

***CONGRESSIONAL TESTIMONY***

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**Congress, Constitutional Authority,  
and the Problem of Bureaucratic Government**

**Testimony before the  
Committee on Rules  
United States House of Representatives**

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Chairman McGovern, Ranking Member Cole, members of the committee: thank you for inviting me to testify before the Committee on Rules of the House of Representatives. I commend you for holding this hearing on Article I: Constitutional Perspectives on the Responsibility and Authority of the Legislative Branch.

Like many of you, I am concerned about the decline of congressional power relative to the modern executive and join in the call for Congress to reassert its Article I powers. I hasten to point out that this is not a recent development, during this administration, or the last, or even the last several presidencies. The sustained expansion of the executive is largely the result of the prolonged narrowing of the legislative branch, and both of these institutional developments, in my opinion, are symptoms of a larger decades-long change in American government toward administrative rule and away from the constitutional rule of law.

Let me put it in the broadest perspective. If the development of the rule of law and constitutional government—rule by representative lawmaking rather than executive decree or judicial edict—is the great accomplishment of the long history of human liberty, then the greatest political revolution in the United States since the establishment of the Constitution has been the shift of power away from the lawmaking institutions of constitutional government to an administrative bureaucracy that regulates extensive aspects of American life, ostensibly under the authority of a modern executive. The result is a structurally unbalanced relationship between an increasingly powerful executive–bureaucratic branch and a weakening legislative branch seemingly unwilling to exercise its institutional muscles to check the executive or rein in a metastasizing bureaucracy of its own making.

If this executive—bureaucratic dominance becomes the undisputed norm—accepted not only by academic and political elites, but also by the American people—it would mark a fundamental restructuring of our system of constitutional self-government.

My testimony will make three general points:

1. Old ways of constitutional governance have been replaced for the most part by a new form of bureaucratic rule;
2. Both Congress and the presidency have adapted to these new ways, but in the legislative-executive battle to control the bureaucratic state the executive has a distinct advantage;
3. The proper remedy to this imbalance is for Congress to reassert its core legislative powers, especially concerning the primary legislative power of the purse.

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Throughout most of human history, the rules by which life was governed were usually determined by force or fraud: Those who had the power—usually the absolute monarch, tyrannical despot, or military dictator—made the rules and their commands had the coercive force of the law. One only need read Shakespeare to see that Anglo-American history of a thousand years is replete with the often violent back and forth between despotic rule and the slowly developing concept of the rule of law. Impatient English kings regularly sought to evade the rudimentary process of law by exercising the prerogative power and enforcing their commands through various institutions such as the King's Council, the Star Chamber, or the

High Commission. Magna Carta in 1215 first challenged this absolutism and forced the monarch to abide by the mechanisms of law. The idea that the law is superior to human rulers is the cornerstone of English constitutional thought as it developed over centuries and directly informed the American Constitution.

The objective of America's founders was to break free of the old despotisms and to establish the rule of law and constitutional government based on the principle of consent. That idea is most famously expressed in the Declaration of Independence, which posits as a self-evident truth "that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." Only a government that derived its power from "the great body of the people," we are told in Federalist 39, was compatible with the "genius of the American people," "the fundamental principles of the revolution," and a determination to "rest all our political experiments on the capacity of mankind for self-government."

The Constitution creates a government of delegated and enumerated powers. Individuals possess equal rights by nature, and from those sovereign rights grant certain powers to government. Governments only possess those powers that are given (or delegated) to them by the people. The concept of enumerated (or listed) powers follows from the concept of delegated powers, as the functional purpose of a constitution is to write down and assign the powers granted to government. The delegation of powers to government along with a written agreement as to the extent (and limits) of those powers are critical (if not necessary) elements of limited constitutional government.

The very form of the Constitution separates the branches in accordance with distinct powers, duties, and responsibilities stemming from the primary functions of governing: to make laws, to execute and enforce the laws, and to uphold (judge or adjudicate) the rule of those laws by applying them to particular individuals or cases. The Constitution creates three branches of government of equal rank in relation to each other; each is vested with independent authority and unique powers that cannot be given away or delegated to others. Nevertheless, the order of the branches – legislature, executive, judiciary – is important, moving from the most to the least “democratic” and from the most to the least directly chosen by the people. Which is to say that the legislative branch is the first among equals. The Constitution lodges the basic power of government in the legislature not only because it is the branch most directly representative of popular consent but also because the very essence of governing according to the rule of law is centered on the legitimate authority to make laws.

Article I begins: “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” This language implies that while there might be other legislative powers, Congress is granted only those “herein” granted, meaning listed in various clauses of the Constitution. The legislative power extends to seventeen topics listed in Article I, Section 8: taxing and borrowing, interstate and foreign commerce, naturalization and bankruptcy, currency and counterfeiting, post offices and post roads, patents and copyrights, federal courts, piracy, the military, and the governance of the national capitol and certain federal enclaves. All told, the powers are not extensive, but they are vital. Apart from some relatively minor matters, the Constitution added to the authority already granted in the Articles of Confederation only the powers to regulate foreign

and interstate commerce and to apportion “direct” taxes among the states according to population.

The diverse powers granted to Congress might at first seem rather disorganized, ranging from the clearly momentous (to declare war) to the seemingly minute (to fix weights and measures). But upon reflection, an underlying pattern emerges based on the distinction between key functions assigned to the national government and those left to the state governments. The two most important functions concern the nation’s security (such as the powers to maintain national defense) and the national economy (such as the power to tax or to regulate interstate commerce). And as might be expected, many of the powers complement each other in supporting those functions: The power to regulate interstate commerce, for instance, is consistent with the power to control currency, which is supported in turn by the power to punish counterfeiting and to establish standards for weights and measures.

Beyond the general legislative power with which it is alone vested, Congress’ most important power is control of the government’s pocketbook. Congress holds the power of the purse not because it is necessarily better at exercising it than the president is –though it may well be – but because it has been given this particular power as a check on the executive. Unlike absolute rulers who control their national treasury, American presidents cannot withdraw a dime of funds without an appropriation from Congress. It is also the long-term authority by which the legislature maintains its role in national affairs. The executive “holds the sword of the community,” Alexander Hamilton reminds us in Federalist 78, but even the most energetic president cannot forget that the legislature “commands the purse.” As a result, James Madison concludes in Federalist 58 that this power over the government’s purse “may, in fact, be

regarded as the most complete and effectual weapon with which the Constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into and effect every just and salutary measure.” Congress has an obligation to jealously maintain control of the nation’s purse because, being closest to the people, it is the guardian of the public treasure.

In Article II “the executive Power shall be vested in a President of the United States of America.” The president plays an important role in legislation through the limited veto power (actually assigned in Article I) and the duty to recommend to Congress “such measures as he shall judge necessary and expedient.” With the advice and consent of the Senate, the president appoints judges (thus shaping the judiciary) and other federal officers (thus overseeing the executive branch). Reflecting the president’s role in directing the nation’s foreign affairs, the president also (again with the advice and consent of the Senate) appoints ambassadors and makes treaties with other nations. He also receives ambassadors from other countries and commissions all military officers of the United States.

The president is charged to “take care that the laws be faithfully executed” — a crucial responsibility necessary for the rule of law. The law to be executed is made by Congress, but when Congress creates programs and departments through its lawmaking function, those programs and departments operationally fall under the executive branch. More generally, it means that it is the president’s core responsibility to be the nation’s chief executive and law-enforcement officer, who is responsible for carrying out and enforcing federal law. Every member of Congress as well as the federal judiciary takes an oath to “support the Constitution,” but it is the president’s exclusive oath, prescribed in Article II, to “faithfully

execute the Office of President of the United States, and . . . preserve, protect and defend the Constitution of the United States.”

It is important to note that the president has unique constitutional powers that do not stem from congressional authority. The president is vested directly with power in Article II of the Constitution, not by virtue of Congress’ lawmaking power. Article II is a general grant of executive power to the president, very different from the “legislative powers, herein granted” to Congress in Article I. The president is granted all the executive powers, except for those specifically granted to Congress (noted below). This is especially the case when it comes to war and national security, for the president acts as the commander in chief of the armed forces.

The office of the president is the Constitution’s recognition of the basic responsibilities of government (foreign policy, national security, and the common defense) and the practical necessity that the task be directed by one person (rather than 535 members of Congress) with adequate support and competent powers to act with the decisiveness and speed that is often required in times of crisis and conflict. The executive power is not unlimited, though, as the general grant of power is mitigated by the fact that many traditionally executive powers—to coin money, to grant letters of marque and reprisal, to raise and support armies—were given to Congress. The most significant of these limits on the executive is that Congress has the sole power to declare war.

While the federal government’s powers are limited, the powers granted are complete. The objective was to create a strong government that could effectively accomplish its purposes. As such, the granted powers are supported by the auxiliary authority needed to carry out these



functions. The central example of this is what is called the “necessary and proper” clause, which empowers Congress 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.” While this language suggests a wide sweep of “implied” powers, it is not a grant to do anything and everything, but only to make those additional laws that are necessary and proper for execution of the powers expressed in the Constitution.

Keeping the powers of government divided in distinct branches is “admitted on all hands to be essential to the preservation of liberty,” Madison notes in Federalist 47. “The accumulation of all powers,” Madison continues, “legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”

It is with this proclivity in mind that the Constitution is designed to maintain three separate and distinct branches of government. Each branch has only those powers granted to it, and can do only what its particular grant of power authorizes it to do. But beyond the written barriers of the Constitution, each branch is to operate so as to “be the means of keeping each other in their proper places,” as Madison explains in Federalist 51. In other words, government is structured so that each branch has an interest in keeping an eye on the others, checking others’ powers while jealously protecting its own. By giving each department an incentive to check the other—with overlapping functions and contending ambitions—the Founders devised a system that recognized and took advantage of man’s natural political motivations to both use power

for the common good and to keep power within constitutional boundaries. Or as Madison put it, the “interest of the man [becomes] connected with the constitutional rights of the place.”

The separation of powers and the introduction of legislative balances and checks, according to Hamilton in Federalist 9, are “means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided.” Not only does it discourage the concentration of power and frustrate tyranny but it also requires the branches of government to collaborate and cooperate in doing their work, limiting conflict and strengthening consensus. By its actions, Congress establishes and represents a political consensus (derived from state and local majorities) which makes it possible to promulgate laws and establish budgets to carry out the policies required by law. The presidency participates in lawmaking by representing a political constituency that is established by a national majority (understood in terms of an electoral college majority). Consequently, the branches are forced to cooperate with each other on behalf of a national or common good. These means also have the powerful effect of focusing individual actors on protecting their constitutional powers and carrying out their constitutional duties and functions—and that transforms the separation of powers from a mere negative concept to a positive and important contributor to constitutional government.

The Founders well understood the need for the good administration of government — an important aspect of their “improved science of politics.” But the administration of things was subordinate to the laws of Congress, and thus responsible to the people through election. As Alexander Hamilton points out in Federalist 68, it is a “heresy” to suggest that of all forms of government “that which is best administered is best.” In the end, liberty is assured not by the

anarchy of no government, on the one hand, or the technocratic rule of administrative government, on the other, but through a carefully designed and maintained structure of government to secure rights and prevent tyranny through the rule of law.

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The great challenge of free government, as the Founders understood it, was to restrict and structure the powers of government in order to secure the rights articulated in the Declaration of Independence, preventing tyranny while preserving liberty. Their solution was to create a strong, energetic government of limited authority, its powers enumerated in a written constitution, separated into different functions and responsibilities, and further divided between the national and the state governments in a system of federalism, leaving ample room for republican self-government. The practical result was that, for much of American history, despite the debates between the Jeffersonians and the Hamiltonians, the fall of the Whigs and the rise of the Jacksonians, and the divisions of the Civil War, the United States was centrally governed under the Constitution but was administratively decentralized at the state and local level.

In the years after the Civil War—with the unleashing of the Industrial Revolution, the expansion of urban society, and the development of the United States as a modern world power—many came to believe that the American political system could not adequately address the emerging character of society. Early Progressive thinkers posited a sharp distinction between politics and what they called “administration.” Politics would remain the realm of expressing opinions—hence the continued relevance of Congress to provide rough guidelines of policies—but the real

decisions and details of governing would be handled by trained administrators, separate and immune from the influence of politics. These administrators would be in charge of running a new form of government, designed to keep up with the expanding ends of government, called “the administrative state.” Where the Founders went to great lengths to preserve consent (and check human nature) through republican institutions and the separation of powers—as in entrusting Congress rather than the executive with the power of the purse—the progressives held that the barriers erected by the Founders had to be removed or circumvented and government unified and streamlined. Emphasis would be placed not on a *separation* of powers (which divided and checked government power) but rather a *combination* of powers (which would concentrate and direct government power) in order to bring about reform, consistent with the popular will. The particulars of accomplishing the broad objectives of reform—the details of regulation and many rule-making functions previously left to legislatures—were to be given over to professionals who would reside in the recesses of agencies like the FCC (Federal Communications Commission), the SEC (Securities and Exchange Commission), the CPSC (Consumer Product Safety Commission), or OSHA (Occupational Safety and Health Administration). As “neutral” experts not susceptible to political bias, so the theory went, these administrators would act above petty partisanship and faction, making decisions mostly unseen and beyond public scrutiny to accomplish the broad objectives of policy.<sup>1</sup>

Throughout much of the first half of the twentieth century, it was primarily progressive presidents of both political parties—Theodore Roosevelt, a Republican and then a Democratic

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<sup>1</sup> For a general history of administrative government, see Joseph Postell, *Bureaucracy in America: The Administrative State’s Challenge to Constitutional Government* (2017).

one, Woodrow Wilson, in particular—who advocated expanding the administrative role of government, which meant pushing Congress to expand the executive branch.<sup>2</sup> The developing structure of the administrative state required dynamic management to keep it moving forward, and so the new thinkers developed the concept of “leadership” to complete their administrative theory of government. An important reform promoted by progressives (and proposed by the Taft Commission), for example, was an executive dominated budget system so that the executive could represent the national will and lead a nonpartisan bureaucracy to carry out that will. The result was the 1921 Budget Act, signed in to law by President Warren Harding, which created the precursor to the Office of Management and Budget (OMB) and required the president to submit to Congress an annual budget for the entire federal government.<sup>3</sup>

Nevertheless, politics operated on the assumption that the legislature remained preeminent regarding legislative matters, and that the budget was the main process by which Congress maintained control of the operations of government. Congress, representing more local interests tied to state power, remained a defender of decentralized administration and insisted on maintaining its deliberative, representative, and lawmaking functions. Federal spending during peacetime remained at or near total revenues, meaning surpluses or small deficits. Even after massive spending during the Second World War, Congress quickly returned the budget to near fiscal balance. Administration at the national level was limited, consistent with a decentralized constitutional system and self-governing civil society.

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<sup>2</sup> On Woodrow Wilson in particular and his ideas about government reform, see Ronald J. Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism* (2005).

<sup>3</sup> The best study of the budget and modern bureaucratic government is *The Politics Of Budget Control: Congress, The Presidency And Growth Of The Administrative State* (1992) by John Marini.

But the seeds of a new form of governing had been sown. The New Deal brought significant new interventions in the national economy and the creation of significant entitlement programs; Franklin Roosevelt recognized the constitutional significance of this shift when he moved the Bureau of the Budget from the Treasury to the new Executive Office of the President, establishing that henceforth presidential control of the budget would be key to controlling and directing the new elements of American government. The experience of World War II further centralized power in the executive and diminished the power of Congress.<sup>4</sup>

The most significant shift in the balance of powers in the executive's favor occurred more recently, under the Great Society and its progeny. Whereas initial regulations dealt with targeted specific commercial activity – such things as railroads, trucking, aviation, banking – when the federal government assumed responsibility for the well-being of American society generally, it created programs (and reformed old ones) to manage the whole range of socioeconomic policy, from employment, civil rights, welfare, and healthcare to the environment and elections. Agree with the policies or not, the expansion of regulatory activities on a society-wide scale in the 1960s and 1970s led to vast new centralizing authority in the federal government and a vast expansion of federal regulatory authority in particular.

When administration is centralized at the national level it does not easily or naturally fall under the authority of the legislature. As four decades of political history show, control over the new bureaucracy created an endless source of conflict between the executive and legislative branches. Having created it, Congress was the first to adapt to the administrative state,

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<sup>4</sup> See Congressional Abdication on War and Spending (2000) by Louis Fisher.

reorganizing its committees and subcommittees in the 1970s to oversee and interact with the day-to-day operations of the bureaucratic apparatus. As the bureaucracy expanded, Congress tried to maintain its power over the administration through the authorization and appropriation process but increasingly turned to back-end checks, such as the legislative veto (which was held unconstitutional by the US Supreme Court in 1983). Over time, Congress has come to focus its power of the purse largely on post-budgetary oversight of and after-the-fact “regulatory relief” from the bureaucracy.

As Great Society programs grew, and new and hard to control entitlement spending absorbed ever more resources, there was less flexibility in the budget to set national priorities. In his second term, President Nixon sought to assert executive power over the bureaucracy not only by controlling department personnel and the regulatory process but also through impoundment (reduction of appropriated funds) not merely as a fiscal management tool but in order to challenge congressional policy. This led to the Congressional Budget and Impoundment Control Act of 1974, which President Nixon signed just before he resigned from office. While that law restored significant legislative authority over the budget process, allowing Congress to budget independently and comprehensively, it has not served to control spending and deficits as intended. Indeed, although there have been numerous amendments to its complex process, it seems to this observer that the Congressional Budget Act has been unraveling from the beginning and its model of congressional budgeting has all but totally collapsed. (The best indicator that Congress has lost control of the budget is its temporary but unsustainable attempts to turn to automatic budget cuts, such as Gramm-Rudman-Hollings and the recent sequester agreement.) Today lawmakers regularly, and often deliberately, miss budget

deadlines, the government often runs on temporary spending measures, and separate appropriations under regular order have been replaced by massive omnibus legislation.

Today, it is fair to say that the primary activity of modern government is regulation. When Congress writes legislation, it uses very broad language that effectively turns extensive power over to agencies and departments, which are often also given the authority of executing and adjudicating violations of their regulations in particular cases. The result is that most of the actual decisions of lawmaking and public policy—decisions previously the constitutional responsibility of elected legislators—are delegated to bureaucrats whose “rules” (whether there is a formal delegation or not) there is little doubt have the full force and effect of laws passed by Congress. In the 115th Congress, the legislature enacted 443 laws and passed 758 resolutions, while federal departments and agencies issued 5,731 rules, amounting to over 125,000 pages in the Federal Register. Today, the modern Congress is almost exclusively a supervisory body exercising limited oversight over administrative policymakers.

The rise of the neo-imperial presidency should not be that surprising given the overwhelming and tempting amount of authority that has been delegated to decision-making actors and bodies largely under executive control. While presidents, especially since 1968, have sometimes acted to diminish the administrative state, they have always without exception acted to control it. Indeed, since the mid 1990s, as party control of Congress changed for the first time in 40 years, presidents of both parties came to see the allure of bureaucratic power. As Congress expanded the bureaucracy—creating agencies, formally and informally delegating its lawmaking authority, losing control of the details of budgeting, and focusing on post hoc checks—the executive grew to new levels of authority. Add to this the general breadth of



legislatively granted executive discretion, as well as sometimes poorly written, ambiguous, and conflicting laws, the modern executive can more than ever lead the bureaucracy to the president's policy ends, with or without the cooperation of Congress.

In terms of what we are discussing here, neither Congress nor the executive governs as a constitutional institution. The separation of powers is less about distinguishing legislative and executive powers and resolving competing institutional prerogatives than about asserting legislative or executive branch control over a permanent "fourth branch" of government. And in this competition the executive has a distinct advantage because administration is inherently executive in nature. "The administration of government, in its largest sense, comprehends all the operations of the body politic, whether legislative, executive, or judiciary," Hamilton recognizes in Federalist 72 (writing about the executive), "but in its most usual, and perhaps its most precise signification, it is limited to executive details, and falls peculiarly within the province of the executive department." As the constitutional rule of law (centered on legislation) has given way to administrative or executive rulemaking, so the administrative Congress of the 1970s and 1980s has been replaced by an administrative executive as the branch that dominates American politics.

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Congress needs to think strategically and act as a constitutional institution – indeed, the primary branch of constitutional government – if it wants to reverse the trend of the diminishing legislature and the continuing expansion of the modern executive.

- Congress must reassert its legislative authority not to paralyze government but to *command* it. It may be a prudent option for Congress to assert checks and balances on the executive through litigation; a successful lawsuit stops actions and prevent further harm. But let's be clear: courts are not going to solve the larger problem. Indeed, the notion of the legislative branch going to the judicial branch to solve its problems with the executive branch seems rather feckless and may have the unintended (and perverse) effect of further weakening the institutional powers of Congress. Likewise, while it is appropriate for Congress to robustly challenge the executive's use of inherent presidential powers, Congress should recognize that it is on weaker ground than when it exerts core legislative powers, where the executive plays a secondary role. The solution is for Congress to strengthen its constitutional muscles as a coequal branch of government in our separation of powers system. A stronger legislative branch would go a long way toward making the role of government a proper political question, as it should be, subject to election rather than executive fiat or judicial decree.
- The first step towards restoring legislative integrity is for Congress, as much as possible, to cease delegating the power to make laws to bureaucrats and administrative agencies and not to flinch from using its legislative powers to rein them in. In cases where Congress gives departments and agencies the authority to create significant rules, Congress should assert its constitutional authority to approve or reject those rules. Congress should insert itself more in the regulatory process, perhaps through a regulatory budget or a vehicle like the REINS Act. Steps like these would restrain the executive's ability to make "laws" without legislation.

- Congress must regain legislative control over today's labyrinthine state, bringing consent and responsibility back to government through better lawmaking up front and, as a result, better oversight after the fact. Regular legislative order, but especially the day-to-day back-and-forth of authorizing, funding and overseeing the operations of government, will do more than anything to restore the Article I powers of Congress and get control of our seemingly unlimited government. If Congress objects to the extent of executive discretion in particular areas of law enforcement, then Congress needs to narrow that discretion through statutes that are clear, precise, and unambiguous.
- Congress is at its strongest—and there is best opportunity for gaining leverage over the executive – when it exercises the power of the purse. Strategically controlling and using the budget process will turn the advantage back to Congress, forcing the executive to engage with the legislative branch and get back into the habit of executing the laws enacted by Congress. Done well, it will also prevent Congress from continually getting cornered in large, messy, and unacceptable omnibus budgets at the end of the year, the settlement of which works to the advantage of the executive. While many budget reforms focus on how to promote more strategic long-term budgeting, fiscal restraint, and other worthy priorities, Congress should pursue reforms that will shift substantive control of the actions of government back to the legislature. The fundamental goal of budget reform should be budget *control*.

The Constitution is grounded in the principle that governments derive their just powers from the consent of the governed. This means that laws should be made by the representatives elected by the people and not unelected bureaucrats under the command

of the executive. The fundamental problem underlying this fight is that vast aspects of governing (lawmaking and executing) occur outside of the regular control of the constitutional institutions that were designed to perform those functions and ensure that governing is both deliberative and energetic, and subject to the electoral consent and political will of the American people. If Congress does not act to correct the growing tilt toward executive-bureaucratic power, the structure of our government will be fundamentally, and perhaps permanently, altered. This outcome imperils not only the constitutional design but also the great achievement of republican self-government.

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Founded in 1844, Hillsdale College is an independent, coeducational, residential, liberal arts college with a student body of about 1,400. Its four-year curriculum leads to the bachelor of arts or bachelor of science degree, and it is accredited by the Higher Learning Commission. Its doors are open to all, regardless of race or religion. It was the first college in Michigan, and the second in the United States, to admit women on par with men. Its student body is assembled from homes in 47 states and 8 foreign countries.

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