

Lesson 7

CONGRESS'S TERRITORIAL POWERS, IMPLIED POWERS, CITIZENSHIP, AND THE BUREAUCRACY

Unit 2

Lesson Objectives:

When you complete Lesson 7, you will be able to:

- Explain why the Framers decided to create the seat of national government outside of the state structure, and understand the significance of the Twenty-third Amendment.
- Explain the purpose of the Military Installations Clause.
- Explain the purpose of the Property Clause and the three broad theories of Congress's power under the clause.
- Understand the significance the Claims Clause.
- Understand why the federal government, rather than the state governments, has power over naturalization and citizenship and explain the scope of Congress's power over naturalization and citizenship.
- Explain the purpose of the Necessary and Proper Clause.
- Describe what the administrative state is and how it functions outside of the constitutional structure.

Part 1:

Congress's Territorial Powers: District of Columbia, Military Installations, and Property

Enclave Clause

Article I, Section 8, Clause 17

Electors for the District of Columbia

Amendment XXIII

Military Installations

Article I, Section 8, Clause 17

Property Clause

Article IV, Section 3, Clause 2

Claims

Article IV, Section 3, Clause 2

Enclave Clause – Article I, Section 8, Clause 17

Essay by Lee Casey (pp. 143–145)

The Founders created the District of Columbia outside of the state structure. The Enclave Clause grants Congress legislative powers (including the police power) over the “District” that is the “Seat of the Government of the United States.”

In *The Federalist* No. 43, James Madison argued that a “federal district” was necessary to house the federal government. This “district” would be a distinct territory, not part of any state or subject to the laws of any one state, and would be governed by Congress. While the Framers insisted that a “federal town” was necessary, Anti-Federalists opposed the idea, claiming it would be a nursery for tyranny.

The location of the capital, though, was more contentious than its necessity. Many states wanted the honor of being the site of America’s capital. In 1800, the district was fashioned from portions of Virginia and Maryland. In 1846, though, a portion of the district was retroceded to Virginia. The constitutionality of the action is debatable.

Congress has experimented with different methods of governing the District, including home rule. Because of D.C.’s status as a federal city outside of the state structure, residents of the District do not have a Representative or Senators. Numerous proposals to grant D.C. representation have been introduced in Congress, including proposed constitutional amendments. A 1964 plan to return a large portion of the District to the state of Maryland was deemed unconstitutional.

Today, there is still a call for D.C. to become the 51st state, but granting statehood to the District would oppose the structure of the Constitution. The Founders wisely crafted a federal district for the seat of government. They made the capital independent from, and therefore not subservient to, the authority of any particular state.



Before You Read

Ask: What do you know about Washington, D.C.? (It is the capital of America. It is where the White House, the Congress, and the Supreme Court of the United States are located.) **What are some characteristics of a state?** (Answers will vary. Students may note that state governments retain the bulk of the legislative powers. They have the police power; that is, they can legislate with respect to health, safety, and morals. States have authority to determine who may vote for members of the House of Representatives, and a state population determines the number of members. States have two Senators and are guaranteed equal representation in the Senate.)



Before You Read

Explain to students that in June 1783, several hundred unpaid and angry Continental soldiers marched on Philadelphia in an attempt to intimidate Congress in Independence Hall. Pennsylvania refused to assist Congress, which adjourned after two days. The Members of Congress fled to New Jersey. This incident impressed the Framers with a need for a “federal town.”



Active Reading

Read the second paragraph on page 143 to students (the one beginning with “The incident made a lasting impression”). **Ask:** What does it mean that “the need for a territory in which the general government exercised full sovereignty...was probably inherent in the federal system itself”? (The federal system needed to have a territory where the federal government would not be subservient to any state’s authority. This is a basic requirement for the federal system to work.)

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Electors for the District of Columbia – Amendment XXIII*Essay by Adam Kurland (pp. 426–427)*

Amendment XXIII granted residents of the District of Columbia the electoral votes to participate in the election for the country’s President and Vice President. From 1800 until 1960, when Congress passed the Twenty-third Amendment, residents of the District of Columbia were not constitutionally able to participate in presidential elections. Residents voted for President for the first time in 1964 after the states ratified the Twenty-third Amendment.

The Twenty-third Amendment underscores the Founders’ wisdom in designing the federal city. It gives D.C. a voice in selecting the President and Vice President through the Electoral College but clarifies that D.C. is not a state: D.C. receives the number of electoral votes “equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State.” The District of Columbia’s electoral votes cannot exceed the number granted to the least populous state. Currently, the District of Columbia has a maximum of three electoral votes, regardless of population.

Congress decides the method by which the District selects presidential electors. This is comparable to the power given to state legislatures. Congress chose a winner-take-all system to choose presidential electors, meaning that the candidate who receives the majority of votes in a popular vote receives all of the District’s electors. Every state, except Maine and Nebraska, uses the winner-take-all system to select electors.

**Before You Read**

Ask: How are electoral votes usually allocated? (States are accorded electoral votes according to the number of Representatives plus the number of Senators. More populous states have more electoral votes than less populous states.)

**Work in Pairs**

Pair students up and ask them to read two paragraphs beginning with the one in the middle of page 426 (the one beginning with “Although not constitutionally required...”). Then have students take opposing views on the following statement and justify their opinions. Write on the board: Congress should approve the creation of the State of New Columbia, which would consist of everything but the White House, the federal Mall, and all federal buildings. (Answers will vary. Students who agree with the statement might give the following reasons: The Constitution states that the District can be no larger than 10 square miles, but this does not mean that the Constitution would need to be amended to make the District smaller than 10 square miles. This would give

citizens representation in Congress but not give the District authority over the federal government. Students who disagree with the statement might give the following reasons: This new state would be unlike any other state in the Union because it functions like a city. The federal buildings would all be located in a separate state. It may create constitutional problems; according to the Twenty-third Amendment, the residents of D.C. would have electoral votes, suggesting that the President would be eligible to vote. It could create a negative precedent for other states.)

Military Installations — Article I, Section 8, Clause 17

Essay by Lee Casey (pp. 145–146)

In addition to the permanent seat of government, the Constitution grants Congress exclusive legislative power over certain federal installations, such as military properties. The Military Installations Clause gives Congress the exclusive power to regulate “federal enclaves,” which is separate from the federal government’s “proprietary” interest in a particular building or parcel of land (which is covered under Article IV, Section 3, Clause 2). A federal enclave may be an individual building, a part of a building, or a vast territory. As with the District of Columbia, the purpose of the Military Installations Clause is to maintain the independence of states and the federal government.

Case law dealing with enclave jurisdiction is complex, and individuals who commit crimes within federal enclaves are subject to federal prosecution. The state in which a federal enclave exists has no authority over the enclave unless it specifically requested such rights when it agreed to the purchase.



Before You Read

Have students use a dictionary or the Internet to define “enclave.” (a place enclosed within or as if within a foreign territory) *Ask: What do you think a federal enclave is?* (a place that is federal and subject to federal laws and regulations)



Work In Pairs

Pair up students and have them summarize Joseph Story’s commentary on page 145. (Sample answer: A state should not have control over property purchased with public money for military purposes. Since the security of the Union may depend upon such places, it would not be right to subject them to the rules of only one state.)



Group Work

Break students into small groups and have them use the Internet to compile a list of federal enclaves. (Sample answer: Federal enclaves include such varying installations as the District of Columbia; the National Institutes of Health in Bethesda, Maryland; and Cape Canaveral, Florida, as well as certain national parks, national cemeteries, lighthouses, and locks and dams.)



Active Reading

Ask: How does the Military Installations Clause show that Congress has complete control of the federal military? (Military installations are not governed by the states in which they are geographically located. These installations are subject to federal regulations and, therefore, ultimately to the federal government.)



Discussion Questions

1. Why are military installations and the District of Columbia the exclusive domain of Congress? (The Constitution grants Congress exclusive legislative power over certain federal installations and the District of Columbia in order to maintain the independence of states and the federal government. The military is under the complete control of Congress; to allow a military territory to be subject to the laws of a particular state would undermine Congress's, and therefore the federal government's, control of that body.)
2. What powers does a state have over military installations contained within its borders? (A state has no power over military installation within its borders unless certain powers were specified at the time of the sale.)

Property Clause — Article IV, Section 3, Clause 2

Essay by Thomas W. Merrill (pp. 278–281)

The Property Clause of the Constitution empowers Congress to regulate federal territories and federal land. Currently, the federal government owns or controls about 30 percent of the land in the United States, ranging from national forests and parks to military bases and federal buildings.

There are three broad theories for interpreting the extent of Congress's power under the Property Clause: the proprietary theory, the police power theory, and the protective theory. The proprietary theory maintains that Congress is an ordinary landowner. It may set policy regarding the sale and use of the lands but does not hold any legal sovereignty over these lands. In most cases, states in which the land

is geographically located hold sovereign authority. Under the police-power theory, Congress has the sovereign power over the area, federal laws trump state laws, and Congress may enact any regulations (ranging from criminal law to family law and exemptions from taxation) for persons residing on that land. Between these two extremes is the protective theory. Under this third theory, the federal government would have partial sovereignty but not extensive police powers.

The original understanding of this clause is debatable, but structural and historical evidence gives some clues to the extent of Congress's power. Because the Property Clause is in Article IV (which governs state-to-state relations) rather than Article I, Section 8 with the Enclave Clause, the Property Clause does not grant Congress full police powers over federal territories. However, the Property Clause justifies the Northwest Ordinance, suggesting that Congress has extensive power over territories before they become states. Therefore, both the structure of the Constitution and historical evidence suggest that the Property Clause authorizes Congress to exercise general police power within territories before they become states. Once these territories are admitted as states, Congress could exercise police powers only in accordance with the Enclave Clause. To put it another way, the police-power theory would apply to federal land located in territories, but the protective theory would apply to non-enclave federal land located in states.

Judicial interpretation of the Property Clause has not remained consistent. The Supreme Court affirmed the protective-theory understanding of the clause in *Fort Leavenworth Railroad Co. v. Lowe* (1885). By the end of the 19th century, the protective theory was dominant. Recent decisions, though, embrace the police-power theory for all federal land, regardless of its location within a state.



Before You Read

Ask: Some land in the United States is owned by the federal government. What type of land do you think the federal government owns? (Students may say national parks, wildlife refuges, or military bases.)



Write About It

Have students read the Property Clause on pages 278–281 and create a chart for the proprietary theory, police-power theory, and protective theory. Which one gives more authority to the federal government? Which one would be better for the people living on the land? Have students consider issues of sovereignty, representation, and geography.



Discussion Questions

1. How does the Northwest Ordinance explain the extent of Congress's power under the Property Clause? (Under the Northwest Ordinance, the federal government would establish governance for territories that were not yet states. Once these areas fulfilled the requirements to become a state, Congress would no longer exercise police power over the areas.)
2. How has the judicial interpretation of the Property Clause changed over time? (Judicial interpretations of the Property Clause have changed significantly over time. Early in the 19th century, courts interpreted the Property Clause to grant the federal government sovereignty over territories, but once the territory became a state, Congress could not exercise general sovereignty without a formal cession from the state. Recent decisions embrace the police-power theory for all federal land, regardless of its location within a state.)

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Claims — Article IV, Section 3, Clause 2

Essay by Jeffrey Sikkenga (pp. 281–282)

The Framers were concerned that individual states would use the New States Clause (which will be discussed in Lesson 14) to claim territory for which ownership was disputed, thereby preventing Congress from establishing rules and regulations to enable territories to join the Union.

At the Convention, Daniel Carroll suggested adding a clause stating that nothing in the Constitution would affect the land claims of the United States. James Madison, however, noted that states could not in principle claim land ceded by one nation to another. Nevertheless, the question of who had a rightful claim to lands ceded to the United States during the American Revolution was a divisive one. Therefore, the Constitution should be neutral and protect the claims of both the states and the federal government.

Madison's suggestion passed and proved useful. The Claims Clause defused controversy over Western lands. The country's political branches successfully handled the final decisions regarding the claims to the Western lands.



Active Reading

Ask: The Framers worried that the New States Clause of Article IV might cause a problem. What was this? (The Framers knew that the land claims for many areas in the West had not yet been settled. The New States Clause required the permission of states in order to create new states out of existing ones. Therefore, the Framers worried that states would try to lay claim to

these disputed territories and stop them from being made part of the United States.) **Why did Madison suggest that the clause should mention claims for land made by particular states?** (Madison knew that the issue of whether the Union or individual states had rightful claim to lands was controversial. To avoid creating conflict and to be fair, he thought the Constitutional Convention should mention the states.)



Check Understanding

Have students complete the following assessment to check their understanding of Lesson 7, Part 1. Review any material for questions they have missed.

Fill in the Blank: Write the correct word or words in each blank.

1. Although federal property can be found in every state, the largest concentrations are in the _____. **(West)**
2. It is possible that the Framers intended the Property Clause to be broad enough at least to constitutionalize the provisions of the _____. **(Northwest Ordinance)**
3. The _____ allows residents of the District of Columbia to participate in federal elections. **(Twenty-third Amendment)**
4. The _____ gives Congress the power to regulate areas belonging to the national government such as military properties. **(Military Installations Clause)**

Short answer: Write out your answer to each question.

1. How many electors does the District of Columbia have according to the Twenty-third Amendment? **(The Constitution does not specify a number. It grants the District of Columbia no more electoral votes than the least populous state has. By this wording, the District has three electors currently.)**
2. What does the Enclave Clause allow Congress to establish? **(a federal district)**
3. What happened in June 1783 that reinforced the need for a district subject to Congress's exclusive jurisdiction and separate from the territory and authority of any single state? **(Several hundred unpaid and angry Continental soldiers marched on Philadelphia. When Pennsylvania refused all requests for assistance, Congress had to adjourn, and Members fled to New Jersey.)**

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4. What does the Twenty-third Amendment do? **(It gives the District of Columbia votes in the Electoral College, thereby enabling the District of Columbia to participate in presidential and vice-presidential elections in the same manner in which the states participate in those elections.)**
5. Federal enclave jurisdictions may apply to what? **(individual buildings, parts of buildings, or vast territories)**
6. Describe the “proprietary theory” of the Property Clause. **(This interpretation of the Property Clause maintains that the clause simply allows Congress to act as an ordinary owner of the land.)**
7. Describe the “police-power theory” of the Property Clause. **(This interpretation regards the Property Clause as conferring not only the powers of ownership but also general sovereign authority to regulate private conduct that occurs on federal land or that affects federal land.)**
8. Describe the “protection theory” of the Property Clause. **(This interpretation of the Property Clause maintains that the federal government would have partial sovereignty but not extensive police powers.)**

Part 2: Naturalization and Citizenship

Naturalization

Article I, Section 8, Clause 4

Citizenship

Amendment XIV, Section 1

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Naturalization – Article I, Section 8, Clause 4

Essay by Joseph Bessette (pp. 109–112)

The Naturalization Clause grants Congress the power to establish a uniform rule of naturalization, the process by which immigrants may become American citizens. Under the Articles of Confederation, states established rules for naturalization, and this resulted in a variety of policies. At the Constitutional Convention, granting the new national legislature the authority to create rules for naturalization was widely accepted.

America had a unique understanding of citizenship. America understood political communities to be free associations of individuals. The European understanding of citizenship did not see citizenship as something that could be forfeited or transferred. But, American naturalization law assumed that a free citizen of one country had a right to transfer his citizenship to another country. Because citizenship required allegiance to one nation, the Founders did not recognize dual citizenship.

Congress passed its first uniform rule in March 1790. Though some states continued to naturalize foreigners, Congress clarified in 1795 that it had exclusive power to establish naturalization rules and standards. The Naturalization Act of 1795 contained many of the criteria that people still must meet to become citizens: being a lawful resident for five years, good moral character and attachment to America's principles, taking an oath to the Constitution, renouncing any hereditary titles. The acquisition of the Louisiana Territory and Florida raised the question of collective naturalization, which the Supreme Court upheld in 1828.

America's unique view of citizenship led to some conflict with Great Britain and France about voluntary expatriation. The American understanding of citizenship presumed that one could renounce prior citizenship, but the European understanding held that men born in a country could never end their allegiance to that nation. As late as the 1860s, Great Britain would not allow naturalization of its former subjects. America responded with the Expatriation Act of 1868.

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Federal law and the U.S. Department of State have established the process by which Americans may renounce their citizenship. Until 1958, one's citizenship might be stripped if, for instance, an individual declared allegiance to a foreign state, voted in a foreign election, or deserted during wartime. Since 1958, however, several Supreme Court decisions have limited expatriation so that it seems that no involuntary expatriation is lawful, even voting in a foreign election and deserting during wartime. Another departure from the Founders' understanding of citizenship is the rise in dual citizenship.



Before You Read

Explain to students that a person who has been naturalized was born in another country and has become a U.S. citizen. **Ask:** *What are some ways that individuals may become United States citizens?* (They may be children of United States citizens or may apply for citizenship.)



Make an Inference

Ask: *What were some advantages of moving the power of naturalization from the states to the national government?* (Leaving the states to determine naturalization would result in a wide variety of laws.)



Active Reading

What were the key criteria of the Naturalization Act of 1795? (Sample responses: five years of lawful residence in the United States, a good moral character, the taking of a formal oath to support the Constitution and to renounce any foreign allegiance, and the renunciation of any hereditary titles.)

Citizenship – Amendment XIV, Section 1

Essay by Edward Erler (pp. 384–386)

Section 1 of the Fourteenth Amendment outlines the conditions for U.S. and state citizenship. In the years before the amendment was approved, citizens of a state were automatically considered citizens of the United States. In *Dred Scott v. Sanford* (1857), the Supreme Court ruled that no black person could be a citizen. The Fourteenth Amendment settled the question of citizenship for newly freed slaves: All persons born or naturalized in the United States and “subject to the jurisdiction” thereof are United States citizens. The Fourteenth Amendment makes United States citizenship primary and state citizenship secondary.

Prior to the adoption of the Fourteenth Amendment, Congress passed the Civil Rights Act of 1866 to clarify the status of citizenship for newly freed slaves, but the constitutional authority for the Civil Rights Act was questionable (it relied on the Thirteenth Amendment), and a constitutional amendment would be more difficult to overturn than a piece of legislation.

The Citizenship Clause of the Fourteenth Amendment has two criteria for Citizenship: One must be born or naturalized in the United States and subject to the jurisdiction of the United States. “Subject to the jurisdiction” means more than being subject to the laws of the country; it requires an exclusive allegiance to it. Diplomats, foreign tourists, Indians, and illegal immigrants would not be subject to the complete jurisdiction of the United States, because these individuals would still owe allegiance to another sovereign.

The American understanding of citizenship departs from the British common-law understanding of citizenship. Under common law, one was born a citizen and could never renounce or forfeit that citizenship. According to the Declaration of Independence, individuals become citizens by consent, which includes the right to forfeit one’s citizenship.

The consent requirement is twofold: The individual must consent to join the community as a citizen, and the community must consent to the individual’s joining. The Supreme Court case of *Elk v. Wilkins* (1884) reveals this twofold understanding of consent. In that case, an Indian who renounced his tribal allegiance was not automatically a citizen of the United States. The Court explained that neither Indian tribes, nor a member of a tribe, nor any other foreigner can become citizens of their own will. Beginning in 1870, Congress extended offers to members of Indian tribes to become United States citizens if they chose to do so.

The 1898 case of *United States v. Wong Kim Ark* has confused the understanding of citizenship under the Fourteenth Amendment. The Supreme Court declared that the amendment adopted a common-law understanding of citizenship, suggesting that citizenship was conferred at birth. The Court has not revisited this decision or explicitly held that the Fourteenth Amendment requires birthright citizenship.



Brainstorm

Explain that the Citizenship Clause requires that one be born or naturalized in the United States and subject to the jurisdiction thereof to be a citizen. Write the phrase “What It Means to Be a United States Citizen” in the center of the board. Give students five minutes to write down their ideas. Tell students that their responses can relate to freedoms, responsibilities, civic virtues, or anything else pertaining to the topic that comes to mind. Then ask them to share their answers and write their responses on the board.

(Answers will vary.)

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Active Reading

Erler points out that America's approach to citizenship was different from European understandings of citizenship. What are the core differences, according to the two clauses, between the Founders' understanding of citizenship and that of their European counterparts? (European understandings of citizenship were based on the feudal system: People were born under sovereigns and had an absolute fealty to the reigning sovereign. However, American citizenship was based on the idea of consent contained within the Declaration of Independence. The idea of consent presents a new grounding for citizenship: It does not consist of sovereigns and subjects, but of equal citizens who rule and are ruled in turn. Consent is twofold: The individual must consent to join the community as a citizen, and the community must consent to the individual's joining it. People can choose to renounce and transfer their citizenship, but the trend of Supreme Court decisions indicates that involuntary expatriation is unlawful.)



Discussion Questions

1. **Why were the Founders leery of the idea of dual citizenship?** (America understood political communities to be free associations of individuals. A free citizen of one country had a right to transfer his citizenship to another country. The Founders required naturalized citizens to renounce their allegiance to their prior nation. Citizenship required allegiance to one nation.)
2. **Why did the Founders see consent in citizenship as twofold?** (The individual must consent to join the community as a citizen, and the community must consent to the individual's joining. Individuals have a natural right to emigrate from their homeland, but that does not translate into a right to join the United States without the consent of the American people as expressed through the laws of the United States.)



Check Understanding

Have students complete the following assessment to check their understanding of Lesson 7, Part 2. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. Which of the following was *not* a key criterion of the Naturalization Act of 1795?
 - a. good moral character
 - b. prohibition of discrimination on the basis of race, sex, or marital status**
 - c. legal residence in the United States for five years
 - d. renunciation of hereditary titles

2. The Naturalization Clause transferred the power of naturalization to the
 - a. states.
 - b. courts.
 - c. Founding Fathers.
 - d. **national government.**

3. The Fourteenth Amendment was necessary to overturn what?
 - a. the Presidential Eligibility Clause
 - b. **the *Dred Scott* decision**
 - c. the Civil Rights Act
 - d. the Thirteenth Amendment

*Unit 2***True / False: Indicate whether each statements is true or false.**

1. The American understanding of citizenship is indistinguishable from the European understanding of citizenship. **(False. In contrast to Europe's feudal understanding of citizenship, which held that people automatically become subjects of country in which they were born, Americans understood citizenship to be based on consent, not accident of birth.)**

2. According to the Declaration of Independence, "obstructing the Laws for the Naturalization of Foreigners" was one of the grievances that led the American colonists to break with Britain. **(True)**

3. In 1857, the *Dred Scott v. Sanford* decision held that blacks of African descent could be citizens of the United States. **(False. The decision held that no black of African descent, including a freed black, could be a citizen of the United States.)**

4. "Subject to the Jurisdiction" of the United States meant exclusive "allegiance" to the United States. **(True)**

5. Congress began to extend offers of citizenship to various Indian tribes in 1970. **(False. Congress began to extend offers of citizenship to various Indian tribes in 1870.)**

Short Answer: Write out your answer to each question.

1. What are the key criteria for citizenship under the Naturalization Act of 1795?
 - **Five years of (lawful) residence within the United States**
 - **A "good moral character" attached to the principles of the Constitution**
 - **Taking a formal oath and renouncing previous titles**

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2. What is the principle of *jus soli*? **(Persons born within sovereign territory, other than children of enemy aliens or foreign diplomats, are citizens from birth.)**
3. What is the parliamentary rule of *jus sanguinis*? **(Citizens may pass their citizenship by descent to their children at birth, regardless of place.)**
4. What two requirements were set for United States citizens according to the Fourteenth Amendment?
 - **Born or naturalized in the United States**
 - **Subject to its jurisdiction**

Part 3: The Necessary and Proper Clause

The Necessary and Proper Clause — Article I, Section 8, Clause 18

Essay by David Engdahl (pp. 146–150)

Although often commonly referred to as the “sweeping clause” or the “elastic clause,” the Necessary and Proper Clause is not in fact as expansive as its nicknames suggest. After listing the 17 specific powers delegated to Congress, Article I, Section 8 of the Constitution concludes by specifying that Congress has the power to pass any law that is both necessary and proper to implement the powers already delegated to it. This lawmaking power is limited and defined by the ends for which it is delegated: “for carrying into execution the foregoing powers.”

This clause makes explicit a power already implied in the grants of powers in Section 8 and elsewhere. The Necessary and Proper Clause is thus a means by which Congress can achieve its constitutionally mandated ends. As James Madison wrote in *The Federalist* No. 44 to explain the meaning of the clause, “No axiom is more clearly established in law, or reason, than that wherever the end is required, the means are authorized.”

The Necessary and Proper Clause achieves two distinct purposes: It facilitates government organization and effectuates enumerated powers. The organizational function of the Necessary and Proper Clause was evident when Congress organized the judicial branch, determine the number of Supreme Court justices, and established the executive departments, activities that would have been violations of the separation of powers without the Necessary and Proper Clause.

The more significant purpose of the Necessary and Proper Clause is its effectuating aspect. During the ratification debates, some pointed to the Necessary and Proper Clause as an unchecked power to allow Congress to enact sweeping regulations. The author of the clause, James Wilson, argued that Congress may pass laws about something outside of its enumerated powers only if those laws are necessary and proper to effectuate a federal policy within those enumerated powers. The Necessary and Proper Clause is the means to achieve the ends set by other enumerated powers.

The Supreme Court affirmed the means-to-end nature of the Necessary and Proper Clause in *McCulloch v. Maryland* (1819). Provided that the law is not inconsistent with the letter and spirit of the Constitution and is in the service of another enumerated power, the law is constitutional under the Necessary and Proper Clause.

McCulloch is the classic explanation of the clause, but the Supreme Court has applied and addressed the clause elsewhere in its jurisprudence—for instance, issues

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relating to taxation and property. In the *Legal Tender Cases* (1870), the Court upheld Congress's discretion to choose among the means for a certain end. Even though better means may be chosen (or the Court may disagree), Congress has the discretion to choose. Often, though, the Supreme Court does not articulate a Necessary and Proper jurisprudence. The Court previously appealed to the Necessary and Proper Clause to justify enhanced commerce power, but now it relies on an expansive reading of the Commerce Clause itself to justify regulation. The result of employing the means-to-end logic but not the Necessary and Proper Clause when affirming certain regulations for commerce is a confused jurisprudence.

The Necessary and Proper Clause allows Congress to enact laws that are appropriate for the execution of one of Congress's powers; it does not authorize Congress to enact any law that it thinks is reasonable or confer a general regulatory power. The means-to-end purpose of the clause has served as a model for the enforcement clauses within the Thirteenth, Fourteenth, and Fifteenth Amendments. In recent cases, the Court has held that a law must be "congruent" and "proportional" to the amendment violation Congress aims to redress. These rulings largely adhere to *McCulloch*: To invoke the Necessary and Proper Clause, a law must be "plainly adapted" to an enumerated end.



Before You Read

Ask: What does it mean for something to be necessary and proper? Why is the Necessary and Proper Clause an effectuating power? (It is based on cause and effect. The Necessary and Proper Clause extends only to those things that Congress must do to fulfill its proper functions. In order to have one thing happen, you need something else.) Say: This clause is called the Necessary and Proper Clause. Think of something that is necessary and proper to achieve some end. (Accept all reasonable responses. For example, wearing corrective glasses or contact lenses is necessary and proper for someone who cannot see very well to read.)



Active Reading

To ensure understanding, ask: Every so often, the Congress uses the Necessary and Proper Clause to legislate on a matter that would normally be out of its jurisdiction, such as intrastate trade or regulation. How are these applications of the Necessary and Proper Clause justified? (The applications are justified if they are in the service of one of Congress's enumerated powers. They do not reflect a general regulatory power.)



Active Reading

To ensure students' understanding, point out the restrictions related to the clause. Ask: *When is Congress prohibited from invoking this clause?* (Congress cannot use this clause to impede another branch of the government from performing its constitutional role. Congress may only enact laws that are appropriate and necessary to exercise its powers. It cannot use the Necessary and Proper Clause to enact any law that it thinks to be reasonable.)



Discussion Question

Why is the Necessary and Proper Clause considered a "means to an end"? (Congress may use the clause to effectuate another enumerated power but not to enlarge its power overall.)



Check Understanding

Have students complete the following assessment to check their understanding of Lesson 7, Part 3. Review any material for questions they have missed.

Short Answer: Write out your answer to each question.

- The Framers crafted the Necessary and Proper Clause for what two great purposes?
 - To facilitate organization of the government, such as empowering Congress to organize the judicial branch
 - To help effectuate the other enumerated powers of Congress
- What is one limitation of Congress's powers under the Necessary and Proper Clause? (**Congress may not enact laws that interfere with the ability of other branches of government to perform their constitutional duties. It also may not simply enact any law it considers reasonable. The laws it enacts must be necessary for Congress to carry out its duties.**)

True / False: Indicate whether each statement is true or false.

- The Necessary and Proper Clause gives Congress the power to enact laws that are appropriate and needed to carry out its powers. (**True**)
- The Necessary and Proper Clause is also referred to as the "sweeping clause" and "the elastic clause." (**True**)
- The Necessary and Proper Clause disregards the principle of separation of powers. (**False. It respects and reinforces the principle of separation of powers.**)

Part 4: Congress and the Fourth Branch of Government

Delegation of Legislative Power: Legislative Vesting Clause

Article I, Section 1

What Is the Administrative State? A Note on Administrative Agencies

Delegation of Legislative Power – Article I, Section 1

Essay by Douglas Ginsburg (pp. 46–48)

The Framers crafted the separation of powers carefully. The lawmaking power was vested in the legislative branch. Neither the judicial nor the executive power includes a general lawmaking power, and Congress may not delegate or give away its power.

But, sometimes it is difficult to distinguish laws that confer discretion upon the executive from those that call for the executive to exercise legislative power. The executive has discretion in executing law, but some decisions are fundamentally legislative.

The Supreme Court has addressed the question of delegated legislative powers several times. In 1825, the Court recognized that it is difficult to draw the line between the subjects that must be regulated by the legislature and what is subject to another branch's discretion. In 1928, the Court upheld a statute that delegated to the President the power to raise tariffs, explaining that a legislative action is not a delegation of legislative power if Congress creates an intelligible principle to which the person or body must conform. In 1935, the Court struck down two laws that delegated large amounts of legislative power. *A.L.A. Schechter Poultry Corp. v. United States* (1935) was the last time the Court struck down a law for violating the Legislative Vesting Clause. In 1980, Justice William Rehnquist argued that a law empowering the Secretary of Labor to determine levels of benzene exposure for employees was a delegation of congressional powers.

Despite a few justices' doubts about delegation and the requirement that Congress must have an intelligible principle to guide actors, the Court has maintained a hands-off approach to delegations of power. By failing to police the boundary between proper and improper delegations of power, the Court forgoes the opportunity to maintain the structure of government prescribed by the Constitution. The legislature continues to delegate its power to unaccountable bureaucrats in administrative agencies.



Before You Read

Ask students whether they have heard the term “bureaucrat” or “expert.” What do these persons do? Are they elected? (Students may say that they have heard the term on television or the news. They are people who work in the government but do not hold elected positions. Some may say that they make rules.)



Active Reading



Ask: What does it mean to *delegate power*? (To delegate power means to authorize someone else to exercise a power that they would not otherwise possess).



Discussion Question

Why do you think it is sometimes difficult for the three branches of government to maintain separate powers? (It is impossible and undesirable to divide authority completely. The design of the Constitution intentionally creates overlapping authorities because some powers ought not to be vested in one branch alone.)

Unit 2

What Is the Administrative State? A Note on Administrative Agencies

Essay by Michael Uhlmann (pp. 229–231)

The administrative state consists of a range of administrative agencies, some of which are small entities with narrow duties and others of which are massive bureaucracies with huge budgets and broad discretionary authority. Some administrative agencies are under the direct control of the executive departments, but most are free-standing agencies that create rules and regulations without any oversight or accountability.

There are two types of stand-alone agencies: executive agencies (which are ultimately accountable to the executive) and independent agencies (which are unaccountable to either the President or Congress). Through these agencies, there are few subjects that the federal government does not regulate.

Congressional statutes determine the purpose, status, and powers of each agency. Most administrative agencies, though, exercise legislative, executive, and judicial powers. They make rules and regulations that have the same force of law as congressional statutes, issue fines and penalties for violations, and conduct trial-type procedures.

In theory, the agencies are subject to the political branches. The President appoints agencies' leadership, Congress has oversight and budgetary powers, and the judiciary reviews agencies' actions. But these controls are remote, indirect, and incomplete. Therefore, agencies exercise broad authority without any accountability.

Each of the political branches has attempted to rein in the administrative state, but the executive–congressional competition for control of the agencies points to the question: Who controls the administrative state? In practice, the administrative

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state appears to be under both Congress and the President. Since bureaucrats exercise lawmaking power and make rules and regulations under some grant of authority from Congress, they should answer to Congress. Insofar as these experts are housed in executive agencies, they are under the President's control. Independent agencies are more difficult because they are not under the executive's control but do not formally report to Congress. Indeed, independent agencies emerged because Congress wanted to legislate over more areas of policy, was willing to delegate its legislative authority to agencies, but was reluctant to vest discretionary control over these agencies in the President.

The result was a battle between the executive and the legislature over who controls the administrative state with the judiciary acting as referee. Prior to the 1930s, the Court sustained some delegations of legislative power but balked at open-ended delegations of power. The Administrative Procedure Act of 1946 quelled the Court's procedural concerns about how Congress delegated authority, but the substance of agencies' power remains controversial. At first, the Court would allow agencies great leeway in interpreting statutes and making rules; then it limited agencies' authority before again allowing them great discretion. In some cases, the Court has upheld broad delegations of power from Congress; in others, it has not. In sum, the Court's oscillation between allowing the administrative state great freedom and then reining it in reflects its ambivalence about the administrative state's constitutional status.

As Congress continues to delegate its legislative power and as bureaucrats in administrative agencies make more regulations that govern Americans' way of life, it is unclear whether the American people will tolerate the constitutional nether-zone the administrative state occupies.



Before You Read

Tell students that early 20th century Progressives laid the groundwork for the modern administrative state to become a fourth branch of government. Thinkers such as Woodrow Wilson, Herbert Croly, and John Dewey argued that policymaking should not be placed in the hands of politicians—elected, inexperienced officials who were unfamiliar with the practicalities of modern society. Rather, Congress should delegate its legislative power to enable technically trained experts, removed from day-to-day politics and political control, to make policy.



Make a Real-Life Connection

Have students research an administrative agency, such as the Environmental Protection Agency. Have them look up what regulations the agency issues, what the punishments are for violating those regulations, and the judicial process within those agencies. Have the students share their findings with the class.



Check Understanding

Have students read the Note on Administrative Agencies on pages 229–231 and create a list of how administrative agencies exercise the three powers of government. (Agencies make rules and regulations, which is similar to the lawmaking power. They enforce their regulations and issue fines and penalties for violations, which is similar to the executive power. They then conduct trials and hearings, as an Article III court would.) **Ask: What did the Founders think about one person or group exercising all three powers of government?** (The Founders were careful to divide the powers of government into three separate branches with separate duties, modes of election, and constituencies. They did not want a single person or group of persons to exercise all three powers of government. They also did not establish a system of government with unelected, unaccountable people make laws.)



Discussion Questions

1. **How does the structure of the administrative state create accountability problems?** (Sample answer: In theory, agencies are subject to the political branches. The President appoints agencies' leaders, Congress has oversight and budgetary powers, and the judiciary reviews agencies' actions. But these controls are remote, indirect, and incomplete. Therefore, agencies exercise broad authority without any accountability.)
2. **Why have Presidents tried to assert their authority over hiring and firing practices in administrative agencies?** (Many Presidents have tried unsuccessfully to assert their authority over hiring and firing practices in administrative agencies in order to harness the power of these groups for themselves.)



Check Understanding

Have students complete the following assessment to check their understanding of Lesson 7, Part 4. Review any material for questions they have missed.

Fill in the Blank: Write the correct word or words in each blank.

1. The number and variety of administrative agencies testify to the _____ of the federal government. **(growth)**
2. The nature and reach of administrative agency powers remains _____. **(controversial)**

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Short Answer: Write out your answer to each question.

1. Why did the Framers of the Constitution design a separation of powers? **(so that undue power would not be combined in any department, since that might lead to tyranny)**
2. How does Congress's delegation of its legislative power affect accountability? **(By delegating legislative power to agencies staffed with unelected officials, Congress makes government less accountable.)**
3. Why are "executive agencies" so called? **(They are more accountable to the President than administrative agencies are.)**
4. Why are "independent agencies" so called? **(They are accountable neither to the President nor to Congress.)**

True / False: Indicate whether each statement is true or false.

1. Separation of powers is fundamental to the idea of a limited government accountable to the people. **(True)**
2. Article I of the Constitution grants all legislative powers to Congress. **(False. Article I grants only certain limited legislative powers "herein granted" to Congress.)**
3. Administrative agencies are created by the President. **(False. They are prescribed by acts of Congress.)**
4. Administrative agencies vary enormously in the breadth and detail of their delegated authority. **(True)**
5. The substantive scope of administrative discretion (whether exercised by executive or independent agencies) has been well defined by the courts with little controversy. **(False. This remains a matter of continuing controversy.)**
6. Administrative agencies exercise legislative, executive, and judicial powers. **(True)**
7. Free-standing administrative agencies are either executive agencies or "independent" agencies. **(true)**