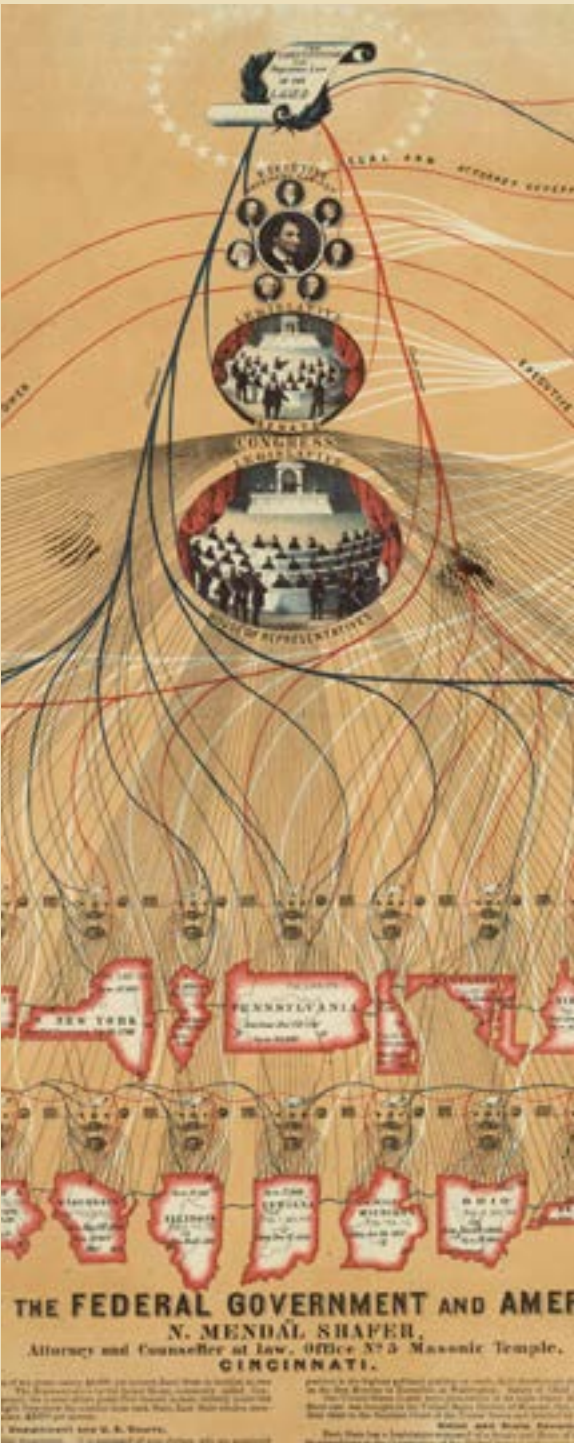


THE HISTORY OF FEDERAL, STATE, AND TRIBAL POWERS, 1787-2020



Ehrgott, Forbriger & Co., *Diagram of the Federal Government and American Union* by N. Mendal Shafer, Cincinnati, Ohio, ca. 1862. (Library of Congress)

THE HISTORY OF FEDERAL, STATE, AND TRIBAL POWERS, 1787–2020

by Rhonda Kemp Webb (created 2022, revised 2023)

Rhonda Kemp Webb, PhD, was a high school social studies teacher in Georgia for more than twenty-five years.

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Time for Completion

- Five 45-minute periods for Lessons 1–4 (Historical Foundations)
- Two 45-minute periods for Lesson 5 (Current Events)
- At least one 45-minute period to set up Lesson 6 (Civic Engagement Project):
Based on the scope of the project(s) you decide to assign, you may choose to add additional in-class and out-of-class time.

Grade Levels: 9–12

Unit Overview

This unit is one of the Gilder Lehrman Institute’s Teaching Civics through History™ (TCTH) resources, designed to align with the Common Core State Standards. These units were developed to provide students with foundational knowledge of the historical roots of current civic and social issues facing their communities and the nation while building their literacy, research, and critical thinking skills.

Through incorporating and linking history and civics, this unit will

- 1) enable students to understand the historical foundations of current political, economic, social, and cultural issues
- 2) encourage students to use their historical literacy, document analysis, and critical thinking skills to connect past and present
- 3) empower students to develop their civic voices

This unit focuses on the concept of federalism and how it has been

interpreted by the US Supreme Court. Federalism is a unique division of power established in the US Constitution. In this system both the state governments and the national, or federal, government have specific powers, and some powers are shared by both levels of government. Tribal sovereignty is further woven into the balance of powers.

Over one to two weeks with this unit, students will learn and practice historical literacy skills that will help them learn how federalism establishes the foundation for the interaction between national, or federal, state, and tribal governments in the United States. They will develop knowledgeable and well-reasoned points of view on federalism and how it has evolved. They will read and assess primary and secondary sources written from different perspectives, analyze Supreme Court opinions, and develop a civic engagement project that integrates their knowledge of history with current issues rooted in debate over federal, state, and tribal governance.

Students will demonstrate their comprehension through their oral and written assessment of the primary sources

and responses to the essential questions, and how they choose, plan, and implement the civic engagement project.

Students will be able to

- Define legal terminology
- Identify pivotal historical events and decision-makers
- Analyze primary source documents using close-reading strategies
- Understand scholarly essays that put the content of the unit into historical context
- Draw logical inferences and summarize the argument of a source
- Compare and contrast the arguments made by different writers
- Develop a viewpoint, present it, and write a response based on textual evidence
- Use their knowledge of American history to understand and develop a viewpoint on current events
- Develop, execute, and evaluate a civic engagement project

Essential Questions

- How did the US Constitution define the responsibilities of the federal government and state governments?
- How have American politicians and judges explained the benefits of federalism?
- Why have the responsibilities of the federal government and state governments changed?
- How have American politicians and judges defined the relationship between state, federal, and tribal authorities?
- Which policy issues have exposed tensions between the federal government and tribal governments?

Common Core State Standards

CCSS.ELA-Literacy.RH.11-12.1: Cite specific textual evidence to support analysis of primary and secondary sources, connecting insights gained from specific details to an understanding of the text as a whole.

CCSS.ELA-Literacy.RH.11-12.2: Determine the central ideas or information of a primary or secondary source; provide an accurate summary that makes clear the relationships among the key details and ideas.

CCSS.ELA-Literacy.RH.11-12.7: Integrate and evaluate multiple sources of information presented in diverse formats and media (e.g., visually, quantitatively, as well as in words) in order to address a question or solve a problem.

CCSS.ELA-Literacy.RH.9-10.4: Determine the meaning of words and phrases as they are used in a text, including

vocabulary describing political, social, or economic aspects of history/social science.

CCSS.ELA-Literacy.SL.9-10.1.C: Propel conversations by posing and responding to questions that relate the current discussion to broader themes or larger ideas; actively incorporate others into the discussion; and clarify, verify, or challenge ideas & conclusions.

CCSS.ELA-Literacy.SL.11-12.1.B: Work with peers to promote civil, democratic discussions and decision-making, set clear goals and deadlines, and establish individual roles as needed.

CCSS.ELA-Literacy.SL.9-10.1.D: Respond thoughtfully to diverse perspectives, summarize points of agreement and disagreement, and, when warranted, qualify or justify their

own views and understanding and make new connections in light of the evidence and reasoning presented.

CCSS.ELA-Literacy.W.11-12.8: Gather relevant information from multiple authoritative print and digital sources, using advanced searches effectively; assess the strengths and limitations of each source in terms of the task, purpose, and audience; integrate information into the

text selectively to maintain the flow of ideas, avoiding plagiarism and overreliance on any one source and following a standard format for citation.

CCSS.ELA-Literacy.W.11-12.9: Draw evidence from literary or informational texts to support analysis, reflection, and research.

Materials

- Activity Sheet 1: “Federalism’s Foundational Documents: Important Phrases” with excerpts from the US Constitution (1787) and James Madison, “Federalist No. 45, The Alleged Danger from the Powers of the Union to the State Governments Considered” (1788)
- Source 1: Historical Background 1: “Federalism: The System of Government Established by the US Constitution” by Gautham Rao, Associate Professor of History, American University
- Activity Sheet 2: Analyzing an Essay
- Activity Sheet 3: *McCulloch v. Maryland* (1819) Case Study, with excerpts from Chief Justice John Marshall’s Majority Opinion, *McCulloch v. Maryland* (1819), *Milestone Documents*, National Archives, [archives.gov/milestone-documents](https://www.archives.gov/milestone-documents)
- Activity Sheet 4: Twentieth- and Twenty-First-Century Case Studies, with excerpts from *New York v. United States* (1992), *Printz v. United States* (1997), *Murphy v. NCAA* (2018)
- Source 2: Historical Background 2: “Tribal Sovereignty and the US Supreme Court” by James Riding In (Pawnee), Associate Professor Emeritus of American Indian Studies, Arizona State University
- Activity Sheet 5: Analyzing an Essay
- Source 3: Federalism and American Indian Tribal Rights Case Studies, with excerpts from *Cherokee Nation v. Georgia* (1831), *Worcester v. Georgia* (1832), *Ex Parte Crow Dog* (1883), the Major Crimes Act of 1885, and *McGirt v. Oklahoma* (2020)
- Activity Sheet 6: Critical Analysis
- Articles from AllSides.com accessed through the Federal, State, and Tribal Governance TCTH website at gilderlehrman.org/tcth
- Activity Sheet 7: Analyzing a News Article
- Source 4: Civil Discourse Guidelines
- Activity Sheet 8: Civic Engagement Project Proposal

HISTORICAL BACKGROUND 1

Federalism: The System of Government Established by the US Constitution

by Gautham Rao, Associate Professor of History, American University

In the complex system of government created by the US Constitution, the individual state governments and the federal government bear responsibility for specific matters. The basic idea of this system of different layers of government handling different responsibilities is known as “federalism.”¹ Since the creation of the United States, questions related to federalism, and specifically the boundaries between state and federal responsibilities, have been key concerns for lawmakers and judges.

In the national constitution that was ratified in 1788, the founders of the United States tried to enumerate the specific areas that the federal government would govern. The first federal government established under the Articles of Confederation had lacked key powers to tax and to superintend an army, so the founders prioritized developing these powers for the new federal government. Their models were European nation-states and empires.² Article I, Section 8 of the US Constitution therefore established the new federal government’s powers to collect taxes, borrow money, regulate commerce with foreign nations and “Indian tribes,” and govern military forces. The so-called “elastic” or “sweeping” clause gave Congress the power to “make all Laws” for “carrying into Execution” laws pertaining to these powers. Elsewhere in the Constitution in Article VI, the founders gave the federal government’s laws “supremacy” over state laws and state constitutions. Meanwhile, Indian tribes had been promised a degree of tribal sovereignty and would continue to govern their own affairs, although White settler-colonists’ continued encroachment on their lands created serious conflicts.

The individual state governments also enjoyed great lawmaking authority. They derived their authority from the Tenth Amendment in the Bill of Rights, which states that “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.” This became the foundation of the “police powers” doctrine, which allows the states to regulate virtually all matters connected to health, safety, commerce, transportation, and connected

matters. Legal scholars tend to cite the case *Commonwealth v. Alger* (1851) as the best example of state police powers, where the Massachusetts high court upheld the state’s power to regulate the infrastructure in Boston harbor, even if it cut against private entrepreneurs’ profits.³

Although the Constitution aimed to clearly distinguish between federal and state responsibilities, the two entities have sometimes encroached on each other’s domains. In these instances, the US Supreme Court has tried to clarify the division of responsibilities. A notable example from the nineteenth century is *Gibbons v. Ogden*, in which the Court held that only the federal government had the authority to regulate commerce between states.⁴ For much of the twentieth century, the Court expanded the federal government’s regulatory authority. However, more recently, the Court’s direction has been considerably less clear as it has sought to limit expansive federal governance over matters like health care and the environment while moving to protect states’ “dignity” from encroachment by the federal government.⁵

¹ See Alison L. LaCroix, *The Ideological Origins of American Federalism* (Cambridge: Harvard University Press, 2011).

² See Max S. Edling, *A Revolution in Favor of Government: Origins of the US Constitution and Making of the American State* (New York: Oxford University Press, 2003).

³ *Commonwealth v. Alger*, 61 Mass. 53 (1851). See William J. Novak, *The People’s Welfare: Law and Governance in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

⁴ *Gibbons v. Ogden*, 22 U.S. 1 (1824).

⁵ See Heather Gerken, “Federalism 3.0,” *California Law Review* 105 (2017), 1695–1723; Leah Litman, “Dignity and Civility, Reconsidered,” *Hastings Law Journal* 70 (2019), 1225–1241.

Gautham Rao, an associate professor of history at American University, is a legal historian of Revolutionary America and the early American republic. He is the author of *National Duties: Custom Houses and the Making of the American State* (2016) and the editor of *Law and History Review*.

HISTORICAL BACKGROUND 2

Tribal Sovereignty and the US Supreme Court

James Riding In (Pawnee), Associate Professor Emeritus of American Indian Studies, Arizona State University

The US Constitution established not only national and state levels of government within the framework of federalism; it also recognized the sovereignty of American Indian and Alaska Native Nations (AIANNs) as a third level of government in certain limited spheres. In Article I, Section 8, Congress was given the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

As the result of numerous legal decisions made over the past two centuries, the Supreme Court of the United States (SCOTUS) has defined the federal government’s relationship with the states and AIANNs based on dramatically different rationales and with dramatically different outcomes. These cases involved disputes over such issues as land ownership, states’ rights, state jurisdiction on AIANN lands, Indian gaming, fishing rights, civil rights violations, slavery, and jurisdiction.

Before the Civil War, SCOTUS expanded the scope of federal power and supremacy over state and AIANN governments for different reasons. In *Martin v. Hunter’s Lessee* (1816), *McCulloch v. Maryland* (1819), and *Ableman v. Booth* (1859), SCOTUS held that states could not violate a US treaty, tax a national bank, nor issue writs of habeas corpus in federal matters.

The Constitution recognizes AIANNs as independent, pre-constitutional entities. Yet SCOTUS supported the US drive to acquire AIANN lands for non-Indian use. *Johnson v. M’Intosh* (1823) held that Indians, with the European “discovery” of the Americas, only had occupancy rights to their lands. *Cherokee Nation v. Georgia* (1831) declared that the Cherokee Nation fell under US domination because they were “domestic dependent nations” in a “ward to its guardian relationship.” *Worcester v. Georgia* (1832), however, protected Indian lands and sovereignty from state laws. These cases established the foundation of federal policy regarding AIANNs.

After the Civil War, federal AIANN policy became increasingly coercive. In *Ex parte Crow Dog* (1883), SCOTUS dismissed the federal conviction of a Sioux for murdering another Sioux on Indian land because the perpetrator had not violated a US treaty or law. Enacting the Major Crimes Act of 1885, Congress imposed federal jurisdiction and punishments over Indian-on-Indian felonies occurring on Indian land. In 1886, SCOTUS deferred to Congress by upholding the law on the dubious assertion that Congress always had *absolute* authority over Indigenous land. After that, federal policy criminalized AIANN cultural practices, shipped thousands of children to distant boarding schools for assimilation, and took more Indian land for non-Indian ownership. In the 1930s, however, federal Indian policy returned to treating AIANNs as domestic dependent nations rather than subjugated wards. SCOTUS decisions upheld Indian fishing, hunting, and water rights reserved by treaties while allowing states to undermine Indian sovereignty by extending some laws over AIANN lands.

In 1978, by a narrow vote, SCOTUS ruled that AIANNs lacked criminal jurisdiction over non-Indians who committed crimes on AIANN reservations. In *McGirt v. Oklahoma* (2017), however, it found that the state lacked criminal jurisdiction over an Indian who had committed a felony within the boundaries of the former Muscogee Creek reservation. But in 2022, the Court overturned parts of this case. The question of tribal sovereignty is, thus, far from settled.

James Riding In is a citizen of the Pawnee Nation and a co-founder of the American Indian Studies program at Arizona State University. Since retiring from ASU in May 2021, he has been developing an online Pawnee cultural heritage portal and research library for the Pawnee Nation.

LESSON 1: FEDERALISM IN THE FOUNDING ERA

by Rhonda Kemp Webb (created 2022, revised 2023)

Overview

This lesson explores how the US Constitution and Federalist No. 45 depict the division of power between the federal government and state governments. You may evaluate students' understanding through the activity sheet.

Students will be able to

- Define legal terminology (e.g., federalism, elastic clause)
- Identify pivotal historical events and decision-makers (e.g., the Constitution, Alexander Hamilton)
- Analyze primary sources using close-reading strategies
- Draw logical inferences and summarize a source's argument
- Understand a scholarly essay that puts the content of the lesson into historical context

Essential Questions

- How did the US Constitution define the responsibilities of the federal government and state governments?
- How have American politicians and judges explained the benefits of federalism?
- Why have the responsibilities of the federal government and state governments changed?

Materials

- Activity Sheet 1: Important Phrase Analysis: Federalism's Foundational Documents, with excerpts from the US Constitution (1787) and James Madison, "Federalist No. 45: The Alleged Danger from the Powers of the Union to the State Governments Considered" (1788)
 - US Constitution, *America's Founding Documents*, National Archives, [archives.gov/founding-docs/constitution](https://www.archives.gov/founding-docs/constitution).
 - James Madison, Federalist No. 45, *Federalist Papers: Primary Documents in American History*, Library of Congress, [guides.loc.gov/federalist-papers/text-41-50#s-lg-box-wrapper-25493409](https://www.loc.gov/federalist-papers/text-41-50#s-lg-box-wrapper-25493409).
- Source 1: Historical Background 1: "Federalism: The System of Government Established by the US Constitution" by Gautham Rao, Associate Professor of History, American University
- Activity Sheet 2: Analyzing an Essay

Rhonda Kemp Webb, PhD, was a high school social studies teacher in Georgia for more than twenty-five years.

Time for Completion: One 45-minute period

Grade Levels: 9–12

Unit Overview: This unit is one of the Gilder Lehrman Institute's Teaching Civics through History™ (TCTH) resources, designed to align with the Common Core State Standards. These units were developed to provide students with foundational knowledge of the historical roots of current civic and social issues facing their communities and the nation while building their literacy, research, and critical thinking skills. This unit focuses on the concept of federalism and how it has been interpreted by the US Supreme Court.

Procedure

1. Distribute Activity Sheet 1. Students will read the excerpts from the US Constitution and Federalist No. 45 and complete the activity sheet.
2. You may choose to have the class "share read" the excerpts. To share read, have the students follow along silently while you begin to read aloud, modeling prosody, inflection, and punctuation. Ask the class to join in with the reading after a few sentences while you continue to read aloud, still serving as the model. This technique will support struggling readers as well as English language learners (ELL).
3. Conduct a class review of the topics to ensure all students have a working knowledge of how and why the structure of the government was intended to divide power between the federal, state, and tribal levels.
4. Distribute Gautham Rao's essay, "Federalism: The System of Government Established by the US Constitution," and the accompanying activity sheet.
 - a. You may have the class share read the essay.
 - b. Discuss the historical background with the class to ensure they comprehend the term federalism and its origins and evolution, particularly the role of the US Supreme Court in determining its parameters. You may use the students' selections of important phrases/sentences as a starting point.
 - c. If you did not ask the students to read the Historical Background essay, you may discuss the content with them before they begin their work on *McCulloch v. Maryland* in the next lesson.

LESSON 2: *McCULLOCH V. MARYLAND*, 1819

by Rhonda Kemp Webb (created 2022, revised 2023)

Overview

In this lesson, students will investigate John Marshall’s majority opinion in *McCulloch v. Maryland* (1819) and the interpretation of federalism he supported. The lesson concludes with an activity sheet in which students summarize key passages from the decision.

Students will be able to

- Define legal terminology (e.g., federalism, elastic clause)
- Identify pivotal historical events and decision-makers (e.g., *McCulloch v. Maryland*, John Marshall)
- Analyze primary source documents using close-reading strategies
- Draw logical inferences and summarize the argument of a source

Essential Questions

- How have American politicians and judges explained the benefits of federalism?
- Why have the responsibilities of the federal government and state governments changed?

Procedure

1. If you did not ask the students to read the Historical Background essay, you may discuss the content with them before they begin their work on *McCulloch v. Maryland*.
2. Remind students of the essential components of the US Constitution related to *McCulloch v. Maryland*:
 - a. Article I, Section 8 – Enumerated Powers
 - b. Article I, Section 8, Clause 18 – Elastic Clause/ “Necessary and Proper” Clause
 - c. Article VI – Supremacy Clause
 - d. Tenth Amendment
3. Case Study Activity
 - a. Distribute the *McCulloch v. Maryland* case study activity sheet.
 - b. As a class, share read (as described in Lesson 1) and discuss the “Case Background.”

You may need to define “banknotes” for students: Banknotes are paper bills issued by a

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Time for Completion: One 45-minute period

Grade Levels: 9–12

Unit Overview: This unit is one of the Gilder Lehrman Institute’s Teaching Civics through History™ (TCTH) resources, designed to align with the Common Core State Standards. These units were developed to provide students with foundational knowledge of the historical roots of current civic and social issues facing their communities and the nation while building their literacy, research, and critical thinking skills. This unit focuses on the concept of federalism and how it has been interpreted by the US Supreme Court.

Materials

- Activity Sheet 3: *McCulloch v. Maryland* (1819) Case Study, with excerpts from Chief Justice John Marshall’s Majority Opinion, *McCulloch v. Maryland* (1819), *Milestone Documents*, National Archives, [archives.gov/milestone-documents](https://www.archives.gov/milestone-documents).

banking institution that can be redeemed at some future time for some form of legal tender—sometimes gold or silver coins. Historically, banknotes sometimes served as a type of currency accepted as payment.

- c. Discuss the case background as a class. Are there additional events, laws, or rulings the class thinks should also be considered?
- d. Students should then carefully read the excerpts from the *McCulloch v. Maryland* Majority Opinion. You may choose to share read the excerpts with the students first, depending on their familiarity with original texts from this period.
- e. The students will identify the main arguments Chief Justice John Marshall presented, completing an activity sheet. Marshall’s opinion is divided into two parts. Have students conduct the analysis separately for each part of the opinion.
 - i. The first objective is to select three important or powerful phrases or sentences from the text and

- explain why each phrase or sentence is important or powerful as it relates to the Supreme Court's overall judgment in the case.
- ii. Have students use their understanding of the three phrases they selected to explain in their own words what the Court ordered and how the distribution of power between the federal and state governments was interpreted in this case.
 - iii. Repeat the same process for the second part of the *McCulloch v. Maryland* opinion.
 - iv. Guide the students in creating a summary sentence based on their previous answers that explains the opinion as a whole.
 - f. After students have identified the main arguments, engage the class in a brief discussion of Chief Justice Marshall's interpretation of the Constitution and how this case relates to federalism. Be sure to examine the balance of power between the federal and state levels of government. In this case, the Supreme Court emphasized federal supremacy over states when policies conflict.

LESSON 3: THE SUPREME COURT AND STATES' AUTHORITY, 1992–2018

by Rhonda Kemp Webb (created 2022, revised 2023)

Overview

The cases in this lesson exemplify Supreme Court rulings that favored protecting state sovereignty from federal power. Teachers will assess student learning as demonstrated through an activity sheet.

Students will be able to

- Define legal terminology (e.g., enumerated powers, sovereignty)
- Identify pivotal historical events and decision-makers (e.g., Sandra Day O'Connor)
- Analyze primary source documents using close-reading strategies
- Draw logical inferences and summarize the argument of a source

Essential Questions

- How have American politicians and judges explained the benefits of federalism?
- Why have the responsibilities of the federal government and state governments changed?

Materials

- Activity Sheet 4: Twentieth- and Twenty-First-Century Case Studies, with excerpts from *New York v. United States* (1992), *Printz v. United States* (1997), and *Murphy v. NCAA* (2018)
 - Excerpts from *New York v. United States, U.S. Reports*: 505 U.S. 144 (1992). Available from the Library of Congress, [loc.gov/item/usrep505144](https://www.loc.gov/item/usrep505144).
 - Excerpts from *Printz v. United States, U.S. Reports*: 521 U.S. 898 (1997). Available from the Library of Congress, [loc.gov/item/usrep521898](https://www.loc.gov/item/usrep521898).
 - Excerpts from *Murphy v. NCAA, U.S. Supreme Court Reports*: 138 S. Ct. 1461 (2018), US Supreme Court, [supremecourt.gov/opinions/17pdf/16-476_dbfi.pdf](https://www.supremecourt.gov/opinions/17pdf/16-476_dbfi.pdf).

Procedure

1. Remind students of the essential components of the US Constitution related to *McCulloch v. Maryland*:
 - a. Article I, Section 8 – Enumerated Powers

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Time for Completion: One 45-minute period

Grade Levels: 9–12

Unit Overview: This unit is one of the Gilder Lehrman Institute's Teaching Civics through History™ (TCTH) resources, designed to align with the Common Core State Standards. These units were developed to provide students with foundational knowledge of the historical roots of current civic and social issues facing their communities and the nation while building their literacy, research, and critical thinking skills. This unit focuses on the concept of federalism and how it has been interpreted by the US Supreme Court.

- b. Article I, Section 8, Clause 18 – Elastic Clause/ “Necessary and Proper” Clause
 - c. Article VI – Supremacy Clause
 - d. Tenth Amendment
2. Case Study Activity
 - a. Distribute the Twentieth- and Twenty-First-Century Case Studies activity sheet to each student.
 - b. Students should complete the keyword activity for each excerpt. Complete the first case study together as a class.
 - i. Describe the process for the class: The first objective is to select keywords from the excerpt from each opinion and use those words to create a summary sentence that clarifies the ruling.
 - ii. Guidelines for selecting the keywords: Keywords are important contributors to the meaning of the text. They are usually nouns or verbs. Advise students not to pick “connector” words (*are, is, the, and, so*, etc.). The number of keywords depends on the length of the paragraph. These excerpts are approximately 120 words in length; therefore, students should select 8–10 keywords from each excerpt. Since the students must know the meaning of the words they choose, you will have opportunities to teach students how to use context clues, word analysis, and dictionary skills to discover word meanings.
 - iii. Students will now select 8–10 words from Justice Sandra Day O'Connor's majority opinion in

- New York v. United States* (1992) that they believe are keywords and underline them on the activity sheet.
- iv. Survey the class to find out what the most popular choices were. You can write them down and have the class discuss the options and vote on the final choice, based on guidance from you. For example, the class could select the following words: *constitutionality*, *Low-Level Radioactive Waste Policy* (this phrase can count as one keyword since it is one particular law), *authority*, *Federal*, *States*, *Congress*, *power*, *disposal*, and *consistent*. Now, no matter which words the students previously selected, have them write the words agreed upon by the class or chosen by you onto the activity sheet.
 - c. Explain to the class that they will use these keywords to write a sentence that summarizes the meaning of the Supreme Court’s ruling in *New York v. United States*. This summary sentence should be developed through discussion and negotiation. The summary might be, for example, “The constitutionality of the Low-Level Radioactive Waste Policy determines which authority—Federal or State—has power over the disposal of waste and it was decided that not all provisions made by Congress in this law are consistent with the Constitution.” The students might decide they don’t need some of the words to make the sentence even more streamlined. This is part of the negotiation process. The students will copy the final negotiated sentence onto the activity sheet.
 - d. Guide the students in restating the summary sentence in their own words, not having to use the keywords from the text. For example, “Congress does not have full power to require states to dispose of radioactive waste.” Again, this is a class negotiation process.
 - e. Once you have demonstrated the process for using keywords to understand and summarize the *New York v. United States* opinion, have students complete the remaining case studies on their own, using the same process.
 - f. You may choose to have the students provide written or oral responses to the Questions to Consider. In either case, they must use evidence from the documents to support their responses.

LESSON 4: FEDERALISM AND AMERICAN INDIAN TRIBAL RIGHTS, 1787–2020

by Rhonda Kemp Webb (created 2022, revised 2023)

Overview

In this lesson, students will examine American Indian tribal sovereignty rights. They will read a historical background essay and excerpts from four Supreme Court majority opinions spanning almost 200 years and the Major Crimes Act. The lesson's Critical Analysis activity sheet guides students in their interpretation of each document, with a focus on textual evidence.

Students will be able to

- Define legal terminology (e.g., federalism, sovereignty, tribal rights)
- Identify pivotal historical events and decision-makers (Chief Justice John Marshall, *Worcester v. Georgia*)
- Understand a scholarly essay that puts the content of the lesson into historical context
- Analyze primary source documents using close-reading strategies
- Draw logical inferences and summarize the argument of a source

Essential Questions

- How have American politicians and judges defined the relationship between state, federal, and tribal authorities?
- Which policy issues have exposed tensions between the federal government and tribal governments?

Materials

- Source 2: Historical Background 2: “Tribal Sovereignty and the US Supreme Court” by James Riding In (Pawnee), Associate Professor Emeritus of American Indian Studies, Arizona State University
- Activity Sheet 5: Analyzing an Essay
- Source 3: Federalism and American Indian Tribal Rights Case Studies, with excerpts from *Cherokee Nation v. Georgia* (1831), *Worcester v. Georgia* (1832), *Ex Parte Crow Dog* (1883), the Major Crimes Act of 1885, and *McGirt v. Oklahoma* (2020)
 - Excerpts from *Cherokee Nation v. Georgia* (1831), *U.S. Reports*: 30 U.S. 5 Pet. 1 (1831). Available from the Library of Congress, [loc.gov/item/usrep030001](https://www.loc.gov/item/usrep030001).

Rhonda Kemp Webb, PhD, was a high school social studies teacher in Georgia for more than twenty-five years.

Time for Completion: Two 45-minute periods

Grade Levels: 9–12

Unit Overview: This unit is one of the Gilder Lehrman Institute's Teaching Civics through History™ (TCTH) resources, designed to align with the Common Core State Standards. These units were developed to provide students with foundational knowledge of the historical roots of current civic and social issues facing their communities and the nation while building their literacy, research, and critical thinking skills. This unit focuses on the concept of federalism and how it has been interpreted by the US Supreme Court.

- Excerpts from *Worcester v. Georgia* (1832), *U.S. Reports*: 31 U.S. 6 Pet. 515 (1832). Available from the Library of Congress, [loc.gov/item/usrep031515](https://www.loc.gov/item/usrep031515).
- Excerpts from *Ex Parte Crow Dog* (1883), *U.S. Reports*: 109 U.S. 556 (1883). Available from the Library of Congress, [loc.gov/item/usrep109556](https://www.loc.gov/item/usrep109556).
- Excerpt from the Major Crimes Act: Offenses Committed within Indian Country, U.S. Code 18 § 1153 (2020).
- Excerpts from *McGirt v. Oklahoma* (2020), Syllabus *McGirt v. Oklahoma Certiorari to the Court of Criminal Appeals of Oklahoma No. 18-9526*, [supremecourt.gov/opinions/slipopinion/19](https://www.supremecourt.gov/opinions/slipopinion/19).
- Activity Sheet 6: Critical Analysis

Procedure

1. Lesson Introduction
 - a. Distribute James Riding In's essay, “Tribal Sovereignty and the US Supreme Court,” and Activity Sheet 5.
 - i. You may assign the reading and/or the activity sheet as homework before starting the lesson or have the students read the essay and complete the activity sheet in class.
 - ii. You may choose to have the class share read the essay as described in Lesson 1.

- iii. Discuss the historical background with the class to ensure they comprehend tribal sovereignty and the conflicts that can arise between federal, state, and tribal governments.
 - b. If you did not ask the students to read the Historical Background essay, you may discuss the context with them before they begin work on the documents, including the background of American Indian relations with the US government. Consider the early conflicts following the Revolutionary War and the numerous nineteenth-century land treaties. Emphasize the conflicts related to land boundaries and sovereignty that have erupted over time between the state and federal governments and American Indians. Some points to review might include any of the following events and policies:
 - Battle of Fallen Timbers in the Northwest Territory (1794)
 - Louisiana Purchase and the Lewis and Clark Expedition (1803–1806)
 - Andrew Jackson and the Battle of Horseshoe Bend (1814)
 - Indian Removal Act (1830)
 - Treaty of New Echota (1835)
 - Trail of Tears (1838)
 - Indian Appropriations Act/Reservation System (1851)
 - Treaty of Fort Laramie (1868)
 - Dawes Severalty Act (1887)
 - Indian Citizenship Act (1924)
 - American Indian Movement (1968)
2. American Indian Tribal Rights and Federalism Activity
 - a. Students will carefully read the excerpts from the court decisions and the Major Crimes Act.
 - b. They will complete the Critical Analysis activity sheet. Questions require students to cite textual evidence from each document.
 - c. Point out to students that the “Final Task” on the activity sheet requires them to write a paragraph, citing evidence from the documents, to summarize how sovereignty over tribal lands has changed over time.
 - d. Students may complete this work at home or during class time.

LESSON 5: FEDERALISM IN THE NEWS

by Rhonda Kemp Webb (created 2022, revised 2023)

Overview

In this lesson, students will read and assess current news articles on issues related to federalism facing American society today, building on the historical knowledge, document analysis, and critical thinking skills they gained in the previous lessons. They will learn how to use the AllSides.com link on the Gilder Lehrman Institute's Teaching Civics through History webpage. AllSides.com is a website that identifies articles written from right, center, and left viewpoints. The students will engage in group discussions that emphasize civil discourse and distinguishing facts from opinions.

Students will be able to

- Draw logical inferences and summarize the argument of a source
- Compare and contrast the arguments made by different writers
- Use their knowledge of American history to assess information about current events

Essential Questions

- How have American politicians and judges defined the relationship between state, federal, and tribal authorities?

Materials

- Articles from AllSides.com on the TCTH website, gilderlehrman.org/tcth. Go to the Federal, State, and Tribal Governance link at the bottom of the page.
- Activity Sheet 7: Analyzing a News Article
- Source 4: Civil Discourse Guidelines. The guidelines provided here are adapted from "Managing Difficult Classroom Discussions," Center for Innovative Teaching and Learning, Indiana University Bloomington, citl.indiana.edu/teaching-resources.

Procedure

1. Introduce the scope and purpose of the lesson. A demonstration of the AllSides material will allow students to comfortably begin to research materials that reflect right, center, and left perspectives on the political spectrum.

Rhonda Kemp Webb, PhD, was a high school social studies teacher in Georgia for more than twenty-five years.

Time for Completion: Two 45-minute periods

Grade Levels: 9–12

Unit Overview: This unit is one of the Gilder Lehrman Institute's Teaching Civics through History™ (TCTH) resources, designed to align with the Common Core State Standards. These units were developed to provide students with foundational knowledge of the historical roots of current civic and social issues facing their communities and the nation while building their literacy, research, and critical thinking skills. This unit focuses on the concept of federalism and how it has been interpreted by the US Supreme Court.

2. To help maintain civil discourse throughout the discussion, you may ask the students to develop guidelines to follow as they discuss potentially divisive issues that affect them and their families or communities. We have provided examples of such Civil Discourse Guidelines in the handouts. Student input is important and helping them create the rules for civil discourse themselves will give them greater commitment to follow those rules.
3. The articles on AllSides.com will be different from day to day, so you may want to assign specific articles or topics for the students to work on. You may assign three articles from AllSides.com representing different points on the political spectrum (right, center, left) or allow students to select their own three articles.
4. Students will then explore (either in groups or individually) some of the articles on topics that relate to federalism, such as immigration, education, health care, tribal land and water rights, or the environment, etc.
5. Students will read the three articles and complete the "Analyzing a News Article" activity sheet for each. If they are working in groups, circulate to ensure they are maintaining civil discourse.
6. Facilitate a class discussion among the students about their responses to the questions in the activity sheet.
7. As a summary activity, students will develop an oral or written response to the following question citing evidence from the articles: How do the important issues presented in current news articles reflect, refute, or compare with the historical development of federalism in the United States?

LESSON 6: CIVIC ENGAGEMENT PROJECT

by Rhonda Kemp Webb (created 2022, revised 2023)

Overview

The final component of the federalism unit is the design, development, and evaluation of a student civic engagement project. Students will select one federalism-related issue of interest to investigate more deeply. The research conducted on Allsides.com from Lesson 5 may assist students in choosing a topic for the final project. Because the broad topic for this unit is federalism, students should pay particular attention to, and include in their proposals, an assessment of which level of government has the power to address the issue. For the culminating civic engagement project each student or student group should develop a plan for addressing an issue, formulate steps for implementing the plan, carry out those steps, and present on the effectiveness of their projects.

Students will be able to

- Use their knowledge of American history to understand and develop a viewpoint on current events
- Develop, execute, and evaluate a civic engagement project

Essential Questions

- How have American politicians and judges defined the relationship between state, federal, and tribal authorities?

Materials

- Activity Sheet 8: Civic Engagement Project Proposal

Procedure

1. Based on knowledge and understanding of the historical roots of current civic and social issues facing their communities and the nation; their literacy, research, and critical thinking skills; and their experience discussing, analyzing, and assessing present-day articles written from different perspectives, the students will design and develop civic engagement projects on topics of their choice with steps for implementation.
2. Based on the time available and your students' experience, establish a schedule of due dates for preparation, implementation, and presentation of the projects. This project may require additional time outside of class.

Rhonda Kemp Webb, PhD, was a high school social studies teacher in Georgia for more than twenty-five years.

Time for Completion: One 45-minute period

Grade Levels: 9–12

Unit Overview: This unit is one of the Gilder Lehrman Institute's Teaching Civics through History™ (TCTH) resources, designed to align with the Common Core State Standards. These units were developed to provide students with foundational knowledge of the historical roots of current civic and social issues facing their communities and the nation while building their literacy, research, and critical thinking skills. This unit focuses on the concept of federalism and how it has been interpreted by the US Supreme Court.

3. The students may work collaboratively or independently to plan, implement, and present civic engagement projects that relate to a current issue for which debate exists over which level of government (federal or state or tribal) has the authority to make policy or regulate activity. The students will work collaboratively with you to develop a list of projects related to federalism that have an impact in the school or community. For example,
 - Immigration policy
 - Health care policy
 - Education policy
 - Environmental policy
 - Crime enforcement policy
 - Land and water rights policy
4. Distribute the Civic Engagement Project Proposal activity sheet to each student or student group. The student or group will complete the project proposal and submit it to you for evaluation and approval. You may return it to them with suggestions and request revisions before signing off.
5. Guidelines for student civic engagement projects:
 - a. Identify issues related to questions of government jurisdiction, or federalism, that are important to the students' lives or community.
 - b. Select an issue to address.
 - c. Research the chosen issue and discuss what specific actions would improve the situation.
 - d. Plan a project that could effect change, keeping in mind what the specific goal is, who or what body

- has power to make the change, and how that person or body can be approached, identifying steps to accomplish the goal.
- e. Carry out the plan (write letters, convene meetings with community members or officials, create flyers/exhibitions/websites, etc.) depending on the specific goals of the project.
 - f. Assess the effort when it is completed to understand student successes and challenges and ways to continue learning in the future.
6. Discuss what the challenges were and how the students addressed those challenges; how successful their civic engagement projects were; and what they could do to be more effective in the future.

ACTIVITY SHEET 1: IMPORTANT PHRASE ANALYSIS

Federalism’s Foundational Documents

US Constitution

Important Phrases: Highlight one or two phrases in each text on the left that helps you explain how that provision of the Constitution contributes to the division of power between the federal and state governments.

Provision in the US Constitution	Explain, in your own words, how this provision of the Constitution contributes to the division of power between the federal and state governments.
<p>US Constitution, Article I, Section 8 (Enumerated Powers and the Elastic [or Necessary and Proper] Clause)</p> <p>The Congress shall have Power To</p> <p>. . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;</p> <p>. . . And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.</p>	
<p>US Constitution, Article VI (Supremacy Clause)</p> <p>. . . This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.</p>	

NAME

DATE

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Provision in the US Constitution	Explain, in your own words, how this provision of the Constitution contributes to the division of power between the federal and state governments.
<p>US Constitution, Tenth Amendment</p> <p>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.</p>	

Source: *America's Founding Documents*, National Archives, [archives.gov/founding-docs/constitution](https://www.archives.gov/founding-docs/constitution).

“Federalist No. 45” by James Madison

Important Phrases: Highlight one or two phrases in each text on the left that helps you explain James Madison’s interpretation of how the US Constitution would incorporate federal and state governments.

<p>“Federalist No. 45” by James Madison</p>	<p>Explain, in your own words, Madison’s interpretation of how the newly proposed Constitution would incorporate government at both the federal and state levels.</p>
<p>“The Alleged Danger from the Powers of the Union to the State Governments Considered”</p> <p>. . . Having shown that no one of the powers transferred to the federal government is unnecessary or improper, the next question to be considered is, whether the whole mass of them will be dangerous to the portion of authority left in the several States. . . .</p> <p>The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former. Without the intervention of the State legislatures, the President of the United States cannot be elected at all The Senate will be elected absolutely and exclusively by the State legislatures. . . . Thus, each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments. . . . On the other side, the component parts of the State governments will in no instance be indebted for their appointment to the direct agency of the federal government. . . .</p> <p>The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State. The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security. . . . If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS. . . .</p>	

Source: *Federalist Papers: Primary Documents in American History*, Library of Congress, guides.loc.gov/federalist-papers/text-41-50#s-lg-box-wrapper-25493409.

SOURCE 1: HISTORICAL BACKGROUND 1

Federalism: The System of Government Established by the US Constitution

by Gautham Rao, Associate Professor of History, American University

In the complex system of government created by the US Constitution, the individual state governments and the federal government bear responsibility for specific matters. The basic idea of this system of different layers of government handling different responsibilities is known as “federalism.”¹ Since the creation of the United States, questions related to federalism, and specifically the boundaries between state and federal responsibilities, have been key concerns for lawmakers and judges.

In the national constitution that was ratified in 1788, the founders of the United States tried to enumerate the specific areas that the federal government would govern. The first federal government established under the Articles of Confederation had lacked key powers to tax and to superintend an army, so the founders prioritized developing these powers for the new federal government. Their models were European nation-states and empires.² Article I, Section 8 of the US Constitution therefore established the new federal government’s powers to collect taxes, borrow money, regulate commerce with foreign nations and “Indian tribes,” and govern military forces. The so-called “elastic” or “sweeping” clause gave Congress the power to “make all Laws” for “carrying into Execution” laws pertaining to these powers. Elsewhere in the Constitution in Article VI, the founders gave the federal government’s laws “supremacy” over state laws and state constitutions. Meanwhile, Indian tribes had been promised a degree of tribal sovereignty and would continue to govern their own affairs, although White settler-colonists’ continued encroachment on their lands created serious conflicts.

The individual state governments also enjoyed great lawmaking authority. They derived their authority from the Tenth Amendment in the Bill of Rights, which states that “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.” This became the foundation of the “police powers” doctrine, which allows the states to regulate virtually all matters connected to

health, safety, commerce, transportation, and connected matters. Legal scholars tend to cite the case *Commonwealth v. Alger* (1851) as the best example of state police powers, where the Massachusetts high court upheld the state’s power to regulate the infrastructure in Boston harbor, even if it cut against private entrepreneurs’ profits.³

Although the Constitution aimed to clearly distinguish between federal and state responsibilities, the two entities have sometimes encroached on each other’s domains. In these instances, the US Supreme Court has tried to clarify the division of responsibilities. A notable example from the nineteenth century is *Gibbons v. Ogden*, in which the Court held that only the federal government had the authority to regulate commerce between states.⁴ For much of the twentieth century, the Court expanded the federal government’s regulatory authority. However, more recently, the Court’s direction has been considerably less clear as it has sought to limit expansive federal governance over matters like health care and the environment while moving to protect states’ “dignity” from encroachment by the federal government.⁵

¹ See Alison L. LaCroix, *The Ideological Origins of American Federalism* (Cambridge: Harvard University Press, 2011).

² See Max S. Edling, *A Revolution in Favor of Government: Origins of the US Constitution and Making of the American State* (New York: Oxford University Press, 2003).

³ *Commonwealth v. Alger*, 61 Mass. 53 (1851). See William J. Novak, *The People’s Welfare: Law and Governance in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

⁴ *Gibbons v. Ogden*, 22 U.S. 1 (1824).

⁵ See Heather Gerken, “Federalism 3.0,” *California Law Review* 105 (2017), 1695–1723; Leah Litman, “Dignity and Civility, Reconsidered,” *Hastings Law Journal* 70 (2019), 1225–1241.

Gautham Rao, an associate professor of history at American University, is a legal historian of Revolutionary America and the early American republic. He is the author of *National Duties: Custom Houses and the Making of the American State* (2016) and the editor of *Law and History Review*.

ACTIVITY SHEET 2: ANALYZING AN ESSAY

IMPORTANT PHRASES

Which phrases or sentences related to federalism in the essay are the most important or informative? Choose three and give your reason for each choice.

Phrase 1:

Why is this phrase
or sentence
important or
informative?

Phrase 2:

Why is this phrase
or sentence
important or
informative?

Phrase 3:

Why is this phrase
or sentence
important or
informative?

ACTIVITY SHEET 3: *McCULLOCH V. MARYLAND* (1819) CASE STUDY

CASE BACKGROUND

In the eighteenth and early nineteenth centuries, state and federal banks printed and circulated paper currency (banknotes), and each viewed the others' currency as competition for their own. On this issue, the states and the federal government had different interests. But did they have the legal right to obstruct each other?

The Maryland legislature defended the value of its state bank's currency by imposing a stamp tax (a tax on printed materials) on banknotes issued by the Bank of the United States. The head officer of the Bank of the United States, James McCulloch, refused to pay the Maryland tax. McCulloch argued that Congress had the right to create a federal bank, that no state had the right to destroy the federal bank, and that the Maryland tax was created with just this aim in mind. Did the Supreme Court agree?

Chief Justice John Marshall's Majority Opinion, Part 1

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

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

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow

money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. . . .

To its enumeration of powers is added that of making "all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof." . . .

It is the unanimous and decided opinion of this Court . . . that act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself. . . .

Source: Majority Opinion, *McCulloch v. Maryland* (1819), *Milestone Documents*, National Archives, [archives.gov/milestone-documents](https://www.archives.gov/milestone-documents).

McCulloch v. Maryland (1819) Case Study Part 1

IMPORTANT PHRASES

Which are the most important or powerful phrases or sentences from this section of the opinion? Choose three phrases and explain why you chose each phrase/sentence.

Phrase 1:

Why is this phrase
or sentence
important or
powerful?

Phrase 2:

Why is this phrase
or sentence
important or
powerful?

Phrase 3:

Why is this phrase
or sentence
important or
powerful?

NAME

DATE

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***McCulloch v. Maryland* (1819) Case Study Part 1**

For Part 1: What has the Court ordered and how has the distribution of power between the state and federal levels of government been interpreted in this section of the case?

McCulloch v. Maryland (1819) Case Study Part 2

Chief Justice John Marshall's Majority Opinion, Part 2

We proceed to inquire –

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

That the power of taxation is one of vital importance; . . . that it is to be concurrently exercised by the two governments: are truths which have never been denied. . . .

[T]he counsel for the [national] bank place its claim to be exempted from the power of a State to tax its operations. . . .

[T]he constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. . . .

These are, 1st. that a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme. . . .

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

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

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

Source: Majority Opinion, *McCulloch v. Maryland* (1819), Milestone Documents, National Archives, [archives.gov/milestone-documents](https://www.archives.gov/milestone-documents)

***McCulloch v. Maryland* (1819) Case Study Part 2**

IMPORTANT PHRASES

Which are the most important or powerful phrases or sentences from this section of the opinion? Choose three phrases and explain why you chose each phrase/sentence.

Phrase 1:

Why is this phrase
or sentence
important or
powerful?

Phrase 2:

Why is this phrase
or sentence
important or
powerful?

Phrase 3:

Why is this phrase
or sentence
important or
powerful?

McCulloch v. Maryland (1819) Case Study Part 2

For Part 2: What has the Court ordered and how has the distribution of power between the state and federal levels of government been interpreted in this section of the case?

Summary Sentence

Use your responses to the question for Parts 1 and 2 to explain the ruling as a whole.

What has the Court ordered and how has the distribution of power between the state and federal levels of government been interpreted in this case?

ACTIVITY SHEET 4: TWENTIETH- AND TWENTY-FIRST-CENTURY CASE STUDIES

Directions

1. *Underline 8–10 keywords in each Majority Opinion excerpt below. Do not select “connector” words (are, is, the, and, so, etc.). Write them in the Keywords section.*
2. *Use the keywords you selected to write a sentence that summarizes the meaning of each Supreme Court ruling.*
3. *Restate the summary sentence—but this time in your own words.*

New York v. United States (1992)

CASE BACKGROUND

The US Congress passed a law in 1985 requiring states to dispose of certain low-level radioactive wastes within their boundaries. New York sued the United States believing that the law was an overreach of the federal government into state jurisdiction.

MAJORITY OPINION BY JUSTICE SANDRA DAY O’CONNOR (EXCERPTS)

“In these cases, we address the constitutionality of three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985. . . . The constitutional question is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States. We conclude that while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so. We therefore find that only two of the Act’s three provisions at issue are consistent with the Constitution’s allocation of power to the Federal Government.”

Source: *U.S. Reports*: 505 U.S. 144 (1992), loc.gov/item/usrep505144.

Keywords

Keyword Summary Sentence

Restate the Summary Sentence in your own words

Printz v. United States (1997)

CASE BACKGROUND

The US Congress passed the Brady Handgun Violence Protection Act in 1993, which included a requirement for local/state law enforcement officers to conduct background checks on people purchasing a handgun. Officers from Montana and Arizona filed suit claiming the federal government could not require local jurisdictions to perform the tasks required in the law.

MAJORITY OPINION BY JUSTICE ANTONIN SCALIA (EXCERPTS)

“We held in *New York v. US* (1992) that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States’ officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved. . . . [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed.”

Source: *U.S. Reports*: 521 U.S. 898 (1996), loc.gov/item/usrep521898.

Keywords

Keyword Summary Sentence

Restate the Summary Sentence in your own words

Murphy v. NCAA (2018)

CASE BACKGROUND

The US Congress passed the Professional and Amateur Sports Protection Act (PASPA) in 1992, which banned states (other than Nevada) from creating state laws to authorize any type of gambling on sporting events. However, the federal law did not make betting on sports a federal crime. The NCAA sued New Jersey for violating PASPA when the state passed a law allowing sports gambling in 2012.

MAJORITY OPINION BY JUSTICE SAMUEL ALITO (EXCERPTS)

“The Professional and Amateur Sports Protection Act (PASPA) authorizes civil suits by . . . sports organizations but does not make sports gambling a federal crime. . . . The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not. PASPA ‘regulate[s] state governments’ regulation’ of their citizens. . . . The Constitution gives Congress no such power. The judgment of the Third Circuit is reversed.”

Source: *U.S. Supreme Court Reports*: 138 S. Ct. 1461 (2018), supremecourt.gov/opinions/17pdf/16-476_dbfi.pdf.

Keywords

Keyword Summary Sentence

Restate the Summary Sentence in your own words

NAME

DATE

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Questions to Consider

What arguments do the three cases have in common?

How do these arguments compare to those presented by Chief Justice John Marshall in *McCulloch v. Maryland*?

SOURCE 2: HISTORICAL BACKGROUND 2

Tribal Sovereignty and the US Supreme Court

James Riding In (Pawnee), Associate Professor Emeritus of American Indian Studies, Arizona State University

The US Constitution established not only national and state levels of government within the framework of federalism; it also recognized the sovereignty of American Indian and Alaska Native Nations (AIANNs) as a third level of government in certain limited spheres. In Article I, Section 8, Congress was given the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

As the result of numerous legal decisions made over the past two centuries, the Supreme Court of the United States (SCOTUS) has defined the federal government’s relationship with the states and AIANNs based on dramatically different rationales and with dramatically different outcomes. These cases involved disputes over such issues as land ownership, states’ rights, state jurisdiction on AIANN lands, Indian gaming, fishing rights, civil rights violations, slavery, and jurisdiction.

Before the Civil War, SCOTUS expanded the scope of federal power and supremacy over state and AIANN governments for different reasons. In *Martin v. Hunter’s Lessee* (1816), *McCulloch v. Maryland* (1819), and *Ableman v. Booth* (1859), SCOTUS held that states could not violate a US treaty, tax a national bank, nor issue writs of habeas corpus in federal matters.

The Constitution recognizes AIANNs as independent, pre-constitutional entities. Yet SCOTUS supported the US drive to acquire AIANN lands for non-Indian use. *Johnson v. M’Intosh* (1823) held that Indians, with the European “discovery” of the Americas, only had occupancy rights to their lands. *Cherokee Nation v. Georgia* (1831) declared that the Cherokee Nation fell under US domination because they were “domestic dependent nations” in a “ward to its guardian relationship.” *Worcester v. Georgia* (1832), however, protected Indian lands and sovereignty from state laws. These cases established the foundation of federal policy regarding AIANNs.

After the Civil War, federal AIANN policy became increasingly coercive. In *Ex parte Crow Dog* (1883), SCOTUS dismissed the federal conviction of a Sioux for murdering another Sioux on Indian land because the perpetrator had not violated a US treaty or law. Enacting the Major Crimes Act of 1885, Congress imposed federal jurisdiction and punishments over Indian-on-Indian felonies occurring on Indian land. In 1886, SCOTUS deferred to Congress by upholding the law on the dubious assertion that Congress always had *absolute* authority over Indigenous land. After that, federal policy criminalized AIANN cultural practices, shipped thousands of children to distant boarding schools for assimilation, and took more Indian land for non-Indian ownership. In the 1930s, however, federal Indian policy returned to treating AIANNs as domestic dependent nations rather than subjugated wards. SCOTUS decisions upheld Indian fishing, hunting, and water rights reserved by treaties while allowing states to undermine Indian sovereignty by extending some laws over AIANN lands.

In 1978, by a narrow vote, SCOTUS ruled that AIANNs lacked criminal jurisdiction over non-Indians who committed crimes on AIANN reservations. In *McGirt v. Oklahoma* (2017), however, it found that the state lacked criminal jurisdiction over an Indian who had committed a felony within the boundaries of the former Muscogee Creek reservation. But in 2022, the Court overturned parts of this case. The question of tribal sovereignty is, thus, far from settled.

James Riding In is a citizen of the Pawnee Nation and a co-founder of the American Indian Studies program at Arizona State University. Since retiring from ASU in May 2021, he has been developing an online Pawnee cultural heritage portal and research library for the Pawnee Nation.

ACTIVITY SHEET 5: ANALYZING AN ESSAY

IMPORTANT PHRASES

Which phrases or sentences related to tribal sovereignty and federalism in the essay are the most important or informative? Choose three and give your reason for each choice.

Phrase 1:

Why is this phrase
or sentence
important or
informative?

Phrase 2:

Why is this phrase
or sentence
important or
informative?

Phrase 3:

Why is this phrase
or sentence
important or
informative?

SOURCE 3: FEDERALISM AND AMERICAN INDIAN TRIBAL RIGHTS CASE STUDIES

Directions

You will investigate the sovereignty rights of American Indian tribes through Supreme Court rulings and US laws from various time periods. Read the documents below and complete the associated Critical Analysis activity sheet. Following the document analysis, you will write a summary paragraph to explain how the rights of American Indians and sovereignty over their tribal lands have been defined over time.

Cherokee Nation v. Georgia (1831)

The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. . . . The Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants. . . .

[The bill filed on behalf of the Cherokees] seeks to restrain a state from the forcible exercise of legislative power over a neighbouring people, asserting their independence; their right to which the state denies. On several of the matters alleged in the bill, for example on the laws making it criminal to exercise the usual powers of self government in

their own country by the Cherokee nation, this court cannot interpose. . . . That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. . . .

But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. . . . It savours too much of the exercise of political power to be within the proper province of the judicial department. . . .

The motion for an injunction is denied.

Clarification of Terms

Injunction — court ruling that would restrict the opposing party in a case from some action

Source: *U.S. Reports*: 20 U.S. 5 Pet.1 (1831), [loc.gov/item/usrep030001](https://www.loc.gov/item/usrep030001).

Worcester v. Georgia (1832)

The indictment charges the plaintiff in error [Samuel Worcester], and others, being white persons, with the offence of “residing within the limits of the Cherokee nation without a license,” and “without having taken the oath to support and defend the constitution and laws of the state of Georgia.” . . .

The plea avers, that the residence, charged in the indictment, was . . . with the permission and approval of the Cherokee nation. That the treaties, subsisting between the United States and the Cherokees, acknowledge their right as a sovereign nation to govern themselves and all persons who have settled within their territory . . . That the act under which the prosecution was instituted is repugnant to the said treaties and is, therefore, unconstitutional and void . . . is, also, unconstitutional; because it interferes with, and attempts to regulate and control, the intercourse with the Cherokee nation, which belongs, exclusively, to congress. . . . Let us inquire into the effect of the particular statute and section on which the indictment is founded.

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

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

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

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

Clarification of Terms

Plaintiff in Error — person who appeals to a higher court to challenge the ruling of a lower court

Source: *U.S. Reports*: 31 U.S. 6Pet.515 (1832), loc.gov/item/usrep031515.

Ex Parte Crow Dog (1883)

MR. JUSTICE MATTHEWS delivered the opinion of the Court.

The petitioner [Crow Dog] is in the custody of the marshal of the United States for the Territory of Dakota, imprisoned in the jail . . . under sentence of death . . . to be carried into execution January 14th, 1884. That judgment was rendered upon a conviction for the murder of an Indian of the Brule Sioux band of the Sioux nation of Indians, by the name of Sin-ta-ge-le-Scka, or in English, Spotted Tail, the prisoner also being an Indian, of the same band and nation, and the homicide having occurred as alleged in the indictment, in the Indian country, within a place and district of country under the exclusive jurisdiction of the United States and within the said judicial district. . . . It is claimed on behalf of the prisoner [Crow Dog] that the crime charged against him, and of which he stands convicted, is not an offence under the laws of the United States; that the district court had no jurisdiction to try him, and that its judgment and sentence are void. . . .

[T]o uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the government towards the Indians, as declared in many statutes and treaties, and recognized in many decisions of this court, from the beginning to the present time. . . .

It results that the First District Court of Dakota was without jurisdiction to find or try the indictment against the prisoner, that the conviction and sentence are void, and that his imprisonment is illegal.

The writs of habeas corpus and certiorari prayed for will accordingly be issued.

Clarification of Terms

Ex Parte — a case in which one party is presenting to the court but the opposing party is not part of the proceedings

Writ — written command by a court

Habeas Corpus — protection against being held in prison without cause

Certiorari — a higher court's request to review the decision of a lower court

Source: *U.S. Reports*: 109 U.S. 556 (1883), [loc.gov/item/usrep109556](https://www.loc.gov/item/usrep109556).

Major Crimes Act

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Source: U.S. Code 18 § 1153 (2020).

McGirt v. Oklahoma (2020)

JUSTICE GORSUCH delivered the opinion of the Court.

In exchange for ceding “all their land, East of the Mississippi river,” the U. S. government agreed by treaty that “[t]he Creek country west of the Mississippi shall be solemnly guaranteed to the Creek Indians.”

. . . Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.

At one level, the question before us concerns Jimcy McGirt. Years ago, an Oklahoma state court convicted him of three serious sexual offenses. Since then, he has argued . . . that the State lacked jurisdiction to prosecute him because he is an enrolled member of the Seminole Nation of Oklahoma and his crimes took place on the Creek Reservation. A new trial, . . . he has contended, must take place in federal court. The Oklahoma state courts hearing Mr. McGirt’s arguments rejected them, so he now brings them here.

Mr. McGirt’s appeal rests on the federal Major Crimes Act (MCA). The statute provides that, within “the Indian country,” “[a]ny Indian who commits” certain enumerated offenses “against the person or property of another Indian or any other person” “shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.”

. . . [A]pplying only to certain enumerated crimes. . . . State courts generally have no jurisdiction to try Indians for conduct committed in “Indian country.”

The key question Mr. McGirt faces concerns that last qualification: Did he commit his crimes in Indian country? . . . [C]an we say that the Creek Reservation persists today? To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress. . . .

Under our Constitution, States have no authority to reduce federal reservations lying within their borders. . . . [T]he Constitution . . . entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the “supreme Law of the Land.” . . . But whatever the confluence of reasons, in all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation. . . .

[T]he MCA applies to Oklahoma according to its usual terms: Only the federal government, not the State, may prosecute Indians for major crimes committed in Indian country. . . .

In reaching our conclusion about what the law demands of us today, we do not pretend to foretell the future and we proceed well aware of the potential for cost and conflict around jurisdictional boundaries, especially ones that have gone unappreciated for so long. . . . The federal government promised the Creek a reservation in perpetuity. . . . To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right. The judgment of the Court of Criminal Appeals of Oklahoma is Reversed.

Source: Syllabus *McGirt v. Oklahoma Certiorari to the Court of Criminal Appeals of Oklahoma No. 18-9526*, supremecourt.gov/opinions/slipopinion/19.

ACTIVITY SHEET 6: CRITICAL ANALYSIS

Federalism and American Indian Tribal Rights

A: *Cherokee Nation v. Georgia* (1831)

How does Chief Justice Marshall define the relationship between American Indian tribes and the United States?

Cite textual evidence to support your answer.

Summarize the overall determination of this ruling in your own words.

B. *Worcester v. Georgia* (1832)

On what basis did Chief Justice Marshall argue that Georgia was in error and Worcester should be freed by the state?

Cite textual evidence to support your answer.

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C. *Ex Parte Crow Dog* (1883)

Why did the Supreme Court support Crow Dog in his complaint to the court?

Cite textual evidence to support your answer.

D: Major Crimes Act

Summarize the requirements of this law in your own words.

Cite textual evidence that indicates a connection between the Major Crimes Act and the *Ex Parte Crow Dog* ruling.

Why might the passage of this law have resulted from the ruling in *Ex Parte Crow Dog*?

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E. *McGirt v. Oklahoma* (2020)

Why did McGirt claim Oklahoma could not hold him for the crime he was charged with committing?

Cite textual evidence from Justice Gorsuch's opinion that relies on the Major Crimes Act.

Summarize the Supreme Court ruling in your own words.

Final Task

Using evidence from the cases and laws reviewed in this lesson, write a paragraph summarizing how American Indian sovereignty rights over tribal lands have been defined over time.

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ACTIVITY SHEET 7: ANALYZING A NEWS ARTICLE

Source (*newspaper/magazine/website*):

Date published:

Article title:

1. What did you already know about that topic?

2. Basic information presented:

Who?

What?

When?

Where?

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Why?

How?

3. What role does federalism play in this issue? Does the author talk about federalism or the role of state, federal, or tribal governments? If so, assess the author's arguments about who has jurisdiction.

4. Does your article have a right/center/left point of view? What evidence leads you to that conclusion?

5. What audience was this article written for? What evidence supports your conclusion?

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6. Reliability of Sources

- a. Is there an author's name? If so, who is the author?
- b. What source or sources does the author quote or refer to in the article? Do you think these sources are reliable? Why or why not? What evidence supports your conclusion?

7. Personal Reaction: What do you think of this article? *(Include two points made in the text to support your answer.)*

SOURCE 4: CIVIL DISCOURSE GUIDELINES

1. Listen respectfully without interrupting.
2. Allow everyone the opportunity to speak.
3. Criticize ideas, not individuals or groups.
4. Avoid inflammatory language, including name-calling.
5. Ask questions when you don't understand; don't assume you know others' thinking or motivations.
6. Don't expect any individuals to speak on behalf of their gender, ethnic groups, class, status, etc. (or the group(s) you perceive them to be a part of).
7. Base your arguments on evidence, not assumptions.

The guidelines provided here are adapted from “Managing Difficult Classroom Discussions,” Center for Innovative Teaching and Learning, Indiana University Bloomington, citl.indiana.edu/teaching-resources/diversity-inclusion.

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ACTIVITY SHEET 8: CIVIC ENGAGEMENT PROJECT PROPOSAL

Project Title

Project
Participant(s)

Project Goal

Action Steps

TEACHER'S COMMENTS

Questions
to Consider

Revisions Needed

Approved