**Big Idea/Topic**

**Incorporation**

**Connecting Theme/Enduring Understanding:** Governance: The student will understand that as a society increases in complexity and interacts with other societies, the complexity of government also increases.

**Essential Question:** How has the concept of incorporation influenced governance at both the state and national levels of government?

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**Standard Alignment**

SSCG6: Analyze the meaning and importance of each of the rights guaranteed under the Bill of Rights and how each is secured.

SSCG7: Demonstrate knowledge of civil liberties and civil rights.

- c: Analyze due process of law as expressed in the 5th and 14th amendments, as understood through the process of incorporation.

**Connection to Literacy Standards for Social Studies and Social Studies Matrices**

L9-10RHSS1 – Cite specific textual evidence to support analysis of primary and secondary sources, attending to such features as the date and origin of information.

L9-10RHSS2De – Determine the central ideas or information of a primary or secondary source; provide an accurate summary of how key events or ideas develop over the course of the text.

L9-10RHSS9 – Compare and contrast treatments of the same topic in several primary and secondary sources.

L9-10WHST4—Produce clear and coherent writing in which the development, organization, and style are appropriate to task, purpose, and audience.

L9-10WHST9—Draw evidence from informational texts to support analysis, reflection, and research.

**Information Processing Skills:**

1- (compare similarities and differences); 5- (identify main idea, detail, sequence of events and cause and effect in a social studies context); 11- draw conclusions and make generalizations.
Instructional Design

*This lesson has a flexible timeline and will cross over several days.

This lesson is intended to reach students in a virtual setting, whether plugged or unplugged. See bottom of lesson for list of unplugged supplies.

Part 1: Prior to this lesson, ensure students are familiar with content surrounding the United States Constitution (SSCG3, SSCG6). You may re-establish background knowledge on the by having students, in small groups or pairs, read the Bill or Rights. While students read have them document how each of these rights are secured for American citizens. Students can document these considerations as they read or directly on the text itself. Have students use an interactive whiteboard tool that allows real-time documentation along with the ability to view peer responses (i.e., Jamboard, Padlet). Use student annotations throughout the lesson and as a formative assessment to target any student misconceptions early.

In a live or recorded session, write or display the first five words of the First Amendment, “Congress shall make no law.” Prompt student thinking by asking students who they believe the Bill of Rights applies to and why they think that. Consider writing the term, “incorporation” and have a student volunteer to quickly define the term using a resource in class or an internet search to share with the class. For reference, a definition of the process of incorporation, in a legal context can be found in the American Government/Civics Teacher Notes for the Georgia Standards of Excellence in Social Studies: the combination or merger of most of the guarantees in the Bill of Rights into the 14th amendment. The Supreme Court has held that most of the protections included in the Bill of Rights are covered in the 14 amendment’s due process clause. Consider displaying this definition after hearing from student volunteers.

Have students use what they wrote about the Bill of Rights, the First Amendment’s first five words and the meaning of incorporation in their responses. Use their responses to lead a discussion introducing that Supreme Court decisions, over time, selectively applied provisions of the Bill of Rights to states through incorporation.

Possible initial guiding questions:

- How does the Fourteenth Amendment address the states?
- How does the Fifth Amendment address the states?
- Thinking back to what you learned about the ratification of the Constitution, what do you believe the Federalists and Anti-Federalists would say about the Bill of Rights and incorporation?

Provide supplemental materials on incorporation for students if needed.

*Unplugged variation – Provide a copy of a transcript of the Bill of Rights, the Fifth and Fourteenth Amendments (in the resources attached), the first five words of the First Amendment, and the definition of incorporation. Have students read the Bill of Rights and document how each of the rights are secured for American Citizens. Give the students the first five words of the First Amendment, “Congress shall make no law…” Have students share who they think the Bill of Rights applies to and why they think that. Have the students define the term “incorporation.” For reference, a definition of the process of incorporation, in a legal context can be found in the American Government/Civics Teacher Notes for the Georgia Standards of Excellence in Social Studies: the combination or merger of most of the guarantees in the Bill of Rights into the 14th amendment. The Supreme Court has held that most of the protections included in the Bill of Rights are covered in the 14 amendment’s due process clause. Make a connection of the definition to the first five words of the Frist Amendment and/or the entire Bill of Rights.
Part 2: Have students research Supreme Court case decisions to find its connection to incorporation. Consider the following cases and links to support research.

- Schenck v. U.S. (1918)
- Gitlow v. New York (1925)
- Chicago, Burlington & Quincy Railroad Co. v. City of Chicago (1897)
- Barron v. Mayor and City Council of Baltimore (1833)
- Powell v. Alabama (1932)
- Palko v. Connecticut (1937)
- Malloy v. Hogan (1964)

An additional list of Supreme Court cases and information related to the process of incorporation may be found at:

- Bill of Rights Institute: Incorporation
- Legal Information Institute of Cornell Law School
- Case Categories: Incorporation / Application of the Bill of Rights to the States

Each group should prepare a presentation a format of your choosing (infographic, essay, PPT, video, etc.), proving why their case displays the most powerful use of incorporation. Students should analyze the court’s decision by researching the issues involved in the case including background facts that led to the case, constitutional issues/amendments being applied to state or local governments, and the decision. Guide students in research by suggesting sites for their research (i.e., https://www.oyez.org/), texts from class or handouts with background information. Have students use the organizational chart/checklist to assist in their analysis and presentation. As students present their case, have the audience document if they agree or agree with the Court’s ruling. Finally, have students vote on the strongest case.

Use the attached checklist to ensure all components are present.

*Unplugged variation—Provide students with resources from class or the activity handouts, a blank checklist, and the model checklist to assist unplugged students in their research and analysis. An additional list of Supreme Court cases and information related to the process of incorporation may be found at:

- Bill of Rights Institute: Incorporation
- Legal Information Institute of Cornell Law School
- Case Categories: Incorporation / Application of the Bill of Rights to the States

Part 3: Summative task: Using their handouts from class and notes from presentations, hold a student-led discussion (i.e., Fishbowl) using one or several of the following questions to drive student dialogue.

- Thinking of the cases presented in class, what guiding principles would you use to decide whether a right should be incorporated? Why?
- Why do you think the Supreme Court has not applied incorporation to all of the rights in the Bill of Rights?
- Has incorporation made the criminal justice systems more fair?
- What economic effect has incorporation had on state governments?
- Is it the national government’s responsibility to fiscally support states with any costs associated with upholding incorporation?
- What elements of the Bill of Rights, specifically the Fifth and Fourteenth Amendments should students always be entitled to?
In a synchronous online setting, create small groups of 3-5 students using breakout rooms. Give each breakout room a short time to discuss the responses to the questions before returning to the whole class and entering as a “fish” in the bowl or an observer out of the bowl. When students return to your whole class, assign students their position. Those students (fish) in the bowl will keep their cameras on while the observers will turn their cameras off and muted. The teacher will begin the discussion by choosing a question to prompt the fish and will only contribute to share when it is time to switch roles.

The students observing will be actively listening to an assigned fish (student) “in the fishbowl.” The listener can gain insight into a response that may not have been previously considered. The listeners are responsible for creating any follow-up questions to ask or to contribute additional evidence for their fish to consider using a rubric or shared Google Docs to evaluate these considerations.

Have students shift from being a camera-on fish in the bowl to a muted, camera-off observer/listener out of the bowl so that all have an opportunity to observe and contribute. This allows all students to gain insight into responses or varied perspectives from one another.

Providing the questions ahead of time and allowing students to use a variety of resources to formulate their responses before discussion day leads to a robust and effective dialogue

Additional asynchronous option for plugged students:
Provide options for students to document responses using a variety of formats: a bulleted list, illustration or infographic, short essay, concept map, persuasive speech or script. Collect responses from students and then assign their response(s) to a peer who had chosen the same question. Allow the students to respond to an anonymous peer with prompts starting with “thoughts to consider” and/or “we agree because” to allow for an asynchronous collaboration opportunity. This may be done in an interactive whiteboard platform (Jamboard, Whiteboard.fi, Whiteboard.chat) and/or short answer response tool in Google Classroom.

*Unplugged variation –

Students may participate by responding to the questions of their choice, by recording or documenting their answers using evidence from class resources in their responses. Provide the summative questions below and allow students to choose (3) to provide a response. Provide options for students to document responses using a variety of formats: a bulleted list, illustration or infographic, short essay, concept map, persuasive speech or script.

Thinking of the cases presented in your packet, what guiding principles would you use to decide whether a right should be incorporated? Why?

- Why do you think the Supreme Court has not applied incorporation to all of the rights in the Bill of Rights?
- Has incorporation made the criminal justice systems more fair?
- What economic effect has incorporation had on state governments?
- Is it the national government’s responsibility to fiscally support states with any costs associated with upholding incorporation?
- What elements of the Bill of Rights, specifically the Fifth and Fourteenth Amendments should students always be entitled to?

If possible: Choose one of the questions you responded to and share your thoughts with an adult or a peer at home. If they are unfamiliar with these concepts or cases, you might need to give them a brief explanation. Record a summary of their response.
Ideas for Differentiation:

Our goal is for all students to be actively engaged using speaking, writing, illustrating, reading, and listening. Below are changes to the lesson to help achieve that goal for students who need additional support. Note: If students are able to complete the activities on their own, it would be best to let them do this independently.

- Conduct a read aloud of the Fifth and Fourteenth Amendments and have students compare and contrast these amendments. Consider providing a same-different chart, Venn diagram or other graphic organizer.
- Have students individually or in small groups create an illustration of the amendments to highlight what is similar and what is different in the amendments.
- Have students restate parts of the Fifth and Fourteenth Amendments in their own words.
- Consider guiding students by pointing out how the meaning of incorporation may look different in each amendment and have students underline these differences on a transcribed text of the amendments.
- Have students choose one of the questions from the summative task to address.

Opportunities for Extension:

- Have students extend their understanding by setting up an interview with a member of their local school board or school administrator and ask about how due process applies to students in their school or district.
- Have students review excerpts from Federalist Papers No.10, Federalist Papers No. 51, Vices of the Political System of the United States, April 1787 or James Madison’s letter to Thomas Jefferson in 1787, have students write a response either supporting or disapproving of Madison’s views on states and individual freedoms.

Unplugged Supplies:

- Lesson checklist, writing utensil, notebook, court case research questions organizational note chart, Federalist Papers No.10, Federalist Papers No.5, Vices of the Political System, Incorporation Background 1, Incorporation Background 2, Schenck V. United States Background, Transcripts of the Fifth and Fourteenth Amendments and Bill of Rights transcript

Evidence of Student Success

Information for diagnostic, formative, and summative assessments are described within the Instructional Design.

Engaging Families

Materials included to support unplugged learners: Lesson checklist, court case research questions, Federalist Papers No.10, Federalist Papers No.5, Vices of the Political System, Incorporation Background 1, Incorporation Background 2, Schenck V. United States Background, Transcripts of the Fifth and Fourteenth Amendments and the Bill of Rights, Court case checklist sample.

Optional materials to support learning not included: blank paper, interactive notebook or something to take notes on, sticky notes
Incorporation Lesson Checklist

SSCG6: Analyze the meaning and importance of each of the rights guaranteed under the Bill of Rights and how each is secured.

SSCG7: Demonstrate knowledge of civil liberties and civil rights.
   c: Analyze due process of law as expressed in the 5th and 14th amendments, as understood through the process of incorporation.

Part 1:

☐ Review the Bill of Rights and list how each of the rights in the Bill of Rights are secured for American citizens.

☐ Use the handouts to help you answer the following questions in complete sentences:
   o How does the Fourteenth Amendment address the states?
   o How does the Fifth Amendment address the states?
   o Thinking back to what you learned about the ratification of the Constitution, what do you believe the Federalists and Anti-Federalists would say about the Bill of Rights and incorporation?

Part 2:

☐ Use the handouts and/or internet to help you analyze the U.S. Supreme Court case decision that involved incorporation. Document your research using the checklist and use the sample provide to guide you in your research. Prepare a presentation to persuade your peers how the case displays the most powerful use of incorporation.

Part 3:

☐ Respond to your choice of 3 of the questions below, by recording or documenting your answers using evidence from the resources provided. You may choose to respond using a variety of formats: a bulleted list, illustration or infographic, short essay, concept map, persuasive speech or script.

Thinking of the cases presented in your packet, what guiding principles would you use to decide whether a right should be incorporated? Why?
   o Why do you think the Supreme Court has not applied incorporation to all of the rights in the Bill of Rights?
   o Has incorporation made the criminal justice systems more fair?
   o What economic effect has incorporation had on state governments?
   o Is it the national government’s responsibility to fiscally support states with any costs associated with upholding incorporation?
   o What elements of the Bill of Rights, specifically the Fifth and Fourteenth Amendments should students always be entitled to?

☐ If possible: Choose one of the questions you responded to and share your thoughts with an adult or a peer at home. If they are unfamiliar with these concepts or cases, you might need to give them a brief explanation. Record a summary of your conversation/discussion.
## U.S. Supreme Court and Incorporation

### Court case:

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### Additional Notes:
**Sample Completed Checklist - U.S. Supreme Court and Incorporation**

**Court case:** Near v. Minnesota (1931)

| Who is involved? | • Jay Near, Howard Guilford  
|                  | • Minnesota newspaper, *The Saturday Press* |

| What happened? | • In the 1920s, Jay and Howard accused local officials of being connected to organized crime and gangsters in *The Saturday Press*.  
|                | • Jay and Howard criticized, on several occasions, elected officials and blatantly accused them of lying to the public, taking bribes, and being incompetent.  
|                | • At that time there was a state law in Minnesota that required all stories be approved prior to publication as well as making it a crime to publish, “malicious, scandalous, and defamatory” information.  
|                | • Authors and/or publishers, like Jay, had to show “good motives and justifiable ends” for what they were about to write and print.  
|                | • If they could not, the paper could be censored before publishing and printing for the public to read.  
|                | • Near was then banned from publishing his newspaper, *The Saturday Press* in 1925 based on this state law. |

| What constitutional issue/amendments are being applied? | • Freedom on the Press / 1st amendment  
|                                                          | • Due Process / 14th amendment |

| How did the majority rule? | • A state law allowing the government to censor in advance (prior restraint) was struck down as unconstitutional: “*Under the Free Press Clause of the First Amendment, and with limited exceptions, government may not censor or prohibit a publication in advance.*”  
|                           | • The 14th amendment requirement of due process to apply (incorporate) to the 1st amendment protection of press  
|                           | • The Supreme Court applied the 1st amendment’s freedom of press to also include state governments through incorporation.  
|                           | • Prior restraint can only be justified in certain situations that endanger other citizens. |

| Do you agree or disagree with the ruling? | • I agree with this ruling because journalists should be able to write and publish information however this should only be presented in a way that is factually based.  
|                                            | • The impact on public opinion from the press’ publications cannot be overlooked. If freedoms of the press exist, citizens must be educated enough to determine the accuracy of the information.  
|                                            | • Only if communication published is considered dangerous to others, by inciting violence or is traitorous (spying for another country, sharing military secrets, etc.) should censorship through prior restraint even be allowed. |

**Additional Notes:** [https://www.law.cornell.edu/wex/prior_restraint](https://www.law.cornell.edu/wex/prior_restraint): In First Amendment law, prior restraint is government action that prohibits speech or other expression before the speech happens. Prior restraint typically happens in a few ways. It may be a statute or regulation that requires a speaker to acquire a permit or license before speaking. Prior restraint can also be a judicial injunction that prohibits certain speech or the government outright prohibits a certain type of speech. The issue of prior restraint often occurred when the state sought to prevent a news publication from publishing something.
Incorporation Doctrine

*A constitutional doctrine whereby selected provisions of the Bill of Rights are made applicable to the states through the due process clause of the Fourteenth Amendment.*

The doctrine of selective incorporation, or simply the incorporation doctrine, makes the first ten amendments to the Constitution—known as the Bill of Rights—binding on the states. Through incorporation, state governments largely are held to the same standards as the federal government with regard to many constitutional rights, including the First Amendment freedoms of speech, religion, and assembly, and the separation of church and state; the Fourth Amendment freedoms from unwarranted arrest and unreasonable searches and seizures; the fifth amendment privilege against self-incrimination; and the Sixth Amendment right to a speedy, fair, and public trial. Some provisions of the Bill of Rights—including the requirement of indictment by a Grand Jury (Sixth Amendment) and the right to a jury trial in civil cases (Seventh Amendment)—have not been applied to the states through the incorporation doctrine.

Until the early twentieth century, the Bill of Rights was interpreted as applying only to the federal government. In the 1833 case *Barron ex rel. Tiernon v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 8 L. Ed. 672, the Supreme Court expressly limited application of the Bill of Rights to the federal government. By the mid-nineteenth century, this view was being challenged. For example, Republicans who were opposed to southern state laws that made it a crime to speak and publish against Slavery alleged that such laws violated First Amendment rights regarding Freedom of Speech and Freedom of the Press.

For a brief time following the ratification of the Fourteenth Amendment in 1868, it appeared that the Supreme Court might use the privileges and immunities clause of the Fourteenth Amendment to apply the Bill of Rights to the states. However, in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1873), the first significant Supreme Court ruling on the Fourteenth Amendment, the Court handed down an extremely limiting interpretation of that clause. The Court held that the clause created a distinction between rights associated with state citizenship and rights associated with U.S., or federal, citizenship. It concluded that the Fourteenth Amendment prohibited states from passing laws abridging the rights of U.S. citizenship (which, it implied, were few in number) but had no authority over laws abridging the rights of state citizenship. The effect of this ruling was to put much state legislation beyond the review of the Supreme Court.

Instead of applying the Bill of Rights as a whole to the states, as it might have done through the Privileges and Immunities Clause, the Supreme Court has gradually applied selected elements of the first ten amendments to the states through the Due Process Clause of the Fourteenth Amendment. This process, known as selective incorporation, began in earnest in the 1920s. In Gitlow v. New York, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925), one of the earliest examples of the use of the incorporation doctrine, the Court held that the First Amendment protection of freedom of speech applied to the states through the Due Process Clause. By the late 1940s, many civil freedoms, including freedom of the press (Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 [1931]), had been incorporated into the Fourteenth Amendment, as had many of the rights that applied to defendants in criminal cases, including the right to representation by counsel in capital cases (Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 [1931]). In 1937, the Court decided that some of the privileges and immunities of the Bill of Rights were so fundamental that states were required to abide by them through the Due Process Clause (*Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288).
In 1947, the Court rejected an argument that the Fifth Amendment’s right against Self-Incrimination applied to the states through the Fourteenth Amendment (Adamson v. People of the State of California, 332 U.S. 46, 67 S. Ct. 1672, 91 L. Ed. 2d 1903 [1947]). However, in one of the most famous dissents in history, Justice Hugo L. Black argued that the Fourteenth Amendment incorporated all aspects of the Bill of Rights and applied them to the states. Justice Felix Frankfurter, who wrote a concurrence in Adamson, disagreed forcefully with Black, arguing that some rights guaranteed by the Fourteenth Amendment may overlap with the guarantees of the Bill of Rights, but are not based directly upon such rights. The Court was hesitant to apply the incorporation doctrine until 1962, when Frankfurter retired from the Court. Following his retirement, most provisions of the Bill of Rights were eventually incorporated to apply to the states.
The Text of the Fifth Amendment
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
Federalist Papers No. 51 (1788)

To the People of the State of New York:

TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constituteion? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.
In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal. But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.
A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State. But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified.

An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department? If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion to the several State constitutions, and to the federal Constitution it will be found that if the latter does not perfectly correspond with them, the former are infinitely less able to bear such a test.
There are, moreover, two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view. First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.

There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.
In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States oppressive combinations of a majority will be facilitated: the best security, under the republican forms, for the rights of every class of citizens, will be diminished; and consequently the stability and independence of some member of the government, the only other security, must be proportionately increased. Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful.

It can be little doubted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practical sphere, the more duly capable it will be of self-government. And happily for the REPUBLICAN CAUSE, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the FEDERAL PRINCIPLE.
PUBLIUS.

Primary Source by James Madison (1788)

Additional Text

In this Federalist Paper, James Madison explains and defends the checks and balances system in the Constitution. Each branch of government is framed so that its power checks the power of the other two branches; additionally, each branch of government is dependent on the people, who are the source of legitimate authority.

“It may be a reflection on human nature, that such devices [checks and balances] should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”

Madison also discusses the way republican government can serve as a check on the power of factions, and the tyranny of the majority. “[I]n the federal republic of the United States... all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.” All of the Constitution's checks and balances, Madison concludes, serve to preserve liberty by ensuring justice. Madison explained, “Justice is the end of government. It is the end of civil society.”

Madison’s political theory as expressed in this Federalist Paper demonstrated the influence of Montesquieu’s The Spirit of the Laws on the Founders.

Related Resources

https://billofrightsinstitute.org/primary-sources/federalist-no-51
Incorporation Doctrine

Overview

In 1791, the Bill of Rights protected American citizens only against the actions of the national government. The Bill of Rights protected individuals against the actions of the federal government only. It did not limit state action. Individual states had their own bills of rights, but these were different in each state.

The incorporation doctrine is a constitutional doctrine through which the Bill of Rights are made applicable to the states through the Due Process clause of the Fourteenth Amendment. Prior to the doctrine's (and the Fourteenth Amendment's) existence, the Bill of Rights applied only to the Federal Government and to federal court cases. States and state courts could choose to adopt similar laws, but were under no obligation to do so.

After the passage of the Fourteenth Amendment, the Supreme Court favored a process called “selective incorporation.” Under selective incorporation, the Supreme Court would incorporate certain parts of certain amendments, rather than incorporating an entire amendment at once.

As a note, the Ninth Amendment and the Tenth Amendment have not been incorporated, and it is unlikely that they ever will be. The text of the Tenth Amendment directly interacts with state law, and the Supreme Court rarely relies upon the Ninth Amendment when deciding cases.

Incorporated Amendments:

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The Text of the Fourteenth Amendment

(Approved by Congress on June 13, 1866; ratified on July 9, 1868)

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

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

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

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

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.
Vices of the Political System of the United States, April 1787

Vices of the Political System of the United States

Editorial Note

Long before the deputies assembled at Philadelphia in May 1787, JM had begun mentally “to revolve the subject” to be discussed at the Federal Convention (JM to Washington, 16 Apr. 1787). No other delegate came to that historic meeting so well prepared as JM, ready to confront the complex problems of establishing an energetic national government based on republican principles. His many years of public service on both the state and continental level had provided JM with an unrivaled knowledge of American affairs. Yet what distinguished JM from his fellow delegates, apart from his superior intellectual gifts, was not so much his firsthand experience in public life—extensive though it was—as his diligent effort to apply to that experience a scholarly study of the principles of government. Blending “together the profound politician, with the Scholar,” JM took the lead on nearly every great question at the convention and consistently came forward as “the best informed Man of any point in debate” (William Pierce, “Character Sketches of Delegates to the Federal Convention,” in Farrand, Records of the Federal Convention, III, 94).

JM’s intellectual preparation for the Federal Convention had begun at the College of New Jersey, where he imbibed the ideas and principles of the Scottish Enlightenment under the tutelage of Dr. Witherspoon. But not until 1786 did he undertake a systematic course of reading in political history with the apparent purpose of applying his learning to the problems besetting the American Confederation. The result was JM’s Notes on Ancient and Modern Confederacies, prepared in the spring of 1786, many months before he knew there would be a convention at Philadelphia. In the spring of 1787 he followed this study with another memorandum, Vices of the Political System of the United States. In addition, his letters to Jefferson (19 Mar. 1787), Randolph (8 Apr. 1787), and Washington (16 Apr. 1787) contained “the first shoot in his thoughts of a plan of Federal Government” (Adair, ed., “James Madison’s Autobiography,” WMQ, 3d ser., II [1945], 202). These letters were the basis of those [p. 346] resolutions submitted by Governor Randolph to the convention on 29 May 1787 which became known in history as the Virginia Plan. Indeed, many of the ideas and supporting facts that JM put forward in his speeches at Philadelphia, his numbers of The Federalist, and his speeches at the Virginia ratifying convention were but an extension and refinement of the research and insights embodied in the memorandums and letters he wrote before the Philadelphia meeting. The period between the spring of 1786 and the spring of 1787 was perhaps the most creative and productive year of JM’s career as a political thinker.

Although (according to the docket on the Ms) JM wrote Vices of the Political System in April, he probably worked on it intermittently from the time he returned to Congress in February. He apparently left his observations unfinished, for there is a blank space opposite the last vice in his list. As the title suggests, this memorandum was a logical complement to JM’s previous studies of ancient and modern confederacies, to each of which (excepting the Lycian Confederacy) he had appended a section entitled “Vices of the Constitution.” The two memorandums are different in style and structure, however. The earlier work is a heavily annotated series of fragmentary and incomplete notes based on a distillation of ancient and modern history. The analysis of the American federal system has more the quality of a
polished essay, in which JM blended together personal experience and theory in masterful fashion.

Among the vices of the American political system, JM included the impotence of the Confederation government: its inability to collect requisitions and to prevent the states from encroaching on its authority, violating treaties, and violating the rights of each other; its lack of control over commerce; and in general its lack of coercive power. Yet the dominant theme of Vices of the Political System was not the structural defects of the Articles of Confederation; the emphasis was rather on the deficiencies and derelictions of the state governments. More than half the work was devoted to the “multiplicity,” “mutability,” and “injustice” of the laws of the states. “The evils issuing from these sources,” JM remarked to Jefferson after the convention, “contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects” (JM to Jefferson, 24 Oct. 1787, Boyd, Papers of Jefferson, XII, 276). JM’s chief concern was the unrestricted power of majorities in state legislatures to pass laws that violated the rights of individuals and minorities. Thus the great task of reform in his view was both to strengthen the national government and to provide “justice” for private individuals (see Edward S. Corwin, “The Progress of Constitutional Theory between the Declaration of Independence and the Meeting of the Philadelphia Convention,” AHR, XXX [1924–25], 512–13, 533–36).

It was JM’s lasting contribution to the work of the Federal Convention to base the argument for an invigorated national government on the greater security it would afford to private rights. He arrived at this conclusion in his discussion of the “Injustice of the laws of the States,” the longest and most theoretical section of Vices of the Political System. Here he brought “into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights.” It was the inexorable tendency of majorities, he observed, to tyrannize over minorities. Yet this oppression, he added, was more likely to occur in a small political unit, such as a town or a state. On the other hand, the rigors of majority rule could be mitigated by extending the sphere of government to include a multitude of factions and interests that would constantly check each other. In this situation “a common interest or passion” would less easily be felt, and the “requisite combinations” less easily formed, than in a constricted geographical area. Logically, then, a republican government which would effectively protect minority rights could operate only over a large territory. These ideas, so “contrary to the prevailing Theory,” remained only partly developed in Vices of the Political System; a full treatment would come in JM’s letter to Jefferson of 24 Oct. 1787 and in numbers 10 and 51 of The Federalist (Boyd, Papers of Jefferson, XII, 276–79; The Federalist [Cooke ed.], pp. 63–65, 351–53).

The problem of reform was thus reduced to a single question: how could the American system of government be transformed into one extended republic? The present system did not qualify, for it was merely a league of thirteen independent republics, in which the vicious effects of majority factionalism could not be effectively controlled. In the system he proposed, sovereignty would be securely lodged in the general government, which would operate over individuals instead of through the intermediary states. The general government would have additional positive powers, including the regulation of trade and the power to tax both imports and exports. A government of expanded powers would have to be divided into separate departments: a national executive and judiciary, as well as a national legislature. Moreover, the principle of representation would have to be changed so that a vote of Delaware or Rhode Island would not have “the same effect and value” as one from Virginia or
Massachusetts (JM to Washington, 16 Apr. 1787). Ratification of the new instrument of government by the people would establish an authority “clearly paramount” to that of the state legislatures (JM to Jefferson, 19 Mar. 1787). Of all the changes JM proposed in his sketch of a new system of government none was of greater significance than the power to be given the central government to negative state laws “in all cases whatsoever,” the prerogative held by the king of Great Britain over the legislation of the former colonies (JM to Washington, 16 Apr. 1787). This federal veto was to be the foundation of the new system, the means by which thirteen independent states would become one indivisible sovereignty. JM regarded [p. 348] this proposition as “the least possible abridgement of the State Sovereignties,” without which all the positive powers granted on paper would be “unavailing” (JM to Randolph, 8 Apr. 1787). The absence of such a provision, he later told Jefferson, “seems to have been mortal to the antient confederacies, and to be the disease of the modern.” JM’s historical studies, confirmed by his own experience, had convinced him that the tendency of federal systems was “rather to anarchy among the members, than to tyranny in the head” (The Federalist No. 18 [Cooke ed.], p. 117). From his perspective in 1787 this problem far outweighed the problem of controlling the central government. Yet JM consistently maintained that the purpose of the negative was not simply to reverse the trend toward anarchy. By establishing supremacy in a general government that would operate over an extended sphere, the negative would also have the “happy effect” of providing greater security for private and minority rights. The negative power would fulfill the “great desideratum” of government by acting as a disinterested & dispassionate umpire in disputes between different passions & interests in the State” (JM to Washington, 16 Apr. 1787). Convinced that a federal power to disallow state laws would serve the end of liberty and justice, JM was a persistent but unsuccessful advocate of such a control at the Federal Convention.

[April–June]
April. 1787
Vices of the Political system of the U. States
Observations by J. M. (a copy taken by permission by Danl. Carroll & sent to Chs Carroll of Carrollton)1
1. Failure of the States to comply with the Constitutional requisitions.
   1. This evil has been so fully experienced both during the war and since the peace, results so naturally from the number and independent authority of the States and has been so uniformly examplified in every similar Confederacy, that it may be considered as not less radically and permanently inherent in, than it is fatal to the object of, the present System.
2. Encroachments by the States on the federal authority.
2. Examples of this are numerous and repetitions may be foreseen in almost every case where any favorite object of a State shall present a temptation. Among these examples are the wars and Treaties of Georgia with the Indians—The unlicensed compacts between Virginia and [p. 349] Maryland, and between Pena. & N. Jersey—the troops raised and to be kept up by Massts.2
3. Violations of the law of nations and of treaties.
3. From the number of Legislatures, the sphere of life from which most of their members are taken, and the circumstances under which their legislative business is carried on, irregularities of this kind must frequently happen. Accordingly not a year has passed without instances of them in some one or other of the States. The Treaty of peace—the treaty with France—the treaty with Holland have each been violated. [See the complaints to Congress on these subjects].3 The causes of these irregularities must necessarily produce frequent violations of the law of nations in other respects.
As yet foreign powers have not been rigorous in animadverting on us. This moderation however cannot be mistaken for a permanent partiality to our faults, or a permanent security agst. those disputes with other nations, which being among the greatest of public calamities, it ought to be least in the power of any part of the Community to bring on the whole.
4. Trespasses of the States on the rights of each other.
4. These are alarming symptoms, and may be daily apprehended as we are admonished by daily experience. See the law of Virginia restricting foreign vessels to certain ports—of Maryland in favor of vessels belonging to her own citizens—of N. York in favor of the same.
5/11 Paper money, instalments of debts, occlusion of Courts, making property a legal tender, may likewise be deemed aggressions on the rights of other States. As the Citizens of every State aggregately taken stand more or less in the relation of Creditors or debtors, to the Citizens of every other States, Acts of the debtor State in favor of debtors, affect the Creditor State, in the same manner, as they do its own citizens who are relatively creditors towards other citizens. This remark may be extended to foreign nations. If the exclusive regulation of the value and alloy of [p. 350] coin was properly delegated to the federal authority, the policy of it equally requires a controul on the States in the cases above mentioned. It must have been meant 1. to preserve uniformity in the circulating medium throughout the nation. 2. to prevent those frauds on the citizens of other States, and the subjects of foreign powers, which might disturb the tranquility at home, or involve the Union in foreign contests. The practice of many States in restricting the commercial intercourse
with other States, and putting their productions and manufactures on the same footing with those of foreign nations, though not contrary to the federal articles, is certainly adverse to the spirit of the Union, and tends to beget retaliating regulations, not less expensive & vexatious in themselves, than they are destructive of the general harmony.

5. want of concert in matters where common interest requires it.

5. This defect is strongly illustrated in the state of our commercial affairs. How much has the national dignity, interest, and revenue suffered from this cause? Instances of inferior moment are the want of uniformity in the laws concerning naturalization & literary property; of provision for national seminaries, for grants of incorporation for national purposes, for canals and other works of general utility, wch. may at present be defeated by the perverseness of particular States whose concurrence is necessary.

6. want of Guaranty to the States of their Constitutions & laws against internal violence.

6. The confederation is silent on this point and therefore by the second article the hands of the federal authority are tied.4 According to Republican Theory, Right and power being both vested in the majority, are held to be synonimous.5 According to fact and experience a minority may in an appeal to force, be an overmatch for the majority. 1. If the minority happen to include all such as possess the skill and habits of military life, & such as possess the great pecuniary resources, one third only may conquer [p. 351] the remaining two thirds. 2. One third of those who participate in the choice of the rulers, may be rendered a majority by the accession of those whose poverty excludes them from a right of suffrage, and who for obvious reasons will be more likely to join the standard of sedition than that of the established Government. 3. Where slavery exists the republican Theory becomes still more fallacious.

6/11

7. want of sanction to the laws, and of coercion in the Government of the Confederacy.

7. A sanction is essential to the idea of law, as coercion is to that of Government. The federal system being destitute of both, wants the great
vital principles of a Political Constitution. Under the form of such a Constitution, it is in fact nothing more than a treaty of amity of commerce and of alliance, between so many independent and Sovereign States. From what cause could so fatal an omission have happened in the articles of Confederation? from a mistaken confidence that the justice, the good faith, the honor, the sound policy, of the several legislative assemblies would render superfluous any appeal to the ordinary motives by which the laws secure the obedience of individuals: a confidence which does honor to the enthusiastic virtue of the compilers, as much as the inexperience of the crisis apologizes for their errors. The time which has since elapsed has had the double effect, of increasing the light and tempering the warmth, with which the arduous work may be revised. It is no longer doubted that a unanimous and punctual obedience of 13 independent bodies, to the acts of the federal Government, ought not be calculated on. Even during the war, when external danger supplied in some degree the defect of legal & coercive sanctions, how imperfectly did the States fulfill their obligations to the Union? In time of peace, we see already what is to be expected. How indeed could it be otherwise? In the first place, Every general act of the Union [p. 352] must necessarily bear unequally hard on some particular member or members of it. Secondly the partiality of the members to their own interests and rights, a partiality which will be fostered by the Courtiers of popularity, will naturally exaggerate the inequality where it exists, and even suspect it where it has no existence. Thirdly a distrust of the voluntary compliance of each other may prevent the compliance of any, although it should be the latent disposition of all. Here are causes & pretexts which will never fail to render federal measures abortive. If the laws of the States, were merely recommendatory to their citizens, or if they were to be rejudged by County authorities, what security, what probability would exist, that they would be carried into execution? Is the security or probability greater in favor of the acts of Congs. which depending for their execution on the will of the state legislatures, wch. are tho’ nominally authoritative, in fact recommendatory only.

8. Want of ratification by the people of the articles of Confederation.

8. In some of the States the Confederation is recognized by, and forms a part of the constitution. In others however it has received no other sanction than that of the Legislative authority. From this defect two evils result:7 1. Whenever a law of a State happens to be repugnant to an act of Congress, particularly when the latter is of posterior date to the former, it will be at least questionable whether the latter must not prevail;8 and as the question must be decided by the Tribunals of the State, they will be most likely to lean on the side of the State.

2. As far as the Union of the States is to be regarded as a league of sovereign powers, and not as a political Constitution by virtue of which
they are become one sovereign power, so far it seems to follow from the doctrine of compacts, that a breach of any of the articles of the [p. 353] confederation by any of the parties to it, absolves the other parties from their respective obligations, and gives them a right if they chuse to exert it, of dissolving the Union altogether.

9. Multiplicity of laws in the several States.

9. In developing the evils which viciate the political system of the U. S. it is proper to include those which are found within the States individually, as well as those which directly affect the States collectively, since the former class have an indirect influence on the general malady and must not be overlooked in forming a compleat remedy. Among the evils then of our situation may well be ranked the multiplicity of laws from which no State is exempt. As far as laws are necessary, to mark with precision the duties of those who are to obey them, and to take from those who are to administer them a discretion, which might be abused, their number is the price of liberty. As far as the laws exceed this limit, they are a nuisance: a nuisance of the most pestilent kind. Try the Codes of the several States by this test, and what a luxuriancy of legislation do they present. The short period of independency has filled as many pages as the century which preceded it. Every year, almost every session, adds a new volume. This may be the effect in part, but it can only be in part, of the situation in which the revolution has placed us. A review of the several codes will shew that every necessary and useful part of the least voluminous of them might be compressed into one tenth of the compass, and at the same time be rendered tenfold as perspicuous.

10. mutability of the laws of the States.

10. This evil is intimately connected with the former yet deserves a distinct notice as it emphatically denotes a vicious legislation. We daily see laws repealed or superseded, before any trial can have been made of their merits; and even before a knowledge of them can have reached the remoter districts within which they were to [p. 354] operate. In the regulations of trade this instability becomes a snare not only to our citizens but to foreigners also.

11. Injustice of the laws of States.

11. If the multiplicity and mutability of laws prove a want of wisdom, their injustice betrays a defect still more alarming: more alarming not merely because it is a greater evil in itself, but because it brings more into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights. To what causes is this evil to be ascribed?

These causes lie 1. in the Representative bodies.

2. in the people themselves.
1. Representative appointments are sought from 3 motives. 1. ambition 2. personal interest. 3. public good. Unhappily the two first are proved by experience to be most prevalent. Hence the candidates who feel them, particularly, the second, are most industrious, and most successful in pursuing their object: and forming often a majority in the legislative Councils, with interested views, contrary to the interest, and views, of their Constituents, join in a perfidious sacrifice of the latter to the former. A succeeding election it might be supposed, would displace the offenders, and repair the mischief. But how easily are base and selfish measures, masked by pretexts of public good and apparent expediency? How frequently will a repetition of the same arts and industry which succeeded in the first instance, again prevail on the unwary to misplace their confidence? How frequently too will the honest but unenlightened representative be the dupe of a favorite leader, veiling his selfish views under the professions of public good, and varnishing his sophistical arguments with the glowing colours of popular eloquence?

[p. 355]

2. A still more fatal if not more frequent cause lies among the people themselves. All civilized societies are divided into different interests and factions, as they happen to be creditors or debtors—Rich or poor—husbandmen, merchants or manufacturers—members of different religious sects—followers of different political leaders—inhabitants of different districts—owners of different kinds of property &c &c. In republican Government the majority however composed, ultimately give the law. Whenever therefore an apparent interest or common passion unites a majority what is to restrain them from unjust violations of the rights and interests of the minority, or of individuals? Three motives only 1. a prudent regard to their own good as involved in the general and permanent good of the Community. This consideration although of decisive weight in itself, is found by experience to be too often unheeded. It is too often forgotten, by nations as well as by individuals that honesty is the best policy. 2dly. respect for character. However strong this motive may be in individuals, it is considered as very insufficient to restrain them from injustice. In a multitude its efficacy is diminished in proportion to the number which is to share the praise or the blame. Besides, as it has reference to public opinion, which within a particular Society, is the opinion of the majority, the standard is fixed by those whose conduct is to be measured by it. The public opinion without the Society, will be little respected by the people at large of any Country. Individuals of extended views, and of national pride, may bring the public proceedings to this standard, but the example will never be followed by the multitude. Is it to be imagined that an ordinary citizen or even an assembly-man of R. Island in estimating the policy of paper money, ever considered or cared in what light the measure would be viewed in France or [p. 356] Holland; or even in Massts or Connect.? It was a sufficient temptation to both that it was for their interest: it was a sufficient sanction to the latter that it was popular in the State; to the
former that it was so in the neighbourhood. 3dly. will Religion the only
remaining motive be a sufficient restraint? It is not pretended to be such on men individually considered. Will its effect be greater on them considered in an aggregate view? quite the reverse. The conduct of every popular assembly acting on oath, the strongest of religious Ties, proves that individuals join without remorse in acts, against which their consciences would revolt if proposed to them under the like sanction, separately in their closets. When indeed Religion is kindled into enthusiasm, its force like that of other passions, is increased by the sympathy of a multitude. But enthusiasm is only a temporary state of religion, and while it lasts will hardly be seen with pleasure at the helm of Government. Besides as religion in its coolest state, is not infallible, it may become a motive to oppression as well as a restraint from injustice. Place three individuals in a situation wherein the interest of each depends on the voice of the others, and give to two of them an interest opposed to the rights of the third? Will the latter be secure? The prudence of every man would shun the danger. The rules & forms of justice suppose & guard against it. Will two thousand in a like situation be less likely to encroach on the rights of one thousand? The contrary is witnessed by the notorious factions & oppressions which take place in corporate towns limited as the opportunities are, and in little republics when uncontrouled by apprehensions of external danger. If an enlargement of the sphere is found to lessen the insecurity of private rights, it is not because the impulse of a common interest or passion is less predominant in this case [p. 357] with the majority; but because a common interest or passion is less apt to be felt and the requisite combinations less easy to be formed by a great than by a small number. The Society becomes broken into a greater variety9 of interests, of pursuits, of passions, which check each other, whilst those who may feel a common sentiment have less opportunity of communication and concert. It may be inferred that the inconveniences of popular States contrary to the prevailing Theory, are in proportion not to the extent, but to the narrowness of their limits.10 The great desideratum in Government is such a modification of the Sovereignty11 as will render it sufficiently neutral between the different interests and factions, to controul one part of the Society from invading the rights of another, and at the same time sufficiently controuled itself, from setting up an interest adverse to that of the whole Society. In absolute Monarchies, the prince is sufficiently, neutral towards his subjects, but frequently sacrifices their happiness to his ambition or his avarice. In small Republics, the sovereign will is sufficiently controuled from such a Sacrifice of the entire Society, but is not sufficiently neutral towards the parts composing it. As a limited Monarchy tempers the evils of an absolute one; so an extensive Republic meliorates the administration of a small Republic. An auxiliary desideratum for the melioration of the Republican form is such a process of elections as will most certainly extract from the mass of the Society the purest and noblest characters which it contains; such
as will at once feel most strongly the proper motives to pursue the end of their appointment, and be most capable to devise the proper means of attaining it.

10/11

12. Impotence of the laws of the States

[p. 358]

Ms (DLC); Tr (NN). Ms in JM’s hand. Tr in hand of Joel Barlow, “copied at Monticello—25 Sepr. 1808.” The editors have not noted JM’s minor stylistic alterations, which appear to be contemporaneous with the time of writing. Several underlinings and braces in the Ms added at a later time by one or more unknown persons have not been noted here.

1. JM added “by J.M.” and the parenthetical note at a later time. Daniel Carroll attended the Federal Convention as a delegate from Maryland and may have made his copy at that time.

2. JM placed a fistnote in the left margin opposite this sentence.

3. JM’s brackets. JM placed a fistnote in the left margin opposite this sentence.

4. Each state under Article II of the Articles of Confederation retained “its sovereignty, freedom and independence, and every power, jurisdiction and right ... not expressly delegated to the United States, in Congress Assembled.” Alarmed by Shays’s uprising and rumors of monarchy, JM and his colleagues at Philadelphia were careful to include a “guarantee” clause (Art. IV, Sec. 4) in the new Constitution. See William M. Wiecek, The Guarantee Clause of the U.S. Constitution (Ithaca, 1972), pp. 11–62.

5. JM placed a fistnote in the left margin opposite this sentence.

6. JM placed a fistnote in the left margin opposite this sentence.

7. JM placed a fistnote in the left margin opposite this sentence.

8. Someone other than JM tampered with this sentence by interlining “former” where JM wrote “latter” and “latter” where JM wrote “former.” Barlow’s copy follows JM’s wording, as does the version of Vices in Madison, Letters (Cong. ed.), I, 323. Hunt (Madison, Writings, II, 365) put the interlineations in brackets.

9. JM deleted “of sections” at this point.

10. JM would expand his theory of the extended republic in his letter to Jefferson of 24 Oct. 1787 and in The Federalist, numbers 10 and 51 ([Cooke ed.], pp. 56–65, 347–53). For David Hume’s influence on JM in formulating this theory, see Douglass Adair, “‘That Politics May Be Reduced to a Science’: David Hume, James Madison, and the Tenth Federalist,” Huntington Library Quarterly, XX (1957), 343–60. It is perhaps indicative of JM’s optimism that he was able to proclaim this theory, in which he tended to minimize the dangers of “interested” majorities forming in an enlarged sphere of government, at the height of the sectional controversy over the navigation of the Mississippi River. Indeed, one of his earliest philosophical reflections on the baneful effects of strict majority rule arose precisely over this issue (see JM to Monroe, 5 Oct. 1786). To be sure, no action had been taken under Jay’s revised instructions, and by April 1787 JM was hopeful that the Mississippi issue was dormant. As the debate over the Constitution would show, many of JM’s fellow Southerners did not share his complacency. Nor did a later generation of Southerners, feeling themselves an oppressed minority, find much comfort in JM’s theory.

11. At a later time someone other than JM interlined “[governing power]” at this point.

12. Barlow wrote on his copy, “That here finish Mr. Madison’s observations, which I regret.” Earlier printed versions of this memorandum give a misleading impression of completeness by excluding the last “vice” in JM’s list, for which he prepared no commentary.
Excerpts from *Federalist No. 10* by James Madison

November 22, 1787

Among the numerous advantages promised by a well constructed union, none deserves to be more accurately developed, than its tendency to break and control the violence of faction... The instability, injustice, and confusion, introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished; ...Complaints are everywhere heard from our most considerate and virtuous citizens....that our governments are too unstable; that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, not according to the rules of justice, and the rights of the minority party, but by the superior force of an interested and overbearing majority. ...It will be found, indeed, on a candid review of our situation, that some of the distresses under which we labor, have been erroneously charged on the operation of our governments... These must be chiefly, if not wholly, effects of the unsteadiness and injustice, with which a factious spirit has tainted our public administrations.

By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

There are two methods of curing the mischief of faction: The one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: The one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said, than of the first remedy, that it is worse than the disease. Liberty is to faction, what

Annotations

One of the most important benefits of a well-constructed union is that the structure helps solve the problems created by factions.

A common problem of government is that decisions are made based on the selfish will of a majority rather than based on justice and the public good.

Some of the problems that we blame on the operation of governments are really caused by conflicts among factions and by the tyranny of the majority.

Publius (in this case, Madison) defines a faction as a group of citizens who are united by some common goal that is opposed to the rights of others or to the common good.

There are two methods of removing the causes of factions: 1. Destroy liberty; 2. Give everyone the same opinions and interests.

The first remedy, removing liberty, is worse than the disease of
air is to fire, an aliment, without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable, as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed...The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to an uniformity of interests. The protection of these faculties, is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders, ambitiously contending for pre-eminence and power; or to persons of other descriptions, whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to co-operate for their common good. So strong is this propensity of mankind, to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions, and excite their most violent conflicts. But the most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A

Remedy 2: It would be both impossible and unwise to try to give everyone the same opinions. Individual differences in thoughts, skills, and interests give rise to property rights. Diversity in people's abilities and interests is part of human nature, and it is the job of government to protect that diversity. Individual differences in opinions and interests will always cause people to seek out groups and associations. The causes of faction, natural differences among people, have often caused them to argue and to oppress one another.

There are many possible causes of faction, but the most common cause is the unequal distribution of property.
landed interest, a manufacturing interest, a mercantile interest, a monied interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests, forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of government.

No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity...is a law proposed concerning private debts? It is a question to which the creditors are parties on one side, and the debtors on the other. Justice ought to hold the balance between them. Yet the parties [within the legislature] are, and must be, themselves the judges; and the most numerous party, or, in other words, the most powerful faction, must be expected to prevail. Shall domestic manufactures be encouraged, and in what degree, by restrictions on foreign manufactures? are questions which would be differently decided by the landed and the manufacturing classes; and probably by neither with a sole regard to justice and the public good. The apportionment of taxes, on the various descriptions of property, is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party, to trample on the rules of justice. Every shilling with which they over-burden the inferior number, is a shilling saved to their own pockets.

It is in vain to say, that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm...

The inference to which we are brought, is, that the causes of faction cannot be removed; and that relief is only to be sought in the means of controlling its effects.

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views, by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of

Regulation of conflict among factions is the main task of writing laws, and the harmful spirit of faction is part of the ordinary operation of government.

When writing laws on topics like debts, restrictions on imports, and taxation, people can be expected to disagree, based on what is best for their own personal situations.

It is not satisfactory to say that wise leaders can resolve all these natural differences; wise leaders will not always be available.

Since the causes of faction are a permanent part of human nature, government must be designed to control its effects.

If a harmful faction is in the minority, its harm can be controlled by majority rule.
the constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add, that it is the great desideratum, by which alone this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.

By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority, at the same time, must be prevented; or the majority, having such co-existent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know, that neither moral nor religious motives can be relied on as an adequate control...

We cannot rely on either religious or moral motives in order to control the evils of a majority faction.

From this view of the subject, it may be concluded, that a pure democracy, by which I mean, a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert, results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have, in general, been as short in their lives, as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed, that, by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the...
scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the union.

The two great points of difference, between a democracy and a republic, are, first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen, that the public voice, pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people. The question resulting is, whether small or extensive republics are most favorable to the election of proper guardians of the public weal; and it is clearly decided in favor of the latter by two obvious considerations.

In the first place... if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice.

In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts, by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit, and the most diffusive and established characters.

A republic is a system of government in which people elect representatives to express the public will. In a democracy, the people directly express the public will themselves.

In a republic there is a smaller number of people in charge of conducting the business of government, and a greater number of citizens who are represented.

In a republic, the voice of the people is passed through representatives who have been chosen because they are patriotic and love justice. This process is more likely to achieve the common good than if the people voted in a direct democracy.

The public good is safer in a large republic than in a small one. In a small republic it is more likely that corrupt men could persuade people to elect them to power. In a large republic there are more potential candidates to choose from and it is less likely that local passions will control elections.
It must be confessed, that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representative too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The federal constitution forms a happy combination in this respect; the great and aggregate interests, being referred to the national, the local and particular to the state legislatures.

The other point of difference is, the greater number of citizens, and extent of territory, which may be brought within the compass of republican, than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former, than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other...

Hence it clearly appears, that the same advantage, which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic... is enjoyed by the union over the states composing it. Does this advantage consist in the substitution of representatives, whose enlightened views and virtuous sentiments render them superior to local prejudices, and to schemes of injustice? It will not be denied, that the representation of the union will be most likely to possess these requisite endowments. Does it consist in the greater security afforded by a greater variety of parties, against the event of any

While a large republic is better than a small one, it is possible for a republic to be so large that the elected officials are not really familiar with the needs and wishes of those who elected them.

The Constitution resolves this problem because national interests will be represented by the central government, and state governments will still deal with issues that only affect state or regional interests.

In a large republic it becomes less likely that a majority will have a common motive to deprive people of their individual rights.

Just as a republic is better than a democracy in controlling the mischiefs of factions, a large republic is better than a small one.
one party being able to outnumber and oppress the rest? In an equal degree does the increased variety of parties, comprised within the union, increase this security. Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here, again, the extent of the union gives it the most palpable advantage.

The influence of factious leaders may kindle a flame within their particular states, but will be unable to spread a general conflagration through the other states: a religious sect may degenerate into a political faction in a part of the confederacy; but the variety of sects dispersed over the entire face of it, must secure the national councils against any danger from that source: a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the union, than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire state.

In the extent and proper structure of the union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans, ought to be our zeal in cherishing the spirit, and supporting the character of federalists.

A large republic makes it more likely that individual rights will be protected because it is harder for anyone to gain a position to oppress others. Factious (selfish, corrupt, power-hungry) leaders are less likely to gain power in a large republic than in a small one.

The best remedy for the republican disease of faction is republicanism itself.
Schenck v. United States

Facts of the case
During World War I, socialists Charles Schenck and Elizabeth Baer distributed leaflets declaring that the draft violated the Thirteenth Amendment prohibition against involuntary servitude. The leaflets urged the public to disobey the draft, but advised only peaceful action. Schenck was charged with conspiracy to violate the Espionage Act of 1917 by attempting to cause insubordination in the military and to obstruct recruitment. Schenck and Baer were convicted of violating this law and appealed on the grounds that the statute violated the First Amendment.

Opinions
Unanimous decision with Majority Opinion written by Oliver Wendell Holmes, Jr
Articulating the clear and present danger test, Holmes voiced the opinion of a unanimous Court in sustaining the convictions. Holmes felt that courts owed greater deference to the government during wartime, even when constitutional rights were at stake. He held that the First Amendment does not protect speech that comes close to creating a clear and present danger of a significant evil that Congress has the power to prevent. There must be some degree of imminence to meet this test, but Holmes found that the widespread dissemination of the leaflets was sufficiently likely to disrupt the conscription process. He famously argued that the First Amendment does not allow people to shout "Fire!" in a crowded theater, which he saw as parallel to the leaflets.

Case Commentary
The Court held that the Espionage Act did not violate the First Amendment and was an appropriate exercise of Congress’ wartime authority. Writing for a unanimous Court, Justice Oliver Wendell Holmes concluded that courts owed greater deference to the government during wartime, even when constitutional rights were at stake. Articulating for the first time the “clear and present danger test,” Holmes concluded that the First Amendment does not protect speech that approaches creating a clear and present danger of a significant evil that Congress has power to prevent. Holmes reasoned that the widespread dissemination of the leaflets was sufficiently likely to disrupt the conscription process. Famously, he compared the leaflets to falsely shouting “Fire!” in a crowded theatre, which is not permitted under the First Amendment.

Although it is not widely applicable now, the decision is notable in the history of First Amendment jurisprudence for defining the clear and present danger test that governed the analysis of courts during this period. The Court interpreted this standard progressively more narrowly over the decades that followed, finding that a more nuanced evaluation was needed to address the complexities of a certain situation.

Adapted from, "Schenck v. United States." Oyez, www.oyez.org/cases/1900-1940/249us47
Amendment I
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment II
A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

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

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

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

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

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

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

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

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