TUNE IN

Foundations of American Democracy

In this session, students will examine the form of government established by the Constitution, and its key ideas—including natural rights, the rule of law, and popular sovereignty. By examining the Declaration of Independence and the Constitution, students will learn how these two documents set the foundation for American democracy and make possible the freedom that is the birthright of all Americans.

Note: There will be no Monday session this week.

• Register for Middle School Session Sept. 9 at 12 p.m. EDT
• Register for High School and College Session Sept. 9 at 2 p.m. EDT
• Register for All Ages Session Sept. 11 at 1 p.m. EDT

INTRODUCTION

Understanding three key terms central to the American constitutional order: popular sovereignty, natural rights, and the rule of law.

• Popular Sovereignty—Big Idea: Beginning with the words “We the People,” the Constitution establishes a government that’s driven by us—not a monarch and not an aristocracy—but by us, the American people.

• Natural Rights—Big Idea: Natural rights are rights that are given by God or by nature and thus come not from any law passed by the government but rather are inherent to all individual human beings from birth.

• Rule of Law—Big Idea: The rule of law is the basic idea that we have a government of laws, not a government by man or by arbitrary rule. In other words, no one is above the law.
POPULAR SOVEREIGNTY

Let’s begin with one of the central concepts at the heart of the Constitution: popular sovereignty. So, what do we mean by popular sovereignty? Think about the opening words of the Constitution: “We the People.”

Defining “popular sovereignty:” Generally, when we refer to “popular sovereignty,” we are talking about “rule by the people” and the idea that ultimate power and authority rests not with the government itself, but with the people.

Where does this idea come from?

- **Social Contract Theory:** All legitimate governments are based upon consent of the people. Governments had the responsibility to protect individual natural rights in return for the obligations of responsible citizenship.

- **Small “r” republicanism:** The idea is that of self-rule—the need to turn away from monarchy and hereditary rule towards self-rule and rule by the people.

Popular sovereignty has been central to many key figures throughout American history, but let’s begin with the founding generation.

As the Constitution’s preamble—“We the People”—suggests, popular sovereignty was important to key delegates at the Constitutional Convention—when the framers signed the Constitution in Philadelphia on September 17, 1787, it was a mere proposal. Only the American people themselves—acting through state ratifying conventions—could give it life.

Both proponents of the Constitution (like James Madison and James Wilson) and its opponents (key Anti-Federalists like Brutus and Federal Farmer) drew on competing visions of sovereignty.

**James Madison in The Federalist Papers**

- Governments must be designed to police the dangers of political factions.
- America—as a (very) large republic would counteract the effects of faction by making it difficult for political majorities to form.
- Representatives should act as trustees—safeguarding the public interest.
- Strong government was necessary to protect liberty.
- And a system of checks and balances would guard against the dangers of corruption.

**Federalist #39**

- A “republican” government derives all of its powers directly or indirectly from the great body of the people. And the government itself is run by representatives for a limited period of time
- In Madison’s view, the Constitution itself was established by a “federal” act—not a “national” one.
  - Under the Constitution’s Article VII, the framers’ document was (again) only a mere proposal submitted to the American people for ratification.
To ratify, the American people were to elect ratification conventions in each state—which would vote the Constitution either up or down.

Therefore, the Constitution conceived of each state as a sovereign body independent of the others.

The Constitution’s text itself contemplated various sources of political power—each derived indirectly by the American people. For instance, consider Congress:

- The American people elected the members of the House of Representatives directly—and the House itself was organized around the principle of proportional representation, with larger states receiving more seats than smaller states.
- At the same time, each state’s legislature elected members of the U.S. Senate. Therefore, the Senate derived its powers from the States as “political and co-equal societies,” based on the principle of equality. Each state—regardless of its size—received two senators.

Or consider the powers of the national government versus the powers of the state governments.

- With Article VI’s supremacy clause, the national government stood supreme over the states in certain realms. In that sense, it was a national government.
- However, the national government was also a government of limited powers. It had no indefinite—or unbounded—supremacy over the states but only for particular purposes. The national government’s power extended only to certain specific objects, written into the Constitution.
- At the same time, the Constitution left the states with “residuary and inviolable sovereignty over all other objects.” In other words, the states retained their traditional police powers—their broad authority to pass laws to promote the health, safety, and welfare of their citizens.

In the end, Madison argued that the new government was neither wholly national nor wholly federal. In this sense, Madison staked out a middle position on sovereignty.

Federalist #40

- Before the Constitution, the United States was governed by the Articles of Confederation—a weak system that many criticized as inadequate to the task of governing a great nation.
- The Articles of Confederation also had its own set method of amendment—requiring the unanimous approval of the states.
- However, the Constitution’s own ratification process—its requirement that three-fourths of the states ratify it—conflicted with the Articles.
- How did Madison (and his fellow Federalists) address this issue—one that many Anti-Federalists stressed in their opposition to the Constitution?
  - Madison drew on popular sovereignty—arguing that, through ratification, the American people could make the decision for themselves, regardless of what the Articles of Confederation said. Here’s Madison:
    - “Instead of reporting a plan requiring the confirmation OF THE LEGISLATURES OF ALL THE STATES, [the delegates] have reported a plan which is to be confirmed by the PEOPLE. . . They must have borne in mind, that as the plan to be framed and proposed was to be submitted TO THE PEOPLE THEMSELVES, the disapprobation of this supreme authority would destroy it forever; its approbation blot out antecedent errors and irregularities.”
  - On this view, the right to alter or abolish a form of government was at the very heart of popular sovereignty.
Federalist #43

- Madison expands further on the link between the Constitution’s Article VII ratification process and popular sovereignty.
- Madison points to Article VII, the ratification clause, as evidence that the Constitution was based in popular sovereignty.
- Madison: “This article speaks for itself. The express authority of the people alone could give due validity to the Constitution. To have required the unanimous ratification of the thirteen States, would have subjected the essential interests of the whole to the caprice or corruption of a single member. It would have marked a want of foresight in the convention, which our own experience would have rendered inexcusable.”

Federalist #45

- Madison spoke of the value of popular sovereignty and connects popular sovereignty to the “happiness of the people.”
- Madison: “It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object.”

Federalist #51

- Madison (once again) connects the structure of Federalism in the Constitution to the object of popular sovereignty.
- Madison argues that the division between state and national authorities gives the people a “double security” to their rights.
- Madison says the “dependency on the people” is the primary control on the government. In other words, if government fails the American people, the American people can hold the government and its officials accountable.
- Yet more is required to protect the rights of the people.
- Madison: “In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.”
- Yet, Madison also notes the potential threat of majority rule if left uncontrolled. It would threaten minority rights.
- Madison: “It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.”
Other Visions of Popular Sovereignty

Madison was not the greatest proponent of popular sovereignty at the Convention or during the battles over the ratification of the Constitution. James Wilson and Gouverneur Morris were. While James Madison is often called the “Father of the Constitution,” Wilson was a towering figure at the Constitutional Convention—and, arguably, as influential (or, at least, nearly as influential) as Madison.

James Wilson

- Wilson argued that sovereignty ultimately resides in the people themselves: While the British lodged sovereignty in Parliament and many Americans argued for state sovereignty, Wilson argued that in America, sovereignty “resides in the PEOPLE, as the fountain of government.”
- Wilson was originally from Scotland and was trained in the Scottish Moral Enlightenment before emigrating to America in 1764. Tracking Scottish Enlightenment principles, Wilson believed in the relationship between the public virtue, a moral commitment to the public interest, and a respect for the will of the people based on their intrinsic goodness.
- Looking to John Locke, Wilson thought that the consent (or will) of the people was essential to creating and maintaining the state. He looked to natural law and believed that government depended on a voluntary agreement between the people and the state—in other words, the “Social Contract” theory.
- Wilson was an early proponent of what became known as the “dual sovereignty” theory. The idea there was that the Constitution recognized co-equal sovereignties between the national and state governments. He believed that popular sovereignty could maintain both sovereigns at once.
- In his Lectures on Law delivered in 1792 and 1793, Wilson articulated the importance of the jury to his vision of popular sovereignty and as an institution of civic republican virtue. He thought the jury was the most important embodiment of the will of the people in the legal system. And he viewed it as an essential safeguard of liberty—and trial by jury was a requirement of any “just” government.
- At the same time, judges, because they were “agents of the people,” could review the constitutionality of laws through a process known as “judicial review.” In other words, by reviewing the constitutionality of laws passed by the elected branches, judges—though unelected—could make sure that the elected branches stayed true to the rules (and powers and rights) endorsed by the American people in their written Constitution.
- Similar to Madison, Wilson connected popular sovereignty to the object of the “happiness of the people:” “The first maxims of jurisprudence are ever kept in view—that all power is derived from the people—that their happiness is the end of government.” (1774)
- In a 1776 address, Wilson added that the King’s prerogative or power came from the people and thus the colonies also drew their power from the people themselves. Wilson: “That all Power was originally in the People—that all the Powers of Government are derived from them—that all Power, which they have not disposed of, still continues theirs—are Maxims of the English Constitution, which, we presume, will not be disputed.”
- Wilson consistently advocated for popular sovereignty at the Constitutional Convention. Madison’s notes show this. On May 31, in the first days of the Convention, he wrote of Wilson’s first comments: “Wilson contended strenuously for drawing the most numerous branch of the Legislature immediately from the people. He was for raising the federal pyramid to a considerable altitude, and for that reason wished to give it as broad a basis as possible. No government could long subsist without the confidence of the people.”
• Wilson thus advocated for a stronger national government and a legislature based on popular representation explicitly based in popular sovereignty—with representatives elected by the American people and each state receiving legislative seats based on their populations, with bigger states receiving more seats than smaller states.

• And while Wilson later pushed the Electoral College as a compromise, he initially proposed that the President be elected directly by the people. In other words, he wished both branches of Congress and the Presidency to operate by the same principle of popular sovereignty.

• Throughout the Convention, Wilson continued to respond to many delegates hostile to popular sovereignty like George Mason and Elbridge Gerry.

• Wilson argued that the people were the only legitimate source of authority.

• On this view, the national government needed both power and legitimacy (Government must flow from the “people at large”).

• And Wilson believed that British history showed the potential for corruption in either the executive or legislature if they were too far removed from the people or not sufficiently representative of them.

Anti-Federalist

Consider the leading Anti-Federalist voices during the ratification battle—Brutus and Federal Farmer, thought to be New York Anti-Federalists Robert Yates and Melancton Smith. (Some scholars believe Smith may have been Brutus and that leading Virginia Anti-Federalist Richard Henry Lee was Federal Farmer.)

Brutus

• In his Essay #1, he warns of the rise of despotism (or consolidation) and tyranny under the new Constitution.

• Brutus feared a powerful national government and valued the traditional role of state governments to shape policy for their people. In the ratification debates, he framed the main issue as one of a “consolidated” (and tyrannical) national government versus one rooted in the sovereignty of the states. Here’s Brutus:

  The “first question that presents itself on the subject is, whether a confederated government be the best for the United States or not? Or in other words, whether the thirteen United States should be reduced to one great republic, governed by one legislature, and under the direction of one executive and judicial; or whether they should continue thirteen confederated republics, under the direction and control of a supreme federal head for certain defined national purposes only?”

• Brutus argued that under the new Constitution, the national government would win out and that consolidation was inevitable. To that end, he made three key argument:
  o First, “imperium in imperio,” two sovereignties could not co-exist.
  o Second, drawing on Montesquieu, Brutus argued that a stable republic could only safely operate over a “contracted territory” of citizens with similar customs and interests. In short, the American republic was simply too large to work as a single, national government. Instead, the Constitution would permit abuses of power which would be exploited by the powerful elites in the national government. Here’s a key passage from Montesquieu: “It is natural to a republic to have only a small territory, otherwise it cannot long subsist. In a large republic there are men of large fortunes, and consequently of less moderation; there are trusts too great to be placed in
any single subject; he has interest of his own; he soon begins to think that he may be happy, great and glorious, by oppressing his fellow citizens; and that he may raise himself to grandeur on the ruins of his country. In a large republic, the public good is sacrificed to a thousand views; it is subordinate to exceptions, and depends on accidents. In a small one, the interest of the public is easier perceived, better understood, and more within the reach of every citizen; abuses are of less extent, and of course are less protected.”

- And third, Brutus emphasized the features of the Constitution most likely to be manipulated—like the aristocratic tendencies of the Senate, the lack of a Bill of Rights, and the rejection of strict separation of powers.

In short, Brutus argued that the Constitution approached so near to a consolidation that it “must, if executed, certainly and infallibly terminate in it.” What features of the Constitution did he emphasize?

- (What he described as) the unlimited power of Congress.
- The extensive jurisdiction of national courts.
- The broad (and open-ended) nature of the necessary and proper clause.
- And the national government’s unlimited taxing power.

- Returning to this week’s topic, what’s the relationship between Brutus’s arguments against the new Constitution and the concept of popular sovereignty?
  - Brutus argues that popular sovereignty is best protected through a government centering political power at the state level.
  - On this view, the states are more responsive to the people. They are closer to the people.
  - And at the founding (at least), people were state citizens first and had duties to the state.
  - Thus, the federal government with “great and uncontrollable” powers would act to annihilate state governments—and, with it, the core of American-style popular sovereignty.

- Brutus reminds his readers about the nature of republican government—rooted in representation: “[A]lthough all laws are derived from the consent of the people, yet the people do not declare their consent by themselves in person, but by representatives, chosen by them, who are supposed to know the minds of their constituents, and to be possessed of integrity to declare this mind” and “the people must give their assent to the laws by which they are governed.”

- Finally, Brutus draws a distinction between a free republican government and an arbitrary government.
  - The former “are ruled by the will of the whole, expressed in any manner they may agree upon; the latter by the will of one, or a few.”
  - Simply put, the United States was too large and thus giving the federal government too much power was tyrannical because, “in a large extended country, it is impossible to have a representation, possessing the sentiments, and of integrity, to declare the minds of the people, without having it so numerous and unwieldy, as to be subject in great measure to the inconveniency of a democratic government.”

So, that’s Brutus. Before summarizing the Anti-Federalist vision, let’s turn to one other key Anti-Federalist voice—Federal Farmer.
The Federal Farmer

- Federal Farmer offered his own account of popular sovereignty: “The supreme power is in the people, and rulers possess only that portion which is expressly given them; yet the wisest people have often declared this is the case on proper occasions, and have carefully formed stipulations to fix the extent, and limit the exercise of the power given.”
- He drew on English history, arguing that Representation, and the jury trial were the “best features of a free government ever as yet discovered, and the only means by which the body of the people can have their proper influence in the affairs of government.”
- He also attacked the Senate. For Federal Farmer, Senators represented the sovereign, not the people, and were insufficiently dependent on the people: “Men elected for several years, several hundred miles distant from their states, possessed of very extensive powers, and the means of paying themselves, will not, probably, be oppressed with a sense of dependance and responsibility.”

So, let’s sum up the Anti-Federalist vision. For the Anti-Federalists:

- The defense of liberty required small republics.
- Representatives were direct agents of the people.
- Decentralized government and simple government guarded against corruption
- The Anti-Federalists were deeply suspicious of the Senate—viewing it as form of tyrannical aristocracy against the true rule of the people.

As Patrick Henry said “The assent of the people in their collective capacity is not necessary to the formation of a Federal Government. The people have no right to enter into leagues, alliances, or confederations: They are not the proper agents for this purpose: States and sovereign powers are the only proper agents for this kind of Government.”

Or, consider the Dissent of the Pennsylvania Minority at the Pennsylvania Ratifying Convention.

- These dissenters were suspicious of the phrase “We the people,” because consolidation “pervaded the whole Constitution.”
- They feared the New Constitution was written in “the style of a compact between individuals entering into a state of society, and not that of a confederation of states.”
- And they argued that Congress’s powers were so unlimited that they would annihilate state governments “and swallow them up in the grand vortex of general empire.”
- And they quoted Montesquieu on popular sovereignty: “That in a democracy there can be no exercise of sovereignty, but by the suffrages of the people, which are their will; now the sovereign’s will is the sovereign himself; the laws therefore, which establish the right of suffrage, are fundamental to this government. In fact, it is as important to regulate in a republic in what manner, by whom, and concerning what suffrages are to be given, as it is in a monarchy to know who is the prince, and after what manner he ought to govern.”
Abraham Lincoln

Finally, let’s leave the founding era and fast forward to Abraham Lincoln—one of the most powerful voices of popular sovereignty in American history.

- For Lincoln, all human beings have the moral right to govern themselves according to their own consent, and no one can govern them without it. Lincoln stated, “I say this is the leading principle—the sheet anchor of American republicanism.”
- For instance, consider Lincoln’s Fourth of July speech in 1858: “Ever true to Liberty, the Union, and the Constitution—true to Liberty, not selfishly, but upon principle—not for special classes of men, but for all men; true to the Union and the Constitution, as the best means to advance that liberty.”
- Like the founders, Lincoln understood the Lockean premise that the purpose of government, according to the Declaration of Independence, was to protect the rights of the people. And that whenever government became destructive of those ends, the American people had a right to alter or abolish it in favor of a new government—the right of revolution “a most valuable, —most sacred right.”
- In his famous debates with Stephen Douglas, Lincoln rejected Douglas’s version of “popular sovereignty”—which would permit territories to determine by a majority vote whether to permit slavery. Lincoln argued that Douglas’s vision would allow for a white majority to enslave an African American minority who (for Lincoln) were among the “all men” in the Declaration who held the same natural rights (including the right to self-rule).
- Finally, consider Lincoln’s famous Gettysburg Address—his vision of a nation “conceived in liberty and dedicated to the proposition that all men are created equal.” Of course, the closing of that brief address ties popular sovereignty to the Nation and to the principles of the Founding in as powerful a way as any passage in American history: “It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they here gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom, and that government of the people, by the people, for the people, shall not perish from the earth.”

NATURAL RIGHTS

Defining “natural rights:” Natural rights are rights that are given by God or by nature and thus come not from a law passed by the government but rather are inherent to all individual human beings from birth.

Where does the idea of natural rights come from?

- Under 18th-century Enlightenment thinking, there is a critical difference between political or civil liberty and natural liberty.
  - Political or civil liberty speaks to the right to participate in government and in society.
  - At the same time, natural liberty means unconstrained liberty—liberty which can also mean harming others or society as a whole.
- Turning to American history, we need to look no further than the 1760s and 1770s and the movement for independence. The revolutionaries drew on the “rhetoric of liberty” throughout their writings and
pamphlets. The revolutionary generation laid claim to their rights to “English liberty” as Englishmen—derived from historic rights under the English Constitution. But they also moved from these English liberties to more abstract claims about natural rights and universal freedom.

- The founding generation broadly believed that all human beings were endowed by God or nature with certain unalienable rights in the state nature—and that they can’t surrender these rights to government when they create a civil society.
  - The quintessential example of a natural right is the right of conscience. Because my religious beliefs (or my lack of religious beliefs) are the product of my reason, I’m not able to give them up.
  - The founders also believed deeply in the right to alter or abolish government. The whole point of the social contract is to promote happiness and to ensure greater security and safety for the rights that I’ve retained. When government fails to hold up its end of the contract, the people have the right to alter or abolish it.

We see (perhaps) the strongest connection between the founding and natural rights in the Declaration of Independence. Of course, Jefferson himself wasn’t writing on a blank slate. We see similar language in leading state constitutions.

- Virginia Constitution, Declaration of Rights: “That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”
- Pennsylvania Constitution of 1776: “That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.”
- Thomas Jefferson was heavily influenced by George Mason and the Virginia Declaration of Rights, which was written shortly before the Declaration of Independence, as well as the English Bill of Rights of 1689.
- In the end, he drew on the language of natural rights and embraced the broad language of equality (“All men are created equal, endowed by their Creator with inalienable rights...”).

Or, consider the Bill of Rights—and, particularly, the Ninth Amendment.

- Here’s the key text of the Ninth Amendment: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”
- During the debates over the Bill of Rights, James Madison looked to preserve a robust conception of rights and guard against future generations limiting rights protections to those specifically listed in the Bill of Rights.
- Madison: “It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the
most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that may be guarded against.”

- Scholars debate the relationship between the Ninth Amendment and natural rights.
  - Some scholars interpret the Ninth Amendment as building protection for natural rights into the fabric of the Constitution.
  - Others say that it, in fact, leaves the existence or protection of other unenumerated rights unresolved.
  - (In one of Madison’s original drafts, he referred explicitly to natural rights.)

**RULE OF LAW**

*Defining the “rule of law”:* The basic idea is that we have a government of laws, not a government by man or by arbitrary rule. And no one is above the law.

The opposite of the rule of law is the arbitrary despotism of the kind the Founders complained of in the Declaration of Independence—government by the whims of an unaccountable monarch (or legislature).

Caligula offers a classic example of when the rule of law is violated.

- There, the Emperor wrote the law in small print and posted it up so high on a pillar that no one could ever read it and be sure about their legal responsibilities.
- Yes, the Emperor wrote the law. And yes, the Emperor even published the law. But no one had access to it. No one knew how to comply with it. And no one knew when they’d be punished.

So, the rule of law depends on stable laws—laws that:

- Are knowable by the people.
- Are possible to understand.
- Are possible to follow.
- Treat people equally and fairly.
- And provide advance notice of what’s expected.

Furthermore, to satisfy the rule of law, the president, Congress, and all members of government must be accountable to the law. And their actions must be reviewable by the courts or by the people themselves.

The rule of law also leads to the idea of judicial review or review of the constitutionality (or legality) of actions by the government inside the courts.

- For instance, consider British history and Sir Edmond Coke’s opinion in *Dr. Bonham’s Case* (1610). There, Coke said that “the king must not be under any man, but under God and the law.” He argued that “when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void.”
- Or consider one of the leading Massachusetts Patriots, James Otis, in 1764: “To say the Parliament is absolute and arbitrary, is a contradiction. The Parliament cannot make 2 and 2 [equal] 5. ... Parliaments
are in all cases to declare what is good for the whole; but it is not the declaration of parliament that makes it so. There must be in every instance a higher authority—God. Should an act of parliament be against any of His natural laws, which are immutably true, their declaration would be contrary to eternal truth, equity and justice, and consequently void.”

**So, where do we see the rule of law embodied in the Constitution’s text?**

- We see it in the requirement that various government officials take an oath of office. For instance:
  - Under Article II, the president has a duty to “take care that the laws be faithfully executed” and must take an oath to swear to “preserve, protect and defend the Constitution.”
  - And under Article VI, all members of Congress, the judiciary, and other federal officials must swear an oath to “support this Constitution.”

- We also see it in Article VI’s “Supremacy Clause.”
  - This provision sets out core features of the rule of law within the Constitution’s structure.
  - Article VI: “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.”
  - More explicitly, under the “Supremacy Clause,” no person or part of government is above the law, and any law that violates the Constitution is no law at all and, therefore, cannot be enforced.

- Art. I, Section IX banned ex post facto laws or bills of attainder. And Art. I, Sect. X applies the same limitation to states.
  - A Bill of Attainder would declare a person or a group of persons guilty of a crime and punish them without trial, violating both the Sixth Amendment and Article III. (For instance, a law that sentenced all “Jane Doe” to five years in prison.)
  - And a ex post facto law would punish someone for a crime that they did before it was illegal.

- And of course, after the Civil War, we ratified the 14th Amendment, which promised “equal protection of the laws” for “all persons” in the United States.

**Finally, let’s end with a couple of examples from American history.**

**President Andrew Jackson and the Nullification Crisis**

- There, South Carolina deems the 1828 and 1832 tariffs (one called the “Tariff of Abominations”) unconstitutional.
- The state declares that these tariffs are unenforceable in South Carolina under the theory of nullification.
It argues that states—as independent sovereigns who joined a compact of limited powers under the Constitution—maintained the power to judge the constitutionality and applicability of federal acts.

John C. Calhoun was the secret author of South Carolina’s ordinances of nullification.

And his ally Robert Hayne defended the state’s actions in the Senate in 1830 against Senator Daniel Webster—known as the “Webster-Haynes debates.”

This is where Webster famously proclaimed, “Liberty and Union, now and forever, one and inseparable.”

President Jackson rejected this theory and saw it as a threat to the Union—the federal Union created by the Constitution—and to popular sovereignty (as embodied by majority rule).

Once again, Henry Clay crafted a compromise. As a political enemy of Jackson, he was willing to reduce the Tariff in order to appease Calhoun and his allies, while passing the Force Bill, which would allow Jackson to enforce the tariff with the army against any nullifying actions.

Abraham Lincoln

In his 1838 Lyceum Speech, a young Lincoln (only 29) gives an address in the wake of growing sectional violence—pro-slavery and anti-slavery riots and the 1837 killing of Elijah Lovejoy (an abolitionist printer) by a pro-slavery mob.

Lincoln rejected the claim of some anti-slavery Whigs like William Seward who claimed that slavery violated a “higher law” than the Constitution.

For Lincoln, as he said in 1852, “In so far as it may attempt to foment a disobedience to the constitution, or to the constitutional laws of the country, it (Seward’s doctrine) has my unqualified condemnation.”

Thus, even if the Fugitive Slave Act of 1850 or the Fugitive Slave Clause in the Constitution were outrageous and wrong, he would “bite [his] lip and keep quiet” because they were the law and must be followed until they could be changed by the people.

In his 1857 Springfield Address—three months after Dred Scott and a Stephen Douglas speech defending the decision—Lincoln criticized Court’s infamous ruling, suggesting it was so weakly argued that it could not be considered a settled matter by the Supreme Court. Yet, he also pleaded with the crowd and Republicans to respect the decision of the Court until it could be overturned.

**Question:** What current constitutional issues bring about questions of rule of law?

**CONCLUSION AND SUMMARY**

**Popular Sovereignty**
Beginning with the words “We the People,” the Constitution establishes a government that’s driven by us—not a monarch and not an aristocracy—but by us, the American people.

**Natural Rights**
Natural rights are rights that are given by God or by nature and thus come not from a law passed by the government but rather are inherent to all individual human beings from birth.
Rule of Law
The rule of law is the basic idea that we have a government of laws, not a government by man or by arbitrary rule. In other words, no one is above the law.

*Research provided by Nicholas Mosvick, Senior Fellow for Constitutional Content and Thomas Donnelly, Senior Fellow for Constitutional Studies, at the National Constitution Center.*