before an immigration judge on January 11, 1974. Chadha conceded that he was deportable for overstaying his visa and the hearing was adjourned to enable him to file an application for suspension of deportation under § 244(a)(1) of the Act. Section 244(a)(1) provides:

“(a) [T]he Attorney General may, in his discretion, suspend deportation… in the case of an alien who...

(1) …has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.”

After Chadha submitted his application for suspension of deportation, the deportation hearing was resumed on February 7, 1974… [T]he immigration judge, on June 25, 1974, ordered that Chadha’s deportation be suspended. The immigration judge found that Chadha met the requirements of § 244(a)(1): he had resided continuously in the United States for over seven years, was of good moral character, and would suffer “extreme hardship” if deported.
Pursuant to § 244(c)(1) of the Act, the immigration judge suspended Chadha’s deportation and a report of the suspension was transmitted to Congress. Section 244(c)(1) provides:

“Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended… a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension...”

Once the Attorney General’s recommendation for suspension of Chadha’s deportation was conveyed to Congress, Congress had the power under § 244(c)(2) of the Act, to veto the Attorney General’s determination that Chadha should not be deported. Section 244(c)(2) provides:

“(2) In the case of an alien specified in paragraph (1) of subsection (a) of this subsection—

if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien...”

The June 25, 1974 order of the immigration judge suspending Chadha’s deportation remained outstanding as a valid order for a year and a half... Congress did not exercise the veto authority reserved to it under § 244(c)(2) until the first session of the 94th Congress. This was the final session in which Congress, pursuant to § 244(c)(2), could act to veto the Attorney General’s determination that Chadha should not be deported. The session ended on December 19, 1975. Absent Congressional action, Chadha’s deportation proceedings would have been cancelled after this date and his status adjusted to that of a permanent resident alien.

On December 12, 1975, Representative Eilberg, Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, introduced a resolution opposing “the granting of permanent residence in the United States to [six] aliens”, including Chadha. The resolution was referred to the House Committee on the Judiciary. On December 16, 1975, the resolution was discharged from further consideration by the House Committee on the Judiciary and submitted to the House of Representatives for a vote... [T]he House consideration of the resolution was based on Representative Eilberg’s statement from the floor that
“[i]t was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution [Chadha and five others] did not meet these statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended.”

The resolution was passed without debate or recorded vote. Since the House action was pursuant to § 244(c)(2), the resolution was not treated as an Article I legislative act; it was not submitted to the Senate or presented to the President for his action.

After the House veto of the Attorney General’s decision to allow Chadha to remain in the United States, the immigration judge reopened the deportation proceedings to implement the House order deporting Chadha… On November 8, 1976, Chadha was ordered deported pursuant to the House action…

Pursuant to § 106(a) of the Act, Chadha filed a petition for review of the deportation order in the United States Court of Appeals for the Ninth Circuit. The Immigration and Naturalization Service agreed with Chadha’s position before the Court of Appeals and joined him in arguing that § 244(c)(2) is unconstitutional…

We turn now to the question whether action of one House of Congress under § 244(c)(2) violates strictures of the Constitution…

[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government...

Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process… Art. I provides:

“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.” Art. I, § 1. (Emphasis added).

“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; …” Art. I, § 7, cl. 2. (Emphasis added).

“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.” Art. I, § 7, cl. 3. (Emphasis added)

These provisions of Art. I are integral parts of the constitutional design for the separation of powers…(W)e find that the purposes underlying the Presentment Clauses…and the bicameral requirement…guide our resolution of the important question presented in this case. The very structure of the articles delegating and separating powers under Arts. I, II, and III exemplify the concept of separation of powers and we now turn to Art. I…

The President’s role in the lawmaking process also reflects the Framers’ careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures…

By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief, already remarked upon in connection with the Presentment Clauses, that legislation should not be enacted unless it has been carefully and fully considered by the Nation’s elected officials…

The President’s participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President’s unilateral veto power, in turn, was limited by the power of two thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person. It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers’ decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure…

When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it. When the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Art. II. And when, as here, one House of Congress purports to act, it is presumptively acting within its assigned sphere.

Beginning with this presumption, we must nevertheless establish that the challenged action under § 244(c)(2) is of the kind to which the procedural requirements of Art. I, § 7 apply…Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon “whether they contain matter which is properly to be regarded as legislative in its character and effect.”
Examination of the action taken here by one House pursuant to § 244(c)(2) reveals that it was essentially legislative in purpose and effect. In purporting to exercise power defined in Art. I, § 8, cl. 4 to “establish an uniform Rule of Naturalization,” the House took action that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch. Section 244(c)(2) purports to authorize one House of Congress to require the Attorney General to deport an individual alien whose deportation otherwise would be cancelled under § 244. The one-House veto operated in this case to overrule the Attorney General...

Neither the House of Representatives nor the Senate contends that, absent the veto provision in § 244(c)(2), either of them, or both of them acting together, could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively delegated authority, had determined the alien should remain in the United States...

The nature of the decision implemented by the one-House veto in this case further manifests its legislative character... Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I...Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.

[When the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action. There are but four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto...

These carefully defined exceptions from presentment and bicameralism underscore the difference between the legislative functions of Congress and other unilateral but important and binding one-House acts provided for in the Constitution. These exceptions are narrow, explicit, and separately justified; none of them authorize the action challenged here. On the contrary, they provide further support for the conclusion that Congressional authority is not to be implied and for the conclusion that the veto provided for in § 244(c)(2) is not authorized by the constitutional design of the powers of the Legislative Branch.

Since it is clear that the action by the House under § 244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Article I. The bicameral requirement, the
Presentment Clauses, the President’s veto, and Congress’ power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution’s prescription for legislative action: passage by a majority of both Houses and presentment to the President.

The veto authorized by § 244(c)(2) doubtless has been in many respects a convenient shortcut; the “sharing” with the Executive by Congress of its authority over aliens in this manner is, on its face, an appealing compromise. In purely practical terms, it is obviously easier for action to be taken by one House without submission to the President...

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution...

We hold that the Congressional veto provision in § 244(c)(2) is severable from the Act and that it is unconstitutional...

Chief Justice BURGER delivered the opinion of the Court.

The question presented by these appeals is whether the assignment by Congress to the Comptroller General of the United States of certain functions under the Balanced Budget and Emergency Deficit Control Act of 1985 violates the doctrine of separation of powers.

On December 12, 1985, the President signed into law the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the “Gramm-Rudman-Hollings Act.” The purpose of the Act is to eliminate the federal budget deficit. To that end, the Act sets a “maximum deficit amount” for federal spending for each of fiscal years 1986 through 1991... If in any fiscal year the federal budget deficit exceeds the maximum deficit amount by more than a specified sum, the Act requires across-the-board cuts in federal spending to reach the targeted deficit level, with half of the cuts made to defense programs and the other half made to nondefense programs...

These “automatic” reductions are accomplished through a rather complicated procedure, spelled out in § 251, the so-called “reporting provisions” of the Act. Each year, the Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) independently estimate the amount of the federal budget deficit for the upcoming fiscal year. If that deficit exceeds the maximum targeted deficit amount for that fiscal year by more than a specified amount, the Directors of OMB and CBO independently calculate, on a program-by-program basis, the budget reductions necessary to ensure that the deficit does not exceed the maximum deficit amount. The Act then requires the Directors to report jointly their deficit estimates and budget reduction calculations to the Comptroller General.

The Comptroller General, after reviewing the Directors’ reports, then reports his conclusions to the President. The President in turn must issue a “sequestration” order mandating the spending reductions specified by the Comptroller General...

We noted recently that “[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.” The declared purpose of separating and dividing the powers of government, of course, was to “diffus[e] power the better
to secure liberty.”

The Framers provided a vigorous Legislative Branch and a separate and wholly independent Executive Branch, with each branch responsible ultimately to the people. The Framers also provided for a Judicial Branch equally independent with “[t]he judicial Power ... extend[ing] to all Cases, in Law and Equity, arising under this Constitution, and the Laws of the United States.”

That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.

The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts. The President appoints “Officers of the United States” with the “Advice and Consent of the Senate....” Once the appointment has been made and confirmed, however, the Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment by the House of Representatives and conviction by the Senate. An impeachment by the House and trial by the Senate can rest only on “Treason, Bribery or other high Crimes and Misdemeanors.” A direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one is inconsistent with separation of powers...

[We] conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws... The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess...

To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress...

[We] turn to consideration of whether the Comptroller General is controlled by Congress.

Appellants urge that the Comptroller General performs his duties independently and is not subservient to Congress... [T]his contention does not bear close scrutiny.
The critical factor lies in the provisions of the statute defining the Comptroller General’s office relating to removability. Although the Comptroller General is nominated by the President from a list of three individuals recommended by the Speaker of the House of Representatives and the President pro tempore of the Senate and confirmed by the Senate, he is removable only at the initiative of Congress. He may be removed not only by impeachment but also by joint resolution of Congress “at any time” resting on any one of the following bases:

“(i) permanent disability;
“(ii) inefficiency;
“(iii) neglect of duty;
“(iv) malfeasance; or
“(v) a felony or conduct involving moral turpitude.”

This provision was included, as one Congressman explained in urging passage of the Act, because Congress “felt that [the Comptroller General] should be brought under the sole control of Congress, so that Congress at any moment when it found he was inefficient and was not carrying on the duties of his office as he should and as the Congress expected, could remove him without the long, tedious process of a trial by impeachment.”…

The statute permits removal for “inefficiency,” “neglect of duty,” or “malfeasance.” These terms are very broad and, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will. The Constitutional Convention chose to permit impeachment of executive officers only for “Treason, Bribery, or other high Crimes and Misdemeanors.”…

The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty. In constitutional terms, the removal powers over the Comptroller General’s office dictate that he will be subservient to Congress.

[It is] simply…error to suggest that the political realities reveal that the Comptroller General is free from influence by Congress. The Comptroller General heads the General Accounting Office (GAO), “an instrumentality of the United States Government independent of the executive departments,” which was created by Congress in 1921 as part of the Budget and Accounting Act of 1921.[.] Congress created the office because it believed that it “needed an officer, responsible to it alone, to check upon the application of public funds in accordance with appropriations.”
It is clear that Congress has consistently viewed the Comptroller General as an officer of the Legislative Branch...

Over the years, the Comptrollers General have also viewed themselves as part of the Legislative Branch...

[W]e see no escape from the conclusion that, because Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers. The remaining question is whether the Comptroller General has been assigned such powers in the Balanced Budget and Emergency Deficit Control Act of 1985.

The primary responsibility of the Comptroller General under the instant Act is the preparation of a “report.” This report must contain detailed estimates of projected federal revenues and expenditures. The report must also specify the reductions, if any, necessary to reduce the deficit to the target for the appropriate fiscal year. The reductions must be set forth on a program-by-program basis.

In preparing the report, the Comptroller General is to have “due regard” for the estimates and reductions set forth in a joint report submitted to him by the Director of CBO and the Director of OMB, the President’s fiscal and budgetary adviser. However, the Act plainly contemplates that the Comptroller General will exercise his independent judgment and evaluation with respect to those estimates. The Act also provides that the Comptroller General’s report “shall explain fully any differences between the contents of such report and the report of the Directors.”

Appellants suggest that the duties assigned to the Comptroller General in the Act are essentially ministerial and mechanical so that their performance does not constitute “execution of the law” in a meaningful sense. On the contrary, we view these functions as plainly entailing execution of the law in constitutional terms. Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of “execution” of the law. Under § 251, the Comptroller General must exercise judgment concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with executing a statute.

The executive nature of the Comptroller General’s functions under the Act is revealed in § 252(a)(3) which gives the Comptroller General the ultimate authority to determine the budget cuts to be made. Indeed, the Comptroller General commands the President himself to carry out, without the slightest variation... the directive of the Comptroller General as to the budget reductions...
CHAPTER 24

Congress of course initially determined the content of the Balanced Budget and Emergency Deficit Control Act; and undoubtedly the content of the Act determines the nature of the executive duty. However... once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation. By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion...

[T]he powers vested in the Comptroller General under § 251 violate the command of the Constitution that the Congress play no direct role in the execution of the laws...
Justice BRENNAN delivered the opinion of the Court.

After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.

While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the “Republican War Chest Tour.” As explained in literature distributed by the demonstrators and in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage “die-ins” intended to dramatize the consequences of nuclear war. On several occasions they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flagpole outside one of the targeted buildings.

The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted: “America, the red, white, and blue, we spit on you.” After the demonstrators dispersed, a witness to the flag burning collected the flag’s remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning.

Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Tex. Penal Code Ann. § 42.09(a)(3) (1989). After a trial, he was convicted, sentenced to one year in prison, and fined $2,000…

Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words. This fact somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether
CHAPTER 24

Johnson’s burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. If his conduct was expressive, we next decide whether the State’s regulation is related to the suppression of free expression. If the State’s regulation is not related to expression, then the less stringent standard we announced in United States v. O’Brien for regulations of noncommunicative conduct controls. If it is, then we are outside of O’Brien’s test, and we must ask whether this interest justifies Johnson’s conviction under a more demanding standard...

The First Amendment literally forbids the abridgment only of “speech,” but we have long recognized that its protection does not end at the spoken or written word...

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.”...

Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in “America.”

We have not automatically concluded, however, that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred...

Johnson burned an American flag as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. At his trial, Johnson explained his reasons for burning the flag as follows: “The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn’t have been made at that time. It’s quite a just position [juxtaposition]. We had new patriotism and no patriotism.”

In these circumstances, Johnson’s burning of the flag was conduct “sufficiently imbued with elements of communication” to implicate the First Amendment.

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word...It may not, however, proscribe particular conduct because it has expressive elements...It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.

Thus, although we have recognized that where “‘speech’ and ‘nonspeech’
elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms,” we have limited the applicability of O’Brien’s relatively lenient standard to those cases in which “the governmental interest is unrelated to the suppression of free expression.”

In order to decide whether O’Brien’s test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson’s conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether O’Brien’s test applies. The State offers two separate interests to justify this conviction: preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression.

Texas claims that its interest in preventing breaches of the peace justifies Johnson’s conviction for flag desecration. However, no disturbance of the peace actually occurred or threatened to occur because of Johnson’s burning of the flag…The only evidence offered by the State at trial to show the reaction to Johnson’s actions was the testimony of several persons who had been seriously offended by the flag burning.

The State’s position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption…

We thus conclude that the State’s interest in maintaining order is not implicated on these facts…

It remains to consider whether the State’s interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson’s conviction…

Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values…

Moreover, Johnson was prosecuted because he knew that his politically charged expression would cause “serious offense.” If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law: federal law designates burning as the preferred means of disposing of a flag “when it is in such condition that it is no longer a fitting emblem for display,” and Texas has no quarrel with this means of disposal. The Texas law is thus not aimed at protecting the physical integrity
of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others…

Whether Johnson’s treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct…

Johnson’s political expression was restricted because of the content of the message he conveyed. We must therefore subject the State’s asserted interest in preserving the special symbolic character of the flag to “the most exacting scrutiny.”

Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis… [T]he State’s claim is that it has an interest in preserving the flag as a symbol of nationhood and national unity, a symbol with a determinate range of meanings. According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag’s referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited.

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable…

We have not recognized an exception to this principle even where our flag has been involved. ..

Johnson was convicted for engaging in expressive conduct. The State’s interest in preventing breaches of the peace does not support his conviction because Johnson’s conduct did not threaten to disturb the peace. Nor does the State’s interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction for engaging in political expression…
CHAPTER 42

42. William Jefferson Clinton
Clinton v. Jones

Supreme Court of the United States

Clinton
v.
Jones


Justice STEVENS delivered the opinion of the Court.

This case raises a constitutional and a prudential question concerning the Office of the President of the United States. Respondent, a private citizen, seeks to recover damages from the current occupant of that office based on actions allegedly taken before his term began. The President submits that in all but the most exceptional cases the Constitution requires federal courts to defer such litigation until his term ends and that, in any event, respect for the office warrants such a stay. Despite the force of the arguments supporting the President’s submissions, we conclude that they must be rejected.

Petitioner, William Jefferson Clinton, was elected to the Presidency in 1992, and re-elected in 1996. His term of office expires on January 20, 2001. In 1991 he was the Governor of the State of Arkansas. Respondent, Paula Corbin Jones, is a resident of California. In 1991 she lived in Arkansas, and was an employee of the Arkansas Industrial Development Commission.

On May 6, 1994, she commenced this action in the United States District Court for the Eastern District of Arkansas by filing a complaint naming petitioner and Danny Ferguson, a former Arkansas State Police officer, as defendants...

Those allegations principally describe events that are said to have occurred on the afternoon of May 8, 1991, during an official conference held at the Excelsior Hotel in Little Rock, Arkansas. The Governor delivered a speech at the conference; respondent—working as a state employee—staffed the registration desk. She alleges that Ferguson persuaded her to leave her desk and to visit the Governor in a business suite at the hotel, where he made “abhorrent” sexual advances that she vehemently rejected. She further claims that her superiors at work subsequently dealt with her in a hostile and rude manner, and changed her duties to punish her for rejecting those advances. Finally, she alleges that after petitioner was elected President, Ferguson defamed her by making a statement to a reporter that implied she had accepted petitioner’s alleged overtures, and that various persons authorized to speak for the President publicly branded her a liar by denying that the incident had occurred...

[T]he alleged misconduct of petitioner was unrelated to any of his official duties as President of the United States and, indeed, occurred before he was elected to that office...
CHAPTER 42

42. WILLIAM JEFFERSON CLINTON

CLINTON v. JONES

Petitioner’s principal submission—that “in all but the most exceptional cases,” the Constitution affords the President temporary immunity from civil damages litigation arising out of events that occurred before he took office—cannot be sustained on the basis of precedent...

The principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct. In cases involving prosecutors, legislators, and judges we have repeatedly explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability...

Petitioner’s effort to construct an immunity from suit for unofficial acts grounded purely in the identity of his office is unsupported by precedent...

Petitioner’s strongest argument supporting his immunity claim is based on the text and structure of the Constitution. He does not contend that the occupant of the Office of the President is “above the law,” in the sense that his conduct is entirely immune from judicial scrutiny. The President argues merely for a postponement of the judicial proceedings that will determine whether he violated any law. His argument is grounded in the character of the office that was created by Article II of the Constitution, and relies on separation-of-powers principles that have structured our constitutional arrangement since the founding.

As a starting premise, petitioner contends that he occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties. He submits that—given the nature of the office—the doctrine of separation of powers places limits on the authority of the Federal Judiciary to interfere with the Executive Branch that would be transgressed by allowing this action to proceed.

We have no dispute with the initial premise of the argument. Former Presidents, from George Washington to George Bush, have consistently endorsed petitioner’s characterization of the office... [W]e accept the initial premise of the Executive’s argument.

It does not follow, however, that separation-of-powers principles would be violated by allowing this action to proceed. The doctrine of separation of powers is concerned with the allocation of official power among the three coequal branches of our Government...

[In this case there is no suggestion that the Federal Judiciary is being asked to perform any function that might in some way be described as “executive.”] Respondent is merely asking the courts to exercise their core Article III
jurisdiction to decide cases and controversies. Whatever the outcome of this case, there is no possibility that the decision will curtail the scope of the official powers of the Executive Branch. The litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power.

Rather than arguing that the decision of the case will produce either an aggrandizement of judicial power or a narrowing of executive power, petitioner contends that—as a byproduct of an otherwise traditional exercise of judicial power—burdens will be placed on the President that will hamper the performance of his official duties...As a factual matter, petitioner contends that this particular case...may impose an unacceptable burden on the President's time and energy, and thereby impair the effective performance of his office.

Petitioner's predictive judgment finds little support in either history or the relatively narrow compass of the issues raised in this particular case...As for the case at hand, if properly managed by the District Court, it appears to us highly unlikely to occupy any substantial amount of petitioner's time.

Of greater significance, petitioner errs by presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions...The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution...

First, we have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law...

Second, it is also settled that the President is subject to judicial process in appropriate circumstances...

If the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct. The burden on the President's time and energy that is a mere byproduct of such review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions. We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office.

The reasons for rejecting such a categorical rule apply as well to a rule that would require a stay “in all but the most exceptional cases.”... In all events,
the question whether a specific case should receive exceptional treatment is
more appropriately the subject of the exercise of judicial discretion than an
interpretation of the Constitution. Accordingly, we turn to the question whether
the District Court’s decision to stay the trial until after petitioner leaves office was
an abuse of discretion…

Strictly speaking the stay was not the functional equivalent of the constitutional
immunity that petitioner claimed, because the District Court ordered discovery
to proceed. Moreover, a stay of either the trial or discovery might be justified by
considerations that do not require the recognition of any constitutional immunity.
The District Court has broad discretion to stay proceedings as an incident to its
power to control its own docket…Although we have rejected the argument that
the potential burdens on the President violate separation–of–powers principles,
those burdens are appropriate matters for the District Court to evaluate in its
management of the case. The high respect that is owed to the office of the Chief
Executive, though not justifying a rule of categorical immunity, is a matter that
should inform the conduct of the entire proceeding, including the timing and
scope of discovery.

Nevertheless, we are persuaded that it was an abuse of discretion for the District
Court to defer the trial until after the President leaves office. Such a lengthy
and categorical stay takes no account whatever of the respondent’s interest in
bringing the case to trial. The complaint was filed within the statutory limitations
period—albeit near the end of that period—and delaying trial would increase the
danger of prejudice resulting from the loss of evidence, including the inability of
witnesses to recall specific facts, or the possible death of a party.

The decision to postpone the trial was, furthermore, premature. The proponent
of a stay bears the burden of establishing its need. In this case, at the stage at
which the District Court made its ruling, there was no way to assess whether a
stay of trial after the completion of discovery would be warranted. Other than
the fact that a trial may consume some of the President’s time and attention,
there is nothing in the record to enable a judge to assess the potential harm that
may ensue from scheduling the trial promptly after discovery is concluded…

The Federal District Court has jurisdiction to decide this case. Like every other
citizen who properly invokes that jurisdiction, respondent has a right to an
orderly disposition of her claims…
CHAPTER 43

43. GEORGE W. BUSH

HAMDI v. RUMSFELD

Supreme Court of the United States

Hamdi
v.
Rumsfeld


Justice O’CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice KENNEDY, and Justice BREYER join.

[W]e are called upon to consider the legality of the Government’s detention of a United States citizen on United States soil as an “enemy combatant” and to address the process that is constitutionally owed to one who seeks to challenge his classification as such...We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker....

Born in Louisiana in 1980, Hamdi moved with his family to Saudi Arabia as a child. By 2001...he resided in Afghanistan. At some point that year, he was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and eventually was turned over to the United States military. The Government asserts that it initially detained and interrogated Hamdi in Afghanistan before transferring him to the United States Naval Base in Guantanamo Bay in January 2002. In April 2002, upon learning that Hamdi is an American citizen, authorities transferred him to a naval brig in Norfolk, Virginia, where he remained until a recent transfer to a brig in Charleston, South Carolina. The Government contends that Hamdi is an “enemy combatant,” and that this status justifies holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the determination that access to counsel or further process is warranted.

In June 2002, Hamdi’s father, Esam Fouad Hamdi, filed the present petition for a writ of habeas corpus...The elder Hamdi alleges...that Hamdi’s detention in the United States without charges, access to an impartial tribunal, or assistance of counsel “violated and continue[s] to violate the Fifth and Fourteenth Amendments to the United States Constitution.” The habeas petition asks that the court, among other things... (3) declare that he is being held in violation of the Fifth and Fourteenth Amendments; (4) “[t]o the extent Respondents contest any material factual allegations in this Petition, schedule an evidentiary hearing, at which Petitioners may adduce proof in support of their allegations”; and (5) order that Hamdi be released from his “unlawful custody.”...Hamdi’s father
has asserted in documents found elsewhere in the record that his son went to Afghanistan to do “relief work,” and that he had been in that country less than two months before September 11, 2001, and could not have received military training…

The threshold question before us is whether the Executive has the authority to detain citizens who qualify as “enemy combatants.”… It has made clear, however, that, for purposes of this case, the “enemy combatant” that it is seeking to detain is an individual who, it alleges, was “‘part of or supporting forces hostile to the United States or coalition partners’ ” in Afghanistan and who “‘engaged in an armed conflict against the United States’ ” there. We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized…

[W]e agree with the Government’s [] position, that Congress has in fact authorized Hamdi’s detention, through the [Authorization for Use of Military Force]…

Hamdi…posits that his detention is forbidden by 18 U.S.C. § 4001(a). Section 4001(a) states that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”… The Government… maintains that § 4001(a) is satisfied, because Hamdi is being detained “pursuant to an Act of Congress”—the AUMF… [W]e conclude that the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe (assuming, without deciding, that such authorization is required), and that the AUMF satisfied § 4001(a)’s requirement that a detention be “pursuant to an Act of Congress” (assuming, without deciding, that § 4001(a) applies to military detentions).

The AUMF authorizes the President to use “all necessary and appropriate force” against “nations, organizations, or persons” associated with the September 11, 2001, terrorist attacks…[D]etention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the “necessary and appropriate force” Congress has authorized the President to use…

There is no bar to this Nation’s holding one of its own citizens as an enemy combatant… A citizen, no less than an alien, can be “part of or supporting forces hostile to the United States or coalition partners” and “engaged in an armed conflict against the United States,” such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict…

Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of “necessary and
appropriate force,” Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.

Hamdi objects, nevertheless, that Congress has not authorized the indefinite detention to which he is now subject...If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi’s detention could last for the rest of his life...

[We understand Congress’ grant of authority for the use of “necessary and appropriate force” to include the authority to detain for the duration of the relevant conflict...The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who “engaged in an armed conflict against the United States.” If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of “necessary and appropriate force,” and therefore are authorized by the AUMF...

To be clear, our opinion only finds legislative authority to detain under the AUMF once it is sufficiently clear that the individual is, in fact, an enemy combatant...

Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status. Hamdi argues that he is owed a meaningful and timely hearing and that “extra-judicial detention [that] begins and ends with the submission of an affidavit based on third-hand hearsay” does not comport with the Fifth and Fourteenth Amendments. The Government counters that any more process than was provided below would be both unworkable and “constitutionally intolerable.”...

All agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States...All agree suspension of the writ has not occurred here. Thus, it is undisputed that Hamdi was properly before an Article III court to challenge his detention under 28 U.S.C. § 2241... Most notably, § 2243 provides that “the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts,” and § 2246 allows the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories...

First, the Government urges...that because it is “undisputed” that Hamdi’s seizure took place in a combat zone, the habeas determination can be made purely as a matter of law, with no further hearing or factfinding necessary. This argument is easily rejected...[T]he circumstances surrounding Hamdi’s seizure cannot in any way be characterized as “undisputed,” as “those circumstances are...
neither conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances.”. Further, the “facts” that constitute the alleged concession are insufficient to support Hamdi’s detention… Hamdi would need to be “part of or supporting forces hostile to the United States or coalition partners” and “engaged in an armed conflict against the United States” to justify his detention in the United States for the duration of the relevant conflict. The habeas petition states only that “[w]hen seized by the United States Government, Mr. Hamdi resided in Afghanistan.”… An assertion that one resided in a country in which combat operations are taking place is not a concession that one was “captured in a zone of active combat” operations in a foreign theater of war and certainly is not a concession that one was “part of or supporting forces hostile to the United States or coalition partners” and “engaged in an armed conflict against the United States.”…

The Government’s second argument [is] that further factual exploration is unwarranted and inappropriate in light of the extraordinary constitutional interests at stake. Under the Government’s most extreme rendition of this argument, “[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict” ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme. At most, the Government argues, courts should review its determination that a citizen is an enemy combatant under a very deferential “some evidence” standard…Under this review, a court would assume the accuracy of the Government’s articulated basis for Hamdi’s detention…and assess only whether that articulated basis was a legitimate one…

In response, Hamdi emphasizes that this Court consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive’s asserted justifications for that detention have basis in fact and warrant in law...

Both of these positions…emphasize the tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right...

[W]e consider the interest of the erroneously detained individual…[T]he risk of erroneous deprivation of a citizen’s liberty in the absence of sufficient process here is very real…Moreover, as critical as the Government’s interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common
sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat...We reaffirm today the fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.

On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States...

The Government also argues...military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war...

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat...

“[T]he risk of an erroneous deprivation” of a detainee’s liberty interest is unacceptably high under the Government’s proposed rule...

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker...

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict... [T]he Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided...

We think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts. The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to continue to hold those who have been seized...

In sum, while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen’s core rights to challenge meaningfully the Government’s case and to be heard by an impartial adjudicator.
In so holding, we necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake…Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions…Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process…

Aside from unspecified “screening” processes and military interrogations in which the Government suggests Hamdi could have contested his classification, Hamdi has received no process. An interrogation by one’s captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker…Plainly, the “process” Hamdi has received is not that to which he is entitled under the Due Process Clause.

There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal…In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved…
Justice STEVENS delivered the opinion of the Court.

These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba...

Petitioners in these cases are 2 Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban. Since early 2002, the U.S. military has held them—along with, according to the Government’s estimate, approximately 640 other non-Americans captured abroad—at the naval base at Guantanamo Bay. The United States occupies the base, which comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement...Under the agreement, “the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas],” while “the Republic of Cuba consents that during the period of the occupation by the United States...the United States shall exercise complete jurisdiction and control over and within said areas.”...

In 2002, petitioners, through relatives acting as their next friends, filed various actions in the U.S. District Court for the District of Columbia challenging the legality of their detention at the base.

Construing all...actions as petitions for writs of habeas corpus, the District Court dismissed them for want of jurisdiction. The court held...that “aliens detained outside the sovereign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus.” The Court of Appeals affirmed...

Congress has granted federal district courts, “within their respective jurisdictions,” the authority to hear applications for habeas corpus by any person who claims to be held “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. §§ 2241(a), (c)(3)...

Consistent with the historic purpose of the writ, this Court has recognized the federal courts’ power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace.
The question now before us is whether the habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not “ultimate sovereignty.”

Petitioners...are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing, and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control...

Respondents contend that we can discern a limit on § 2241 through application of the “longstanding principle of American law” that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested. Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within “the territorial jurisdiction” of the United States. By the express terms of its agreements with Cuba, the United States exercises “complete jurisdiction and control” over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. Respondents themselves concede that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee’s citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority under § 2241.

Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called “exempt jurisdictions,” where ordinary writs did not run, and all other dominions under the sovereign’s control...

In the end, the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court’s jurisdiction over petitioners’ custodians. Section 2241, by its terms, requires nothing more. We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners’ habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base...
What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we...remand these cases for the District Court to consider in the first instance the merits of petitioners’ claims...
Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause. We hold these petitioners do have the habeas corpus privilege. Congress has enacted a statute, the Detainee Treatment Act of 2005 (DTA), that provides certain procedures for review of the detainees’ status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore §7 of the Military Commissions Act of 2006 (MCA), operates as an unconstitutional suspension of the writ...

Under the Authorization for Use of Military Force (AUMF), the President is authorized “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”...

After Hamdi [v. Rumsfeld], the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at Guantanamo were “enemy combatants,” as the Department defines that term. A later memorandum established procedures to implement the CSRTs. The Government maintains these procedures were designed to comply with the due process requirements identified by the plurality in Hamdi.

Interpreting the AUMF, the Department of Defense ordered the detention of these petitioners, and they were transferred to Guantanamo. Some of these individuals were apprehended on the battlefield in Afghanistan, others in places as far away from there as Bosnia and Gambia. All are foreign nationals, but none is a citizen of a nation now at war with the United States. Each denies he is a member of the al Qaeda terrorist network that carried out the September 11 attacks or of the Taliban regime that provided sanctuary for al Qaeda. Each petitioner appeared before a separate CSRT; was determined to be an enemy combatant; and has sought a writ of habeas corpus in the United States District Court...
Court for the District of Columbia...

As a threshold matter, we must decide whether MCA § 7 denies the federal courts jurisdiction to hear habeas corpus actions pending at the time of its enactment. We hold the statute does deny that jurisdiction, so that, if the statute is valid, petitioners’ cases must be dismissed...

[T]he MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us.

In deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, i.e., petitioners’ designation by the Executive Branch as enemy combatants, or their physical location, i.e., their presence at Guantanamo Bay. The Government contends that noncitizens designated as enemy combatants and detained in territory located outside our Nation’s borders have no constitutional rights and no privilege of habeas corpus. Petitioners contend they do have cognizable constitutional rights and that Congress, in seeking to eliminate recourse to habeas corpus as a means to assert those rights, acted in violation of the Suspension Clause...

Because the Constitution’s separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles...

The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account...

The United States has maintained complete and uninterrupted control of the bay for over 100 years... And although it recognized, by entering into the 1903 Lease Agreement, that Cuba retained “ultimate sovereignty” over Guantanamo, the United States continued to maintain the same plenary control it had enjoyed since 1898. Yet the Government’s view is that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint...

The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply...

[We note at the onset that the status of these detainees is a matter of dispute.
Petitioners...are not American citizens. [T]he detainees deny they are enemy combatants. They have been afforded some process in CSRT proceedings to determine their status; but...there has been no trial by military commission for violations of the laws of war.

[T]he procedural protections afforded to the detainees in the CSRT hearings...fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. Although the detainee is assigned a “Personal Representative” to assist him during CSRT proceedings, the Secretary of the Navy’s memorandum makes clear that person is not the detainee’s lawyer or even his “advocate.” The Government’s evidence is accorded a presumption of validity. The detainee is allowed to present “reasonably available” evidence, but his ability to rebut the Government’s evidence against him is limited by the circumstances of his confinement and his lack of counsel at this stage. And although the detainee can seek review of his status determination in the Court of Appeals, that review process cannot cure all defects in the earlier proceedings.

[T]he sites of their apprehension and detention are technically outside the sovereign territory of the United States...Guantanamo Bay...is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States....

[W]e recognize... that there are costs to holding the Suspension Clause applicable in a case of military detention abroad. Habeas corpus proceedings may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks. While we are sensitive to these concerns, we do not find them dispositive. Compliance with any judicial process requires some incremental expenditure of resources...

We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause...The MCA does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is. Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention.

In light of this holding the question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus. The Government submits there has been compliance with the Suspension Clause because the DTA review process in the Court of Appeals provides an adequate substitute. Congress has granted that court jurisdiction to consider

"(i) whether the status determination of the [CSRT] ... was consistent with
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the standards and procedures specified by the Secretary of Defense ... and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.”…

[T]he DTA’s jurisdictional grant is quite limited. The Court of Appeals has jurisdiction not to inquire into the legality of the detention generally but only to assess whether the CSRT complied with the “standards and procedures specified by the Secretary of Defense” and whether those standards and procedures are lawful…[M]oreover, there has been no effort to preserve habeas corpus review as an avenue of last resort...

The differences between the DTA and the habeas statute that would govern in MCA § 7’s absence, are likewise telling. In § 2241 Congress confirmed the authority of “any justice” or “circuit judge” to issue the writ… That statute accommodates the necessity for factfinding that will arise in some cases by allowing the appellate judge or Justice to transfer the case to a district court of competent jurisdiction, whose institutional capacity for factfinding is superior to his or her own. By granting the Court of Appeals “exclusive” jurisdiction over petitioners’ cases, Congress has foreclosed that option...

In passing the DTA Congress did not intend to create a process that differs from traditional habeas corpus process in name only. It intended to create a more limited procedure...

[T]he privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to “the erroneous application or interpretation” of relevant law. And the habeas court must have the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy...These are the easily identified attributes of any constitutionally adequate habeas corpus proceeding. But, depending on the circumstances, more may be required...

Accordingly, where relief is sought from a sentence that resulted from the judgment of a court of record, as [is] the case in... most federal habeas cases, considerable deference is owed to the court that ordered confinement... Both aspects of federal habeas corpus review are justified because it can be assumed that, in the usual course, a court of record provides defendants with a fair, adversary proceeding...The present cases fall outside these categories, however; for here the detention is by executive order.

Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing... In this context the need for habeas corpus is more urgent...The habeas court must
have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive’s power to detain.

To determine the necessary scope of habeas corpus review, therefore, we must assess the CSRT process, the mechanism through which petitioners' designation as enemy combatants became final...What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral...

[A]t the CSRT stage the detainee has limited means to find or present evidence to challenge the Government’s case against him. He does not have the assistance of counsel and may not be aware of the most critical allegations that the Government relied upon to order his detention...

[E]ven when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal’s findings of fact... And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore...

[T]he court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This includes some authority to assess the sufficiency of the Government’s evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding...

We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner’s release.

We now consider whether the DTA allows the Court of Appeals to conduct a proceeding meeting these standards...

The more difficult question is whether the DTA permits the Court of Appeals to make requisite findings of fact. The DTA enables petitioners to request “review” of their CSRT determination in the Court of Appeals; but the “Scope of Review” provision confines the Court of Appeals’ role to reviewing whether the CSRT followed the “standards and procedures” issued by the Department of Defense and assessing whether those “standards and procedures” are lawful. Among these standards is “the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence ... allowing a rebuttable presumption in favor of the Government’s evidence.”

[W]e see no way to construe the statute to allow what is also constitutionally required in this context: an opportunity for the detainee to present relevant
exculpatory evidence that was not made part of the record in the earlier proceedings...

[T]he DTA review process is, on its face, an inadequate substitute for habeas corpus...

MCA § 7 thus effects an unconstitutional suspension of the writ...

In light of our conclusion that there is no jurisdictional bar to the District Court’s entertaining petitioners’ claims the question remains whether there are prudential barriers to habeas corpus review under these circumstances...

The Government argues petitioners must seek review of their CSRT determinations in the Court of Appeals before they can proceed with their habeas corpus actions in the District Court...

The cases before us…do not involve detainees who have been held for a short period of time while awaiting their CSRT determinations... In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions...The detainees in these cases are entitled to a prompt habeas corpus hearing...

The only law we identify as unconstitutional is MCA § 7. Accordingly, both the DTA and the CSRT process remain intact...The CSRT process is the mechanism Congress and the President set up to deal with these issues. Except in cases of undue delay, federal courts should refrain from entertaining an enemy combatant's habeas corpus petition at least until after the Department, acting via the CSRT, has had a chance to review his status...

We hold that petitioners may invoke the fundamental procedural protections of habeas corpus...
Supreme Court of the United States

National Federation of Independent Business v. Sebelius


...Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act of 2010: the individual mandate, which requires individuals to purchase a health insurance policy providing a minimum level of coverage; and the Medicaid expansion, which gives funds to the States on the condition that they provide specified health care to all citizens whose income falls below a certain threshold...

This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power. The Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Our precedents read that to mean that Congress may regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." ... The power over activities that substantially affect interstate commerce can be expansive...

Congress may also "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Put simply, Congress may tax and spend. This grant gives the Federal Government considerable influence even in areas where it cannot directly regulate. The Federal Government may enact a tax on an activity that it cannot authorize, forbid, or otherwise control... And in exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions...

The reach of the Federal Government’s enumerated powers is broader still because the Constitution authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." ...

The individual mandate requires most Americans to maintain "minimum essential" health insurance coverage... [F]or individuals who are not exempt and do not receive health insurance through a third party, the means of satisfying the requirement is to purchase insurance from a private company.

Beginning in 2014, those who do not comply with the mandate must make a "[s]hared responsibility payment" to the Federal Government... The Act provides that the penalty will be paid to the Internal Revenue Service with an individual’s
taxes, and “shall be assessed and collected in the same manner” as tax penalties...

On the day the President signed the Act into law, Florida and 12 other States filed a complaint in the Federal District Court for the Northern District of Florida. Those plaintiffs...were subsequently joined by 13 more States, several individuals, and the National Federation of Independent Business. The plaintiffs alleged...that the individual mandate provisions of the Act exceeded Congress’s powers under Article I of the Constitution...

The second provision of the Affordable Care Act directly challenged here is the Medicaid expansion. Enacted in 1965, Medicaid offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. In order to receive that funding, States must comply with federal criteria governing matters such as who receives care and what services are provided at what cost. By 1982 every State had chosen to participate in Medicaid. Federal funds received through the Medicaid program have become a substantial part of state budgets, now constituting over 10 percent of most States’ total revenue.

The Affordable Care Act expands the scope of the Medicaid program and increases the number of individuals the States must cover... If a State does not comply with the Act’s new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds.

[T]he state plaintiffs...argued that the Medicaid expansion exceeds Congress's constitutional powers...

The Government's first argument is that the individual mandate is a valid exercise of Congress’s power under the Commerce Clause and the Necessary and Proper Clause. According to the Government, the health care market is characterized by a significant cost-shifting problem. Everyone will eventually need health care at a time and to an extent they cannot predict, but if they do not have insurance, they often will not be able to pay for it. Because state and federal laws nonetheless require hospitals to provide a certain degree of care to individuals without regard to their ability to pay, hospitals end up receiving compensation for only a portion of the services they provide. To recoup the losses, hospitals pass on the cost to insurers through higher rates, and insurers, in turn, pass on the cost to policyholders in the form of higher premiums. ..

In the Affordable Care Act, Congress addressed the problem of those who cannot obtain insurance coverage because of preexisting conditions or other health issues. It did so through the Act’s “guaranteed-issue” and “community-rating” provisions. These provisions together prohibit insurance companies from denying coverage to those with such conditions or charging unhealthy
individuals higher premiums than healthy individuals...

By requiring that individuals purchase health insurance, the mandate prevents cost-shifting by those who would otherwise go without it. In addition, the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept. The Government claims that Congress has power under the Commerce and Necessary and Proper Clauses to enact this solution.

The Government contends that the individual mandate is within Congress’s power because the failure to purchase insurance “has a substantial and deleterious effect on interstate commerce” by creating the cost-shifting problem... [It is now well established that Congress has broad authority under the Clause... Congress’s power, moreover, is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others...

But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product...

The power to regulate commerce presupposes the existence of commercial activity to be regulated. If the power to “regulate” something included the power to create it, many of the provisions in the Constitution would be superfluous...

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority...

The Government next contends that Congress has the power under the Necessary and Proper Clause to enact the individual mandate because the mandate is an “integral part of a comprehensive scheme of economic regulation”—the guaranteed-issue and community-rating insurance reforms...

The power to “make all Laws which shall be necessary and proper for carrying into Execution” the powers enumerated in the Constitution...vests Congress with authority to enact provisions “incidental to the [enumerated] power, and conducive to its beneficial exercise,”...

As our jurisprudence under the Necessary and Proper Clause has developed, we have been very deferential to Congress’s determination that a regulation is “necessary.”... But we have also carried out our responsibility to declare
unconstitutional those laws that undermine the structure of government established by the Constitution…

Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power… The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power…

Even if the individual mandate is “necessary” to the Act’s insurance reforms, such an expansion of federal power is not a “proper” means for making those reforms effective…

Just as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a “necessary and proper” component of the insurance reforms. The commerce power thus does not authorize the mandate…

Because the Commerce Clause does not support the individual mandate, it is necessary to turn to the Government’s second argument: that the mandate may be upheld as within Congress’s enumerated power to “lay and collect Taxes.”…

[T]he Government asks us to read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that product…

Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes. That, according to the Government, means the mandate can be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes…

The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The “[s]hared responsibility payment,” as the statute entitles it, is paid into the Treasury by “taxpayer[s]” when they file their tax returns… For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status…This process yields the essential feature of any tax: it produces at least some revenue for the Government…

[T]he shared responsibility payment may for constitutional purposes be considered a tax, not a penalty: First, for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more… [T]he payment is collected solely by the IRS through the normal means of taxation—
except that the Service is not allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution...

Upholding the individual mandate under the Taxing Clause thus does not recognize any new federal power. It determines that Congress has used an existing one...

The States also contend that the Medicaid expansion exceeds Congress’s authority under the Spending Clause. They claim that Congress is coercing the States to adopt the changes it wants by threatening to withhold all of a State’s Medicaid grants, unless the State accepts the new expanded funding and complies with the conditions that come with it. This, they argue, violates the basic principle that the “Federal Government may not compel the States to enact or administer a federal regulatory program.”

There is no doubt that the Act dramatically increases state obligations under Medicaid. The current Medicaid program requires States to cover only certain discrete categories of needy individuals—pregnant women, children, needy families, the blind, the elderly, and the disabled...

The Medicaid provisions of the Affordable Care Act, in contrast, require States to expand their Medicaid programs by 2014 to cover all individuals under the age of 65 with incomes below 133 percent of the federal poverty line… The Affordable Care Act provides that the Federal Government will pay 100 percent of the costs of covering these newly eligible individuals through 2016. In the following years, the federal payment level gradually decreases, to a minimum of 90 percent...

The Spending Clause grants Congress the power “to pay the Debts and provide for the ... general Welfare of the United States.” We have long recognized that Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States’ “taking certain actions that Congress could not require them to take.”…

Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when “pressure turns into compulsion,” the legislation runs contrary to our system of federalism...

The States, however, argue that the Medicaid expansion is far from the typical case. They object that Congress has “crossed the line distinguishing encouragement from coercion,” in the way it has structured the funding: Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States’ existing Medicaid funds. The States claim that this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care...
coverage effected by the Act...

In this case, the financial “inducement” Congress has chosen is much more than “relatively mild encouragement”—it is a gun to the head... A State that opts out of the Affordable Care Act’s expansion in health care coverage...stands to lose not merely “a relatively small percentage” of its existing Medicaid funding, but all of it. Medicaid spending accounts for over 20 percent of the average State’s total budget, with federal funds covering 50 to 83 percent of those costs... The threatened loss of over 10 percent of a State’s overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion...

The Affordable Care Act is constitutional in part and unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress’s power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress’s power to tax.

As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act...
CHAPTER 44

44. Barak Obama
National Labor Relations Board v. Canning

Supreme Court of the United States
National Labor Relations Board
v.
Canning

134 S.Ct. 2550 (2014).

Justice Breyer delivered the opinion of the Court.

Ordinarily the President must obtain “the Advice and Consent of the Senate” before appointing an “Officer of the United States.” But the Recess Appointments Clause creates an exception. It gives the President alone the 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.” We here consider three questions about the application of this Clause.

The first concerns the scope of the words “recess of the Senate.” Does that phrase refer only to an inter-session recess (i.e., a break between formal sessions of Congress), or does it also include an intra-session recess, such as a summer recess in the midst of a session? We conclude that the Clause applies to both kinds of recess.

The second question concerns the scope of the words “vacancies that may happen.” Does that phrase refer only to vacancies that first come into existence during a recess, or does it also include vacancies that arise prior to a recess but continue to exist during the recess? We conclude that the Clause applies to both kinds of vacancy.

The third question concerns calculation of the length of a “recess.” The President made the appointments here at issue on January 4, 2012. At that time the Senate was in recess pursuant to a December 17, 2011, resolution providing for a series of brief recesses punctuated by “pro forma session[s],” with “no business ... transacted,” every Tuesday and Friday through January 20, 2012. In calculating the length of a recess are we to ignore the pro forma sessions, thereby treating the series of brief recesses as a single, month-long recess? We conclude that we cannot ignore these pro forma sessions.

Our answer to the third question means that, when the appointments before us took place, the Senate was in the midst of a 3–day recess. Three days is too short a time to bring a recess within the scope of the Clause. Thus we conclude that the President lacked the power to make the recess appointments here at issue...

[O]n December 17, 2011, the Senate, by unanimous consent, had adopted a resolution providing that it would take a series of brief recesses beginning the following day. Pursuant to that resolution, the Senate held pro forma sessions
44. Barak Obama
National Labor Relations Board v. Canning

every Tuesday and Friday until it returned for ordinary business on January 23, 2012. The President’s January 4 appointments were made between the January 3 and January 6 pro forma sessions...

Before turning to the specific questions presented, we shall mention two background considerations that we find relevant to all three. First, the Recess Appointments Clause sets forth a subsidiary, not a primary, method for appointing officers of the United States. The immediately preceding Clause—Article II, Section 2, Clause 2—provides the primary method of appointment. It says that the President “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” (emphasis added)...

Thus the Recess Appointments Clause reflects the tension between, on the one hand, the President’s continuous need for “the assistance of subordinates” and, on the other, the Senate’s practice, particularly during the Republic’s early years, of meeting for a single brief session each year[.] We seek to interpret the Clause as granting the President the power to make appointments during a recess but not offering the President the authority routinely to avoid the need for Senate confirmation.

Second, in interpreting the Clause, we put significant weight upon historical practice...

Presidents have made recess appointments since the beginning of the Republic. Their frequency suggests that the Senate and President have recognized that recess appointments can be both necessary and appropriate in certain circumstances...

The first question concerns the scope of the phrase “the recess of the Senate.” Art. II, § 2, cl. 3 (emphasis added) ... [T]he 2–year life of each elected Congress typically consists of two formal 1–year sessions, each separated from the next by an “inter-session recess.”...

The Senate and the House also take breaks in the midst of a session. The Senate or the House announces any such “intra-session recess” by adopting a resolution stating that it will “adjourn” to a fixed date, a few days or weeks or even months later. All agree that the phrase “the recess of the Senate” covers inter-session recesses. The question is whether it includes intra-session recesses as well.

In our view, the phrase “the recess” includes an intra-session recess of substantial length. Its words taken literally can refer to both types of recess. Founding-era dictionaries define the word “recess,” much as we do today, simply as “a period of cessation from usual work.”...
[T]he Clause gives the President authority to make appointments during “the recess of the Senate” so that the President can ensure the continued functioning of the Federal Government when the Senate is away. The Senate is equally away during both an inter-session and an intra-session recess…

The greater interpretive problem is determining how long a recess must be in order to fall within the Clause. Is a break of a week, or a day, or an hour too short to count as a “recess”? The Clause itself does not say…

[A] 3–day recess would be too short…

That is not to say that the President may make recess appointments during any recess that is “more than three days.” The Recess Appointments Clause seeks to permit the Executive Branch to function smoothly when Congress is unavailable. And though Congress has taken short breaks for almost 200 years, and there have been many thousands of recess appointments in that time, we have not found a single example of a recess appointment made during an intra-session recess that was shorter than 10 days…

We therefore conclude…that a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause…

In sum, we conclude that the phrase “the recess” applies to both intra-session and inter-session recesses … And a recess lasting less than 10 days is presumptively too short…

The second question concerns the scope of the phrase “vacancies that may happen during the recess of the Senate.” (emphasis added). All agree that the phrase applies to vacancies that initially occur during a recess. But does it also apply to vacancies that initially occur before a recess and continue to exist during the recess? In our view the phrase applies to both kinds of vacancy…

The Clause’s purpose strongly supports the broader interpretation. That purpose is to permit the President to obtain the assistance of subordinate officers when the Senate, due to its recess, cannot confirm them…

[T]he Executive Branch has adhered to the broader interpretation for two centuries, and Senate confirmation has always remained the norm for officers that require it…

No one disputes that every President since James Buchanan has made recess appointments to pre-existing vacancies…

[W]e conclude that the phrase “all vacancies” includes vacancies that come into existence while the Senate is in session.

The third question concerns the calculation of the length of the Senate’s
“recess.” On December 17, 2011, the Senate by unanimous consent adopted a resolution to convene “pro forma session[s]” only, with “no business ... transacted,” on every Tuesday and Friday from December 20, 2011, through January 20, 2012. At the end of each pro forma session, the Senate would “adjourn until” the following pro forma session. During that period, the Senate convened and adjourned as agreed. It held pro forma sessions on December 20, 23, 27, and 30, and on January 3, 6, 10, 13, 17, and 20; and at the end of each pro forma session, it adjourned until the time and date of the next.

The President made the recess appointments before us on January 4 in between the January 3 and the January 6 pro forma sessions. We must determine the significance of these sessions—that is, whether, for purposes of the Clause, we should treat them as periods when the Senate was in session or as periods when it was in recess...

In our view…the pro forma sessions count as sessions, not as periods of recess. We hold that, for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business. The Senate met that standard here.

The standard we apply is consistent with the Constitution’s broad delegation of authority to the Senate to determine how and when to conduct its business. The Constitution explicitly empowers the Senate to “determine the Rules of its Proceedings.”...

We conclude that when the Senate declares that it is in session and possesses the capacity, under its own rules, to conduct business, it is in session for purposes of the Clause.

Applying this standard, we find that the pro forma sessions were sessions for purposes of the Clause. First, the Senate said it was in session...

Second, the Senate’s rules make clear that during its pro forma sessions, despite its resolution that it would conduct no business, the Senate retained the power to conduct business...

By way of contrast, we do not see how the Senate could conduct business during a recess. It could terminate the recess and then, when in session, pass a bill. But in that case, of course, the Senate would no longer be in recess. It would be in session. And that is the crucial point. Senate rules make clear that, once in session, the Senate can act even if it has earlier said that it would not...

The Recess Appointments Clause … simply provides a subsidiary method for appointing officials when the Senate is away during a recess…

The Recess Appointments Clause responds to a structural difference between
CHAPTER 24

the Executive and Legislative Branches: The Executive Branch is perpetually in operation, while the Legislature only acts in intervals separated by recesses. The purpose of the Clause is to allow the Executive to continue operating while the Senate is unavailable. We believe that the Clause’s text, standing alone, is ambiguous. It does not resolve whether the President may make appointments during intra-session recesses, or whether he may fill pre-recess vacancies. But the broader reading better serves the Clause’s structural function. Moreover, that broader reading is reinforced by centuries of history, which we are hesitant to disturb. We thus hold that the Constitution empowers the President to fill any existing vacancy during any recess—intra-session or inter-session—of sufficient length...

[W]e conclude that the Recess Appointments Clause does not give the President the constitutional authority to make the appointments here at issue...
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CHAPTER 1

GEORGE WASHINGTON

Washington’s Papers, Primary Documents, External Links to Papers:


http://gwpapers.virginia.edu/index.html The Papers of George Washington, a grant-funded project, was established in 1968 at the University of Virginia, under the joint auspices of the University and the Mount Vernon Ladies’ Association of the Union, to publish a comprehensive edition of Washington’s correspondence.

Letters written to Washington as well as letters and documents written by him are being published in the complete edition that will consist of approximately ninety volumes. The work is now more than two-thirds complete.

The following include an Introduction, Transcription, Original, Editorial Notes, and additional links to help supplement each paper...

FAREWELL ADDRESS:
http://gwpapers.virginia.edu/documents/farewell/transcript.html

THANKSGIVING PROCLAMATION:
http://gwpapers.virginia.edu/documents/thanksgiving/transcript.html

EMANCIPATION OF WASHINGTON’S SLAVE IN HIS LAST WILL: MT VERNON:
http://gwpapers.virginia.edu/documents/slavery/eman.html

WASHINGTON’S LAST WILL AND TESTAMENT:
http://gwpapers.virginia.edu/documents/will/text.html


Mount Vernon’s library, collections, and education department exist to navigate these exhaustive resources and share them with the public. Whether
searching for Washington’s dentures, seeking a rare text on the commander in chief, or preparing a lesson about the first president’s leadership style, an abundance of online assets lie at your fingertips. Please explore, enjoy, and if you don’t find what you’re looking for, ask!
http://www.mountvernon.org/educational-resources


Introductory Video: http://www.history.com/topics/george-washington/videos#george-washington

http://www.biography.com/people/george-washington-9524786/videos

VIDEO (2 hrs. and 31 minutes): http://www.c-spanvideo.org/program/121783-1

Biographies and Reference Works:


CHAPTER 1

GEORGE WASHINGTON


CHAPTER 1

GEORGE WASHINGTON


CHAPTER 2

John Adams

Adam’s Papers, Primary Documents, External Links to Papers:


http://millercenter.org/scripps/online/reference/presidentialpapers/adams


http://www.masshist.org/digitaladams/aea/index.html

http://www.loc.gov/rr/program/bib/presidents/adams/bibliography.html

http://avalon.law.yale.edu/subject_menus/adamspap.asp

VIDEO (2 hrs. and 30 minutes): http://www.c-spanvideo.org/program/121951-1

Chapter 2
John Adams

Biographies and Reference Works:
Chapter 3  
Thomas Jefferson

Jefferson’s Papers, Primary Documents, External Links to Papers:


http://ead.lib.virginia.edu/vivaxtf/view?docld=uva-sc/viu00007.xml;query=; Jefferson’s Letters compiled at the University of Virginia’s Library Collection

http://guides.lib.virginia.edu/content.php?pid=77323&sid=573180 A guide to Univ. of Virginia’s collections related to Thomas Jefferson and Other Texts and Resources

http://www.pbs.org/jefferson/archives/interviews/frame.htm Transcripts from a PBS Interview with Jefferson Historian Natalie Bober

http://memory.loc.gov/ammem/collections/jefferson_papers/

The Letters of Thomas Jefferson (selected documents) http://odur.let.rug.nl/~usa/P/tj3/writings/brf/jeflxx.htm#1814

Avalon Project (Yale) Selected Jefferson Papers http://www.yale.edu/lawweb/avalon/presiden/jeffpap.htm

VIDEO (2 hrs. and 31 minutes): http://www.c-spanvideo.org/program/121787-1
http://www.americanpresidents.org/presidents/president.asp?PresidentNumber=3

Picture link: http://smithsonianconference.org/jefferson/

Biographies and Reference Works:


Chapter 3

Thomas Jefferson

York, 1890.


Chapter 4

James Madison

Madison’s Papers, Primary Documents, External Links to Papers:


http://memory.loc.gov/ammem/collections/madison_papers/ (“The James Madison Papers from the Manuscript Division at the Library of Congress consist of approximately 12,000 items captured in some 72,000 digital images. They document the life of the man who came to be known as the “Father of the Constitution” through correspondence, personal notes, drafts of letters and legislation, an autobiography, legal and financial documents, and miscellaneous manuscripts. The collection is organized into six series dating from 1723 to 1836. Beginning with a selection of his father’s letters, the series moves through Madison’s years as a student, and as a member of the Virginia House of Delegates and include extensive notes of the debates during his three-year term in the Continental Congress (1779-82). Notes and a memoranda document Madison’s pivotal role in the Constitutional Convention of 1787 and the Virginia ratification convention of 1788. Other materials reflect the nine years that Madison spent in the House of Representatives and his tenure as Secretary of State during Thomas Jefferson’s presidency. Correspondence and notes trace his two terms as the fourth president of the United States, illuminating the origins and course of the War of 1812 and the post-war years of his presidency and subsequent retirement.”)

http://avalon.law.yale.edu/subject_menus/madispap.asp (Inaugural Addresses, Notes on Debates, and Virginia Resolution)

http://www.thejamesmadisonmuseum.org

http://founders.archives.gov/about/Madison

Chapter 4
James Madison

Biographies and Reference Works:
Chapter 5
James Monroe

Monroe’s Papers, Primary Documents, External Links to Papers:


http://www.loc.gov/rr/program/bib/presidents/monroe/

http://millercenter.org/president/monroe

http://ead.lib.virginia.edu/vivaxtf/view?docId=uva-sc/viu03476.xml;query=James_Monroe;brand=default#bioghist_1.1

http://avalon.law.yale.edu/19th_century/monroe.asp

http://jamesmonroemuseum.umw.edu/

http://www.monroefoundation.org/

http://www.americanpresidents.org/presidents/president.asp?PresidentNumber=5

C-Span Video 2 hours and 25 minutes: http://www.c-spanvideo.org/program/122387-1

Picture: http://www.whitehouseresearch.org/assetbank-whha/action/viewAsset?id=113

Biographies and Reference Work:


Chapter 5
James Monroe


Unger, Harlow G.. "The Last Founding Father: James Monroe and a Nation’s Call to Greatness" (2009).


Chapter 6

John Quincy Adams

Adam's Papers, Primary Documents, External Links to Papers:


Butterfield, L. H. et al., eds., The Adams Papers (1961–).


http://www.loc.gov/rr/program/bib/presidents/adams/

http://www.masshist.org/digitaladams/aea/index.html

http://millercenter.org/president/adams

http://avalon.law.yale.edu/subject_menus/adamspap.asp

http://www.presidency.ucsb.edu/ws/?pid=25802

http://www.americanpresidents.org/presidents/president.asp?PresidentNumber=2

Picture: http://www.metmuseum.org/collections/search-the-collections/268333
Chapter 6
John Quincy Adams

C-Span Video 1 hour and 59 minutes: http://www.c-spanvideo.org/program/122555-1

Biographies and Reference Work:


CHAPTER 6

John Quincy Adams


Chapter 7

Andrew Jackson

Jackson’s Papers, Primary Documents, External Links to Papers:


http://www.loc.gov/rr/program/bib/presidents/jackson/

http://millercenter.org/president/jackson

http://avalon.law.yale.edu/subject_menus/jackpap.asp

http://www.thehermitage.com/

http://www.americanpresidents.org/presidents/president.asp?PresidentNumber=7

Picture: http://www.senate.gov/artandhistory/art/resources/graphic/xlarge/32_00018.jpg

C-Span Video 2 hours and 31 minutes: http://www.c-spanvideo.org/program/122792-1

Biographies and Reference Work:


Chapter 7
Andrew Jackson


CHAPTER 8

MARTIN VAN BUREN

Van Buren’s Papers, Primary Documents, External Links to Papers:


http://www.loc.gov/rr/program/bib/presidents/vanburen/
http://millercenter.org/president/vanburen
http://millercenter.org/president/speeches/detail/3486
http://www.gutenberg.org/author/Martin_Van_Buren_(1782–1862)

http://www.loc.gov/pictures/resource/pga.02634/

C-Span Video: http://www.c-spanvideo.org/program/122988-1

Biographies and Reference Work:


Chapter 8

Martin Van Buren


CHAPTER 9

WILLIAM HENRY HARRISON

Harrison’s Papers, Primary Documents, External Links to Papers:


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The Miller Center is a nonpartisan affiliate of the University of Virginia that specializes in presidential scholarship, public policy, and political history and strives to apply the lessons of history to the nation’s most pressing contemporary governance challenges. [http://millercenter.org/president/harrison](http://millercenter.org/president/harrison)


C-span Video: In the ninth in a series on American presidents, the life and career of William Henry Harrison was discussed. Harrison was president of the U.S. for only one month, February-April 1841. Professor Huston, Emeritus Dean of Purdue University, talked about the military and political career of Harrison and offered anecdotes about his life and that of his contemporaries. [http://www.c-spanvideo.org/program/123123-1](http://www.c-spanvideo.org/program/123123-1)

Biographies and Reference Work:


Chapter 9

William Henry Harrison


Chapter 10

John Tyler

Tyler’s Papers, Primary Documents, External Links to Papers:

http://scdb.swem.wm.edu/?p=collections/controlcard&id=7008
*John Tyler’s papers are located at the College of William and Mary

http://www.loc.gov/rr/program/bib/presidents/tyler/index.html


http://www.gutenberg.org/ebooks/5018

C-span Video: http://www.c-spanvideo.org/program/123380-1

Picture in Blue Room of White House: https://en.wikipedia.org/wiki/File:WHOportTyler.jpg

Biographies and Reference Work:

Abell, Alexander G. Life of John Tyler, President of the United States, Up to the Close of the Second Session of the Twenty-seventh Congress. New York: Harper & Brothers, 1843.


Chapter 10
John Tyler


CHAPTER 11

JAMES K. POLK

Polk’s Papers, Primary Documents, External Links to Papers:


http://www.loc.gov/rr/program/bib/presidents/polk/

http://www.shapell.org/manuscript.aspx?171535

http://avalon.law.yale.edu/19th_century/polk.asp

http://www.gutenberg.org/browse/authors/p#a1644

C-Span Video: http://www.c-spanvideo.org/program/123943-1


Biographies and Reference Work:


Chapter 11

James K. Polk


CHAPTER 12
ZACHARY TAYLOR

Taylor’s Papers, Primary Documents, External Links to Papers:

Taylor’s Inaugural Address and State of the Union:


http://archive.org/stream/letterszachtaylor00taylrich#page/n7/mode/2up

C-Span Video: http://americanpresidents.org/presidents/president.asp?PresidentNumber=12


Biographies and Reference Work:


Chapter 13

Millard Fillmore

Fillmore’s Papers, Primary Documents, External Links to Papers:


State of the Union Address: [http://www.usa-presidents.info/union/fillmore-1.html](http://www.usa-presidents.info/union/fillmore-1.html)

Video: [http://www.c-spanvideo.org/program/124976-1](http://www.c-spanvideo.org/program/124976-1)

Portrait: [http://www.loc.gov/pictures/item/96522448/](http://www.loc.gov/pictures/item/96522448/)

Biographies and Reference Work:


CHAPTER 13

MILLARD FILLMORE


Chapter 14
Franklin Pierce

Pierce’s Papers, Primary Documents, External Links to Papers:


Inaugural Address: http://avalon.law.yale.edu/19th_century/pierce.asp

Video: http://www.c-spanvideo.org/program/125004-1

Interview with Peter Wallner, author of most prominent biography of Franklin Pierce: http://www.booknotes.org/Watch/184075-1/Peter+Wallner.aspx

Portrait: http://www.npg.si.edu/exh/travpres/index6.htm

Biographies and Reference Work:


Brown, Thomas J. “Franklin Pierce’s Land Grant Veto and the Kansas-Nebraska Session of Congress.” Civil War History 42 (June 1996).


Chapter 14
Franklin Pierce


Chapter 15

James Buchanan

Buchanan’s Papers, Primary Documents, External Links to Papers:


Inaugural Address: http://millercenter.org/president/speeches#buchanan

State of the Union: http://www.presidency.ucsb.edu/ws/?pid=29501

Collection of Buchanan’s Papers: http://www2.hsp.org/collections/manuscripts/b/Buchanan0091.html

Video: http://www.c-spanvideo.org/program/125214-1

Portrait: http://npgportraits.si.edu/eMuseumNPG/code/emuseum.asp?rawsearch=ObjectID,/is/,/54525/,/false/,false&newprofile=CAP&newstyle=single

Biographies and Reference Work:


James Buchanan and the American Empire. Selinsgrove, Penn.: Susquehanna
Chapter 15

James Buchanan


Chapter 16
Abraham Lincoln

Lincoln’s Papers, Primary Documents, External Links to Papers:

Online Website for Sources: http://quod.lib.umich.edu/l/lincoln/


Library of Congress Resources: http://www.loc.gov/rr/program/bib/presidents/lincoln/

Print Versions for Sources:


Portrait (Smithsonian): http://www.senate.gov/artandhistory/art/artifact/Painting_33_00005.htm

Biographies and Reference Work:  


Luthin, Reinhard H. The Real Abraham Lincoln: A Complete One Volume History
Chapter 16
Abraham Lincoln


Chapter 17
Andrew Johnson

Johnson’s Papers, Primary Documents, External Links to Papers:

Online Website Sources: The Andrew Johnson National Historic Site and National Cemetery interprets the life and legacy of the 17th President. [http://www.nps.gov/anjo/index.htm](http://www.nps.gov/anjo/index.htm)

Articles of Impeachment: [http://law2.umkc.edu/faculty/projects/ftrials/impeach/articles.html](http://law2.umkc.edu/faculty/projects/ftrials/impeach/articles.html)


All of Johnson’s Speeches: [http://archive.org/details/johnsonjohnson00andrrich](http://archive.org/details/johnsonjohnson00andrrich)

Harper’s Weekly articles about Johnson’s impeachment controversies and trial: [http://www.andrewjohnson.com/09ImpeachmentAndAcquittal/ImpeachmentAndAcquittal.htm](http://www.andrewjohnson.com/09ImpeachmentAndAcquittal/ImpeachmentAndAcquittal.htm)

Print Version for Sources:


Video [C-span 2 hours and 27 minutes on Johnson’s life and career]: [http://www.c-spanvideo.org/program/150104-1](http://www.c-spanvideo.org/program/150104-1)

Biographies and Reference Work:


Chapter 17
Andrew Johnson


DeWitt, David Miller. The Impeachment and Trial of Andrew Johnson, New York, 1903.


Chapter 18
Ulysses S. Grant

Grant’s Papers, Primary Documents, External Links to Papers:

Online Website Sources:
The Ulysses S. Grant Collection housed at Mississippi State University Libraries consists of some 15,000 linear feet of correspondence, research notes, artifacts, photographs, scrapbooks, and memorabilia and includes information on Grant’s childhood from his birth in 1822, his later military career, Civil War triumphs, tenure as commanding general after the war, presidency, and his post-White House years until his death in 1885. There are also 4,000 published monographs on various aspects of Grant’s life and times.
http://digital.library.msstate.edu/cdm/usgrantcollection
http://www.usgrantlibrary.org

Inaugural Address: http://millercenter.org/cripps/archive/speeches/detail/3556


Grant’s documents and manuscripts: http://www.shapell.org/manuscript.aspx?169060

Video [C-span 2 hours and 28 minutes on the life and career of Grant]:
http://www.c-spanvideo.org/program/150209-1

Portrait (the Met):
http://www.metmuseum.org/collections/search-the-collections/459518

Print Version for Sources:


Biographies and Reference Work:


Chapter 18
Ulysses S. Grant


Nevins, Allan, Hamilton Fish: The Inner History of the Grant Administration. New York, Dodd, Mead, 1936, 2 vol.


Chapter 19
Rutherford B. Hayes

Hayes’ Papers, Primary Documents, External Links to Papers:

Online Website Sources:

Rutherford B. Hayes Presidential Center [The Hayes Presidential Center, Inc. operates and manages the Rutherford B. Hayes Presidential Center. A non-profit entity, it receives the majority of its funding through the Rutherford B. Hayes–Lucy Webb Hayes Foundation. The State of Ohio also provides an annual appropriation administered through the Ohio Historical Society]: http://www.rbhayes.org/hayes/


Portrait: http://www.loc.gov/pictures/resource/cwpbh.03606/

Video: http://www.c-spanvideo.org/program/150637-1

Print Version for Sources:

Hayes, Rutherford B. Williams, Charles Richard, ed. The Diary and Letters of Rutherford B. Hayes, Nineteenth President of the United States. Columbus, Ohio: Ohio State Archeological and Historical Society, 1922.


Biographies and Reference Work:


Bruce, Robert V. 1877: Year of Violence. Ivan R. Dee, Publisher, 1989.


Eckenrode, H. J., Rutherford B. Hayes: Statesman of Reunion, NY: Dodd, Mead,
Chapter 19
Rutherford B. Hayes

1930.


CHAPTER 20

JAMES A. GARFIELD

Garfield’s Papers, Primary Documents, External Links to Papers:

Online Website Sources:

Portrait [Smithsonian]: [http://www.npg.si.edu/exh/travpres/index6.htm](http://www.npg.si.edu/exh/travpres/index6.htm)

Video: [http://www.c-spanvideo.org/program/151093-1](http://www.c-spanvideo.org/program/151093-1)

Print Version for Sources:


Biographies and Reference Work:


Chapter 20

James A. Garfield


Chapter 21
Chester A. Arthur

Arthur’s Papers, Primary Documents, External Links to Papers:

Online Website Sources: http://www.shapell.org/manuscript.aspx?171771

Video [C-span the life and career of Arthur]: http://www.c-spanvideo.org/program/151431-1

Portrait: http://mobile.npg.si.edu/gallery.html#&ui-state=dialog
Chester Alan Arthur by Ole Peter Hansen Balling; Oil on canvas, 1881 in the National Portrait Gallery, Smithsonian Institution; gift of Mrs. Harry Newton Blue; Frame conserved with funds from the Smithsonian Women’s Committee.

Print Version for Sources:

Biographies and Reference Work:


Cleveland’s Papers, Primary Documents, External Links to Papers:

Online Website Sources:

http://www.gutenberg.org/browse/authors/c#a1654

Video [C-span the life and career of Cleveland]: http://www.c-spanvideo.org/program/151466-1

Portrait: http://www.npg.si.edu/exh/travpres/grovers.htm

Print Version for Sources:


Public Papers of Grover Cleveland, Governor. 2 vols. Albany, N.Y.: Argus, 1883-84.


Biographies and Reference Work:


Denis Tilden Lynch, Grover Cleveland: A Man Four-Square, NY: Horace Liveright 1932

John E Marszalek, comp., Grover Cleveland: A Bibliography, Westport, Conn., 1988

Chapter 22

Grover Cleveland


Chapter 23

Benjamin Harrison

Benjamin Harrison’s Papers, Primary Documents, External Links to Papers:

Benjamin Harrison papers, 1780-1948 (Library of Congress Finding Aid)
http://findingaids.loc.gov/db/search/xq/searchMfer02.xq?id=loc.mss.eadmss.
ms009029&faSection=overview&faSubsection=did&dmdid=
hdl.loc.gov › Researchers › Search Finding Aids

Correspondence, speeches, articles, notebooks in shorthand, legal papers, Benjamin Harrison Papers [finding aid]. Library of Congress. [PDF]

The American Presidency Project
http://www.presidency.ucsb.edu/benjamin_harrison.php


Speeches of Benjamin Harrison, Twenty-third President of the United States compiled by Charles Hedges 1892.
https://books.google.com/books?vid=OCLC02863703&id=TCRtVz3JKF-4C&printsec=titlepage#v=onepage&q&f=false

http://www.lib.msu.edu/cs/branches/vvl/presidents/harrison.html


Biographies and Reference Works:


CHAPTER 24

Grover Cleveland

Cleveland’s Papers, Primary Documents, External Links to Papers:

Online Website Sources:
http://www.gutenberg.org/browse/authors/c#a1654

Video [C-span the life and career of Cleveland]: http://www.c-spanvideo.org/program/151466-1

Portrait: http://www.npg.si.edu/exh/travpres/grovers.htm

Print Version for Sources:


Public Papers of Grover Cleveland, Governor. 2 vols. Albany, N.Y.: Argus, 1883-84.


Biographies and Reference Work:


Denis Tilden Lynch, Grover Cleveland: A Man Four-Square, NY: Horace Liveright 1932

John E Marszalek, comp., Grover Cleveland: A Bibliography, Westport, Conn., 1988

Chapter 24
Grover Cleveland


McKinley’s Papers, Primary Documents, External Links to Papers:

**Online Website Sources:**

http://www.gutenberg.org/browse/authors/m#a1656

http://www.mckinleymuseum.org William McKinley Presidential Library and Museum

**Video [C-span on the life and career of McKinley]:** http://www.c-spanvideo.org/program/151617-1

**Portrait:** http://www.loc.gov/pictures/item/96522569/resource/cph.3a53298/

**Print Version for Sources:**


**Biographies and Reference Work:**


Chapter 25

William McKinley


Chapter 26

Theodore Roosevelt

Roosevelt’s Papers, Primary Documents, External Links to Papers:

Online Website Sources:
http://hcl.harvard.edu/libraries/houghton/collections/roosevelt.cfm

Theodore Roosevelt Almanac http://www.theodore-roosevelt.com


Video [C-span on the life and career of Roosevelt]: http://www.c-spanvideo.org/program/151618-1.


Print Version for Sources:


Biographies and Reference Work:


Chapter 26

Theodore Roosevelt

“Theodore Roosevelt’s Campaign Against the Vice-Presidency.” Historian 14 (Spring 1952).


Chapter 27

William Howard Taft

Taft’s Papers, Primary Documents, External Links to Papers:

Online Website Sources:
http://www.gutenberg.org/browse/authors/t#a3382

Inaugural Address http://avalon.law.yale.edu/20th_century/taft.asp

William Howard Taft National Historic Center http://www.nps.gov/wiho/index.htm

Taft Museum of Art in Cincinnati, OH http://www.taftmuseum.org

Video [C-span on the life and career of Taft]: http://www.c-spanvideo.org/program/151431-1


Print Version for Sources:


Biographies and Reference Work:


Chapter 27

William Howard Taft


Chapter 28
Woodrow Wilson

Wilson’s Papers, Primary Documents, External Links to Papers:

Online Website Sources:

http://www.gutenberg.org/author/Woodrow+Wilson
Wilson’s Papers http://findingaids.princeton.edu/collections/MC215
http://www.shapell.org/manuscript.aspx?woodrow-wilson-wwi

Video [C-span on the life and career of Wilson]: http://www.c-spanvideo.org/program/151624-1

Portrait: http://www.loc.gov/pictures/item/2006683568/resource/cph.3a51432/

Print Version for Sources:


Biographies and Reference Work:


Chapter 28

Woodrow Wilson


Chapter 29
Warren G. Harding

Harding’s Papers, Primary Documents, External Links to Papers:

Online Website Sources:


Video [C-span on the life and career of Harding]: http://www.c-spanvideo.org/program/151625-1

Portrait: http://www.loc.gov/pictures/item/ggb2006011257/resource/ggbain.35844/
Harding shaking Babe Ruth’s hand at Yankee Stadium

Print Version for Sources:

Biographies and Reference Work:
Cuneo, Sherman A. From Printer to President. Philadelphia: Dorrance, 1922.
CHAPTER 29

WARREN G. HARDING


Chapter 30
Calvin Coolidge

Coolidge’s Papers, Primary Documents, External Links to Papers:

Online Website Sources:
http://www.forbeslibrary.org/coolidge/coolidge.shtml Calvin Coolidge Presidential Library and Museum

Video [C-span on the life and career of Coolidge]: http://www.c-spanvideo.org/program/151626-1

Portrait: http://www.loc.gov/pictures/item/93510035/resource/cph.3b39835/

Print Version for Sources:


Biographies and Reference Work:


Clifford A. Pease, Jr., Calvin Coolidge and His Family: An Annotated Bibliography Plymouth, Vt., 1987.

Chapter 30
Calvin Coolidge


CHAPTER 31

HERBERT HOOVER

Hoover’s Papers, Primary Documents, External Links to Papers:

**Online Website Sources:**

http://www.hoover.archives.gov  Herbert Hoover Presidential Library and Museum

http://www.history.army.mil/books/Last_Salute/Ch25.htm  Hoover’s Last Salute

http://www.presidency.ucsb.edu/medialist.php?presid=31#axzz2jDRvMoVo  Audio Clips of Hoover’s Addresses

http://www.nps.gov/heho/historyculture/genealogy.htm  Herbert Hoover National Historic Site

**Video [C-span on the life and career of Hoover]:**  http://www.c-spanvideo.org/program/151627-1

**Portrait Library of Congress:**  http://www.loc.gov/pictures/item/96522651/resource/cph.3a02089/

**Print Version for Sources:**


Hoover, Herbert. *Addresses Upon the American Road, 1933-1938*. New York: Charles Scribner’s Sons, 1938.


Hoover, Herbert. *Further Addresses Upon the American Road, 1938-1940*. New York: Charles Scribner’s Sons, 1940.


*Public Papers of the Presidents: Herbert Hoover (1929-1933)*. 4 vols.
Chapter 31

Herbert Hoover


Biographies and Reference Work:


Nash, George H. The Life of Herbert Hoover. 3 vols. New York: W. W. Norton,
CHAPTER 31

HERBERT HOOVER

1983-96.


Chapter 32
Franklin Delano Roosevelt

Roosevelt’s Papers, Primary Documents, External Links to Papers:

Online Website Sources:
http://www.nps.gov/hofr/index.htm Home of Franklin Delano Roosevelt


http://lib.washington.edu/specialcollections/laws Roosevelt’s New Deal Papers

Video [C-span the life and career of Roosevelt]: http://www.c-spanvideo.org/program/151628-1

Portrait: http://www.loc.gov/pictures/item/00650969/resource/ppmsca.19179/
FDR and Hoover ride in a convertible to U.S. Capitol for Roosevelt’s Inauguration in 1933

Print Version for Sources:


Biographies and Reference Work:

Philip Abbott, The Exemplary Presidency: Franklin D. Roosevelt and the American
Chapter 32

Franklin Delano Roosevelt

Political Tradition, Amherst, Mass., 1990.


Chapter 32

Franklin Delano Roosevelt


Betty H. Winfield, FDR and the News Media, Urbana, Ill., 1990
Chapter 33
Harry S. Truman

Truman's Papers, Primary Documents, External Links to Papers:

Online Website Sources:


http://millercenter.org/presidentialrecordings Truman Tapes of meetings and telephone conversations

Video [C-span life and career of Truman]: http://www.c-spanvideo.org/program/151466-1

http://www.pbs.org/wgbh/americancollection/films/truman/player/

Portrait: http://www.loc.gov/pictures/item/96523444/resource/cph.3c17122/

Print Version for Sources:


Merrill, Dennis, ed. Documentary History of the Truman Presidency. Bethesda, Md.: University Publications of America, 1995-.


Chapter 33

Harry S. Truman

Biographies and Reference Work:


Chapter 34

Dwight D. Eisenhower

Cleveland’s Papers, Primary Documents, External Links to Papers:

Online Website Sources:

http://www.presidency.ucsb.edu/dwight_eisenhower.php#axzz2jDRvMoVo
Eisenhower’s public papers

http://millercenter.org/scrivps/archive/speeches/dwighteisenhower
Full Audio of Eisenhower’s speeches

http://millercenter.org/scrivps/archive/presidentialrecordings/eisenhower/index
Eisenhower’s secret recordings

Video [C-span the life and career of Eisenhower]:
http://www.c-spanvideo.org/program/151630-1

https://archive.org/details/gov.archives.arc.2569699 National Archives and Records Administration Video

Portrait in Library of Congress:
http://www.loc.gov/pictures/item/93511989/resource/cph.3c04631/

Print Version for Sources:


Biographies and Reference Work:


Chapter 35

John F. Kennedy

Kennedy’s Papers, Primary Documents, External Links to Papers:

**Online Website Sources:**

http://millercenter.org/scrpps/archive/presidentialrecordings/kennedy/index

Kennedy's Meetings recorded

http://www.jfklibrary.org John F. Kennedy Presidential Library and Museum

http://radiotapes.com/special postings.html Radio Coverage of Kennedy’s Assassination

**Video [C-span the life and career of Kennedy]:** http://www.c-spanvideo.org/

johnkennedy Kennedy’s Appearances on C-span

http://www.americanrhetoric.com/speeches/jfkinaugural.htm Kennedy’s Inaugural Address on Video

http://www.youtube.com/watch?v=zkzjodKAQhA Kennedy Discusses Cuban Missile Crisis with Eisenhower

**Portrait in Library of Congress:** http://www.loc.gov/pictures/item/96523447/

resource/cph.3c17124/

http://research.archives.gov/description/194255 National Archives Portrait of Kennedy in Oval Office

**Print Version for Sources:**


Chapter 35
John F. Kennedy

Biographies and Reference Work:


Chapter 36
Lyndon B. Johnson

Johnson’s Papers, Primary Documents, External Links to Papers:

Online Website Sources:
Lyndon B. Johnson’s Presidential Library http://www.lbjlibrary.org
http://www.loc.gov/rr/program/bib/presidents/lbjohnson/index.html

Recordings of Johnson’s telephone conversations http://millercenter.org/scripps/archive/presidentialrecordings/johnson/index

Compilation of works by Johnson http://www.gutenberg.org/browse/authors/j#a1667

Inaugural Address http://avalon.law.yale.edu/20th_century/johnson.asp

Video [C-span the life and career of Johnson]:
Johnson’s appearances as president, and as senator in the Senate and House http://www.c-spanvideo.org/lyndonjohnson
http://www.pbs.org/wgbh/amERICANexperience/films/lbj/player/

Portrait in Johnson Library: http://www.lbjlibrary.net/collections/photo-archive.html

Print Version for Sources:


Biographies and Reference Work:
Chapter 36
Lyndon B. Johnson


CHAPTER 36

LYNDON B. JOHNSON


Chapter 36

Lyndon B. Johnson


Johnson, Sam Houston. My Brother, Lyndon. Edited by Enrique Hank Lopez.
Chapter 36

Lyndon B. Johnson


Kearns, Doris. “Lyndon Johnson’s Political Personality.” Political Science Quarterly 91 (Fall 1976): 385-409. See also, Goodwin, Doris Kearns.


CHAPTER 36
LYndon B. Johnson


Vaverek, Margaret A. “The Press Looks at Lyndon: A Study of the Political Career
Chapter 36

Lyndon B. Johnson


CHAPTER 37

RICHARD M. NIXON

Nixon’s Papers, Primary Documents, External Links to Papers:

Online Website Sources:


Richard Nixon Foundation http://nixonfoundation.org

Berkley Library Watergate Tapes http://www.lib.berkeley.edu/MRC/watergate.html

Works by Nixon http://www.gutenberg.org/browse/authors/n#a1668

Resources on Library of Congress http://www.loc.gov/rr/program/bib/presidents/nixon/loc.html

Video [C-span the life and career of Nixon]: http://www.c-spanvideo.org/program/151633-1

Nixon’s Appearances as President, in the House and Senate: http://www.c-spanvideo.org/richardnixon

http://video.pbs.org/video/979746298/

Library of Congress Portrait: http://www.loc.gov/pictures/item/96522669/resource/cph.3a53306/

Print Version for Sources:


Chapter 37
Richard M. Nixon


Biographies and Reference Work:


CHAPTER 37

RICHARD M. NIXON


Chapter 37

Richard M. Nixon


U.S. Congress. Senate. Tributes to Richard M. Nixon, Vice President of the
Chapter 37
Richard M. Nixon


Chapter 38
Gerald R. Ford

Ford's Papers, Primary Documents, External Links to Papers:

Online Website Sources:

Gerald Ford Library and Museum http://www.fordlibrarymuseum.gov
Gerald Ford Foundation http://www.geraldfordfoundation.org
Works by Ford http://www.gutenberg.org/browse/authors/f#a1669

Video [C-span the life and career of Ford]: http://www.c-spanvideo.org/program/151634-1

Appearances as President, and in Senate and House http://www.c-spanvideo.org/geraldford


Print Version for Sources:


Biographies and Reference Work:

Ralph Nader Congress Project. Citizens Look at Congress: Gerald R. Ford,
CHAPTER 38
GERALD R. FORD


Chapter 39
Jimmy Carter

Carter’s Papers, Primary Documents, External Links to Papers:

Online Website Sources:


The Carter Center http://www.cartercenter.org/index.html

Video [C-span the life and career of Carter]: http://www.c-spanvideo.org/program/151635-1

http://video.pbs.org/video/1049390462/

Interview with Carter http://www.c-spanvideo.org/program/194700-1

Appearances as President and Governor http://www.c-spanvideo.org/jimmycarter

Portrait: http://www.loc.gov/pictures/item/96512268/resource/cph.3b37659/?sid=cdfcbdbc0d698d9ade4792c96acd079a

Print Version for Sources:


Biographies and Reference Work:


CHAPTER 39

JIMMY CARTER


Chapter 40
Ronald Reagan

Reagan’s Papers, Primary Documents, External Links to Papers:

Online Website Sources:
Reagan’s Presidential Library http://www.reaganfoundation.org
http://millercenter.org/president/reagan

Video [C-span the life and career of Reagan]: http://www.c-spanvideo.org/program/151636-1

Appearances http://www.c-spanvideo.org/ronaldreagan

Reagan’s Speeches http://www.reagan.utexas.edu/archives/speeches/major.html#.UpODQRZAuMM

Portrait: http://www.loc.gov/pictures/resource/cph.3a53308/

Print Version for Sources:


Biographies and Reference Work:


CHAPTER 40

RONALD REAGAN

CHAPTER 41
GEORGE H. W. BUSH

Bush’s Papers, Primary Documents, External Links to Papers:

Online Website Sources:
George Bush Presidential Library and Museum http://bushlibrary.tamu.edu
Works by Bush http://www.gutenberg.org/author/George+Bush

Video [C-span the life and career of Bush]: http://www.c-spanvideo.org/program/151637-1

Appearances http://www.c-spanvideo.org/georgebush
http://video.pbs.org/video/979907571/

Portrait: http://www.loc.gov/pictures/resource/cph.3g01700/

Print Version for Sources:


Biographies and Reference Work:


CHAPTER 41

GEORGE H. W. BUSH


Chapter 42
William J. Clinton

Clinton’s Papers, Primary Documents, External Links to Papers:

Online Website Sources:
Clinton Foundation http://www.clintonfoundation.org

Works by Clinton http://www.gutenberg.org/browse/authors/c#a3565

Clinton’s Audio Speeches https://web.archive.org/web/20080209014908/http://millercenter.virginia.edu/scripps/digitalarchive/speechDetail/34

Video [C-span the life and career of Clinton]: http://www.c-spanvideo.org/program/151639-1
http://www.pbs.org/wgbh/americanexperience/films/clinton/player/
http://www.c-spanvideo.org/program/KenSt&showFullAbstract=1

Appearances by Clinton http://www.c-spanvideo.org/billclinton

Portrait: http://www.loc.gov/pictures/resource/ppmsc.02863/

Print Version for Sources:
Public Papers of the Presidents of the United States, William J. Clinton.


Biographies and Reference Work:


Michael Isikoff. Uncovering Clinton: A Reporter’s Story (1999)

Chapter 42
William J. Clinton


Chapter 43
George W. Bush

Bush's Papers, Primary Documents, External Links to Papers:

Online Website Sources:
http://millercenter.org/index.php/academic/americanpresident/gwbush
http://americanpresidents.org/presidents/president.asp?PresidentNumber=42
http://www.pbs.org/wgbh/amERICANexperience/features/biography/bush-george/

Video:
Interview http://www.c-spanvideo.org/program/185341-1
Appearances http://www.c-spanvideo.org/georgewbush

Portrait: http://www.loc.gov/pictures/resource/ppbd.00371/

Print Version for Sources:


Biographies and Reference Work:
Chapter 44
Barack Obama

Obama’s Papers, Primary Documents, External Links to Papers:

Online Website Sources:
http://www.barackobama.com/#get-the-facts

Video [C-span the life and career of Obama]:
Appearances as President and Senator http://www.c-spanvideo.org/barackobama

Portrait: http://www.whitehouse.gov/administration/president-obama

Print Version for Sources:


Biographies and Reference Work:
