

Separation of Powers

Teacher Power Point Notes

Essential Question:

How did the delegates in the Constitutional Convention separate the powers of government to prevent tyranny?

English Legacy of Separation of Powers and the Glorious Revolution

- **Main idea**—The result of the Glorious Revolution (1688) was the end of absolute monarchy in England. It established that the monarch could not govern without the consent of Parliament. It also laid the groundwork for later separating the legislative and executive functions.
 - **Details**
 - The Glorious Revolution marked the peaceful overthrow of King James II who, along with his father, heavily emphasized “divine right of kings.” James II was peacefully replaced by William III and Mary II under the condition that they accept the Bill of Rights (1689), which firmly established Parliament’s authority over the Crown and some basic civil rights for English subjects.
 - This influenced the thinking of John Locke who suggested in his work *Two Treatises of Government* (1689) the idea of checks and balances and separation of power. Later, Montesquieu more clearly articulated the idea of separation of powers in *The Spirit of Laws* (1748) by observing the British system from his home country of France.

What were Revolutionary Americans reading about separation of powers?

Summary of *The Spirit of Laws* (1748) by Montesquieu

- **Main idea**—Montesquieu’s main argument was that political power should be divided among different branches of government to prevent tyranny and protect liberty.

- **Separation of Powers**—Montesquieu’s most influential idea in his work *The Spirit of Laws* (1748) is that political power should be divided among different government branches to prevent tyranny.
 - Legislative Branch—Makes Laws
 - Executive Branch—Enforces Laws
 - Judicial Branch—Interprets Laws
- **Political Liberty and Law**—Montesquieu argues that true liberty is not doing whatever one wants but living under laws that protect individuals from arbitrary power. This depends on the separation of powers and laws suited to the circumstances of the people.
- **Checks and Balances**—Montesquieu argues for the need for each branch of government to have the means to limit the power of the others, features later incorporated into the U.S. Constitution.

American Revolutionary Era State Constitutions Build on English Legacy of Separation of Powers

- **Main idea**—A form of separation of powers already existed in the English tradition. Montesquieu’s ideas in *The Spirit of Laws* were immensely influential in furthering to separate powers among branches of government. As Americans declared independence and began drafting their new governments in the form of state constitutions, they further separated power among branches of government

These points are drawn from Gordon Wood’s, *Power and Liberty*, chapter 2

- “We Americans are apt to think of the federal Constitution of 1787 as the model of constitutional thinking. It looms so large in our lives that we can scarcely pay any attention to our state constitutions. But the Revolutionary state constitutions created in 1776 were far more important in shaping America’s understanding of constitutionalism than was the federal Constitution framed a decade later. Our single executives, our bicameral legislatures, our independent judiciaries, our idea of separation of powers, our bills of rights, and our unique use of constitutional conventions were all born in the state constitution-making period between 1775 and the early 1780s, well before the framing of the federal Constitution of 1787.”

- Key summary points about choices Revolutionary Era state constitution writers made concerning separation of powers
 - **Diminish the power of state governors who under royal rule were usually appointed by the king**—American Revolutionaries saw the Crown as the source of violating their rights and the governors were usually the agents to enforce the will of the Crown. So as American Revolutionaries were writing their state constitutions in 1776-1780, many writers diminished the power of governors.
 - **Increase the power of the state legislatures**—While American Revolutionaries diminished the power of governors in their state constitutions, they saw the legislature as the best branch to protect the rights of the people, so they emphasized the power of representative government. So later, when writing the U.S. Constitution, delegates in Convention spent much of their time discussing the design and powers of Congress.
 - **Create independent judiciaries**—At the time of the American Revolution, it was common in England for Crown appointed judges to also hold seats in Parliament. Influenced by the ideas of Montesquieu to separate the branches of government, the American Revolutionaries in their state constitutions (1776-1780) chose to bar holding both a seat in the legislature and a seat as a judge.

Debate in the Constitutional Convention of 1787 Concerning Separation of Powers

Essential Question after going through the debate excerpts: How did the delegates in the Constitutional Convention separate the powers of government to prevent tyranny?

Main idea—The delegates in the Convention were heavily influenced by Montesquieu's argument to separate power across branches of government. But the specifics of how that looked still needed to be worked out. In these debate excerpts, delegates are responding to the proposal to allow the judiciary to revise

laws made by the legislature, with some involvement by the executive. There was a fear that the legislature had the most power to impose on the rights of the people and there needed to be some check on that power. Some disagreed. Eventually, the proposal did not carry. This debate shows the negotiation of ideas to get to our final version of the Constitution.

Summary of debate excerpts from the worksheet

- On June 2 in Convention, John Dickinson argued that the legislative, executive, and judiciary must be as separate as possible. This reflects Montesquieu's argument in *The Spirit of Laws* to separate power across branches of government. He also worries that some delegates want a powerful executive and argues for a limited monarchy, which he argues is more consistent with a republic. This view of a limited monarchy reflects the Glorious Revolution's outcome to limit the power of the monarchy with Parliament.
- The delegates debated allowing the judiciary to revise laws made by the legislature, but the delegates voted down that proposal. On June 6, James Wilson moved to consider allowing the judiciary to revise laws and involve the executive in revising the process. The excerpts of the debates that follow respond to this proposal.
- On July 20, Rufus King of Massachusetts worries that if the judiciary and executive are allowed to revise laws made by the legislature would enervate--or drain the government's power. He wanted to get back to the axiom—a statement that is assumed to be true without further argument—that the branches of government needed to be separate.
- On July 21, James Madison argued that allowing the judiciary to revise laws would allow for protections against legislative encroachments. He thought if anyone objected, it ought to be that it gave too much power to the judiciary or the executive, but he thought there was no need to worry on this point. He thought that the legislature would be too powerful and needed the combined check of the cooperation of the executive and judiciary. He pointed to the states as an example of the state legislature taking too much power. He thought there needed to be more defense against the legislature at the national level.

- On July 21, George Mason argued that he agreed with the provision to allow the judiciary and executive to revise laws after they passed the legislature. He thought it would give power to the executive which he needed. (Remember that many Revolutionary Era state constitutions limited the power of the governors in favor of the legislatures.)
- On July 21, Elbridge Gerry of Massachusetts spoke against allowing the judiciary to revise laws made by the legislature with the help of the executive. He thought it mixed powers too much, which he described as an “improper coalition.” He thought it made “Statesmen of the Judges” and that the elected representatives of the people were better guardians of the rights and interests of the people.
- On July 21, James Wilson argued that separating the branches of government does not mean they can’t work on the same business. He pointed to how the two houses of the legislature were separate, but both worked on making laws.

Some ideas for improving the separation of powers designed by the delegates in the Convention:

- Clarify and limit executive power
- Reform the legislative process to be more efficient and prevent minority senators from blocking legislation with a filibuster (developed after the Founding Era).
- Term limits for Supreme Court justices and members of Congress
- Strengthen congressional oversight
- Improve civic education and accountability for citizens