

United States Government

United States Government

AUSTIN COMMUNITY COLLEGE



United States Government Copyright © by Lumen Learning is licensed under a [Creative Commons Attribution 4.0 International License](https://creativecommons.org/licenses/by/4.0/), except where otherwise noted.

Contents

Part I. Faculty Resources

1. Request Access	3
2. Instructor Test Banks	4
3. Instructor Classroom Activities and Writing Assessments	5
4. Visual Presentations to Enhance Learning	6
5. Instructor Lecture Outlines	9
6. Practice Quiz Handouts with Attached Vocabulary Lists	10
7. Chapter Handouts with Note-Taking Boxes	13
8. Proposed Unit Review Sheets	16
9. Separate Handouts for Helpful Charts and Diagrams	17
10. Sample Syllabi	19
11. Review and Practice Quizzes	20
12. I Need Help	22

Part II. Student Resources

13. Handy-Dandy Handouts	25
14. Helpful Charts and Diagrams	28

Part III. United States Government

15. United States Government: Where do we start?	33
--	----

16. United States Government: Why form a government?	36
17. United States Government: Who is in control?	53
18. United States Government: Shared Political Culture and Civic Engagement	61

Part IV. Constitutions and Contracts

19. Constitutions and Contracts: Why establish rules for governing?	81
20. Constitutions and Contracts: Where did the ideas for the US Constitution originate?	83
21. Constitutions and Contracts: Articles of Confederation	93
22. Constitutions and Contracts: Is another new contract really necessary?	98
23. Constitutions and Contracts: Ratification or Approving the Contract	114
24. Constitutions and Contracts: Amending or Changing the Contract	128

Part V. Federalism

25. Federalism: Basic Structure of Government	141
26. Federalism: How should power be structurally divided?	144
27. Federalism: How is revenue shared?	164

Part VI. U. S. Courts

28. U. S. Courts: Interpreting the Contract	179
29. U. S. Courts: What do they do?	181

30. U S Courts: Structure and Procedure	194
31. U S Courts: Due Process and Equality Under the Law	235

Part VII. Congress

32. Congress: Making Laws--Adding to and Changing the Contract	249
33. Congress: How is the legislative branch structured?	253
34. Congress: How do we choose our representatives?	274
35. Congress: What does legislative procedure look like?	289

Part VIII. The President

36. The President: Who is upholding the law?	301
37. The President: What are the powers, structure and function of the executive branch?	303
38. The President: How do we select and elect a president?	347
39. The President: What is the public presidency?	358

Part IX. The Bureaucracy

40. The Bureaucracy: The Executive Branch, Bureaucrats and Civil Service	369
41. The Bureaucracy: Policy Implementation	371
42. The Bureaucracy: Structure and Function	383
43. The Bureaucracy: Who is in control?	395

Part X. Domestic Policy

44. Domestic Policy: Actors, Issues and Disputes	413
45. Domestic Policy: What is public policy?	415
46. Domestic Policy: Categorizing Public Policy	423
47. Domestic Policy: Policy Arenas	437
48. Domestic Policy: Who are the policymakers?	448
49. Domestic Policy: How are budgeting and tax policy implemented?	460

Part XI. Foreign Policy

50. Foreign Policy: Actors, Issues and Disputes	479
51. Foreign Policy: Basics and International Actors	481
52. Foreign Policy: Tools or Instruments	502
53. Foreign Policy: Institutional Relations	516
54. Foreign Policy: Approaches	529

Part XII. Public Opinion

55. Public Opinion: How is it formed?	545
56. Public Opinion: How is it measured?	562
57. Public Opinion: What is the connection to political institutions?	577

Part XIII. Interest Groups

58. Interest Groups: People Engage	591
59. Interest Groups: Who or what are they?	594
60. Interest Groups: How are they formed?	612

61. Interest Groups: Pathways to Participation and Influence	616
62. Interest Groups: How are they regulated?	639

Part XIV. Political Parties

63. Political Parties: What are they?	649
64. Parties: How and why did they form?	651
65. Political Parties: How does the two-party system work?	665
66. Political Parties: How are they organized?	681
67. Political Parties: What is divided government?	700

Part XV. Elections

68. Elections: The People Take Action	723
69. Elections: Voter Registration	726
70. Elections: Voter Turnout	742
71. Elections: Why run for office?	757
72. Elections: Campaigns and Voting	785
73. Elections and Other Methods of Participation: People Actively Engage	802

Part XVI. Media

74. Media: Influence and Impact	815
75. Media: What is their function?	817
76. Media: How have they evolved?	828
77. Media: How are they regulated?	852
78. Media: What is their impact?	873

Part XVII. Civil Liberties

79. Civil Liberties: Protecting Freedoms	897
80. Civil Liberties: What does the contract protect?	904
81. Civil Liberties: How are basic freedoms secured?	920
82. Civil Liberties: How are rights of the accused protected?	959
83. Civil Liberties: How are the Bill of Rights interpreted?	978

Part XVIII. Civil Rights

84. Civil Rights: People Challenging the Rules	995
85. Civil Rights: How are rights identified?	997
86. Civil Rights : What has occurred in the struggle for equality?	1009
87. Civil Rights: How has the fight for women's rights progressed?	1038
88. Civil Rights: Native Americans, Alaskans, and Hawaiians--how has the fight expanded?	1056
89. Civil Rights: How is equal protection achieved?	1076

Part XIX. Liberty v. Security--Wrapping it Up in Review

90. Liberty v. Security: A Short Review	1103
---	------

Part XX. Appendix

91. Declaration of Independence	1109
92. The Articles of Confederation	1116
93. The Constitution of the United States	1132

94. Federalist No. 10	1175
95. Federalist No. 51	1186
96. Electoral College Votes by State, 2012–2020	1193
97. Selected Supreme Court Cases	1194
98. U. S. Department of Justice Legal Terms Glossary	1202

PART I

FACULTY RESOURCES

I. Request Access

This text is openly licensed and is accessible to all by navigating using the “Contents” menu in the upper left hand corner.

To preserve academic integrity and prevent students from gaining unauthorized access, we have hidden faculty resources and assessments.

Please [contact oer@achievingthedream.org](mailto:contact_oer@achievingthedream.org) to request access to the faculty resources for this course.

Once you have been given access, you’ll be able to use the resources provided through the drop down in the upper left hand corner.

List of Faculty Resources

- Syllabus
- PowerPoints
- In-Class Activities
- Assignments
- Question Banks
- Additional Resources

Share Your Favorite Resources

If you have sample resources you would like to share with other faculty teaching this course, please send them with an explanatory message and learning outcome alignment to oer@achievingthedream.org.

2. Instructor Test Banks

Go to OpenStax to request access to more of their instructor materials.

Bank of Essay Questions (preliminary version/still under development)

- [govt-2305-instructor-resource-essay-question-text-bank-under-development](#)

Bank of Matching Questions

- 2 divided sections of 15 per chapter
- [govt-2305-instructor-resource-matching-question-split-section-version-text-bank-under-development](#)
- 30 per chapter
-

Bank of Either/Or Questions

- [govt-2305-instructor-resource-either-or-question-text-bank-under-development](#)

Bank of Blank Diagrams

Bank of Multiple Choice Questions

Bank of Opinion Questions

Bank of Unit Exam Examples

- [govt-2305-instructor-resource-unit-exam-government-constitutions-federalism-courts](#)
- [govt-2305-unit-public-opinion-interest-groups-political-parties-elections](#)

3. Instructor Classroom Activities and Writing Assessments

Islands Activity (Why is government necessary?)

- [govt-2305-instructor-resource-islands-activity-for-kinesthetic-learning](#)

Know Your Constitution Activity (Why is a written contract desirable?)

- [govt-2305-student-resource-constitution-basic-outline-handout](#)

Writing Assignment & Assessment of Critical Thinking and Basic Writing Skills

- proposed instructions, samples, and grading rubric for significant course writing assignment
 - [govt-2305-government-student-assignment-grading-rubric-and-details-for-paper](#)
- in addition to course paper, it is suggested that students write daily in class (see questions and ‘quote of the day’ opinion questions in PowerPoint™ presentations)
- the combination of in-class writing and the course paper are proposed to make a more complete assessment of student skill level

4. Visual Presentations to Enhance Learning

- Chapter: United States Government
 - [govt-2305-instructor-resource-power-point-slides-for-united-states-government](#)
 - [govt-2305-instructor-resource-power-point-slides-for-united-states-government](#) (printable .pdf version)
- Chapter: Constitutions and Contracts
 - [govt-2305-instructor-resource-power-point-slides-for-constitutions-and-contracts](#)
 - [govt-2305-instructor-resource-power-point-slides-for-constitutions-and-contracts](#) (printable .pdf version)
- Chapter: Federalism
 - [govt-2305-instructor-resource-power-point-slides-for-federalism](#)
 - [govt-2305-instructor-resource-power-point-slides-for-federalism](#) (printable .pdf version)
- Chapter: U. S. Courts
 - [govt-2305-instructor-resource-power-point-slides-for-u-s-courts](#)
 - [govt-2305-instructor-resource-power-point-slides-for-u-s-courts](#) (printable .pdf version)
- Chapter: Congress
 - [govt-2305-instructor-resource-power-point-slides-for-congress](#)
 - [govt-2305-instructor-resource-power-point-slides-for-congress](#) (printable .pdf version)
- Chapter: The President
 - [govt-2305-instructor-resource-power-point-slides-for-](#)

- [the-president](#)
- [govt-2305-instructor-resource-power-point-slides-for-the-president](#) (printable .pdf version)
- Chapter: The Bureaucracy
 - [govt-2305-instructor-resource-power-point-slides-for-the-bureaucracy](#)
 - [govt-2305-instructor-resource-power-point-slides-for-the-bureaucracy](#) (printable.pdf version)
- Chapter: Domestic Policy
 - [govt-2305-instructor-resource-power-point-slides-for-domestic-policy](#)
 - [govt-2305-instructor-resource-power-point-slides-for-domestic-policy](#) (printable .pdf version)
- Chapter: Foreign Policy
 - [govt-2305-instructor-resource-power-point-slides-for-foreign-policy](#)
 - [govt-2305-instructor-resource-power-point-slides-for-foreign-policy](#) (printable .pdf version)
- Chapter: Public Opinion
 - [govt-2305-instructor-resource-power-point-slides-for-public-opinion](#)
 - [govt-2305-instructor-resource-power-point-slides-for-public-opinion](#) (printable .pdf version)
- Chapter: Interest Groups
 - [govt-2305-instructor-resource-power-point-slides-for-interest-groups](#)
 - [govt-2305-instructor-resource-power-point-slides-for-interest-groups](#) (printable .pdf version)
- Chapter: Political Parties
 - [govt-2305-instructor-resource-power-point-slides-for-political-parties](#)
 - [govt-2305-instructor-resource-power-point-slides-for-political-parties](#) (printable .pdf version)

- Chapter: Elections
 - [govt-2305-instructor-resource-power-point-slides-for-elections](#)
 - [govt-2305-instructor-resource-power-point-slides-for-elections](#) (printable .pdf version)
- Chapter: Media
 - [govt-2305-instructor-resource-power-point-slides-for-media](#)
 - [govt-2305-instructor-resource-power-point-slides-for-media](#) (printable .pdf version)
- Chapter: Civil Liberties
 - [govt-2305-instructor-resource-power-point-slides-for-civil-liberties](#)
 - [govt-2305-student-resource-practice-quiz-and-review-sheet-for-civil-liberties](#) (printable.pdf version)
- Chapter: Civil Rights
 - [govt-2305-instructor-resource-power-point-slides-for-civil-rights](#)
 - [govt-2305-student-resource-practice-quiz-and-review-sheet-for-civil-rights](#) (printable .pdf version)

5. Instructor Lecture Outlines

Outlines for Instructors (.pdf files)

Proposed Unit (government, constitutions, federalism, courts)

- [lecture-outline-unit-with-government-constitutions-federalism-and-courts](#)

Proposed Unit (Congress, President, bureaucracy, domestic policy, foreign policy)

- [lecture-outline-unit-on-congress-president-bureaucracy-domestic-and-foreign-policy](#)

Proposed Unit (public opinion, interest groups, political parties, elections)

- [lecture-outline-unit-public-opinion-interest-groups-political-parties-elections](#)

Proposed Unit (media, civil liberties, civil rights, liberty v. security review)

- [lecture-outline-unit-for-media-civil-liberties-civil-rights-and-liberty-versus-security](#)

6. Practice Quiz Handouts with Attached Vocabulary Lists

Click on the links below to download the Review and Practice Quizzes for each chapter of the textbook (.pdf files).

Government Basics Quiz:

- [GOVT 2305 Student Resource Practice Quiz and Review Sheet for US Government Basics](#)

Constitutions & Contracts Quiz:

- [GOVT 2305 Student Resource Practice Quiz and Review Sheet for Contracts and Constitutions](#)

Federalism Quiz:

- [GOVT 2305 Student Resource Practice Quiz and Review Sheet for Federalism](#)

U. S. Courts Quiz:

- [GOVT 2305 Student Resource Practice Quiz and Review Sheet for U S Courts](#)

Congress Quiz:

- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-congress](#)

The President Quiz:

- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-the-president](#)

The Bureaucracy Quiz:

- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-the-bureaucracy](#)

Domestic Policy Quiz:

- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-domestic-policy](#)

Foreign Policy Quiz:

- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-foreign-policy](#)

Public Opinion Quiz:

- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-public-opinion](#)

Interest Groups Quiz:

- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-interest-groups](#)

Political Parties Quiz:

- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-political-parties](#)

Elections Quiz:

- [govt-2305-student-resource-practice-quiz-and-review-sheet-](#)

[for-elections](#)

Media Quiz:

- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-media](#)

Civil Liberties Quiz:

- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-civil-liberties](#)

Civil Rights Quiz:

- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-civil-rights](#)

Liberty v. Security Questions for Discussion and Terms to Remember:

- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-liberty-v-security](#)

7. Chapter Handouts with Note-Taking Boxes

Handy-Dandy Handouts for Students (two versions so students have a choice of spacing for note taking)

Note-Taking Boxes–Wide Rule Versions

- [govt-2305-student-resource-us-government-handout-wide-rule](#)
- [govt-2305-student-resource-constitutions-and-contracts-handout-wide-rule-version](#)
- [govt-2305-student-resource-federalism-handout-wide-rule-version](#)
- [govt-2305-student-resource-u-s-courts-handout-wide-rule-version](#)
- [govt-2305-student-resource-handout-for-congress-wide-rule-version](#)
- [govt-2305-student-resource-handout-for-the-president-wide-rule-version](#)
- [govt-2305-student-resource-handout-for-the-bureaucracy-wide-rule-version](#)
- [govt-2305-student-resource-handout-for-domestic-policy-wide-rule-version](#)
- [govt-2305-student-resource-handout-for-foreign-policy-wide-rule-version](#)
- [govt-2305-student-resource-handout-for-public-opinion-wide-rule-version](#)
- [govt-2305-student-resource-handout-for-interest-groups-wide-rule-version](#)
- [govt-2305-student-resource-handout-for-political-parties-wide-rule-version](#)
- [govt-2305-student-resource-handout-for-elections-wide-](#)

[rule-version](#)

- [govt-2305-student-resource-on-media-wide-rule-version](#)
- [govt-2305-student-resource-handout-on-civil-liberties-wide-rule-version](#)
- [govt-2305-student-resource-handout-civil-rights-wide-rule-version](#)

Note-Taking Boxes–Narrow/College Rule Versions

- [govt-2305-student-resource-us-government-handout-narrow-rule](#)
- [govt-2305-student-resource-constitutions-and-contracts-handout-narrow-rule-version](#)
- [govt-2305-student-resource-federalism-handout-narrow-rule-version](#)
- [govt-2305-student-resource-u-s-courts-handout-narrow-rule-version](#)
- [govt-2305-student-resource-handout-for-congress-narrow-rule-version](#)
- [govt-2305-student-resource-handout-for-the-president-narrow-rule-version](#)
- [govt-2305-student-resource-handout-for-the-bureaucracy-narrow-rule-version](#)
- [govt-2305-student-resource-handout-for-domestic-policy-narrow-rule-version](#)
- [govt-2305-student-resource-handout-for-foreign-policy-narrow-rule-version](#)
- [govt-2305-student-resource-handout-for-public-opinion-narrow-rule-version](#)
- [govt-2305-student-resource-handout-for-interest-groups-narrow-rule-version](#)
- [govt-2305-student-resource-handout-for-political-parties-narrow-rule-version](#)
- [govt-2305-student-resource-handout-for-elections-narrow-rule-version](#)

- [govt-2305-student-resource-on-media-narrow-rule-version](#)
- [govt-2305-student-resource-handout-on-civil-liberties-narrow-rule-version](#)
- [govt-2305-student-resource-handout-civil-rights-narrow-rule-version](#)

8. Proposed Unit Review Sheets

Review Sheet (.pdf) Government, Constitutions, Federalism & Courts

[govt-2305-student-resource-unit-review-sheet-for-government-constitutions-federalism-and-courts](#)

Review Sheet (.pdf) Congress, The President, The Bureaucracy, Domestic & Foreign Policy

[govt-2305-student-resource-unit-review-sheet-for-congress-the-president-the-bureaucracy-domestic-and-foreign-policy](#)

Review Sheet (.pdf) Public Opinion, Interest Groups, Political Parties & Elections

[govt-2305-student-resource-unit-review-sheet-for-public-opinion-interest-groups-political-parties-and-elections](#)

Review Sheet (.pdf) Media, Civil Liberties, Civil Rights, Liberty v. Security (semester terms to review)

[govt-2305-student-resource-unit-review-sheet-for-media-civil-liberties-civil-rights-and-liberty-versus-security](#)

9. Separate Handouts for Helpful Charts and Diagrams

Charts and Diagrams (printable .pdf versions)

- Chart of the Basic Structure of a Federal Government
 - [govt-2305-student-resource-federal-structure-of-government-chart](#)
- Chart of the Basic Functions of Government as Based Upon the Preamble to the U. S. *Constitution*
 - [govt-2305-government-functions-of-government-chart](#)
- Chart of Government Powers and Descriptions of Powers
 - [govt-2305-student-resource-government-powers-chart](#)
- Chart of the Reapportionment and Redistricting Process
 - [govt-2305-student-resource-reapportionment-pie-chart](#)
- Diagram for the Policy Making Process
 - [govt-2305-student-resource-policy-making-diagram](#)
- Chart of Different Types of Jurisdiction in the Federal Court System
 - [govt-2305-government-types-of-jurisdiction-chart](#)
- Chart of the Types of Goods in Society
 - [govt-2305-government-types-of-goods-chart](#)
- Chart of the Courts in the Policy Making Process
 - [govt-2305-government-courts-and-policy-making-process-chart](#)
- Chart Listing Agents of Socialization and Descriptions of Agents
 - [govt-2305-government-agents-of-socialization-chart](#)
- Chart of Amendments to the U. S. *Constitution*

- [govt-2305-government-27-amendments-chart](#)

10. Sample Syllabi

Click on the links below to download a Sample Syllabus for this course.

Proposed Master Syllabus

[PDF version of the Master Syllabus](#)

[DOC version of the Master Syllabus](#)

Proposed Sample Syllabus and Suggested Course Calendar for Austin Community College Spring 2017 (16 week semester)

[PDF version of the Sample Syllabus and Suggested Course Calendar](#)

[DOC version of the Sample Syllabus and Suggested Course Calendar](#)

Proposed Sample Learning Objectives From El Paso Community College

[GOVT2305 syllabus part II](#)

II. Review and Practice Quizzes

Click on the links below to download the practice quizzes for review.

- [GOVT 2305 Student Resource Practice Quiz and Review Sheet for US Government Basics](#)
- [GOVT 2305 Student Resource Practice Quiz and Review Sheet for Contracts and Constitutions](#)
- [GOVT 2305 Student Resource Practice Quiz and Review Sheet for Federalism](#)
- [GOVT 2305 Student Resource Practice Quiz and Review Sheet for U S Courts](#)
- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-congress](#)
- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-the-president](#)
- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-the-bureaucracy](#)
- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-domestic-policy](#)
- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-foreign-policy](#)
- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-public-opinion](#)
- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-interest-groups](#)
- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-political-parties](#)
- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-elections](#)
- [govt-2305-student-resource-practice-quiz-and-review-sheet-](#)

[for-media](#)

- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-civil-liberties](#)
- [govt-2305-student-resource-practice-quiz-and-review-sheet-for-civil-rights](#)

12. I Need Help



Need more information about this course? Have questions about faculty resources? Can't find what you're looking for? Experiencing technical difficulties?

We're here to help! Contact oe@achievingthedream.org for support.

PART II

STUDENT RESOURCES

13. Handy-Dandy Handouts

Handy-Dandy Handouts for each chapter including space for class notes—wide rule and narrow rule versions.

Note-Taking Boxes—Wide Rule Versions

- [govt-2305-student-resource-us-government-handout-wide-rule](#)
- [govt-2305-student-resource-constitutions-and-contracts-handout-wide-rule-version](#)
- [govt-2305-student-resource-federalism-handout-wide-rule-version](#)
- [govt-2305-student-resource-u-s-courts-handout-wide-rule-version](#)
- [govt-2305-student-resource-handout-for-congress-wide-rule-version](#)
- [govt-2305-student-resource-handout-for-the-president-wide-rule-version](#)
- [govt-2305-student-resource-handout-for-the-bureaucracy-wide-rule-version](#)
- [govt-2305-student-resource-handout-for-domestic-policy-wide-rule-version](#)
- [govt-2305-student-resource-handout-for-foreign-policy-wide-rule-version](#)
- [govt-2305-student-resource-handout-for-public-opinion-wide-rule-version](#)
- [govt-2305-student-resource-handout-for-interest-groups-wide-rule-version](#)
- [govt-2305-student-resource-handout-for-political-parties-wide-rule-version](#)
- [govt-2305-student-resource-handout-for-elections-wide-rule-version](#)
- [govt-2305-student-resource-on-media-wide-rule-version](#)

- [govt-2305-student-resource-handout-on-civil-liberties-wide-rule-version](#)
- [govt-2305-student-resource-handout-civil-rights-wide-rule-version](#)

Note-Taking Boxes–Narrow/College Rule Versions

- [govt-2305-student-resource-us-government-handout-narrow-rule](#)
- [govt-2305-student-resource-constitutions-and-contracts-handout-narrow-rule-version](#)
- [govt-2305-student-resource-federalism-handout-narrow-rule-version](#)
- [govt-2305-student-resource-u-s-courts-handout-narrow-rule-version](#)
- [govt-2305-student-resource-handout-for-congress-narrow-rule-version](#)
- [govt-2305-student-resource-handout-for-the-president-narrow-rule-version](#)
- [govt-2305-student-resource-handout-for-the-bureaucracy-narrow-rule-version](#)
- [govt-2305-student-resource-handout-for-domestic-policy-narrow-rule-version](#)
- [govt-2305-student-resource-handout-for-foreign-policy-narrow-rule-version](#)
- [govt-2305-student-resource-handout-for-public-opinion-narrow-rule-version](#)
- [govt-2305-student-resource-handout-for-interest-groups-narrow-rule-version](#)
- [govt-2305-student-resource-handout-for-political-parties-narrow-rule-version](#)
- [govt-2305-student-resource-handout-for-elections-narrow-rule-version](#)
- [govt-2305-student-resource-on-media-narrow-rule-version](#)
- [govt-2305-student-resource-handout-on-civil-liberties-](#)

[narrow-rule-version](#)

- [govt-2305-student-resource-handout-civil-rights-narrow-rule-version](#)

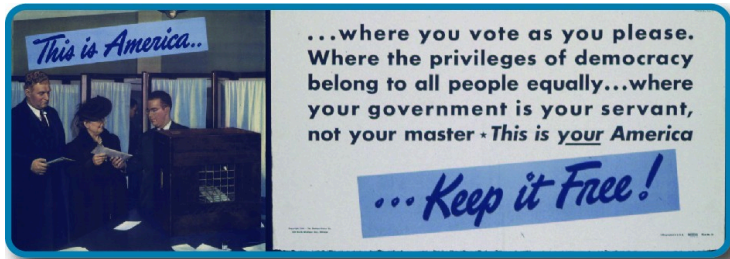
14. Helpful Charts and Diagrams

A few of the charts and diagrams from the textbook chapters are included here in .pdf printable format for students.

- Chart for Reapportionment and Redistricting
 - [govt-2305-student-resource-reapportionment-pie-chart](#)
- Diagram of the Policy Making Process
 - [govt-2305-student-resource-policy-making-diagram](#)
- Chart of the Powers of Government
 - [govt-2305-student-resource-government-powers-chart](#)
- Chart of a Federal Structure of Government
 - [govt-2305-student-resource-federal-structure-of-government-chart](#)
- Chart of the Types of Jurisdiction in the Court System
 - [govt-2305-government-types-of-jurisdiction-chart](#)
- Chart of Goods in Society
 - [govt-2305-government-types-of-goods-chart](#)
- Chart of the Basic Functions of Government
 - [govt-2305-government-functions-of-government-chart](#)
- Chart on Courts and the Policy Making Process
 - [govt-2305-government-courts-and-policy-making-process-chart](#)
- Chart of Agents of Socialization
 - [govt-2305-government-agents-of-socialization-chart](#)
- Chart of the Amendments to the U. S. Constitution
 - [govt-2305-government-27-amendments-chart](#)

PART III
UNITED STATES
GOVERNMENT

15. United States Government: Where do we start?



The right to vote is an important feature of the nation's system of government; and, over the years, many people have fought and sacrificed to obtain or maintain this right. Why do people often ignore this means of civic engagement? (credit: modification of work–National Archives and Records Administration)

The United States has relied on citizen participation to govern at the local, state, and national level as a representative republic. The right to participate in government is an important pillar of this republic. The people have known that and valued that right enough to fight for and then defend it over nearly two and a half centuries. Active civic participation is at once foundational to a free society, under assault from political agendas, and taken for granted by too many.

The founders of the United States were originally focused on freedom from the tyranny of a remote and arrogant monarchy. While forming a new independent government, they realized an opportunity to draw on the wisdom of revered political philosophers and centuries of experience with European states and

governance. A government structure and process to serve the current and future interests of the people resulted. Perhaps most importantly, the resulting representative republic—centered on *civic* participation and control—is able to meet the people's changing interests over time.

Consider the very issue of participation. At the founding, only free white land-owning males participated. Over time, their privileged control gradually gave way to codified equal participation for all citizens. Only a government structured for ultimate control by the people, would be able to evolve the very definition of the governing people themselves. The definition of *the people* has changed over time. The struggle to include more groups of people to participate on equal footing has been long and difficult. The fact that each group continued the struggle is evidence of the value they place on our representative republic and the opportunities equal participation affords them.

The World War II era poster shown above depicts voting as an important part of the fight to keep the United States free. Voting is both a right worth protecting and a tool for engagement, which ensures the government serves the people rather than the reverse.

United States Government: Questions to Consider

1. Why are governments necessary to society?
2. What does government do to serve the people?
3. What functions should governments perform?
4. What forms of government exist?
5. How do these forms differ?
6. How can citizens engage with government and

participate in the crucial process of governing?

16. United States Government: Why form a government?

Learning Objectives

- Define Basic Forms of Government
- Examine Various Forms of Government
- Consider the Level of Order/Control Exerted Over Citizens by Various Forms of Government
- Comprehend Basic Functions of Government

People compete for resources, recognition, power, territory, etc. This competition is controlled by government, which defines and manages the ground rules.

Thomas Jefferson writes in the **Declaration of Independence** that “political bands” of government connect citizens of a nation. These connections of government may “secure” individual rights and manage competition if the form of government chosen balances protection of liberty and provision of security.¹

1. Library of Congress, Primary Documents in American History, Declaration of Independence at

People form a government and agree to rules and even written contracts in order to protect their liberties and rights. No government is perfect. Government sometimes regulates what we eat, where we go to school, what kind of education we receive, how our tax money is spent, and what we do in our free time. Americans are often *unaware* of the extent of government intervention in their lives.

What is government and why would we even want one?

The term **government** describes the means by which a society organizes itself and allocates authority in order to accomplish goals and provide benefits. Countries provide benefits via different governmental forms and structures. Most governments seek to provide defense, education, health care, and an infrastructure for transportation and trade for their citizens. The form of governmental organization a country chooses should not be confused with **politics**, gaining and exercising control of processes for setting and achieving goals, especially those related to the division of resources within a nation.

John Locke, an English political philosopher of the seventeenth century, posited that all people have **natural** and **unalienable** (inseparable) **rights** to life, liberty, and property. If people have natural rights of self-determination, does it then follow that all social contracts/governments should involve individual consent from the people? In the eighteenth century, in Great Britain's North American colonies and later in France, this political thought

<https://www.loc.gov/rr/program/bib/ourdocs/DeclarInd.html?&locId=rec004>

developed into the idea that people should govern themselves through elected representatives; and, only representatives chosen by the people should make laws and institute control.

Consider the Original

The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments

From the New York Packet.
Friday, February 8, 1788.

Author: **Alexander Hamilton** or **James Madison**

To the People of the State of New York:

[...] “But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”
[...]”²

Why would we want any other individual or group to have any type

2. Congress.gov Resources, The Federalist Papers at <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-51>

of control over our lives or property? Individuals would not need to band together for order or control if everyone respected each other's lives, liberty and property 100% of the time. Unfortunately, this is not the case with some individuals who seek to take away others' lives, curtail others' liberty, or deprive others of property; therefore, governments are established to protect against such usurpations. The individuals organizing governmental control and imposition of order for the new United States of America clearly stated the goals of good government in the *Preamble* to the contract for this new constitutional republic (their choice of governmental form). They sought balance in government between liberty and order.

While most governments seek to establish order and control, not all seek to protect liberty or property.



In a **republic** (or what is commonly described as a **representative democracy**), citizens do not govern directly. They elect representatives to make decisions and pass laws in the best interests of the people. U.S. citizens vote for members of Congress, the president and vice president, members of state legislatures, governors, mayors, and members of town councils and school boards to act on their behalf. Most representative governments favor **majority rule**: the opinions of the majority of the people have more influence with government than those of the minority. If the number of elected representatives who favor a proposed law is greater than those who oppose it, the law will be enacted. However, in representative governments like the United States, **minority rights** are protected: people cannot be deprived of certain rights

even if an overwhelming number of people think that they should be deprived.

Even though the number of Americans who believe in the authority of a Higher Power far outweigh the number who do not, the minority is still protected. Because decisions are made through majority rule, making your opinions known and voting (for individuals who make decisions affecting all citizens) are influential forms of civic engagement in a republic.

Form of Government	Description of Form
anarchy	no order/control; no government structure; power vacuum
monarchy	rule of one; undivided rule; typically hereditary rule; backed by oligarchical power
oligarchy	rule of few (well-connected, socially, financially, physically powerful); elites rule
direct democracy	rule of citizens; simple majority rule; no restraint on majority
republic	indirect rule of citizens through representatives; rule of law; limited government
tyranny	micromanagement of citizens via government structure; military control; authoritarian
totalitarianism	total governmental control

A generalized view of a few basic forms of government reveal the reality that most actual governments around the world are a mix of elements listed in this chart.

In a **direct democracy**, unlike a republic or representative democracy, people participate directly in government decisions. In ancient Athens, the most famous example of a direct democracy, all male citizens were allowed to attend meetings of the Assembly. Here they debated and voted for or against all proposed laws. Americans vote for people to represent them and make laws on their behalf. They may sometimes vote directly on issues. For example, a referendum or proposed law may be placed on the ballot for citizens to vote on directly, taking the matter out of the hands of the state legislature. At New England town meetings, all residents are allowed to debate decisions affecting the town. Such occasions provide additional opportunities for civic engagement. Direct

control is often more effective at local levels of government, becoming unmanageable as populations increase.

At the other end of the political spectrum are elite-driven forms of government. In a **monarchy**, one ruler, usually a hereditary ruler, holds political power. Although the power of some monarchs is limited by law, and such kings and queens often rule along with an elected legislature, this is not always the case. Kingdoms such as Saudi Arabia, Qatar, and the



Residents of Boxborough, Massachusetts, gather in a local hotel to discuss issues affecting their town. New England town meetings provide an opportunity for people to experience direct democracy. This tradition has lasted for hundreds of years. (credit: modification of work by Liz West)

United Arab Emirates have absolute monarchs with unrestricted power. Another nondemocratic form of government is **oligarchy**, in which a handful of elite members of society, often from the same political party, hold all political power. In Cuba and China, only members of the Communist Party are allowed to vote or hold public office, and the party's most influential members make all government decisions. Some nondemocratic societies are totalitarian in nature. Under **totalitarianism**, the government controls all aspects of citizens' lives. Citizens' rights are limited and government does not allow political criticism or opposition. North Korea is an example of a totalitarian government.



The [CIA website](#) provides information about the types of government across the world.

Consider the Original

“Society in every state is a blessing, but Government, even in its best state, is but a necessary evil; in its worst state an intolerable one: for when we suffer, or are exposed to the same miseries BY A GOVERNMENT, which we might expect in a country WITHOUT GOVERNMENT, our calamity is heightened by reflecting that we furnish the means by which we suffer.”

Thomas Paine³

The framers of government in the new United States of America understood the dangers of anarchy, the problems of monarchy (the oppressions of a distant and disengaged monarchy spurred a desire for revolt) and oligarchy, the repression of tyranny, and the impracticality of direct democracy. The new country was already too large and diverse for direct democracy. A representative republic was their choice—citizen control via elected representatives. They also had a clear understanding of the functions they wished the republic’s representatives to implement on behalf of citizens.

3. <https://catalog.loc.gov/vwebv/holdingsInfo?searchId=6939&recCount=25&recPointer=9&bibId=1164811>

Basic Functions of Government

Consider the Original

The **preamble** to the Constitution clearly outlines the basic functions of government stating,

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.⁴

What are these six (6) goals for government?

1. unify (**form a union**) to maintain order and liberty
2. formulate rules to establish order and a means of carrying out punishment (**establish justice**) for anyone overstepping the rules
3. make sure the new rules and punishments help keep order
4. Charters of Freedom, National Archives,
http://www.archives.gov/exhibits/charter/constitution_transcript.html

- within the boundaries of the nation(**domestic tranquility**)
4. make sure the union protects its citizens from invasion & threats–military, political, and economic(**common defense**)
 5. promote social, political, and economic prosperity while supporting the provision of basic necessities for those not able to do for themselves (**general welfare**)
 6. maintain (**secure liberty**) individual liberties against excessive government encroachment

These goals outline difficult tasks requiring delicate balance.

Basic Functions of Government
form a union/strength in unity
set up a system of justice/accountability
keep people safe & secure/domestically
provide for defense of the nation
promote the general welfare of citizens
protect people’s liberties

Most governments work to balance governing tasks within a specific economic framework. The United States government works closely with its capitalist economic system. The interconnectedness of the two affect the distribution of goods and

services. The market provides many needed goods and services. An ample supply of food, clothing, and housing are provided by private businesses earning a profit in return. These goods and services are known as **private goods**.⁵

The market cannot provide everything (in enough quantity or at low enough prices) to meet everyone’s needs. Therefore, the government also provides goods or services—**public goods**. Two such public goods are national security and education.

If you wish to avoid traffic in a large metropolitan area, you may choose to pay a fee to drive on a less congested toll road. **Toll goods** are available to people if they can pay the price. Toll goods occupy a middle ground between public and private goods. All parents may send their children to public schools in the United States, or they may choose to send their children to a private school which will charge them fees. Unlike private or toll goods, public goods are typically available to all.

Type of Good	Description of Types of Goods in Society
private	goods provided by private businesses & groups used only by those who pay for them (cars, flat screen televisions, personal computers, etc.)
public	goods provided by taxpayers to government that anyone can use/no fees charged (education, water, most roads and bridges, etc.)
common	goods that all people may use but that are of limited supply (ocean fish, fresh water, etc.)
toll	goods that are available to many people but used only by those who can pay the fee (toll roads, private schools, toll bridges, etc.)

At the federal, state, and local level, government provides stability and security as well as goods and services. Security and safety

5. Paul A. Samuelson. 1954. “The Pure Theory of Public Expenditure,” *Review of Economics and Statistics* 36, No. 4: 387–389.

require some form of military establishment and also police, fire departments, and other first responders. Government provides other valuable goods and services such as public education, public transportation, mail service, and food, housing, and health care for the poor. If a house catches on fire, the fire department does not demand payment before they put the fire out. If someone breaks into a house and tries to harm the occupants, the police will try to protect them and arrest the intruder, but the police department will not request payment for services rendered. The provision of these goods and services is funded by citizens paying into the general tax base. No public goods are “free.” Public goods are funded by all taxpayers and available based either on need or entitlement.



A fire department ambulance rushes to the rescue in Chicago. Emergency medical services, fire departments, and police departments are all paid for by government through the tax base, and they provide their services without an additional charge. (credit: Tony Webster)

Government also performs the important job of protecting **common goods**: goods that all people may use free of charge but are of limited supply, such as fish in the sea or clean drinking water. Because everyone can use these goods, they must be protected so a

few people do not take everything that is available and leave others with nothing.



This [federal website](#) shares information about the many services the government provides.

Fishing Regulations

Governments regulate public access to common goods like natural resources, which may be of limited supply. If more public schools are needed, the government may build more. Public lands and wildlife, however, are not goods the government can simply multiply if supply falls due to demand. Indeed, if some people take too freely from the supply of common goods, there will not be enough left for others to use.

Government currently regulates access to fish (a common good of limited supply) in order to ensure against extinction–sustainability. Environmentalists want to set strict fishing limits. Commercial fishers resist limits. Fishing limits are set by a combination of

scientists, politicians, local resource managers, and groups representing the interests of fishers.⁶



Fishing provides income, as well as food, for many Americans. Without government restrictions on the kinds and number of fish that can be caught, the fish population might decline and certain species might become extinct. (credit: Michael L. Baird)

Besides providing goods to citizens and maintaining public safety, most governments also provide a means for citizens to participate and make their opinions known to those in positions of power. Western democracies like the United States, Britain, France, and

6. Juliet Elperin, “U.S. Tightens Fishing Policy, Setting 2012 Catch Limits for All Mandated Species,” *Washington Post*, 8 January 2012.

others protect citizens' freedom of speech and a free press. These nations, and others in the world, also allow citizens to vote.

Politics is a power struggle for control of the process by which choices are made regarding allocation of goods and resources as well as the pursuit of social, political and economic policy. Politics is the process of who gets what and how. If government chooses to support an ideal such as individualism, it may choose to loosen regulations on business and industry or to cut taxes so that people have more money to invest in business. If it chooses to support an ideal such as egalitarianism, which calls for equal treatment for all and the destruction of socioeconomic inequalities, it may raise taxes in order to be able to spend more on public education, public transportation, housing for the poor, and care for the elderly. If, for example, the government is more concerned with national security than with individual liberty, it may authorize the tapping of people's phones and restrict what newspapers may publish. If liberty is more important, then government will place greater restrictions on the extent that law enforcement agencies can intrude upon citizens' private communications. The political process and the input of citizens help determine the answers when protection of liberty and provision of security conflict.

Civic engagement, or the participation that connects citizens to government, is a vital ingredient of politics. In the United States, citizens play an important role in influencing what policies are pursued, what values the government chooses to support, what initiatives are granted funding, and who gets to make the final decisions. Political engagement can take many forms: reading about politics, listening to news reports, discussing politics, attending (or watching televised) political debates, donating money to political campaigns, handing out flyers promoting a candidate, voting, joining protest marches, and writing letters to their elected representatives.

Questions to Consider

1. What form of government exerts almost 100% control over citizens?
2. What term describes a lack of government, order, or control?
3. Why did the founders compromise with a representative republic?
4. What are the six functions of government laid out by the *Preamble* to the *Constitution*?
5. What is the difference between a public good and a private good?
6. Is it right to interfere with people's ability to earn money in order to protect the access of future generations to the nation's common goods?
7. What is the difference between a representative democracy and a direct democracy?

Terms to Remember

anarchy—absence of government, order, control

common goods—goods that all people may use but that are of limited supply

Declaration of Independence—written reasoning for political and economic separation between colonies in America and Great Britain

democracy—a form of government where political power rests in the hands of the people; majority rule; minority rights may be ignored

dictatorship—excessive regulation of public and private lives of individuals subject to government

direct democracy—a form of government where people participate directly in making government decisions instead of choosing representatives to do this for them

government—the means by which a society organizes itself and allocates authority in order to accomplish collective goals

majority rule—a fundamental principle of democracy; the majority should have the power to make decisions binding upon the whole

minority rights—protections for those who are not part of the majority

monarchy—a form of government where one ruler, usually a hereditary one, holds political power

oligarchy—a form of government where a handful of elite society members hold political power

political power—influence over a government's institutions, leadership, or policies

politics—struggle for power over the process by which we decide how resources will be allocated and which policies government will pursue

preamble—beginning statement

private goods—goods provided by private businesses that can be used only by those who pay for them

public goods—goods provided by taxpayers to the

government that anyone can use and that are available to all without charge/fees

representative democracy—a form of government where voters elect representatives to make decisions and pass laws on behalf of all the people instead of allowing people to vote directly on laws

republic—indirect rule by citizens' representatives

toll goods—goods that are available to many people but is used only by those who can pay the price for use

totalitarianism—a form of government where government is all-powerful and citizens have no rights

tyranny—excessive control by individual, group, or government

17. United States Government: Who is in control?

Learning Objectives

- Define important concepts such as unalienable rights and consent of the governed
- Understand basic theories of government–elitism and pluralism
- Acknowledge the existence of tradeoffs

The United States allows its citizens to participate in government in many ways. In fact, the republic is based upon the ideas of **consent** and individual participation. If each individual, regardless of birth or circumstances, has value and possesses **unalienable rights**, individuals may band together to protect and defend these rights. If individuals believe these rights are unalienable (inseparable) from the human condition either by human reasoning or personal recognition of divine authority, they may also believe that no government should separate them from their rights to life, liberty, and property without their consent. Individuals in the new republic formed a government based upon consent; unfortunately, consent was not expanded to all individuals living within the borders of the new nation at the time of formation. Ideally, all individual citizens would acknowledge consent for the government while allowing this

government to balance protection of individual liberty with maintenance of security and order.

The formation of representative government implied citizen participation in choice of representation. The United States has many different levels and branches of government that any citizen or group might approach with concerns about protection of liberty and property or maintenance of order and security. Who is really in control of the government? Many people believe evidence indicates U.S. citizens, especially as represented by competing groups, are able to influence government actions. Some political theorists, however, argue that this is not the case. They claim that only a minority of economic and political elites have any influence over government.

ELITISM VS. PLURALISM

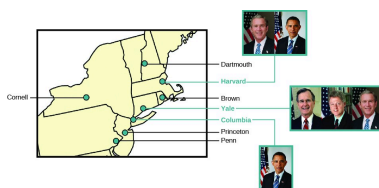
Many Americans fear that a set of elite citizens control government and others have no influence. This belief is called the **elite theory** of government or **elitism**. In contrast to that perspective is the **pluralist theory** of government, which says political power rests with competing interest groups sharing influence in government. Pluralist theorists assume that citizens who want to get involved do so because of the abundant access points to government. That is, the U.S. system with several levels and branches has many places where people and groups can engage and influence the government.

The foremost supporter of elite theory was C. Wright Mills. In his book, *The Power Elite*, Mills argued that government was controlled by a combination of business, military, and political elites.¹

1. C. Wright Mills. 1956. *The Power Elite*. New York: Oxford University Press.

Most political elites are highly educated, often graduating from prestigious universities. According to elite theory, the wealthy use their power to control the nation's economy such that those with little influence cannot advance economically. Wealth or political connections allow the elite to secure for themselves the politically important positions used to make decisions and allocate resources in ways that benefit this group. Politicians do the bidding of the wealthy instead of attending to the needs of ordinary people. Those who favor government by the elite believe the elite are better fit to govern and that average citizens are content to allow them to do so.²

In apparent support of the elite perspective, one-third of U.S. presidents have attended Ivy League schools, a much higher percentage than the rest of the U.S. population.³



The four most recent U.S. presidents have all graduated from an Ivy League university.

2. Jack L. Walker. 1966. "A Critique of the Elitist Theory of Democracy," *The American Political Science Review* 60, No. 2: 295.
3. The Ivy League is technically an athletic conference in the Northeast comprised of sports teams from eight institutions of higher education—Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University, University of Pennsylvania, Princeton University, and Yale University—however, the

All four of the most recent U.S. presidents attended Ivy League schools such as Harvard, Yale, or Columbia. Among members of the U.S. House of Representatives, 93 percent have a bachelor's degree, as do 99 percent of members of the U.S. Senate.⁴

Fewer than 40 percent of U.S. adults have even an associate's degree.⁵

The majority of the men and women in Congress also engaged in either state or local politics, were business people, or practiced law before being elected to Congress.⁶

Approximately 80 percent of both the U.S. Senate and the U.S. House of Representatives are male, and fewer than 20 percent of members of Congress are people of color. The nation's laws are made primarily by well-educated white male professionals and businessmen.

term is also used to connote academic excellence or social elitism.

4. Jennifer E. Manning, "Membership of the 113th Congress: A Profile," *Congressional Research Service*, p. 5 (Table 5), November 24, 2014.

5. Kyla Calvert Mason. 22 April 2014. "Percentage of Americans with College Degrees Rises, Paying for Degrees Tops Financial Challenges," <http://www.pbs.org/newshour/rundown/percentage-americans-college-degrees-rises-paying-degrees-tops-financial-challenges/>.

6. Manning, p. 3 (Table 2).



This picture depicts the fairly uniform nature of Congress. Most are men and nearly all are Caucasian.

The makeup of Congress is important because race, sex, profession, education, and socioeconomic class frequently influence people's political interests.

Currently, more than half of the members of Congress are millionaires; their median net worth is just over \$1 million, and some have much more.⁷

As of 2003, more than 40 percent of Congress sent their children to private schools. Overall, only 10 percent of the American population does so.⁸

Pluralist theory rejects this approach, arguing that although there are elite members of society they do not control government. Instead, pluralists argue, political power is distributed throughout society. Rather than resting in the hands of individuals, a variety of organized groups hold power, with some groups having more influence on certain issues than others. Thousands of interest groups exist in the United States.⁹

7. Alan Rappeport, "Making it Rain: Members of Congress Are Mostly Millionaires," *New York Times*, 12 January 2016.

8. Grace Chen. "How Many Politicians Send Their Kids to Public Schools?" <http://www.publicschoolreview.com/blog/how-many-politicians-send-their-kids-to-public-schools> (February 18, 2016).

9. "The Non-Governmental Order: Will NGOs Democratise,

Approximately 70–90 percent of Americans report belonging to at least one group.¹⁰

According to pluralist theory, people with shared interests will form groups to make their desires known to politicians. These groups include environmental advocates, unions, and organizations representing various business interests. Because most people lack the inclination, time or expertise necessary to actively advocate for their interests in Washington, D.C., these groups assume this role. As groups compete with one another and find themselves opposed on important issues, government policy forms. In this way, government policy is shaped from the bottom up and not from the top down, as in elitist theory. Robert Dahl, author of *Who Governs?*, was one of the first to advance the pluralist theory, and argued that politicians seeking an “electoral payoff” are attentive to the concerns of politically active citizens and through them become acquainted with the needs of ordinary people. They will attempt to give people what they want in exchange for their votes.¹¹ Do interests groups and lobbying efforts fulfill the original concept of representative government?

or Merely Disrupt, Global Governance?” *The Economist*, 9 December 1999.

10. Ronald J. Hrebienar. 1997. *Interest Group Politics in America*, 3rd ed. New York: Routledge, 14; Clive S. Thomas. 2004. *Research Guide to U.S. and International Interest Groups*. Westport, CT: Praeger, 106.

11. Dahl, *Who Governs?* 91–93.



The Center for Responsive Politics is a non-partisan research group that provides data on who gives to whom in elections. Visit [OpenSecrets.org: Center for Responsive Politics](https://www.opensecrets.org/center-for-responsive-politics) to track campaign contributions, congressional bills and committees, and interest groups and lobbyists.

Questions to Consider

1. What is the difference between elite and pluralist theory?
2. Can you describe unalienable rights?
3. From what/who/where do unalienable rights arise or originate?
4. Is citizen consent to government essential to liberty?

Terms to Remember

consent—individual citizens of a government recognize governmental authority over life, liberty, and property; agree to give up some liberties

elite theory (elitism)—claims political power rests in the hands of a small, elite group of people

pluralist theory (pluralism)—claims political power rests in the hands of groups of people; competing groups

unalienable rights—rights possessed by every person; rights not conferred by the government; individual rights to life, liberty, and property

18. United States Government: Shared Political Culture and Civic Engagement

Learning Objectives

- Explain the importance of citizens engaging with or accessing their government
- Discuss shared beliefs, values, and political culture
- Describe the primary ways Americans can influence and become engaged with government
- Discuss factors influencing people's willingness to become engaged with government

Participation in government matters. Although people may not get all they desire, they can achieve many goals and improve their lives through civic engagement. The pluralist theory asserts government cannot function without active participation by at least some citizens. Even if we believe the elite make important political decisions, participation through voting may change which elites are in powerful positions of authority. Whether individuals think elites, groups, or people control government, many share beliefs about American political culture that affect their level of civic engagement/participation with government.

SHARED POLITICAL CULTURE: VALUES AND BELIEFS

The first, and perhaps most crucial, elements of a shared political culture are values and beliefs. **Values** are a culture’s standard for discerning what is good and just in society. Values are deeply embedded and critical for transmitting and teaching a culture’s beliefs.

Agents of Socialization
parents, family
friends, peers
education, teachers
books, movies, media
experiences
circumstances
religious practice/leaders
others

Beliefs are the tenets or convictions that people hold to be true. Individuals in a society have specific beliefs, but they also share collective values. To illustrate the difference, Americans commonly believe in the American Dream—that anyone who works hard

enough will be successful and wealthy. Underlying this belief is the American value that wealth is good and important.

Element	Description of Element of Shared Political Culture
liberty/freedom	political, social and economic liberty of each individual
populism	belief that the people should be in control of the government
egalitarianism	belief that everyone should be treated equally by the government
individualism	independence; self-determination
capitalism	market-based economy with minimal controls to protect the people

Values help shape a society by suggesting what is good and bad, beautiful and ugly, sought or avoided. Consider the value that the United States places upon **egalitarianism** or the belief that everyone should be treated equally by the government regardless of other factors such as age, ethnicity, socioeconomic status, gender, etc. The United States also has an individualistic culture, meaning people place a high value on **individualism** and independence. In contrast, many other cultures are collectivist, meaning the welfare of the group and group relationships are a primary value. Americans tend to value **populism** or the belief that the people are in control of the government and the government should protect our **liberty/freedoms** whether political, social or economic. Additionally, most Americans think **capitalism** or a market based economy is the best economic system.

Living up to a culture's values can be difficult. It is easy to value good health, but it is hard to quit smoking. Cultural diversity and equal opportunities for all people are valued in the United States, yet the country's highest political offices have been dominated by white men.

Values often suggest how people should behave, but they do not accurately reflect how people do behave. Values portray an **ideal culture**, the standards society would like to embrace and live up to. But ideal culture differs from **real culture**, the way society actually

is, based on what occurs and exists. In an ideal culture, there would be no traffic accidents, murders, poverty, or racial tension. But in real culture, police officers, lawmakers, educators, and social workers constantly strive to prevent or repair those accidents, crimes, and injustices.

One way societies strive to put values into action is through rewards, sanctions, and punishments. When people observe the norms of society and uphold its values, they are often rewarded. A boy who helps an elderly woman board a bus may receive a smile and a “thank you.” A business manager who raises profit margins may receive a quarterly bonus. People sanction certain behaviors by giving their support, approval, or permission, or by instilling formal actions of disapproval and nonsupport. Sanctions are a form of social control, a way to encourage conformity to cultural norms. Sometimes people conform to norms in anticipation or expectation of positive sanctions: good grades, for instance, may mean praise from parents and teachers. From a criminal justice perspective, properly used social control is also inexpensive crime control. Utilizing social control pushes most people to conform to societal rules, regardless of whether authority figures (such as law enforcement) are present.

When people go against a society’s values, they are punished. A boy who shoves an elderly woman aside to board the bus first may receive frowns or even a scolding from other passengers.¹ A business manager who drives away customers will likely be fired. Breaking norms and rejecting values can lead to cultural sanctions such as earning a negative label—lazy, no-good bum—or to legal sanctions, such as traffic tickets, fines, or imprisonment.

1. *Singh v. Baidwan* (2016) <http://cdn.ca9.uscourts.gov/datastore/memoranda/2016/06/02/14-16287.pdf>



In many parts of Africa and the Middle East, it is considered normal for men to hold hands in friendship. How would Americans react to these two soldiers? (Photo courtesy of Georgie Mott/Wikimedia Commons)

Values are not static; they vary across time and between groups as people evaluate, debate, and change collective societal beliefs. Values also vary from culture to culture. For example, cultures differ in their values about what kinds of physical closeness are appropriate in public. It is rare to see two male friends or coworkers holding hands in the United States where that

behavior often symbolizes romantic feelings. But in many nations, masculine physical intimacy is considered natural in public. This difference in cultural values came to light when people reacted to photos of former president George W. Bush holding hands with the Crown Prince of Saudi Arabia in 2005. A simple gesture, such as hand-holding, carries great symbolic differences across cultures.

POPULISM: HOW DO PEOPLE GET INVOLVED?

If Americans value populism and want the people rather than elites in charge of the government, why are fewer people today active in politics than in the past? Political scientist Robert Putnam has argued that **civic engagement** is declining; although many Americans may report belonging to groups, these groups are usually large and impersonal. People who join groups such as Amnesty International or Greenpeace may share certain values and ideals with other members of the group, but they do not actually interact

with these other members.² Putnam argues that a decline in social capital—"the collective value of all 'social networks' [those whom people know] and the inclinations that arise from these networks to do things for each other"—accompanies an observed decline in membership in small, interactive groups.³

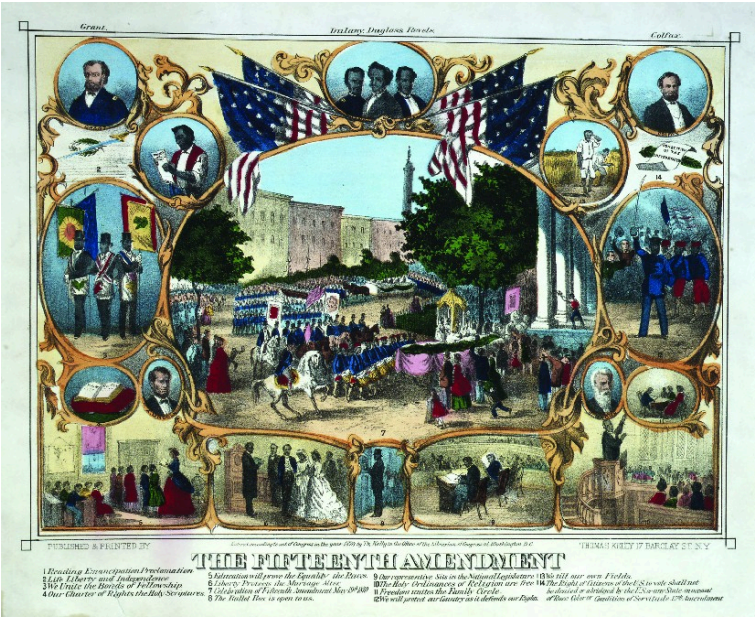


To learn more about political engagement in the United States, read ["The Current State of Civic Engagement in America"](#) by the Pew Research Center.

Civic engagement can increase the power of ordinary people to influence government actions. Even those without money or connections to influential people can influence the policies affecting their lives and change the direction of government. U.S. history is filled with examples of people actively challenging the power of elites, gaining rights for themselves, and protecting their

2. Robert D. Putnam. 2001. *Bowling Alone: The Collapse and Revival of American Community*. New York: Simon & Schuster, 75.
3. ——. 1995. "Bowling Alone: America's Declining Social Capital," *Journal of Democracy* 6: 66–67, 69; "About Social Capital," <https://www.hks.harvard.edu/programs/saguaro/about-social-capital> (May 2, 2016).

interests. Slavery was once legal in the United States and large sectors of the U.S. economy were dependent on this forced labor. Slavery was outlawed and blacks were finally recognized as possessing citizenship and individual rights—resulting from abolitionists’ pressure. Although some abolitionists were wealthy white men, most were ordinary people including men and women of both races. White women and blacks were able to actively assist in the campaign to end slavery despite the fact that, with few exceptions, they were unable to vote.



The print above, published in 1870, celebrates the extension of the right to vote to African American men. The various scenes show legal rights denied to African Americans.

The rights gained by these activists and others have dramatically improved the quality of life for many in the United States. Civil rights legislation did not focus solely on the right to vote or to hold public office; it also integrated schools and public accommodations,

prohibited discrimination in housing and employment, and increased access to higher education. Activists for women's rights fought for and won greater reproductive freedom for women, better wages, and access to credit. Only a few decades ago, homosexuality was considered a mental disorder, and intercourse between consenting adults of the same sex was illegal in many states.

Activism may also improve people's lives in less dramatic ways. Working to make cities clean up vacant lots, destroy or rehabilitate abandoned buildings, build more parks and playgrounds, pass ordinances requiring people to curb their dogs, and ban late-night noise greatly improves people's quality of life. The actions of individual Americans can make their own lives better and improve their neighbors' lives as well.

Government cannot work effectively without the participation of informed citizens. Engaged citizens familiarize themselves with the most important issues confronting the country and with the plans different candidates have for dealing with those issues. They vote for the candidates they believe will be best suited to the job, and they may join others to raise funds or campaign for those they support. They inform their representatives how they feel about important issues. Through these efforts and others, engaged citizens let their representatives know what they want and thus influence policy. Only then can government actions accurately reflect the interests and concerns of the majority. Even people who believe the elite rule government should recognize that it is easier for them to do so if ordinary people make no effort to participate in public life.

PATHWAYS TO ENGAGEMENT

People can become civically engaged in many ways, either as individuals or as members of groups. Some forms of individual engagement require very little effort. Awareness is the first step

toward engagement. News is available from a variety of reputable sources, such as newspapers like the *Wall Street Journal*, *The Washington Post*, and the *New York Times*; national news shows, including those offered by the Public Broadcasting Service and National Public Radio; and reputable internet sites.

Another form of individual engagement is to write or email government representatives. Filing a complaint with the city council is another avenue of engagement. City officials cannot fix problems of which they are unaware. Responding to public opinion polls, actively contributing to a political blog, or starting a new blog are all examples of active engagement.

Voting is a fundamental way to engage with government. Individual votes do matter. City council members, local judges, some local law enforcement officials, mayors, state legislators, governors, and members of Congress are all chosen by popular vote. Although the president of the United States is not chosen directly by popular vote but by a group called the Electoral College, the votes of individuals in their home states determine how the Electoral College ultimately votes. Registering to vote beforehand is necessary in most states and many states allow registration online.



Voters line up to vote early outside an Ohio polling station in 2008. Many who had never voted before did so because of the presidential candidacy of Barack Obama. (credit: Dean Beeler)

Individuals may engage by attending political rallies, donating money to campaigns, and signing petitions. Starting a petition of one's own is relatively easy, and some websites that encourage involvement provide petitions that can be circulated through email. Participating in a poll or survey is another simple way to make your voice heard and be counted.

Young Americans are often reluctant to become involved in traditional forms of political activity. They may believe politicians

are not interested in what they have to say, or they may feel their votes do not matter. However, this attitude has not always prevailed. Indeed, today's college students can vote because of the activism of college students in the 1960s. Most states at that time required citizens to be twenty-one years of age before they could vote in national elections. This angered many young people, especially young men who could be drafted to fight the war in Vietnam. They argued that it was unfair to deny eighteen-year-olds the right to vote for the people who had the power to send them to war. As a result, the Twenty-Sixth Amendment, which lowered the voting age in national elections to eighteen, was ratified by the states and went into effect in 1971.

Some people prefer to work with groups when participating in political activities or performing service to the community. Group activities can be as simple as hosting a book club or discussion group to talk about politics. Coffee Party USA provides an online forum for people from a variety of political perspectives to discuss issues of concern to them. People who wish to be more active often work for political campaigns. Helping with fundraising efforts, handing out bumper stickers and campaign buttons, helping people register to vote, and driving voters to the polls on Election Day are all important activities that anyone can engage in. Individual citizens can also join interest groups promoting causes they favor.

Getting Involved

There is ample opportunity for average citizens to become active in government, whether through a city council subcommittee or another type of local

organization. Civic organizations always need volunteers, both short and long term.

For example, [Common Cause](#) is a non-partisan organization seeking government accountability. It calls for campaign finance reform and paper verification of votes registered on electronic voting machines. Voters would then receive proof that the machine recorded their actual vote. This would help to detect faulty machines that were inaccurately tabulating votes or election fraud. Common Cause has also advocated that the Electoral College be done away with and that presidential elections be decided solely on the basis of the popular vote.

Check out some other groups...

- [Friends of the Earth](#) mobilizes people to protect the natural environment
- [Grassroots International](#) works for global justice
- [The Family Research Council](#) promotes traditional values
- [Eagle Forum](#) supports fewer restrictions on home schooling



After the Southern California wildfires in 2003, sailors from the USS Ronald Reagan helped volunteers rebuild houses in San Pasqual as part of Habitat for Humanity. Habitat for Humanity builds homes for low-income people. (credit: Johansen Laurel, U. S. Navy)

More active and direct forms of engagement include protest marches and demonstrations, including civil disobedience. Such tactics were used successfully in the African American civil rights movement of the 1950s and 1960s and remain effective today. Other tactics, such as boycotting businesses of whose policies the activists disapproved, are also still common. There are now “buycotts,” in which

consumers purchase goods and services from companies that give extensively to charity, help the communities in which they are located, or take steps to protect the environment.

FACTORS OF ENGAGEMENT

Many Americans engage in political activity on a regular basis. A 2008 survey revealed that approximately two-thirds of American adults had participated in some type of political action in the past year. These activities included largely non-personal activities that did not require significant interaction with others.⁴

4. Aaron Smith et al., 1 September 2009. “The Current State of Civic Engagement in America,” <http://www.pewinternet.org/2009/09/01/the-current-state-of-civic-engagement-in-america/>.

Americans aged 18–29 were less likely to become involved in political activity than older Americans. A 2015 poll of more than three thousand young adults by Harvard University’s Institute of Politics revealed that only 22 percent claimed to be politically engaged, and fewer than 10 percent said that they belonged to any type of political



*Volunteers fed people at New York’s Zuccotti Park during the Occupy Wall Street protest in September 2011.
(credit: David Shankbone)*

organization or had volunteered for a political campaign. Only slightly more claimed they had gone to political rallies.⁵ However, although Americans under age thirty are less likely than older Americans to engage in traditional types of political participation, many remain engaged in activities on behalf of their communities. One-third reported that they had voluntarily engaged in some form of community service in the past year⁶

5. Harvard Institute of Politics, “Survey of Young Americans’ Attitudes toward Politics and Public Service,” Survey, October 30, 2015–November 9, 2015. http://www.iop.harvard.edu/sites/default/files_new/pictures/151208_Harvard_IOP_Fall_2015_Topline.pdf

6. Keller, “Young Americans are Opting Out.”



Why are younger Americans less likely to become involved in traditional political organizations and a more traditional policy making path? One answer may be that as American politics become more partisan in nature, young people turn away. Committed partisanship, which is the tendency to identify with and to support (often blindly) a particular political party, alienates some Americans who feel that elected representatives should vote in support of the nation's best interests instead of voting in the way their party wishes them to. When elected officials ignore all factors other than their party's position on a particular issue, some voters become disheartened while others may become polarized. However, a recent study reveals that it is a distrust of the opposing party and

not an ideological commitment to their own party that is at the heart of most partisanship among voters.⁷

Young Americans are particularly likely to be put off by partisan politics. More Americans under the age of thirty now identify themselves as Independents instead of Democrats or Republicans. Instead of identifying with a particular political party, young Americans are increasingly concerned about specific issues, like same-sex marriage.⁸

The likelihood that people will become active in politics also depends not only on age but on wealth and education. In a 2006 poll, the percentage of people who reported that they were regular voters grew as levels of income and education increased.⁹

Questions to Consider

1. What kinds of people are most likely to become active in politics or community service?
2. What political activities can people engage in other

7. Marc Hetherington and Thomas Rudolph, “Why Don’t Americans Trust the Government?” *The Washington Post*, 30 January 2014.

8. Keller, “Young Americans are Opting Out.”

9. 18 October 2006. “Who Votes, Who Doesn’t, and Why,” <http://www.people-press.org/2006/10/18/who-votes-who-doesnt-and-why/>.

than running for office?

3. Is citizen engagement necessary for government to function? Explain.
4. Which is the more important reason for being engaged: to gain power or improve the quality of life? Why?
5. Are all Americans equally able to become engaged in government?
6. What factors make it more possible for some people to become engaged than others? What could be done to change this?
7. Are there problems with allowing interest groups to exercise influence over government? Explain.
8. Are you engaged in or at least informed about actions of the federal or local government?
9. Are you registered to vote?
10. How would you feel if you were not allowed to vote until age twenty-one?

Terms to Remember

beliefs—the tenets or convictions that people hold to be true

capitalism—economic system, a market based economy, free markets

egalitarianism— the belief that everyone should be treated equally by the government

ideal culture—the standards society would like to embrace and live up to

individualism—independence of the individual, each individual has value regardless of any factor of birth or circumstance

liberties—freedoms possessed because an individual is a human being with reasoning capabilities; life, liberty and property; basic freedoms

partisanship—strong support, or even blind allegiance, for a particular political party

populism—belief that the people are in control of the government

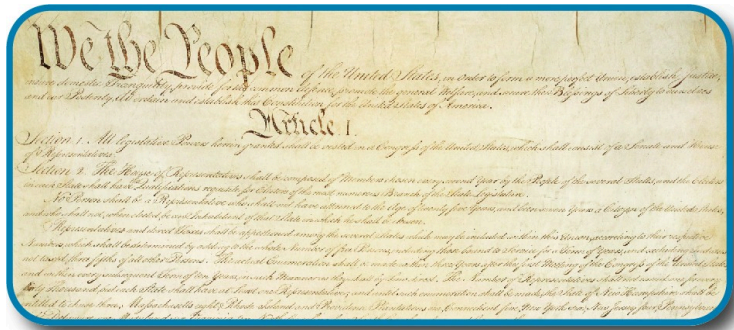
real culture—the way society actually is

values—a culture's standard for discerning or determining what is good and just in society

PART IV

CONSTITUTIONS AND CONTRACTS

19. Constitutions and Contracts: Why establish rules for governing?



If individuals band together to form a government, give their consent to this government to gain the protection of rights, and work to maintain collective order and security, it is preferable to put the rules of consent in writing—a contract. Whether the nation has 13 states or 50 with 3 million or 330 million citizens, a country as large and diverse as the US needs a written contract between government and citizens.

The American people have a contract with their government—the Constitution of the United States of America. Written in 1787 and

amended twenty-seven times, this document is the basis for U.S. government.¹

The U.S. *Constitution* is the oldest and shortest written constitution of the modern era, the culmination of American (as well as British/European/Greek/etc.) political thought about government power. The framers of this contract were not like-minded individuals aligned in thought or purpose. The *Constitution* was born of necessity following the failures of the first revolutionary government and featured several pragmatic compromises. More than 225+ years later the U.S. government still requires compromise to function.

Constitutions & Contracts: Questions to Consider

1. What reason would you give for maintaining the written contract US citizens have with the government?
2. Would you like to see the contract/constitution changed? In what way?
3. Would a verbal contract work for government?
4. Would a contract by handshake work for government?
5. Is government more accountable to a written contract? Why/why not?

1. credit: modification of work by National Archives and Records Administration

20. Constitutions and Contracts: Where did the ideas for the US Constitution originate?

Learning Objectives

- Identify the origins of political thought leading to the Declaration of Independence
- Identify some of the actions leading to the American Revolution

Revolution and nation building in America emerged from historical European roots—not *new* ideas but *old* ones led the colonists to revolt and form a new nation.

Where did ideas for revolution arise?

Most people understand the idea of **natural** or **unalienable** rights, believing no other individual or government has the right to take away their life, restrict their liberty, or take their property—without a very good reason.

People often band together to protect life, liberty and property. These bands may have a contractual agreements because individuals and governments do not always respect the life, liberty, and property of others. Throughout history few governments have

recognized individual rights. John Locke, a seventeenth-century English philosopher, wrote about the relationship between government and unalienable or natural rights (whether arising from a belief in a higher power bestowing these rights or from a human ability to reason that such rights exist).

Locke was not the first to suggest such rights. The English elites sought to protect lives, liberties, and property of English freemen long before the settling of North American colonies. In 1215, King John signed *Magna Carta*—a contract protecting life, liberty, and property—“No freemen shall be taken, imprisoned . . . or in any way destroyed . . . except by the lawful judgment of his peers or by the law of the land.” While *Magna Carta* afforded protections only to the English barons who were in revolt against King John in 1215, these protections were considered a cornerstone of liberty for freemen of all socio-economic conditions by the time of the



John Locke was one of the most influential thinkers of the Enlightenment. His writings form the basis for many modern political ideas.

American Revolution—rights always possessed by the people but begrudgingly acknowledged by King John. A belief in unalienable or natural rights of all human beings precludes a belief that rights are only protected by government and not granted or conveyed by government.

The problem with *Magna Carta* is significant. If a king may grant rights, a king may remove rights. If rights are unalienable (not granted by any individual or government), people may never be separated from these rights to life, liberty and property. Governments may protect the rights or infringe/restrict them, but they do not bestow or grant them.

Locke also addressed the purpose of government. For centuries monarchies claimed their authority originated from God. Locke, however, asserted that human beings created government. People sacrifice some freedom in exchange for government protection of their lives, liberty, and property. Locke called this implicit agreement between a people and their government the **social contract**. Should government deprive people of their rights by abusing its authority, the contract was broken and the people were no longer bound by its terms.

The people could thus withdraw their consent to obey and form another government for their protection—**popular sovereignty**. For Locke, withdrawing **consent** meant replacing one monarch with another.

Why revolt?

How did disagreement move from thought to war? Over time the British monarchy came to treat colonists differently from other freemen living in Britain. Learned men among the colonies' elites, familiar with the works of Locke and other political philosophers boldly sought a solution. Appeals to the monarchy failed. Parliament and King George III made decisions for colonists without their input/consent. Colonists' rights to property (taxes and quartering of soldiers without consent) were taken from them. Ultimately, these colonial elites determined the social contract was broken, and they sought a means of self-government. Separation was the solution.

Following the Boston Massacre, resistance to British rule grew. In December 1773, a group of Boston men boarded a ship in Boston harbor and threw a cargo of tea into the water. The protest



The Sons of Liberty circulated this sensationalized version of the events of March 5, 1770, in order to promote the rightness of their cause; it depicts British soldiers firing on unarmed civilians in the event that became known as the Boston Massacre. Later portrayals would more prominently feature Crispus Attucks, an African American who was one of the first to die. Eight British soldiers were tried for murder as a result of the confrontation.

concerned granting of a monopoly on tea to the British East India Company, which many colonial merchants resented.¹

This act of defiance became known as the Boston Tea Party. Today, many who do not agree with the positions of the Democratic or Republican parties have organized themselves into an oppositional group called the Tea Party.



(a)



(b)

Members of the modern Tea Party movement claim to represent the same spirit as their colonial forebears in the iconic lithograph The Destruction of Tea at Boston Harbor (a) and protest against what they perceive as government's interference with people's rights. In April 2010, members of a Tea Party Express rally on the Boston Common signed a signature wall to record their protest (b). (credit b: modification of work by Tim Pierce)

In 1774, Parliament responded to colonial defiance with laws called the Coercive Acts, punishing Boston for leading resistance to British rule. These acts interfered with the colony's ability to govern itself. This assault on Massachusetts and its economy enraged people throughout the colonies, and delegates from all the colonies except Georgia formed the First Continental Congress to create a unified opposition to Great Britain and to develop a declaration of rights and grievances. King George III continued to ignore the reasoned appeals of colonial leaders for equal treatment.

1. Bernhard Knollenberg. 1975. *Growth of the American Revolution: 1766-1775*. New York: Free Press, 95-96.

In 1775, delegates met again as the Second Continental Congress. Armed conflict had begun with skirmishes between colonial militiamen and British troops at Lexington and Concord, Massachusetts. Congress drafted a *Declaration of Causes* explaining the colonies' reasons for rebellion. On July 2, 1776, Congress declared American independence from Britain and two days later signed the ***Declaration of Independence***.

Consider the Original

Thomas Jefferson drafted the *Declaration of Independence* officially proclaiming separation from Britain. Jefferson laid out justification for revolt.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, —That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its

powers in such form, as to them shall seem most likely to effect their Safety and Happiness.²

Britain had deprived the colonists of their rights. The King had “establish[ed] . . . an absolute Tyranny over these States.” Just as their English forebears had removed King James II from the throne in 1689, the colonists now wished to establish a new rule. There was a crucial difference this time. The colonists did not want a new king. They wanted self-government.³

With their signing of the Declaration of Independence, the founders of the United States committed themselves to the creation of a new government.

2. Declaration of Independence complete transcript available with the National Archives at [usa.gov](https://www.archives.gov)

3. Declaration of Independence excerpt from the National Archives at [usa.gov](https://www.archives.gov)



The presentation of the Declaration of Independence is commemorated in a painting by John Trumbull in 1817. It was commissioned to hang in the Capitol in Washington, DC.



Thomas Jefferson explains in the [Declaration of Independence](#) why many colonists felt the need to form a new nation. His evocation of the natural rights of man and his list of grievances against the king also served as the model for the [Declaration of Sentiments](#) that was written in 1848 in favor of giving women in the United States rights equal to those of men. View both documents and compare.

Questions to Consider

1. What key tenets of American political thought influenced in the decision to declare independence from Britain?
2. What actions by the British government convinced the colonists they needed to declare their independence?

Terms to Remember

consent—citizens may consent to give up some liberties to governing authority/rule of law in order to receive a benefit like security/order

Declaration of Independence—a document written in 1776 in which the American colonists proclaimed their independence from Great Britain and listed their grievances against King George III

natural rights—the right to life, liberty, and property; believed to be given by a Higher Power or understood by human reasoning ability; no government may give/convey these liberties; government may only protect or infringe on these rights

social contract—an agreement between people and government in which citizens consent to be governed so long as the government protects their natural rights

popular sovereignty—the people are sovereign rather than a monarch or oligarchy; the rule of law places people above politics

unalienable rights—rights all human beings possess; rights to life, liberty of movement, and personal property; inseparable

2I. Constitutions and Contracts: Articles of Confederation

Learning Objectives

- Describe the steps taken during and after the American Revolution to create a government
- Identify basic tenets of the *Articles of Confederation*
- Describe some unexpected consequences of the *Articles of Confederation*

Successful revolt depended on the ability to borrow money, negotiate treaties, and defend the borders. Delegates of the confederation government sought recognition as an independent nation by other countries. The Second Continental Congress needed a government strong enough to win independence and recognition without depriving people of the very liberties for which they were fighting.

Establishing a New Framework for Governing

The final draft of the ***Articles of Confederation***, which formed the basis of the new nation's government, was accepted by Congress in 1777 and submitted for ratification by all thirteen states. Maryland

argued that territory west of the Appalachian mountains, to which some states had laid claim, should instead be held by the national government as public land for the benefit of all. The last of these states, Virginia, relinquished its land claims in 1781, clearing the way for Maryland's approval and ratification of the *Articles*.¹

The *Articles* defined a governmental structure (confederacy) based upon a **confederation** of states, which would be independent, self-governing entities unifying for the purpose of common defense and commerce. Newly separated from a monarchy with a **unitary** or highly centralized power structure, the representatives sought an emphasis on local government within the states, which they believed were best suited to manage states' separate interests. Fearful of replacing one oppressive national government with another, the framers of this confederation created an alliance held together by a weak central government.



View the [Articles of Confederation](#) at the National Archives. The [timeline for drafting and ratifying the Articles of Confederation](#) is available at the Library of Congress.

Following the *Declaration of Independence*, the central government had written authority to act for national defense. States were

1. Stuart Bruchey. 1990. *Enterprise: The Dynamic Economy of a Free People*. Cambridge, MA: Harvard University Press, 223.

assumed to have a common interest in defense and a common desire to supply militias. In the careful balance between power for the national government and liberty for the states, the *Articles of Confederation* favored the states.

Powers given to the central government were limited. The Confederation Congress had the authority to exchange ambassadors, make treaties with foreign governments and Indian tribes, declare war, coin currency, borrow money, and settle disputes between states. Each state legislature appointed delegates to the Congress. Regardless of its size or the number of delegates it chose to send, each state had one vote. To avoid an elite professional political class, delegates served for no more than three consecutive years, . The nation had no independent chief executive or judiciary. Nine of thirteen votes were required before the central government could act, and the *Articles of Confederation* could be changed only by unanimous approval of all thirteen states.

Why did the *Articles* fail?

Weakness	<i>Articles of Confederation</i> —Result of Identified Weakness
taxation	money requests not always honored by states; no predictable national income
trade & commerce	US hurt by foreign competition; states competing with each other
no national military	states could ignore request for militia/troops; hard to coordinate national defense
one vote per state	populous states underrepresented; lack of equal access for citizens
unanimous vote to change	problems with <i>Articles</i> not easy to fix
no national courts	no way to enforce limited central power; no way to resolve disputes between states
no executive branch	enforcing and implementing acts passed by Congress was impossible

The *Articles of Confederation* satisfied the goal of a weak central government with limited power. It soon became apparent that,

while the sovereignty of the states was protected, the Articles had created a central government too weak to function effectively.



This contemporary depiction of Continental Army veteran Daniel Shays (left) and Job Shattuck (right), who led an uprising of Massachusetts farmers in 1786–1787 that prompted calls for a stronger national government, appeared on the cover of Bickerstaff's Genuine Boston Almanack for 1787.

Fearful of creating a system no better than the oppressive monarchy they fought to escape, the men drafting the *Articles of Confederation* limited the powers of the central government. The states maintained the right to locally govern their residents, while the central government could declare war, coin money, and conduct foreign affairs. An inability to impose taxes, regulate commerce, or raise an army hindered the defense of the nation and payment of debts. A solution had to be found. Miraculously, this confederation managed to win a war with the world's leading super power of the 18th century in spite of its weaknesses.

Questions to Consider

1. What are two reasons the *Articles of Confederation* hindered the government during the American Revolution?
2. Why would lack of a national judicial system be considered a weakness of the *Articles*?
3. What is a confederation?
4. How might a unitary government be useful?

Terms to Remember

Articles of Confederation—the first basis for the new nation's government; adopted in 1781; created an alliance of sovereign states held together by a weak central government

confederacy/confederation—a highly decentralized form of government; sovereign states form a union for purposes such as mutual defense

unitary—a form of government in which political power is highly centralized; often despotic/authoritarian; high level of order and control

22. Constitutions and Contracts: Is another new contract really necessary?

Learning Objectives

- Identify the reasons for a new contract revising or replacing the *Articles of Confederation*
- Understand the controversies and compromises of the Constitutional Convention
- Distinguish between ratification and amendment

If the *Articles* are not working, what do we do next?

Fifty-five delegates arrived at Philadelphia in May 1787 tasked with reworking the *Articles of Confederation*. It was apparent that the very loose confederation of states and the weak central government would not work as a long term solution for governing the new nation. Throughout the long, hot Philadelphia summer, delegations from twelve states discussed, debated, and finally worked out a new blueprint for the nation—designed to resolve conflicts between small and large states, northern and southern states, and those favoring a strong federal government with those arguing for state sovereignty.



The closest thing to minutes of the Constitutional Convention is the [collection of James Madison's letters and notes](#) about the proceedings in Philadelphia. Several such letters and notes may be found at the Library of Congress's *American Memory* project.

Many delegates to what is now called the **Constitutional Convention** wanted to strengthen the role and authority of the central government but feared allowing too much centralized power. They intended to preserve state autonomy without preventing states from working collectively. They wanted to protect the political rights of all free men but also feared mob rule, a potential result of Shays' Rebellion had it succeeded. Delegates replaced the *Articles of Confederation* rather than make revisions. Although James Madison is known as the father of this new contract—the *Constitution*—George Washington's support gave the convention and the *Constitution* hope of success due to his perceived sense of fairness, his overall credibility and his reputation as a non-partisan leader.

3 Structures of Government—Unitary, Confederation & Federal



After rejecting a **unitary** government (monarchy) and living with the weaknesses of **confederation** government (during the Revolution), the delegates opted for a **federal** system with a strong central government balanced by state and local power. Each of these levels of the federal structure would employ separation of power as well as checks and balances between branches. Division of power between branches of government and between the federal and state governments, slavery, trade, taxes, foreign affairs, representation, and even the procedure to elect a president were just a few of the contentious issues of the convention. Diverging plans, strong egos, regional demands, and states' rights made solutions difficult. Five months of debate, compromise, and creative strategies produced a new constitution creating a federal representative republic with a strong central government, leaving most of the power with the state governments.

Ten months of public and private debate were required to secure

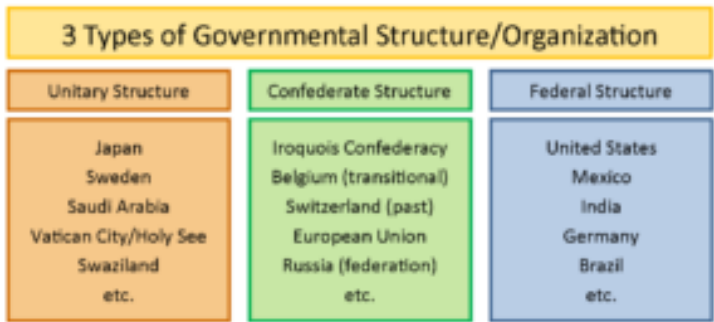
ratification by the minimum nine states. Even then Rhode Island and North Carolina held out until after the adoption of a Bill of Rights.

Consider the Original

Benjamin Franklin portrait “For we are sent hither to
consult **not** contend, with
each other;
and Declaration of a fix’ Opinion,
and of determined Resolutions never to change it,
neither enlighten nor convince us.”
*Benjamin Franklin, Speech in Congress, June 11, 1787*¹²

1. (emphasis added—revised from The Library of Congress—*Wise Guide: Who’s the Father of the Constitution?* at <http://www.loc.gov/wiseguide/may05/constitution.html> and *Creating the United States: Convention and Ratification* at <https://www.loc.gov/exhibits/creating-the-united-states/convention-and-ratification.html>)
2. Benjamin Franklin Credit: Duplessis, Joseph-Siffrede, artist. “Benjamin Franklin, head-and-shoulders portrait, facing slightly right, wearing fur collar.” 1907. Prints and Photographs Division of the Library of Congress.

The structure of government impacts the function (day-to-day business) of government. Countries must make this important decision about which structure of government to employ before working on the details of how this organizational structure will carry out the basic functions of governing.



Information on countries is available at the Central Intelligence Agency's library in a section called "World Fact Book" located at <https://www.cia.gov/library/publications/the-world-factbook/geos/vt.html>. Switzerland was formerly a confederation and is now considered a federal system by the CIA. Belgium appears to be moving from a federal system to a more confederate-like structure with the 2012 sixth state reform transferring power to regions and linguistic communities. Russia is also listed by the CIA as a mixed federation of entities including provinces, republics, oblasts, okrugs, krays, etc.

No decision about structure, function, or agenda for the new Republic's government was easy. Delegates from small states did not want their interests pushed aside by populous states like Virginia. Everyone was concerned about slavery no matter which side of this contentious issue was supported. Representatives from southern states worried that delegates from free states might try to outlaw slavery nationwide. Conversely, free states feared southerners might attempt to make slavery permanent. They all agreed on the election of George Washington, former commander of the Continental Army and hero of the American Revolution, as the president of the convention. A core question needed to be

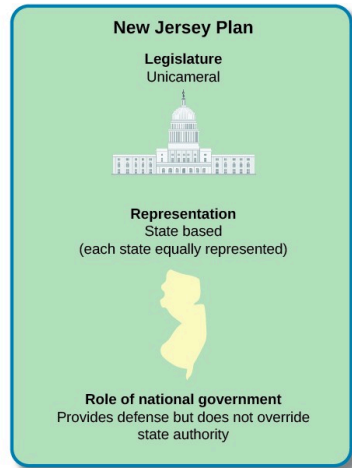
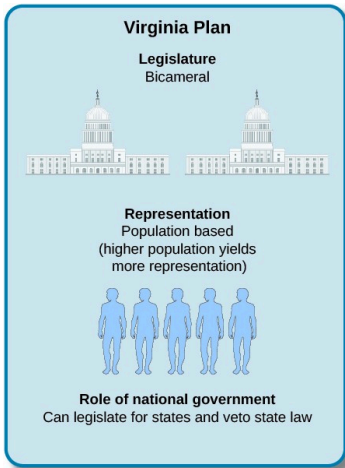
answered. If you intend to implement a representative republic, how do you represent all states and citizens in a fair and equitable manner regardless of the geographical size or population of each state?

How do you organize representation in a republic?

The **Constitution** consists of a **preamble** and seven articles. The first three articles divide the national government into three branches—the legislative branch, the executive branch, and the federal judiciary—and describe the powers and responsibilities of each. In Article I, ten sections describe the structure of Congress, the basis for representation and the requirements for serving in Congress, the length of Congressional terms, and the powers of Congress. The national legislature created by the article reflects the compromises reached by the delegates regarding such issues as representation, slavery, and national power.

The delegates from Virginia called for a **bicameral legislature** consisting of two chambers, with a state's representatives in each chamber based on the state's population. Delegates from small states objected to this **Virginia Plan**. Another proposal, the **New Jersey Plan**, called for a **unicameral legislature** with one chamber and each state possessing one vote (a weakness already observed under the *Articles of Confederation*). Thus, smaller states would have the same power in the national legislature as larger states. However, the larger states argued that because they had more residents, they should be allotted more legislators to represent their interests. They argued populations should be represented proportionally—equal access by individual citizen rather than equal share of power by states. Senators were to be appointed by state legislatures, a variation on the Virginia Plan, and members of the House of

Representatives would be popularly elected by the voters in each state.



As evidence the delegates were considering and incorporating every conceivable controversy of representative government, consider Alexander Hamilton's concerns about state rivalry and dissension.

Consider the Original

In Federalist #6, Alexander Hamilton states,

The three last numbers of this paper have been dedicated to an enumeration of the dangers to which we should be exposed, in a state of disunion, from the arms and arts of foreign nations. I shall now proceed to delineate

dangers of a different and, perhaps, still more alarming kind—those which will in all probability flow from dissensions between the States themselves, and from domestic factions and convulsions. These have been already in some instances slightly anticipated; but they deserve a more particular and more full investigation.

A man must be far gone in Utopian speculations who can seriously doubt that, if these States should either be wholly disunited, or only united in partial confederacies, the subdivisions into which they might be thrown would have frequent and violent contests with each other. To presume a want of motives for such contests as an argument against their existence, would be to forget that men are ambitious, vindictive, and rapacious. To look for a continuation of harmony between a number of independent, unconnected sovereignties in the same neighborhood, would be to disregard the uniform course of human events, and to set at defiance the accumulated experience of ages.

The causes of hostility among nations are innumerable. There are some which have a general and almost constant operation upon the collective bodies of society. Of this description are the love of power or the desire of pre-eminence and dominion—the jealousy of power, or the desire of equality and safety. There are others which have a more circumscribed though an equally operative influence within their spheres. Such are the rivalships and

competitions of commerce between commercial nations. And there are others, not less numerous than either of the former, which take their origin entirely in private passions; in the attachments, enmities, interests, hopes, and fears of leading individuals in the communities of which they are members. Men of this class, whether the favorites of a king or of a people, have in too many instances abused the confidence they possessed; and assuming the pretext of some public motive, have not scrupled to sacrifice the national tranquility to personal advantage or personal gratification.³

Hamilton goes on to support his position with numerous historical examples over thousands of years of collective human experience with governing. Hamilton speaks eloquently of “dissensions between the States,” which is evidenced in the controversy over representation. Ultimately, compromise was achieved.

The **Connecticut** or **Great Compromise** (suggested by Roger Sherman of Connecticut) effectively combined the New Jersey and Virginia Plans—a bicameral (two chambered) legislative body with a Senate where each state, regardless of size or population, received equal representation (2 senators for each state) and a House of Representatives where each state’s population was counted to

3. Alexander Hamilton, Federalist 6, The Federalist Papers (complete text at the National Archives at usa.gov)<https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-6>

ensure proportional representation (total number of representatives divided proportionally between the states).

The Great Compromise that determined the structure of Congress soon led to another debate, however. When states took a census of their population for the purpose of allotting House representatives, should slaves be counted? Southern states were adamant that they should be, while delegates from northern states were vehemently opposed, arguing that representatives from southern states would not represent the interests of enslaved people. If slaves were not counted, however, southern states would have far fewer representatives in the House than northern states did. For example, if South Carolina were allotted representatives based solely on its free population, it would receive only half the number it would have received if slaves, who made up approximately 43 percent of the population, were included.⁴

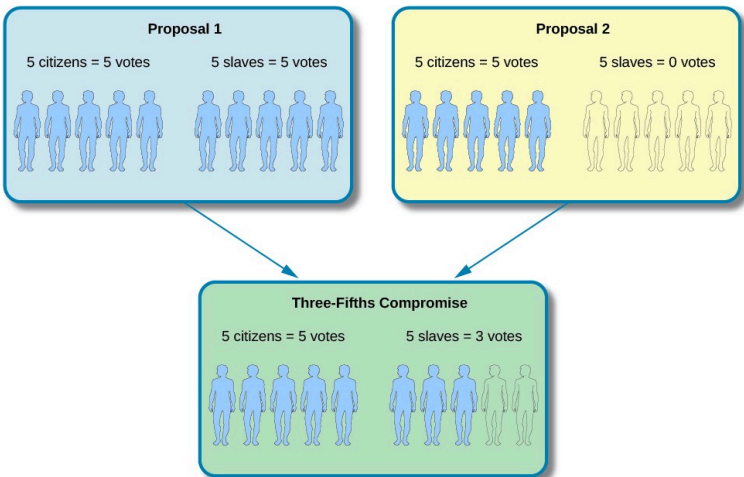
How do we reconcile slavery and unalienable rights?

Slavery was another fundamental division separating states. Many delegates believed slavery contradicted the ideals of the *Declaration of Independence*. How can you reconcile the ideal of unalienable rights with the notion that some human beings are property? None of the southern states had abolished slavery and none wanted the new *Constitution* to interfere. Southern states developed their economy with a dependence on slavery—the cheapest possible

4. U.S. Department of Commerce. Bureau of the Census. 1790. *Statistical Abstract of the United States*. Washington, DC: Department of Commerce.

labor. Other states hoped to abolish slavery entirely. Again, pragmatic compromise effectively perpetuated the institution of slavery and pushed the controversy off to a future reckoning.

The **three-fifths compromise** allowed slaves to be taxed as property and counted as population for purposes of a state's representation in the government. This compromise resolved the impasse without truly satisfying anyone. For purposes of congressional representation, slaveholding states could count all their free population, including free African Americans and 60 percent (three-fifths) of their enslaved population. To mollify the north, the compromise allowed counting 60 percent of a state's slave population for federal taxation, although no such taxes were ever collected. Another compromise granted Congress the right to impose taxes on imports in exchange for a twenty-year prohibition on laws attempting to ban the importation of slaves to the United States, which would hurt the economy of southern states more than that of northern states. Because the southern states, especially South Carolina, had made it clear they would leave the convention if abolition were attempted, no serious effort was made by the framers to abolish slavery in the new nation, even though many delegates disapproved of the institution.



The Library of Congress in *Creating the United States: Convention and Ratification* notes,

On August 21 the debate over the issue of commerce became very closely linked to another explosive issue—slavery. When Luther Martin of Maryland proposed a tax on slave importation, the convention was thrust into a strident discussion of the institution of slavery and its moral and economic relationship to the new government. John Rutledge of South Carolina, asserting that slavery had nothing at all to do with morality, declared, “Interest alone is the governing principle with nations.” Roger Sherman of Connecticut was for dropping the tender issue altogether before it jeopardized the convention. George Mason of Virginia expressed concern over unlimited importation of slaves but later indicated that he also favored federal protection of slave property already held. This nagging issue of possible federal intervention in slave traffic, which Sherman and others feared could irrevocably split northern and southern delegates, was settled by, in Mason’s words, “a bargain.” Mason later wrote that delegates from South Carolina and Georgia, who most feared federal meddling in the slave trade, made a deal with delegates from the New England states. In exchange for the New Englanders’ support for continuing slave importation for 20 years, the southerners accepted a clause that required only a simple majority vote on navigation laws, a crippling blow to southern economic interests.

The bargain was also a crippling blow to those working to abolish slavery. Congregationalist minister and abolitionist Samuel Hopkins of Connecticut charged that the convention had sold

out: “How does it appear . . . that these States, who have been fighting for liberty and consider themselves as the highest and most noble example of zeal for it, cannot agree in any political Constitution, unless it indulge and authorize them to enslave their fellow men . . . Ah! these unclean spirits, like frogs, they, like the Furies of the poets are spreading discord, and exciting men to contention and war.” Hopkins considered the Constitution a document fit for the flames.

On August 31 a weary George Mason, who had 3 months earlier written so expectantly to his son about the “great Business now before us,” bitterly exclaimed that he “would sooner chop off his right hand than put it to the Constitution as it now stands.”

The *Constitution* contained protections for slavery. Article I postponed the abolition of the foreign slave trade until 1808 (the **importation clause**); and, in the interim, those in slaveholding states were allowed to import as many slaves as they wished.⁵

Furthermore, the *Constitution* placed no restrictions on the domestic slave trade, so residents of one state could still sell enslaved people to other states. Article IV of the *Constitution*—which, among other things, required states to return fugitives to the states where they had been charged with crimes—also prevented slaves from gaining their freedom by escaping to states where slavery had been abolished—clause 3 of Article IV (known as the **fugitive slave clause**) allowed slave owners

5. U.S. Const. art. I, § 9.

to reclaim their human property in the states where slaves had fled.⁶

The *Constitution* also gave the federal government control over all “Territory or other Property belonging to the United States.” This would prove problematic when, as the United States expanded westward and population growth led to an increase in the power of the northern states in Congress, the federal government sought to restrict the expansion of slavery into newly acquired territories.



A growing number of institutes and study centers focus on the Constitution and the founding of the republic.

Examples such as the [Institute for the American Constitutional Heritage](#) and the [Bill of Rights Institute](#) have informative public websites with documents and videos. Another example is the [National Constitution Center](#) that also holds programs related to aspects of the enduring U.S. Constitution. You can also access a free-online course offered by Hillsdale College at [Constitution 101: The Meaning and History of the Constitution](#)

Realizing that flaws in the *Articles of Confederation* could harm the new country and recognizing that the *Articles* could not easily be revised as originally intended, delegates from the states who met in Philadelphia from May through September 1787 set about drafting a new governing contract. The United States that emerged from the Constitutional Convention in September was not a confederation. It

6. U.S. Const. art. IV, § 2.

was a republic with a strengthened government. Congress had been transformed into a bicameral legislature with additional powers, and a national judicial system had been created.

To satisfy the concerns of those fearing a strong central government, the framers of the *Constitution* created a system with separation of powers and checks and balances. Although such measures satisfied many, concerns still lingered that the federal government remained too powerful.

Questions to Consider

1. How was the controversy over representation resolved?
2. Why was slavery not abolished with the *Constitution*?
3. What does separation of powers mean?

Terms to Remember

bicameral legislature—a legislature with two houses, such as the U.S. Congress

federal—a form of government in which power is divided between state governments and a national government

Great Compromise—a compromise between the Virginia Plan and the New Jersey Plan that created a two-house Congress; representation based on population in the House

of Representatives and equal representation of states in the Senate

New Jersey Plan—a plan that called for a one-house national legislature; each state would receive one vote

separation of powers—the sharing of powers among three separate branches of government

Three-Fifths Compromise—a compromise between northern and southern states that called for counting of all a state's free population and 60 percent of its slave population for both federal taxation and representation in Congress

unicameral—a legislature with only one house, like the Confederation Congress or the legislature proposed by the New Jersey Plan

Virginia Plan—a plan for a two-house legislature; representatives would be elected to the lower house based on each state's population; representatives for the upper house would be chosen by the lower house

23. Constitutions and Contracts: Ratification or Approving the Contract

Learning Objectives

- Identify the steps required to ratify the Constitution
- Describe arguments the framers raised in support of a strong national government
- Discuss counterpoints raised by the Anti-Federalists

On September 17, 1787, the delegates to the Constitutional Convention in Philadelphia voted to approve the document they had drafted over the course of many months. Before it could become the law of the land, the *Constitution* faced another hurdle. It had to be ratified by the states.

What is the process of approval?

Article VII, the final article of the *Constitution*, required that before the *Constitution* could become law and a new government could form, the document had to be ratified by nine of the thirteen states. Eleven days after the delegates at the Philadelphia convention

approved it, copies of the *Constitution* were sent to each of the states, which were to hold ratifying conventions to either accept or reject.

This approach to **ratification** was unusual.

Authority under the *Articles of Confederation* and the Confederation Congress had rested on the consent of the states, changes to the nation's government should also have been ratified by the state legislatures. Instead, by calling upon state legislatures to hold ratification conventions to approve the *Constitution*, the framers avoided asking the legislators to approve a document that would require them to give up a degree of their own power. The men attending ratification conventions would be delegates elected by their neighbors. Delegates were not being asked to relinquish their own power; in fact, they were being asked to place limits upon the power of their state legislators.

Because the new nation was a republic with power held by the people through elected representatives, it was appropriate to leave the ultimate acceptance or rejection of the *Constitution* to the nation's citizens. If convention delegates, who were chosen by popular vote, approved it, then the new government could rightly claim that it ruled with the **consent** of the people.

The greatest sticking point when it came to ratification, as it had been at the Constitutional Convention itself, was the relative power of the state and federal governments. The framers believed the central government needed power to maintain and command an army and navy, impose taxes, and force the states to comply with laws passed by Congress. Many people resisted increasing the powers of the national government at the expense of the states.

Edmund Randolph of Virginia, disapproved of the *Constitution* because it created a new national judicial system. The fear was that the federal courts were too far away. State courts were located closer to the homes of both plaintiffs and defendants, and it was believed that judges and juries in state courts could better understand the actions of those who appeared before them. In

response to these fears, federal courts were created in each of the states.¹

Perhaps the greatest source of dissatisfaction with the Constitution was that it did not guarantee protection of individual liberties. State governments had given jury trials to residents charged with violating the law and allowed their residents to possess weapons for their protection. Some had practiced religious tolerance. The Constitution did not contain reassurances that the national government would do so. This led opponents to call for a bill of rights and the refusal to ratify the document without one. The lack of a bill of rights was especially problematic in Virginia, as the *Virginia Declaration of Rights* was the most extensive rights-granting document among the states. The promise that a bill of rights would be drafted for the Constitution persuaded delegates in many states to support ratification.²

Consider the Original

Thomas Jefferson on the Bill of Rights

John Adams and Thomas Jefferson carried on a lively correspondence regarding the ratification of the

1. Pauline Maier. 2010. *Ratification: The People Debate the Constitution, 1787-1788*. New York: Simon & Schuster, 464.
2. Maier, *Ratification*, 431.

Constitution. In the following excerpt (reproduced as written) from a letter dated March 15, 1789, after the *Constitution* had been ratified by nine states but before it had been approved by all thirteen, Jefferson reiterates his previously expressed concerns that a bill of rights to protect citizens' freedoms was necessary and should be added to the *Constitution*:

“In the arguments in favor of a declaration of rights, . . . I am happy to find that on the whole you are a friend to this amendment. The Declaration of rights is like all other human blessings alloyed with some inconveniences, and not accomplishing fully its object. But the good in this instance vastly overweighs the evil. . . . This instrument [the *Constitution*] forms us into one state as to certain objects, and gives us a legislative & executive body for these objects. It should therefore guard us against their abuses of power. . . . Experience proves the inefficacy of a bill of rights. True. But tho it is not absolutely efficacious under all circumstances, it is of great potency always, and rarely inefficacious. . . . There is a remarkable difference between the . . . Inconveniences which attend a Declaration of rights, & those which attend the want of it. . . . The inconveniences of the want of a Declaration are permanent, afflicting &

irreparable: they are in constant progression from bad to worse.”³

Citizens quickly separated into two groups: federalists and anti-federalists. The **federalists** believed a strong government was essential for both national defense and economic growth. A national currency would ease business transactions. The central authority to regulate trade and place tariffs on imports would protect merchants from foreign competition. Furthermore, the power to collect taxes would allow the national government to fund internal improvements like roads, which would also help commerce.

Opponents of ratification were called **anti-federalists**. Anti-federalists feared the power of the national government and believed more accessible state legislatures could better protect freedoms. Although some anti-federalists, like Patrick Henry, were wealthy, most distrusted the elite and believed a strong national government would favor the rich over those of “the middling sort.”⁴

Even members of the social elite, like Henry, feared that the centralization of power would lead to the creation of a political

3. Letter from Thomas Jefferson to James Madison, March 15, 1789, https://www.gwu.edu/~ffcp/exhibit/p7/p7_1text.html.
4. Isaac Krannick. 1999. “The Great National Discussion: The Discourse of Politics in 1787.” In *What Did the Constitution Mean to Early Americans?* ed. Edward Countryman. Boston: Bedford/St. Martins, 52.

aristocracy, to the detriment of state sovereignty and individual liberty.

Related to these concerns were fears that the strong central government levy taxes on farmers and planters, who lacked the hard currency needed to pay them. Many also believed Congress would impose tariffs on foreign imports making American agricultural products less welcome in Europe and in European colonies in the western hemisphere.

Some anti-federalists believed that a large federal republic could not work as intended. Americans had long held that virtue was necessary in a nation where people governed themselves (i.e., putting self-interest and petty concerns aside for the good of the larger community). In small republics, similarities among community members would naturally lead them to the same positions and enable those in power to understand the needs of their neighbors. In a larger republic, encompassing nearly the entire Eastern Seaboard and running west to the Appalachian Mountains, people would lack such a strong commonality of interests.⁵

Concern	Description of a Few Concerns of Anti-Federalists
national government	too powerful; less likely to preserve freedom; interests of elites will be favored
national legislature	power to levy taxes, imports and tariffs will hurt the general public; Congress might harass citizens with a standing army; no term limits
large republic	no real common interests in such a large republic; people's interests overlooked
slavery	Congress might authorize slave trade over state law where prohibited
protecting liberties	no written guarantee that national government will protect individual liberties
states v. national	state power will be eroded by Constitution; supremacy clause, etc.

Likewise, anti-federalists argued, the diversity of religion

5. Krannick, *Great National Discussion*, 42-43.

protected by the *Constitution* would prevent the formation of a political community with shared values and interests.

In all the states, educated men authored pamphlets and published essays and political cartoons arguing either for or against ratification. Although many writers supported each position, the Federalist essays are now best known. The arguments these authors put forth, along with explicit guarantees that amendments would be added to protect individual liberties, helped to sway delegates toward ratification.

For obvious reasons smaller and less populous states favored the *Constitution* and the protection of a strong central government. Delaware and New Jersey ratified the document within a few months after it was sent to them for approval in 1787. Connecticut ratified it early in 1788. Some of the larger states like Pennsylvania and Massachusetts also voted for the new government. New Hampshire became the ninth state to ratify the *Constitution* in the summer of 1788.



(a)

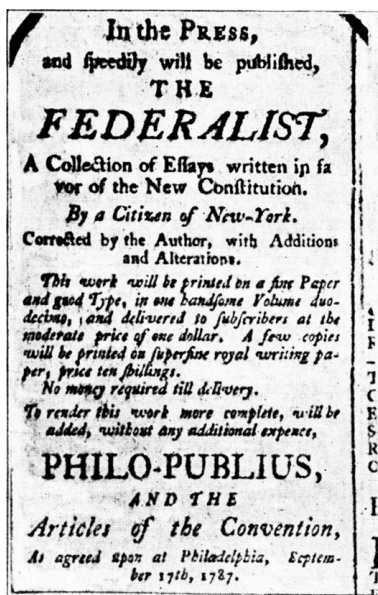


(b)

This Massachusetts Sentinel cartoon (a) encourages the state's voters to join Georgia and neighboring Connecticut in ratifying the *Constitution*. Less than a month later, on February 6, 1788, Massachusetts became the sixth member of the newly formed federal union (b).

Although the *Constitution* went into effect following ratification

by New Hampshire, four states still remained outside the newly formed union. Two were the wealthy and populous states of Virginia and New York. In Virginia, James Madison's active support and the intercession of George Washington, who wrote letters to the convention, changed the minds of many. Some who had initially opposed the *Constitution*, such as Edmund Randolph, were persuaded that the creation of a strong union was necessary for the country's survival and changed their position. Other Virginia delegates were swayed by the promise that a bill of rights similar to the *Virginia Declaration of Rights* would be added after the Constitution was ratified. On June 25, 1788, Virginia became the tenth state to grant its approval.



From 1787 to 1788, Alexander Hamilton, James Madison, and John Jay authored a series of essays intended to convince Americans, especially New Yorkers, to support the new Constitution. These essays, which originally appeared in newspapers, were collected and published together under the title *The Federalist* in 1788. They are now known as *The Federalist Papers*.

the national government would grow too powerful. The federal system, in which power was divided between the national and state governments and the division of authority within the federal government into separate branches, would prevent any one part of the government from becoming too strong.

Furthermore, tyranny could not arise in a government in which “the legislature necessarily predominates.” Finally, the desire of office holders in each branch of government to exercise the powers given to them, described as “personal motives,” would encourage them to limit any attempt by the other branches to overstep their

The last major hurdle was New York’s approval. Facing considerable opposition, Alexander Hamilton, James Madison, and John Jay wrote a series of essays, beginning in 1787, arguing for a strong national government and support of the Constitution. Later compiled as *The Federalist* and now known as *The Federalist Papers*, these eighty-five essays were originally published in newspapers in New York and other states under the name of Publius, a supporter of the Roman Republic.

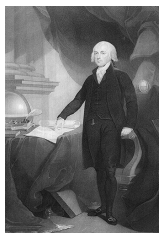
The essays addressed a variety of issues that troubled citizens. In *Federalist* No. 51, attributed to James Madison, the author assured readers they did not need to fear that the

authority. According to Madison, “Ambition must be made to counteract ambition.”

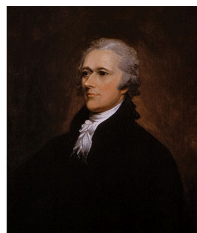
In *Federalist* No. 35, Hamilton argued that people’s interests *could* be represented by men who were not their neighbors. Hamilton asked rhetorically, would American citizens best be served by a representative “whose observation does not travel beyond the circle of his neighbors and his acquaintances” or by someone with more extensive knowledge of the world? To those who argued that a merchant and land-owning elite would come to dominate Congress, Hamilton countered that the majority of men currently sitting in New York’s state senate and assembly were landowners of moderate wealth and that artisans usually chose merchants, “their natural patron[s] and friend[s],” to represent them. An aristocracy would not arise, and if it did, its members would have been chosen by lesser men. Similarly, Jay reminded New Yorkers in *Federalist* No. 2 that union had been the goal of Americans since the time of the Revolution. A desire for union was natural among people of such “similar sentiments” who “were united to each other by the strongest ties,” and the government proposed by the *Constitution* was the best means of achieving that union.

Madison also addresses fears of elite dominance in *Federalist* No. 10. Americans need not fear the power of factions or special interests, he argued, for the republic was too big and the interests of its people too diverse to allow the development of large, powerful political parties. Likewise, elected representatives, who were expected to “possess the most attractive merit,” would protect the government from being controlled by “an unjust and interested [biased in favor of their own interests] majority.”

For those who worried that the president might indeed grow too ambitious or king-like, Hamilton, in *Federalist* No. 68, assured placing the leadership of the country in the hands of one person was not dangerous. Electors from each state would select the president. Because these men would be members of a “transient” body called together only for the purpose of choosing the president and would meet in separate deliberations in each state, they would be free of corruption and beyond the influence of the “heats and ferments” of the voters. Indeed, Hamilton argued in *Federalist* No. 70, instead of fearing a tyrannical president, Americans should realize that it was easier to control one person than it was to control many. Furthermore, one person could also act with an “energy” that Congress did not possess. Making decisions alone, the president could decide what actions should be taken faster than could Congress, whose deliberations, because of its size, were necessarily slow. At times,



(a)



(b)

James Madison (a) played a vital role in the formation of the Constitution. He was an important participant in the Constitutional Convention and authored many of *The Federalist Papers*. Despite the fact that he did not believe that a Bill of Rights was necessary, he wrote one in order to allay the fears of those who believed the federal government was too powerful. He also served as Thomas Jefferson's vice president and was elected president himself in 1808. Alexander Hamilton (b) was one of the greatest political minds of the early United States. He authored the majority of *The Federalist Papers* and served as Secretary of the Treasury in George Washington's administration.

the “decision, activity, secrecy, and dispatch” of the chief executive might be necessary.



The Library of Congress has [The Federalist Papers](#) on their website. The Anti-Federalists also produced a body of writings, less extensive than *The Federalists Papers*, which argued against the ratification of the Constitution. However, these were not written by one small group of men as *The Federalist Papers* had been. A collection of the writings that are unofficially called [The Anti-Federalist Papers](#) is also available online.

Although arguments of the Federalists were persuasive, it is unclear whether they actually succeeded in changing the minds of New Yorkers. Once Virginia ratified the *Constitution* on June 25, 1788, New York realized that it had little choice but to do so as well. If it did not ratify the *Constitution*, it would be the last large state that had not joined the union. A year later, North Carolina became the twelfth state to approve. Alone and realizing it could not hope to survive on its own, Rhode Island became the last state to ratify, nearly two years after New York.

Term Limits

One of the objections raised to the *Constitution's* new government was that it did not set term limits for members of Congress or the president. Those who opposed a strong central government argued that this failure could allow a handful of powerful men to gain control of the nation and rule it for as long as they wished. Although the framers did not anticipate the idea of career politicians, those who supported the *Constitution* argued that reelecting the president and reappointing senators by state legislatures would create a body of experienced men who could better guide the country through crises. A president who did not prove to be a good leader would be voted out of office instead of being reelected. In fact, presidents long followed George Washington's example and limited themselves to two terms. Only in 1951, after Franklin Roosevelt had been elected four times, was the Twenty-Second Amendment passed to restrict the presidency to two terms.

Questions to Consider

1. Why did so many people oppose ratification of the

Constitution, and how was their opposition partly overcome?

2. What were some of the consequences of not having a written protection of liberties or bill of rights?
3. Why did Jefferson favor a bill of rights?
4. Are term limits a good idea?
5. Should term limits be added to the *Constitution*? Why or why not?

Terms to Remember

Anti-federalists—those who did not support ratification of the *Constitution*

Federalists—those who supported ratification of the *Constitution*

Federalist Papers—a collection of eighty-five essays written by Alexander Hamilton, James Madison, and John Jay in support of ratification of the *Constitution*

Term Limits—limiting the president and members of Congress to a specified number of terms of office; no restrictions to this day on congressional terms

24. Constitutions and Contracts: Amending or Changing the Contract

Learning Objectives

- Describe how the *Constitution* may be formally amended/changed
- Explain the contents and significance of the Bill of Rights
- Discuss the importance of amendments

A major problem with the *Articles of Confederation* was the inability to adapt and change without unanimous consent. The framers learned this lesson well. One of the strengths they built into the *Constitution* was the ability to amend it to meet the nation's needs and address concerns or structural elements they had not anticipated.

Since ratification in 1789, the *Constitution* has changed only 27 times. The first 10 amendments were added in 1791. Responding to charges by anti-federalists that the *Constitution* made the national government too powerful and provided no protections for the rights of individuals, the newly elected federal government tackled the issue of guaranteeing liberties for American citizens. James Madison, a member of Congress from Virginia, took the lead in drafting nineteen potential changes to the *Constitution*.

Madison followed the procedure outlined in Article V that says

amendments can originate from one of two sources. First, they can be proposed by Congress and approved by a two-thirds majority in both the House and the Senate before being sent to the legislatures in all the states. If three-quarters of state legislatures vote to approve an amendment, it becomes part of the *Constitution*. A second method allows for the petitioning of Congress by the states: Upon receiving such petitions from two-thirds of the states, Congress must call a convention for the purpose of proposing amendments, which would then be forwarded to the states for ratification by the required three-quarters. All the current Constitutional amendments were created using the first method.

Having drafted nineteen proposed amendments, Madison submitted them to Congress. Only twelve were approved by two-thirds of both the Senate and the House of Representatives and sent to the states for ratification. Of these, only ten were accepted by three-quarters of the state legislatures. In 1791, these first ten amendments were added to the Constitution and became known as the **Bill of Rights**.

The ability to change the Constitution has made it a flexible document. Framers made amending the document sufficiently difficult that it has not been changed repeatedly; only seventeen amendments have been added since the ratification of the first ten (one of these, the Twenty-Seventh Amendment, was among Madison's rejected nine proposals).

How has the contract changed?

Bill of Rights	
1st Amendment	protected right to free speech, press, assembly, religion, and petition of government
2nd Amendment	protected right to bear arms
3rd Amendment	no quartering of soldiers during peace time in private homes without consent
4th Amendment	right to be secure in your property & person against unreasonable search or seizure
5th Amendment	grand jury, against double jeopardy & self incrimination, due process, eminent domain
6th Amendment	criminal procedure—speedy & public trial, impartial jury, counsel, etc.
7th Amendment	civil procedure—jury trial according to rules of common law
8th Amendment	no excessive bail or fine, no cruel and unusual punishment
9th Amendment	rights not enumerated belong to the people
10th Amendment	powers not delegated to US belong to the states & the people

The Bill of Rights was intended to quiet the fears of anti-federalists that the *Constitution* did not adequately protect individual liberties and thus encourage their support of the new national government. Many of the first ten amendments were based on provisions of the *English Bill of Rights* and the *Virginia Declaration of Rights*. For example, the right to bear arms for protection, the right to refuse shelter and provision for soldiers in peacetime, the right to a trial by jury, and protection against cruel and unusual punishment are taken from the *English Bill of Rights*. The Fifth Amendment, that people cannot be deprived of their life, liberty, or property except by a legal proceeding, was greatly influenced by English law as well as the protections granted to Virginians in the *Virginia Declaration of Rights*.



Learn more about the formal [process of amending the Constitution](#) and view exhibits related to the passage of specific amendments at the National Archives website.

The protections for religion, speech, press, and assembly did not exist under English law—the right to petition the government did, however. The prohibition in the First Amendment against the establishment of an official church differed significantly from both English precedent and the practice of several states. The Fourth Amendment, protecting Americans from unwarranted search and seizure of their property, was also new.

The Ninth and Tenth Amendments were intended to provide yet another assurance that people's rights would be protected and that the national government would not become too powerful. The Ninth Amendment guarantees that liberties extend beyond those described in the preceding documents. This was an important acknowledgment that the protected rights were extensive, and the government should not attempt to interfere with them. The Supreme Court, for example, has held that the Ninth Amendment protects the right to privacy even though none of the preceding amendments explicitly mentions this right. The Tenth Amendment, one of the first submitted to the states for ratification, ensures that states possess all powers not explicitly assigned to the national government by the *Constitution*. This guarantee protected states' reserved powers to regulate things like marriage, divorce, intrastate transportation, and commerce, as well as passing laws affecting education, public health, and safety.

Of the later amendments only one, the Twenty-First, repealed

another amendment, the Eighteenth, which had prohibited the manufacture, import, export, distribution, transportation, and sale of alcoholic beverages. Other amendments rectify problems that have arisen over the years or that reflect changing times. For example, the Seventeenth Amendment, ratified in 1913, gave voters the right to directly elect U.S. senators. The Twentieth Amendment, which was ratified in 1933 during the Great Depression, moved the date of the presidential inauguration from March to January. In a time of crisis, like a severe economic depression, the president needed to take office almost immediately after being elected. The Twenty-Second Amendment, added in 1955, limits the president to two terms in office, and the Twenty-Seventh Amendment, first submitted for ratification in 1789, regulates the implementation of laws regarding salary increases or decreases for members of Congress.

17th Amendment	voters may directly elect United States Senators
18th Amendment	prohibition of alcohol manufacture, sales, and distribution
20th Amendment	inauguration day moved from March to January after election of previous year
21st Amendment	repeal of 18th Amendment prohibiting alcohol manufacture, sales, and distribution
22nd Amendment	president is limited to two (2) terms of office
25th Amendment	presidential succession; vice presidential succession; unable to serve
27th Amendment	regulation of congressional salaries

Of the remaining amendments, four are of especially great significance. The Thirteenth Amendment abolished slavery in the United States. The Fourteenth Amendment granted citizenship and equal protection under the law regardless of race. It also prohibited states from depriving their residents of life, liberty, or property without a legal proceeding. Over the years, the Fourteenth Amendment has been used to require states to protect most of the same freedoms granted by the Bill of Rights.

13th Amendment	abolition of the institution of slavery
14th Amendment	citizenship rights/responsibilities; equal protection; due process of law; protections
15th Amendment	all males may now vote regardless of race unless they are Native Americans

The Fifteenth and Nineteenth Amendments extended the right

to vote. The *Constitution* granted states the power to set voting requirements, but the states had used this authority to deny women the right to vote. Most states used this authority to deny suffrage to property-less men and often to African American men as well. The Fifteenth Amendment gave men the right to vote regardless of race or color (unless they were Native American), but women were still prohibited from voting in most states.

After many years of campaigns for suffrage, the Nineteenth Amendment finally gave women the right to vote in 1920 after a tie vote in Tennessee. A 24-year old representative (Harry Burn, a Republican) cast the tie-breaking vote after a little push from his mother. (National Archives excerpt)

19th Amendment	women guaranteed the right to vote
23rd Amendment	residents of the District of Columbia (Washington, D. C.) may vote for president of US
24th Amendment	poll taxes abolished; no poll tax stopping citizens from exercising right to vote
26th Amendment	all citizens over the age of eighteen years old may register and cast their vote



Suffragists encourage Ohio men to support votes for women. Before the Nineteenth Amendment was added to the Constitution in 1920, only a few western states such as Wyoming gave women the right to vote. These women seem to be attracting a primarily female audience to hear their cause.

Subsequent amendments further extended the suffrage. The Twenty-Third Amendment (1961) allowed residents of Washington, DC to vote for the president. The Twenty-Fourth Amendment (1964) abolished the use of poll taxes. Many southern states had used a poll tax, a tax placed on voting, to prevent poor persons from voting. The last extension of the suffrage occurred in 1971 in the midst of the Vietnam War. The Twenty-Sixth Amendment

reduced the voting age from twenty-one to eighteen. Many people complained that the young people who were serving in Vietnam should have the right to vote for or against those making decisions

that might literally meant life or death. Other amendments have been proposed, including an amendment to guarantee equal rights to women, but all have failed.

Guaranteeing Your First Amendment Rights

The liberties of U.S. citizens are protected by the Bill of Rights, but potential or perceived threats to these freedoms arise constantly. This is especially true regarding First Amendment rights. Read about some of these threats at the [American Civil Liberties Union \(ACLU\)](http://aclj.org) website and let people know how you feel about these issues or check out [American Center for Law and Justice \(ACLJ\)](http://aclj.org) at <http://aclj.org/news>.

The Eleventh Amendment is extremely complicated from the judicial perspective, with federal courts taking multiple paths for interpretation of the language. Essentially, it deals with the issue of sovereign immunity (Is the government immune from prosecution?). Most attorneys understand that suits in the federal court system are more likely to achieve impartial results rather than suits filed against a state within the state's system.

The Twelfth Amendment supersedes clause 3 of § 1 of Article II of the *Constitution*. According to the Article II, Section 1 of the Constitution, if two candidates each received a majority of the electoral votes but are tied, the House of Representatives would determine which one would be President. Therefore, the decision rested with the lame duck, federalist-controlled House of

Representatives. Thirty-five ballots were cast over five days but neither candidate received a majority. Many federalists saw Jefferson as their principal foe, whose election was to be avoided at all costs. But Alexander Hamilton, a well-respected Federalist Party leader, hated Burr and advised Federalists in Congress that Jefferson was the safer choice. Finally, on February 17, 1801, on the thirty-sixth ballot, the House elected Thomas Jefferson to be President. The tie vote between Jefferson and Burr in the 1801 Electoral College pointed out problems with the electoral system. The framers of the Constitution had not anticipated such a tie nor had they considered the possibility of the election of a President or Vice President from opposing factions – which had been the case in the 1796 election. In 1804, the passage of the 12th Amendment corrected these problems by providing for separate Electoral College votes for President and Vice President. (excerpt from the National Archives)

In 1909 progressives in Congress again attached a provision for an income tax to a tariff bill. Conservatives, hoping to kill the idea for good, proposed a constitutional amendment enacting such a tax; they believed an amendment would never receive ratification by three-fourths of the states. Much to their surprise, the amendment was ratified by one state legislature after another, and on February 25, 1913, with the certification by Secretary of State Philander C. Knox, the Sixteenth Amendment took effect. Yet in 1913, due to generous exemptions and deductions, less than 1 percent of the population paid income taxes at the rate of only 1 percent of net income. This document settled the constitutional question of how to tax income and, by so doing, effected dramatic changes in the American way of life.¹

1. (excerpt from the National Archives)

11th Amendment	regarding lawsuits against states; may states be sued in court
12th Amendment	presidential election procedures
16th Amendment	individual income tax

The possibility of amending the *Constitution* helped ensure its ratification, although many feared the powerful federal government it created would deprive them of their rights. To allay their anxieties, the framers promised that a Bill of Rights safeguarding individual liberties would be added following ratification. These ten amendments were formally added to the document in 1791 and other amendments followed over the years. One of the problems with the *Articles of Confederation* was the difficulty of changing it. To prevent this difficulty from recurring, the framers provided a method for amending the *Constitution* that required a two-thirds majority in both houses of Congress and in three-quarters of state legislatures to approve a change.

Questions to Consider

1. Has the Tenth Amendment been circumvented by the Supreme Court?
2. Was the Bill of Rights a necessary addition to the Constitution? Defend your answer.
3. Is the federal government too powerful? Should states have more power? If so, what specific power(s) should states have?
4. What new amendments should be added to the Constitution? Why?
5. What issue regarding First Amendment protections causes you the most concern?
6. Why is it important that the amending process be

difficult and time consuming?

Term to Remember

Bill of Rights—the first ten amendments to the U.S. Constitution; most were designed to protect fundamental rights and liberties

PART V
FEDERALISM

25. Federalism: Basic Structure of Government



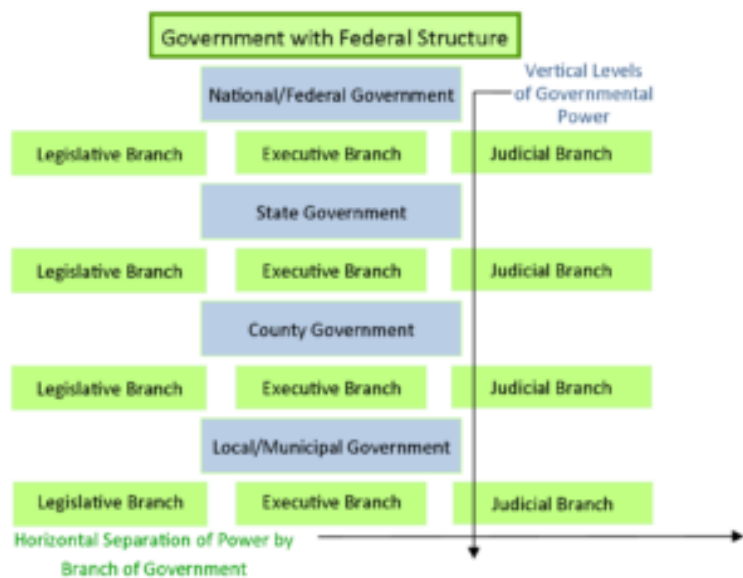
Figure 1. Your first encounter with differences across states may have come from a childhood experience—perhaps visiting relatives in another state or on a cross-country trip during summer vacation. The distinct postcard images of different states are symbolic of American federalism. (credit: modification of work by Boston Public Library)

Part of the discussion at the Constitutional Convention focused on basic governmental structures. The *Declaration of Independence* rejected the experience of **unitary** (highly centralized) government under a king. The *Articles of Confederation* promoted a **confederation** of the states (decentralized power with a weak central government—committee style). As previously discussed, this was not as successful as the delegates hoped. Would a third option deliver positive results? A **federal** system (strong central government balanced with strong independent states) could be the answer.

The real key to the American federal system is a balance of horizontal and vertical separation of power. The federal design divides powers between multiple vertical layers or levels of

government—national, state, county, parish, local, special district—allowing for multiple access points for citizens. The governments at each level check and balance one another. As an institutional design, federalism both safeguards state interests and creates a strong union led by a capable central government.

At each level of the US federal structure, power is further divided horizontally by branches—legislative, executive, judicial.



American federalism seeks to balance **decentralization** and **centralization** forces. We see decentralization when we cross state lines and encounter different taxation levels, welfare eligibility requirements, and voting regulations. Centralization is apparent with the federal government’s unique authority to print money or to offer money grants and mandates to shape state actions. State border crossings may greet us with colorful billboards, but behind them lies a complex federal design that has structured relationships between states and the national government since the late 1700s.

Federalism: Questions to Consider

1. What are the central differences between unitary, confederation, and federal governmental structures?
2. Is national government power too centralized in the US federal structure?

Terms to Remember

centralization—power is concentrated at one horizontal level of government; for example, states are not permitted to make treaties with foreign governments or coin their own money

confederation—decentralized governmental power; group of separate entities share power

decentralization—power is divided or shared between vertical levels of government

federal—balance of power between centralized national authority and decentralized state and local authority

unitary—highly centralized governmental authority; centralized power with national government

26. Federalism: How should power be structurally divided?

Learning Objectives

- Explain the concept of federalism
- Identify some of the powers and responsibilities of federal, state, and local governments
- Examine how responsibilities differ and powers overlap
- Discover how federalism evolved in the US

The US republic divides governmental power in two general ways—vertically and horizontally. Horizontally, we share power among three branches of government—the legislature, the executive, and the judiciary. Vertically, power is shared between levels of government: national and subnational (state, parish, county, local, special district). In the United States, the term **federal government** refers to government at the *national level*.

Federalism is an institutional arrangement creating relatively autonomous levels of government, each able to act directly on behalf of the people with the authority granted to it.¹ What does

1. See John Kincaid. 1975. “Federalism.” In *Civitas: A*

this mean? People agree (consent) to cooperate, to write some rules (a constitution) defining how they will work together and hold each other accountable, and to set up a framework (branches and levels of governmental power) keeping people in control of the government by providing numerous points of access. Federalism increases access opportunities.

The second characteristic common to all federal systems is a written contract/constitution that cannot be changed without the substantial consent of subnational governments. In the American federal system, the twenty-seven amendments added to the *Constitution* since its adoption resulted from an arduous process requiring approval by two-thirds of both houses of Congress and three-fourths of the states. This supermajority requirement ensures no changes to the *Constitution* may occur without broad support within Congress (the people's representatives) and among states.

Third, the constitutions of federal systems formally allocate legislative, judicial, and executive authority to the various levels of government to ensure each has some degree of autonomy from the other. Under the U.S. *Constitution*, the president assumes executive power, Congress exercises legislative powers, and the federal courts (e.g., U.S. district courts, appellate courts, and the Supreme Court) assume judicial powers. In each of the fifty states, a governor assumes executive authority, a state legislature makes laws, and state-level courts (e.g., trial courts, intermediate appellate courts, and supreme courts) possess judicial authority.

Framework for Civil Education, eds. Charles Quigley and Charles Bahmueller. Calabasas, CA: Center for Civic Education, 391–392; William S. Riker. 1975. “Federalism.” In *Handbook of Political Science*, eds. Fred Greenstein and Nelson Polsby. Reading, MA: Addison-Wesley, 93–172.

According to political scientist Richard Neustadt, the system of **separation of powers** and **checks and balances** encourages cooperation rather than control. Neustadt notes the Constitutional Convention “created a government of separated institutions *sharing powers*.”²

While each level of government is somewhat independent of the others (**dual federalism**), a great deal of interaction occurs (**cooperative federalism**). The ability of the federal and state governments to achieve their objectives often depends on cooperation. Law enforcement agents at the local and state levels work to bolster the national government’s efforts to ensure homeland security.

Struggle Between National Power & State Power: How did US federalism evolve?

Historical Struggle for Power—Conflicts with a Federal Structure of Governing

As George Washington’s secretary of the treasury from 1789 to 1795, Alexander Hamilton championed legislative efforts to create a publicly chartered bank. For Hamilton, the establishment of the Bank of the United States was fully within Congress’s authority, and

2. R. E. Neustadt. 1960. *Presidential Power and the Politics of Leadership*. New York: Wiley, 33.

he hoped the bank would foster economic development, print and circulate paper money, and provide loans to the government. Although Thomas Jefferson, Washington's secretary of state, staunchly opposed Hamilton's plan on the constitutional grounds that the national government had no authority to create such an instrument, Hamilton managed to convince the reluctant president to sign the legislation.³

When the bank's charter expired in 1811, Jeffersonian Democratic-Republicans prevailed in blocking its renewal. However, the fiscal hardships that plagued the government during the War of 1812, coupled with the fragility of the country's financial system, convinced Congress and then-president James Madison to create the Second Bank of the United States in 1816. Many states rejected the Second Bank, arguing that the national government was infringing upon the states' constitutional jurisdiction.

A political showdown between Maryland and the national government emerged when James McCulloch, an agent for the Baltimore branch of the Second Bank, refused to pay a tax that Maryland had imposed on all out-of-state chartered banks. The standoff raised two constitutional questions: Did Congress have the

3. The Lehrman Institute. "The Founding Trio: Washington, Hamilton and Jefferson."
<http://lehrmaninstitute.org/history/FoundingTrio.asp>

authority to charter a national bank? Were states allowed to tax federal property? In *McCulloch v. Maryland*, Chief Justice John Marshall argued that Congress could create a national bank even though the Constitution did not expressly authorize it.⁴

Under the necessary and proper clause of Article I, Section 8, the Supreme Court asserted that Congress could establish “all means which are appropriate” to fulfill “the legitimate ends” of the Constitution. In other words, the bank was an appropriate instrument that enabled the national government to carry out several of its enumerated powers, such as regulating interstate commerce, collecting taxes, and borrowing money.

4. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

This ruling established the doctrine of implied powers, granting Congress a vast source of discretionary power to achieve its constitutional responsibilities. The Supreme Court also sided with the federal government on the issue of state authority to tax federal property. Under the supremacy clause of Article VI, legitimate national laws trump conflicting state laws. As the court observed, “the government of the Union, though limited in its

powers, is supreme within its sphere of action and its laws, when made in pursuance of the constitution, form the supreme law of the land.” Maryland’s action violated national supremacy because “the power to tax is the power to destroy.” This second ruling established the principle of national supremacy, which prohibits states from meddling in the lawful activities of the national government.

In *Gibbons v. Ogden*, the scope of national power was subjected to court interpretation of the commerce clause of Article I, Section 8; specifically, it had to determine whether the federal government had the sole

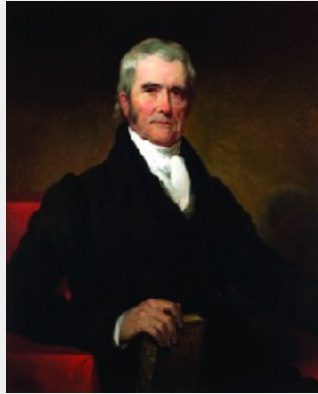


Figure 1. Chief Justice John Marshall, shown here in a portrait by Henry Inman, was best known for the principle of judicial review established in Marbury v. Madison (1803), which reinforced the influence and independence of the judiciary branch of the U.S. government.

authority to regulate the licensing of steamboats operating between New York and New Jersey.⁵

Aaron Ogden, who had obtained an exclusive license from New York State to operate steamboat ferries between New York City and New Jersey, sued Thomas Gibbons, who was operating ferries along the same route under a coasting license issued by the federal government. Gibbons lost in New York state courts and appealed. Chief Justice Marshall delivered a two-part ruling in favor of Gibbons that strengthened the power of the national government. First, interstate commerce was interpreted broadly to mean “commercial intercourse” among states, thus allowing Congress to regulate navigation. Second, because the federal Licensing Act of 1793, regulating coastal commerce was a constitutional exercise of Congress’s authority under the commerce clause, federal law trumped the New York State license-monopoly law granting Ogden an exclusive steamboat operating license. Marshall pointed out, “the acts of New York must yield to the law of Congress.”⁶

Various states railed against the nationalization of power that had been going on since the late 1700s. When President John Adams signed the Sedition Act in

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

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

1798, which made it a crime to speak openly against the government, the Kentucky and Virginia legislatures passed resolutions declaring the act null on the grounds that they retained the discretion to follow national laws. In effect, these resolutions articulated the legal reasoning underpinning the doctrine of nullification—that states had the right to reject national laws they deemed unconstitutional.⁷

A nullification crisis emerged over the tariff acts of 1828 and 1832. Nullifiers argued that high tariffs on imported goods benefited northern manufacturing interests while disadvantaging economies in the South. South Carolina passed an Ordinance of Nullification declaring both tariff acts null and void and threatened to leave the Union. The federal government responded by enacting the Force Bill in 1833, authorizing the president's use of military force against states challenging federal tariff laws.

In the ultimate showdown between national and state authority, *Dred Scott v. Sandford*, the Supreme Court

7. W. Kirk Wood. 2008. *Nullification, A Constitutional History, 1776–1833*. Lanham, MD: University Press of America.

ruled the national government lacked the authority to ban slavery in the territories.⁸

The election of President Abraham Lincoln in 1860 influenced eleven southern states to secede from the Union believing the new president would challenge the institution of slavery. What was initially a conflict to preserve the Union became a conflict to end slavery when Lincoln issued the Emancipation Proclamation in 1863, freeing all slaves in the rebellious states. The defeat of the South impacted the balance of power between the states and the national government in two important ways. First, the Union victory put an end to the right of states to secede and to challenge legitimate national laws. Second, Congress imposed several conditions for readmitting former Confederate states into the Union; among them was ratification of the Fourteenth and Fifteenth Amendments. After the Civil War the power balance shifted toward the national government, a movement that had begun several decades before with *McCulloch v. Maryland* (1819) and *Gibbons v. Odgen* (1824).

In the late 1800s, some states attempted to regulate working conditions. For example, New York State passed the Bakeshop Act in 1897, which prohibited bakery employees from working more than sixty hours in a week. In *Lochner v. New York*, the Supreme Court ruled

8. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

this state regulation that capped work hours unconstitutional, on the grounds that it violated the due process clause of the Fourteenth Amendment.⁹ In other words, the right to sell and buy labor is a “liberty of the individual” safeguarded by the *Constitution*, the court asserted. The federal government also took up the issue of working conditions, with the same result.¹⁰



Puck, a humor magazine published from 1871 to 1918, satirized political issues of the day such as federal attempts to regulate commerce and prevent monopolies.

“Will you walk into my parlor?” said the spider to the fly” (a) by Udo Keppler depicts a spider labeled “Interstate Commerce Commission” capturing a large fly in a web labeled “The Law” while “Plague take it! Why doesn’t it stay down when I hit it?” (b), also drawn by Keppler, shows President William Howard Taft and his attorney general, George W. Wickersham, trying to beat a “Monopoly” into submission with a stick labeled “Sherman Law.”

The Great Depression of the 1930s brought new

9. *Lochner v. New York*, 198 U.S. 45 (1905).

10. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

economic hardships. Between 1929 and 1933, the national unemployment rate reached 25 percent, industrial output dropped by half, stock market assets lost more than half their value, thousands of banks went out of business, and the gross domestic product shrunk by one-quarter.¹¹ Given the magnitude of the economic depression, the national government was pressured to coordinate a robust national level response along with the states.

Cooperative federalism, in contrast to **dual federalism**, erodes the jurisdictional boundaries between the states and national government, leading to a blending of layers as in the marble cake analogy. The era of cooperative federalism contributed to the gradual incursion of



A line outside a Chicago soup kitchen in 1931, in the midst of the Great Depression. The sign above reads "Free Soup, Coffee, and Doughnuts for the Unemployed."

11. Nicholas Crafts and Peter Fearon. 2010. "Lessons from the 1930s Great Depression," *Oxford Review of Economic Policy* 26: 286–287; Gene Smiley. "The Concise Encyclopedia of Economics: Great Depression." <http://www.econlib.org/library/Enc/GreatDepression.html>

national authority into the jurisdictional domain of the states, as well as the expansion of the national government's power in concurrent policy areas.¹²

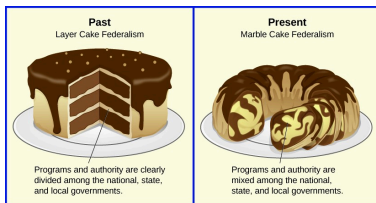
In the 1960s, President Lyndon Johnson's administration expanded the national government's role in society. The created Medicaid (which provides medical assistance to the indigent), Medicare (which provides health insurance to the elderly and disabled), and school nutrition programs. While the era of cooperative federalism witnessed a broadening of federal powers in concurrent and state policy domains, it is also the era of a deepening coordination between the states and the federal government in Washington. Nowhere is this clearer than with respect to the social welfare and social insurance programs created during the New Deal and Great Society eras, most of which are administered by both state and federal authorities and are jointly funded.

Although today's federal systems vary in design, five characteristics are common to the United States and other federal systems around the world, including Germany and Mexico.

All federal systems establish multiple levels of government. The national government is responsible for handling matters that affect the country as a whole—national defense, domestic peace, general welfare of the people, and a stable economy. Subnational, or state governments, are responsible for matters that lie within their

12. Marbach et al, *Federalism in America: An Encyclopedia*.

regions, which include ensuring the well-being of their people by administering education, health care, public safety, and other public services. A system like this requires different levels of government to cooperate, the institutions at each level form an interacting network. In the U.S. federal system, all national matters are handled by the federal/national government, which is led by the president and members of Congress, all of whom are elected. All matters at the subnational level are the responsibility of the fifty states, each headed by an elected governor and legislature. Thus, there is a separation of functions between the federal and state governments (**dual federalism**), and voters choose leaders at each level.¹³



Morton Grodzins, a professor of political science at the University of Chicago, coined the expression “marble-cake federalism” in the 1950s to explain the evolution of federalism in the United States.

Dual Federalism v. Cooperative Federalism

The late 1870s ushered in a new phase in the evolution of U.S. federalism. Under **dual**

federalism, the states and national government exercise exclusive authority in distinctly delineated spheres of jurisdiction. Like the layers of a cake, the levels of government do not blend with one another but rather are clearly defined. Two factors contributed to this conception of federalism. Supreme Court rulings blocked attempts by state and federal governments to step outside their

13. Garry Willis, ed. 1982. *The Federalist Papers* by Alexander Hamilton, James Madison and John Jay. New York: Bantam Books, 237.

jurisdictional boundaries. Further, the prevailing economic philosophy at the time loathed government interference in the process of industrial development.

Morton Grodzins coined the cake analogy of federalism in the 1950s while conducting research on the evolution of American federalism. Until then most scholars had thought of federalism as a layer cake, but according to Grodzins the 1930s ushered in “marble-cake federalism”: “The American form of government is often, but erroneously, symbolized by a three-layer cake. A far more accurate image is the rainbow or marble cake, characterized by an inseparable mingling of differently colored ingredients, the colors appearing in vertical and diagonal strands and unexpected whirls. As colors are mixed in the marble cake, so functions are mixed in the American federal system.”¹⁴

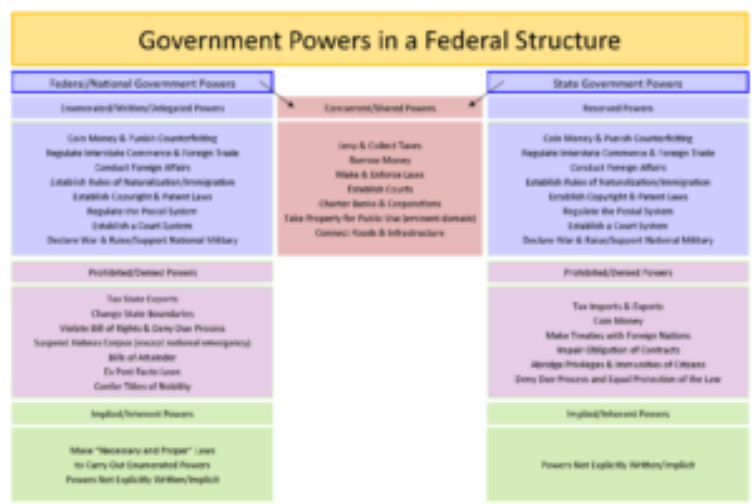


The governmental design of the United States is unusual; most countries do not have a federal structure. Aside from the United States, how many other countries have a federal system?

14. Morton Grodzins. 2004. “The Federal System.” In *American Government Readings and Cases*, ed. P. Woll. New York: Pearson Longman, 74–78.

What are the various types of power in a federal structure?

The *Constitution* contains several provisions that direct the functioning of the U.S. federal structure. The power of the national government is restricted and the states retain a degree of sovereignty as part of the framers' creation of this federal system. Although states retain some sovereignty, the **supremacy clause** in Article VI proclaims the U.S. *Constitution*, national laws, and treaties are “the supreme Law of the Land.” In the event of a conflict between the states and the national government, the national government takes precedence. Some delineate the scope of national and state power while others expressly restrict it. The remaining provisions shape relationships among the states and between states and the national government.



Before ratifying the *Constitution*, a number of states requested an amendment explicitly identifying the **reserved powers** of the states.

These anti-federalists sought further assurance that the national government's capacity to act directly on behalf of the people would be restricted, which the first ten amendments (Bill of Rights) provided. The Tenth Amendment affirms the states' reserved powers: "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." Some of the states' reserved powers are no longer exclusively within state domain, however. For example, since the 1940s, the federal government has *also* engaged in administering health, safety, income security, education, and welfare to state residents. The boundary has completely blurred between intrastate and interstate commerce becoming indefinable as a result of broad interpretation of the commerce clause. **Shared** (overlapping or concurrent) **powers** have become an integral part of contemporary U.S. federalism. These **concurrent powers** range from taxing, borrowing, and making and enforcing laws to establishing court systems.¹⁵

Article I, Sections 9 and 10, and constitutional amendments, lay out the restrictions (**prohibited powers/powers denied**) on national and state authority. The most important restriction Section 9 places on the national government prevents measures that deprive personal liberty. Specifically, the government cannot suspend the **writ of habeas corpus**, which enables someone in custody to petition a judge to determine whether that person's detention is legal (unless the executive declares a state of emergency); pass a **bill of attainder**, a legislative action declaring guilt without a trial; or enact an **ex post facto law**, which

15. Elton E. Richter. 1929. "Exclusive and Concurrent Powers in the Federal Constitution," *Notre Dame Law Review* 4, No. 8: 513–542. <http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4416&context=ndlr>

criminalizes an act retroactively. The Bill of Rights affirms and expands these constitutional restrictions, attempting to ensure that the government will not encroach on personal freedoms.

Again, if a state law clashes with a federal law found to be within the national government's constitutional authority, the federal law is supposed to prevail. The supremacy clause does not intend to subordinate the states to the federal government; rather, it affirms that one body of laws binds the country. In fact, all national and state government officials are bound by oath to uphold the Constitution regardless of the offices they hold. Yet enforcement is not always that simple. In the case of marijuana use, which the federal government defines to be illegal, twenty-three states and the District of Columbia have nevertheless established medical marijuana laws, others have decriminalized its recreational use, and four states have completely legalized it. The federal government could act in this area if it wanted to. Recent and current administrations have actively chosen to ignore the supremacy clause—using prosecutorial discretion—not holding states or individuals accountable for violating federal/national laws. For example, in addition to the legalization issue, there is the question of how to treat the money from marijuana sales, which the national government designates as drug money and regulates under laws regarding its deposit in banks.

Various constitutional provisions govern state-to-state relations. Article IV, Section 1, referred to as the **full faith and credit clause** or the Comity Clause (U.S. Constitution, Article IV, Section 2, Clause 1) requires the states to accept court decisions, public acts, and contracts of other states. Thus, an adoption certificate or driver's license issued in one state is valid in any other state.

The **privileges and immunities clause** of Article IV asserts that states are prohibited from discriminating against out-of-staters by denying them such guarantees as access to courts, legal protection, property rights, and travel rights. The clause has not been interpreted to mean there cannot be *any* difference in the way a state treats residents and non-residents. For example, individuals

cannot vote in a state in which they do not reside, tuition at state universities is higher for out-of-state residents, and in some cases individuals who have recently become residents of a state must wait a certain amount of time to be eligible for social welfare benefits. Another constitutional provision prohibits states from establishing trade restrictions on goods produced in other states. However, a state can tax out-of-state goods sold within its borders as long as state-made goods are taxed at the same level.

Federalism as a structural system of government creates relatively autonomous levels of governing, each possessing authority granted to them by the national constitution. The U.S. *Constitution* allocates powers to the states and federal government, structures the relationship between these two levels of government, and guides state-to-state relationships, and federal, state, and local governments rely on different sources of revenue to enable them to fulfill their public responsibilities.

Questions to Consider

1. What key constitutional provisions define the scope of authority of the federal and state governments?
2. What are the main functions of federal and state governments?
3. What are the main differences between cooperative federalism and dual federalism?
4. What were the implications of *McCulloch v. Maryland* for federalism?

Terms to Remember

bill of attainder—a legislative action declaring someone guilty without a trial; prohibited under the Constitution

concurrent powers—shared state and federal powers that range from taxing, borrowing, and making and enforcing laws to establishing court systems

cooperative federalism—a style of federalism in which both levels of government coordinate their actions to solve national problems, leading to the blending of layers as in a marble cake

dual federalism—a style of federalism in which the states and national government exercise exclusive authority in distinctly delineated spheres of jurisdiction, creating a layer-cake view of federalism

elastic clause—the last clause of Article I, Section 8, which enables the national government “to make all Laws which shall be necessary and proper for carrying” out all its constitutional responsibilities

ex post facto law—a law that criminalizes an act retroactively; prohibited under the Constitution

federalism—an institutional arrangement that creates two relatively autonomous levels of government, each possessing the capacity to act directly on the people with authority granted by the national constitution

fiscal federalism—sharing of tax dollars, fees, etc. between levels of government; usually in the form of grants to state governments

full faith and credit clause—found in Article IV, Section 1, of the Constitution, this clause requires states to accept court decisions, public acts, and contracts of other states; also referred to as the comity provision

privileges and immunities clause—found in Article IV, Section 2, of the Constitution, this clause prohibits states from discriminating against out-of-staters by denying such guarantees as access to courts, legal protection, and property and travel rights

writ of habeas corpus—a petition that enables someone in custody to petition a judge to determine whether that person's detention is legal

27. Federalism: How is revenue shared?

Learning Objectives

- Explain how federal intergovernmental grants have evolved over time
- Identify the types of federal intergovernmental grants
- Describe the characteristics of federal unfunded mandates

Fiscal Federalism: How are the people's dollars distributed?

Federal, state, and local governments depend on different sources of revenue to finance their annual expenditures.

Two important developments have fundamentally changed the allocation of revenue since the early 1900s. First, the ratification of the Sixteenth Amendment in 1913 authorized Congress to impose income taxes without apportioning it among the states on the basis of population, a burdensome provision that Article I, Section 9,

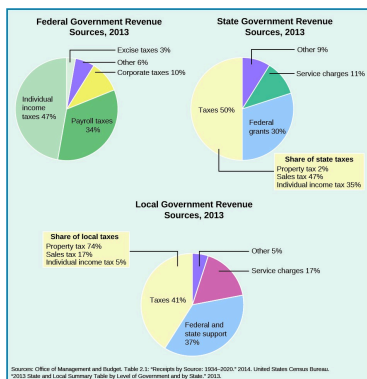
had imposed on the national government.¹ This change significantly increased the federal government's ability to raise revenue and spend it.

The second development regulates federal grants-transfers of federal money to state and local governments. These transfers, which do not have to be repaid, are designed to support the recipient governments, but also to encourage them to pursue federal policy objectives they might not otherwise adopt. The expansion of the federal government's spending power has enabled it to transfer more grant money to lower government levels, which has accounted for an increasing share of their total revenue.²

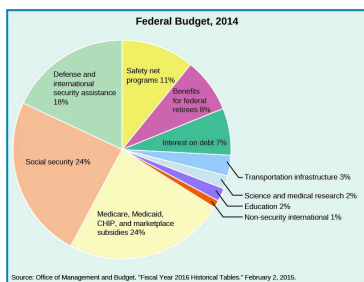
The sources of revenue for federal, state, and local governments are detailed in Figure 3. Although the data reflect 2013 results, patterns revealed in the figure give us an idea of how governments funded their activities in recent years. For the federal government, 47 percent of 2013 revenue came from individual income taxes and 34 percent from payroll taxes, which combine Social Security tax and Medicare tax.

1. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895).
2. See Robert Jay Dilger, "Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues," *Congressional Research Service*, Report 7-5700, 5 March 2015.

How are the revenues generated by people's tax dollars and people's fees paid for public services and licenses put to use by different levels of government? To gain insight on this question check Article I, Section 8, of the Constitution, assigning the federal government various powers allowing it to affect the nation as a whole.³



The 2014 federal budget demonstrates that providing for the general welfare and national defense consumes much of the government's resources—not just its revenue, but also its administrative capacity and labor power.



Educational expenditures constitute a major category for all levels. However, whereas the states spend comparatively more than local governments on university education, local governments spend even more on elementary and secondary education. Local governments

allocate more funds to police protection, fire protection, housing and community development, and public utilities such as water,

3. Data reported by the Center on Budget and Policy Priorities. 2015. "Policy Basics: Where Do Our Federal Tax Dollars Go?" March 11. <http://www.cbpp.org/research/policy-basics-where-do-our-federal-tax-dollars-go>

sewage, and electricity. While state governments allocate comparatively more funds to public welfare programs, such as health care, income support, and highways, both local and state governments spend roughly similar amounts on judicial and legal services and correctional services.

The national government's ability to achieve its objectives often requires the participation and cooperation of state and local governments. Intergovernmental grants offer positive financial inducements to get states to work toward selected national goals. A grant is commonly likened to a "carrot" to the extent that it is designed to entice the recipient toward a specific goal. On the other hand, unfunded mandates impose federal requirements on state and local authorities. Mandates are typically backed by the threat of penalties for non-compliance and provide little to no compensation to carry out the mandated action. Thus, given its coercive nature, a mandate is commonly likened to a "stick."

Grants

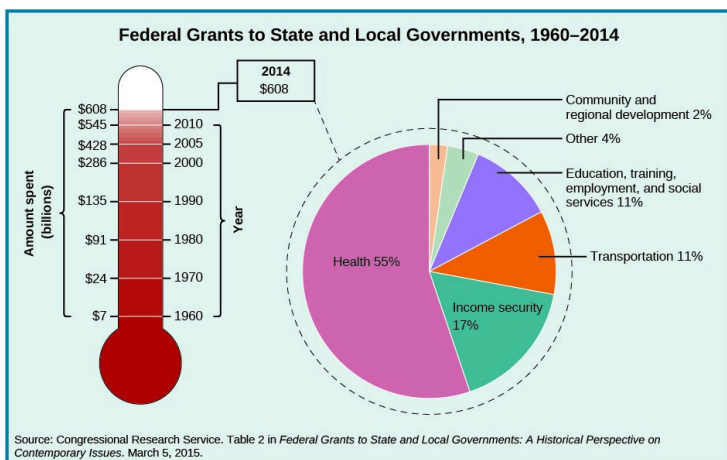
The national government has used grants to influence state actions as far back as the *Articles of Confederation* when it provided states with land grants. In the first half of the 1800s, land grants were the primary means by which the federal government supported the states. Millions of acres of federal land were donated to support road, railroad, bridge, and canal construction projects, all of which were instrumental in piecing together a national transportation system to facilitate migration, interstate commerce, postal mail service, and movement of military people and equipment. Numerous universities and colleges across the country, such as Ohio State University and the University of Maine, are land-grant institutions because their campuses were built on land donated by the federal government. By 1900, cash grants replaced land grants

as the main form of federal intergovernmental transfers and have become a central part of modern federalism.⁴

Federal cash grants have strings attached; the national government wants public monies used for policy activities that advance national objectives. **Categorical grants** are federal transfers formulated to limit recipients' discretion in the use of funds and subject them to strict administrative criteria that guide project selection, performance, and financial oversight, among other things. These grants also often require some commitment of matching funds. Examples are Medicaid and the food stamp program—categorical grants. **Block grants** come with less stringent federal administrative conditions and provide recipients more flexibility over how to spend grant funds. Examples of block grants include the Workforce Investment Act program, which provides state and local agencies money to help youths and adults obtain skill sets that will lead to better-paying jobs, and the Surface Transportation Program, which helps state and local governments maintain and improve highways, bridges, tunnels, sidewalks, and bicycle paths. Finally, recipients of general revenue sharing faced the least restrictions on the use of federal grants. From 1972 to 1986, when revenue sharing was abolished, upwards of \$85 billion of federal money was distributed to states, cities, counties, towns, and villages.⁵

4. Dilger, “Federal Grants to State and Local Governments.”

5. John Mikesell. 2014. *Fiscal Administration*, 9th ed. Boston: Wadsworth Publishing.



During the 1960s and 1970s, funding for federal grants grew significantly, as the trend line shows in the figure above. Growth picked up again in the 1990s and 2000s. The upward slope since the 1990s is primarily due to the increase in federal grant money going to Medicaid. Federally funded health-care programs jumped from \$43.8 billion in 1990 to \$320 billion in 2014.⁶

Health-related grant programs such as Medicaid and the Children’s Health Insurance Program (CHIP) represented more than half of total federal grant expenses.

6. Dilger, “Federal Grants to State and Local Governments,”
5.



The federal government uses grants and other tools to achieve its national policy priorities. Take a look at the [National Priorities Project](#) to find out more.

The national government favors using categorical grants to transfer funds to state and local authorities because this gives them more control and discretion in how the money is spent. In 2014, the federal government distributed 1,099 grants, 1,078 of which were categorical, while only 21 were block grants.⁷

In response to the terrorist attack on the United States on September 11, 2001, more than a dozen new federal grant programs relating to homeland security were created, but as of 2011, only three were block grants.

There are a couple of reasons that categorical grants are more popular than block grants despite calls to decentralize public policy. One reason is that elected officials who sponsor these grants can take credit for their positive outcomes (e.g., clean rivers, better-performing schools, healthier children, a secure homeland) since elected officials, not state officials, formulate the administrative standards that lead to the results. Another reason is that categorical grants afford federal officials greater command over grant program performance.

7. —, “Federal Grants to State and Local Governments,” Table 4.

Block grants have been championed for their cost-cutting effects. Unfortunately, their flexibility has been undermined over time as a result of creeping categorization, a process in which the national government places new administrative requirements on state and local governments or supplants block grants with new categorical grants.⁸

Among the more common measures used to restrict block grants' programmatic flexibility are set-asides (i.e., requiring a certain share of grant funds to be designated for a specific purpose) and cost ceilings (i.e., placing a cap on funding other purposes).

Unfunded mandates are federal laws and regulations that impose obligations on state and local governments without fully compensating them for the administrative costs they incur. The federal government has used mandates increasingly since the 1960s to promote national objectives in policy areas such as the environment, civil rights, education, and homeland security. One type of mandate threatens civil and criminal penalties for state and local authorities that fail to comply with them across the board in all programs, while another provides for the suspension of federal grant money. These are commonly referred to as *crosscutting mandates/requirements*. Failure to fully comply with crosscutting mandates can result in punishments that normally include reduction of or suspension of federal grants, prosecution of officials, fines, or some combination of these penalties. If only one requirement is not met, state or local governments may not get any money at all.

Some mandates include partial preemption regulations, whereby

8. Kenneth Finegold, Laura Wherry, and Stephanie Schardin. 2014. "Block Grants: Historical Overview and Lessons Learned," *New Federalism: Issues and Options for States Series A*, No A-63: 1-7.

the federal government sets national regulatory standards but delegates the enforcement to state and local governments. For example, the Clean Air Act sets national air quality regulations but instructs states to design implementation plans to achieve such standards.⁹



Figure 2. The Clean Air Act is an example of an unfunded mandate. The Environmental Protection Agency sets federal standards regarding air and water quality, but it is up to each state to implement plans to achieve these standards.

The widespread use of federal mandates in the 1970s and 1980s provoked a backlash among state and local authorities, which culminated in the Unfunded Mandates Reform Act (UMRA) in 1995. The UMRA's main objective has been to restrain the national government's use of mandates by subjecting rules that impose unfunded requirements on state and local governments to greater procedural scrutiny. However, since the act's implementation, states and local authorities have obtained limited relief. A new piece of legislation aims to take this approach further. The 2015

Unfunded Mandates and Information Transparency Act, HR 50,

9. Martha Derthick. 1987. "American Federalism: Madison's Middle Ground in the 1980s," *Public Administration Review* 47, No. 1: 66–74.

passed the House early in 2015 before being referred to the Senate, where it waits committee consideration.¹⁰

Some leading federalism scholars have used the term *coercive federalism* to describe or label this aspect of contemporary U.S. federalism.¹¹

In other words, Washington, D. C. has been as likely to use the stick of mandates as the carrot of grants to accomplish its national agenda. As a result, there have been more instances of confrontational interactions between the states and the federal government.

The Clery Act

The Clery Act of 1990, formally the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, requires public and private colleges

10. U.S. Congress. Senate. 2015–2016. H. R. 50 – *Unfunded Mandates Information and Transparency Act of 2015* H. Rept. 114–11. <https://www.congress.gov/bill/114th-congress/house-bill/50>
11. John Kincaid. 1990. “From Cooperative Federalism to Coercive Federalism,” *Annals of the American Academy of Political and Social Science* 509: 139–152.

and universities that participate in federal student aid programs to disclose information about campus crime. The Act is named after Jeanne Clery, who in 1986 was raped and murdered by a fellow student in her Lehigh University dorm room.

The U.S. Department of Education's Clery Act Compliance Division is responsible for enforcing the 1990 Act. Specifically, to remain eligible for federal financial aid funds and avoid penalties, colleges and universities must comply with the following provisions:

- Publish an annual security report and make it available to current and prospective students and employees;
- Keep a public crime log that documents each crime on campus and is accessible to the public;
- Disclose information about incidents of criminal homicide, sex offenses, robbery, aggravated assault, burglary, motor vehicle theft, arson, and hate crimes that occurred on or near campus;
- Issue warnings about Clery Act crimes that pose a threat to students and employees; Develop a campus community emergency response and notification strategy that is subject to annual testing;
- Gather and report fire data to the federal government and publish an annual fire safety report;
- Devise procedures to address reports of missing students living in on-campus housing.

For more about the Clery Act, see Clery Center for Security on Campus, <http://clerycenter.org>.

Questions to Consider

1. What does it mean to refer to the carrot of grants and the stick of mandates?
2. Were you made aware of your campus's annual security report before you enrolled?
3. Do you think reporting about campus security is appropriately regulated at the federal level under the Clery Act? Why or why not?

Terms to Remember

block grant—a type of grant that comes with less stringent federal administrative conditions and provide recipients more latitude over how to spend grant funds

categorical grant—a federal transfer formulated to limit recipients' discretion in the use of funds and subject them to strict administrative criteria

unfunded mandates—federal laws and regulations that

impose obligations on state and local governments without fully compensating them for the costs of implementation

PART VI
U. S. COURTS

28. U. S. Courts: Interpreting the Contract



The Marriage Equality Act vote in Albany, New York, 2011 (left), was just one of a number of cases testing the constitutionality of both national and state law. In the years leading up to the 2015 ruling that same-sex couples may marry in all fifty states, marriage equality had become a key issue for the LGBT community as demonstrated at Seattle's 2012 Pride parade (right). (credit left: modification of work by "Celebration chapel"/Wikimedia; credit right: modification of work by Brett Curtiss)

The **judiciary** is arguably the branch where the individual has the best chance to be heard—competing contractual claims may be heard above the noise and distraction of the media, politics, and technology.

As part of **checks and balances**, courts protect the Constitution from breaches by the other branches of government, and they protect individual rights against societal and governmental oppression. At the national level, nine Supreme Court justices are nominated by the president and confirmed by the Senate for lifetime appointments. Hence, populist control over them is indirect at best, but this provides courts the independence needed. Court power is confined to ruling on those cases the courts decide to

hear—in *interpreting* the law rather than *making* the law, as law-making power resides with the legislative branch.

U.S. Courts: Questions to Consider

1. How do courts make decisions?
2. How do they exercise their power to protect individual rights?
3. How are the courts structured?
4. What distinguishes the Supreme Court from all others?

Terms to Remember

checks and balances—limitations placed on governmental power; separation into branches that oversee one another

judiciary—judicial authority, courts, judges, justices

29. U. S. Courts: What do they do?

Learning Objectives

- Describe the evolving role of the courts since the ratification of the *Constitution*
- Explain why courts are uniquely situated to protect individual rights
- Recognize how the courts make public policy
- Examine the basic provisions of Article III of the *Constitution* and the Judiciary Act of 1789

Under the *Articles of Confederation*, there was no national judiciary. The *Constitution* changed that, but Article III, which addresses “the judicial power of the United States,” is the shortest and least detailed of the three articles creating branches of government. Article III calls for creation of “one supreme Court” and establishes the Court’s **jurisdiction** (its authority to hear cases and make decisions) and the types of cases the Court may hear.

Type of Jurisdiction	Description
original	function of court is to hear original dispute, witnesses, testimony, cross-examination, evidence, etc.; to arrive at a verdict or decision based upon preponderance of evidence
appellate	function of court is to hear oral arguments about a legal or procedural error occurring at a lower level court; an individual/group may not appeal just because they do not agree with the verdict or decision reached; there must be a further justiciable dispute

The rest of the development of the judicial system and the creation of the lower courts were left in the hands of Congress.

Consider the Original

To add further explanation to Article III, Alexander Hamilton discussed details about the federal/national judiciary in Federalist No. 78.

[...] In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out [...]

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder (trial by legislature), no ex-post-facto laws (after the fact), and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, **whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing [...emphasis added]**

No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his

principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid [...]

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws [...]

Alexander Hamilton, *Federalist* #78, www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-78; public domain

In explaining the importance of an independent judiciary separated

from the other branches of government, Hamilton said “interpretation” was a key role of the courts as they seek to protect people from unjust laws. But he also believed “the Judiciary Department” would “always be the least dangerous” because “with no influence over either the sword or the purse,” it had “neither force nor will, but merely judgment.” The courts were to make decisions—not take action. With no control over how those decisions would be implemented and no power to enforce their choices, they could exercise only judgment, and their power would begin and end there.

The judicial branch finds its place as chief interpreter of the *Constitution* and the equal of the other two branches, though still checked and balanced by them. Appointment of judges and justices at the national level provides an independent judiciary—a result of indirect populist control (elected individuals nominate and affirm judges/justices).

The first session of the first U.S. Congress laid the framework for today’s national judicial system, established in the **Judiciary Act of 1789**. Although legislative changes over the years have altered it, the basic structure of the judicial branch remains—at the lowest level are the district courts, where federal cases involving national laws are tried, witnesses testify, and evidence and arguments are presented. A losing party unhappy with a district court decision may appeal to the circuit courts, or U.S. courts of appeal, where the decision of the lower court is reviewed. Still further, appeal to the U.S. Supreme Court is possible, but of the thousands of petitions for appeal, the Supreme Court will typically hear fewer than one hundred each year.¹

1. “The U.S. Supreme Court.” *The Judicial Learning Center*. <http://judiciallearningcenter.org/the-us-supreme-court/> (March 1, 2016).



This public site maintained by the [Administrative Office of the U.S. Courts](#) provides detailed information from and about the judicial branch.

How did the new judiciary get started?

Starting in New York in 1790, the early **Supreme Court** focused on establishing its rules and procedures.

It took years for the Court to establish its interpreter position, and it faced a number of setbacks on the way. In their first case of significance, *Chisholm v. Georgia* (1793), the justices ruled that the federal courts could hear cases

brought by a citizen of one state against a citizen of another state, and that Article III, Section 2, of the Constitution did not protect the states from facing such an interstate lawsuit.²

The decision was almost immediately overturned by the Eleventh



The Supreme Court building in Washington, DC, was not completed until 1935. Engraved on its marble front is the motto "Equal Justice Under Law," while its east side says, "Justice, the Guardian of Liberty."

2. *Chisholm v. Georgia*, 2 U.S. 419 (1793).

Amendment, passed by Congress in 1794 and ratified by the states in 1795. In protecting the states, the Eleventh Amendment put a prohibition on the courts by stating, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” It was an early hint that Congress had the power to change the jurisdiction of the courts as it saw fit—**checks and balances** in action.

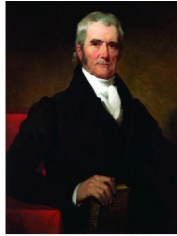
In an atmosphere of perceived weakness, the first chief justice John Jay, an author of *The Federalist Papers* and appointed by President George Washington, resigned his post to become Governor of New York. He later declined President John Adams’s offer of a subsequent term.³

In fact, the Court might have remained in a state of what Hamilton called its “natural feebleness” if not for the man who filled the vacancy Jay had refused—the fourth chief justice, John Marshall. Often credited with defining the modern court, clarifying its power, and strengthening its role, Marshall served in the chief’s position for thirty-four years. One landmark case during his tenure changed the course of the judicial branch’s history.

3. Associated Press. “What You Should Know About Forgotten Founding Father John Jay,” PBS Newshour. July 4, 2015. <http://www.pbs.org/newshour/rundown/forgotten-founding-father>.



(a)



(b)

“Life and Legacy.” The John Marshall Foundation. <http://www.johnmarshallfoundation.org> (March 1, 2016). John Jay (a) was the first chief justice of the Supreme Court but resigned his post to become governor of New York. John Marshall (b), who served as chief justice for thirty-four years, is often credited as the major force in defining the modern court’s role in the U.S. governmental system.

In 1803, the Supreme Court declared for itself the power of **judicial review**, a power that Hamilton referred to but is not expressly mentioned (enumerated) in the Constitution. Judicial review is the power of the courts, as part of the system of checks and balances, to look at actions taken by the other branches of government and the states and determine whether they are constitutional. If the courts find an action to be unconstitutional, it becomes null and void. Judicial review

was established in the Supreme Court case **Marbury v. Madison** when for the first time, the Court declared an act of Congress to be unconstitutional.⁴ Marshall defined this power as the “very essence of judicial duty,” and it continues today as one of the most significant aspects of judicial power. Judicial review lies at the core of the court’s ability to check the other branches of government—and the states.

Since *Marbury*, the power of judicial review has continually expanded, and the Court has not only ruled actions of Congress and the president to be unconstitutional, but it has also extended its power to include the review of state and local actions. Judicial review is not confined to the Supreme Court but is also exercised by the lower federal courts and even the state courts. Any legislative or executive action at the federal or state level inconsistent with the

4. *Marbury v. Madison*, 5 U.S. 137 (1803).

U.S. Constitution or a state constitution can be subject to judicial review.⁵

Marbury v. Madison (1803)

The Supreme Court found itself in the middle of a dispute between the outgoing presidential administration of John Adams and that of incoming president (and opposition party member) Thomas Jefferson. It was an interesting circumstance at the time, particularly because Jefferson and the man who would decide the case—John Marshall—were themselves political rivals.

President Adams had appointed William Marbury to a position in Washington, DC, but his commission was not delivered before Adams left office. Marbury petitioned the Supreme Court to use its power under the Judiciary Act of 1789 and issue a **writ of mandamus** (mandate, command, compel an action) to force the new president's secretary of state James Madison to deliver the commission documents. Madison refused. A unanimous Court under the leadership of Chief Justice

5. Stephen Hass. "Judicial Review." *National Juris University*. [http://juris.nationalparalegal.edu/\(X\(1\)S\(wwbvsi5iswopl1t1bfpzfkdj\)\)/JudicialReview.aspx](http://juris.nationalparalegal.edu/(X(1)S(wwbvsi5iswopl1t1bfpzfkdj))/JudicialReview.aspx) (March 1, 2016).

John Marshall ruled that although Marbury was entitled to the job, the Court did not have the power to issue the writ and order Madison to deliver the documents, because the provision in the Judiciary Act giving the Court that power was unconstitutional.⁶

Perhaps Marshall feared a confrontation with the Jefferson administration and thought Madison would refuse his directive anyway. In any case, his ruling shows an interesting contrast in the early Court. The Court declined a power—issuing a writ of mandamus—given to it by Congress; however, it laid the foundation for legitimizing a much more important power—judicial review. Marbury never got his commission, but the Court’s ruling in the case has become more significant for the precedent it established.

As Marshall put it, “it is emphatically the province and duty of the judicial department to say what the law is.”⁷ The United States has a common law system in which law is largely developed through binding judicial decisions. With roots in medieval England, the system was inherited by the American colonies along with many other British traditions.⁸

6. *Marbury v. Madison*, 5 U.S. 137 (1803).

7. *Marbury v. Madison*, 5 U.S. 137 (1803).

8. “The Common Law and Civil Law Traditions.” *The Robbins*

In their role as policymakers, Congress and the President tend to consider broad questions of public policy and their costs and benefits. The courts consider specific cases with narrower questions, enabling them to focus more closely than other government institutions on the exact context of the individuals, groups, or issues affected by the decision. While the legislature can make policy through statute/law, and the executive can form policy through regulations and administration based upon constitutionally delegated power or legislative authority, the judicial branch can also influence policy through its rulings and interpretations. As cases are brought to the courts, court decisions shape policy.

Freedom of speech, for example, just like many constitutional concepts, has come to mean different things to different generations and the courts that have designed the lens through which we understand the *Constitution* in modern times. It is often said that the *Constitution* changes less by amendment and more by interpretation. Rather than collecting dust on a shelf, the nearly 230-year-old document has come with us into the modern age, and the accepted practice of judicial review has helped carry it along the way.

While the U.S. Supreme Court and state supreme courts exert power over many when reviewing laws or declaring acts of other branches unconstitutional, they become particularly important when an individual or group comes before them with an alleged wrong. A citizen or group that feels wronged may approach a variety of institutional venues in the U.S. system for assistance in changing policy or seeking support. Organizing protests, garnering

Collection. School of Law (Boalt Hall). University of California at Berkeley. <https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html> (March 1, 2016).

special interest group support, and changing laws through the legislative and executive branches are all possible, but an individual is most likely to find the courts best suited to analyze the case particulars.



Questions to Consider

1. How do courts make decisions?

2. How do they exercise their power to protect individual rights?
3. How are the courts structured?
4. What distinguishes the Supreme Court from all others?
5. Consider the dual nature of John Marshall's opinion in *Marbury v. Madison*: On one hand, it limits the power of the courts, yet on the other it also expanded their power. Can you explain the different aspects of the decision in terms of these contrasting results?
6. Why do you believe the *Constitution's* framers chose lifetime terms?

Terms to Remember

Article III—establishes a third branch of government, the judiciary

checks and balances—limitations placed on governmental power; separation into branches that oversee one another

judicial review—the power of the courts to review actions taken by the other branches of government and the states and to rule on whether those actions are constitutional

judiciary—judicial authority, courts, judges, justices

Judiciary Act of 1789—expands on Article III with details about additional federal/national courts, court structure and operations

jurisdiction—the power of a court to hear a case on appeal or to hear a case for the first time

Marbury v. Madison—the 1803 Supreme Court case that established the courts' power of judicial review and the first time the Supreme Court ruled an act of Congress to be unconstitutional

Supreme Court—highest federal/national court; 8 justices and 1 chief justice; largely discretionary power to hear cases on appeal; limited original jurisdiction

writ of mandamus—paperwork compelling an action, court requires a specific action

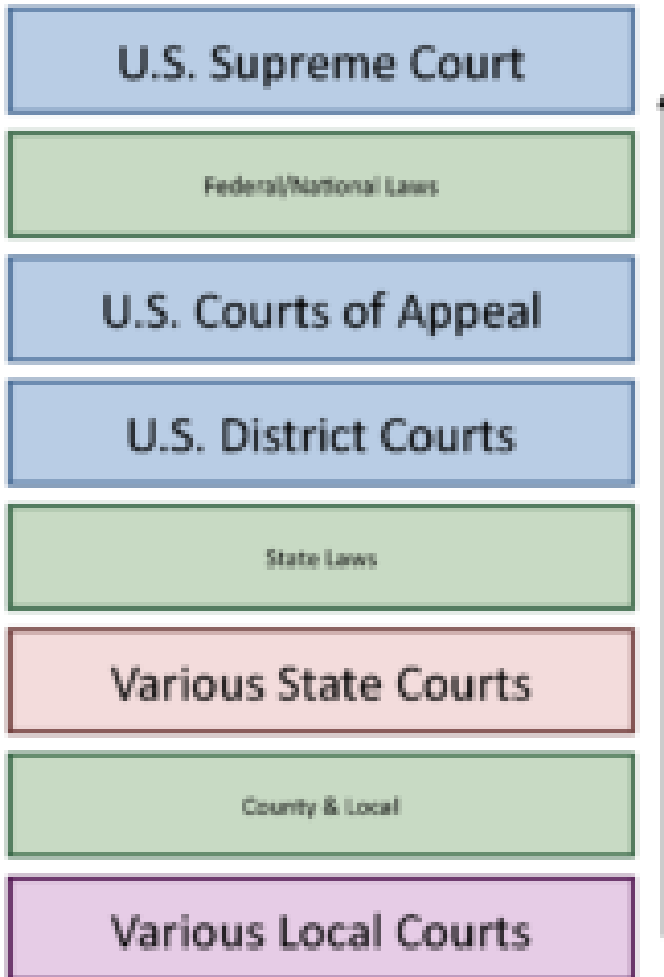
30. U S Courts: Structure and Procedure

Learning Objectives

- Describe the court system's basic structure
- Explain how you are protected by different U.S. court systems
- Describe the differences between the U.S. district courts, circuit courts, and the Supreme Court
- Explain the significance of precedent in the courts' operations
- Describe how judges are selected for their positions
- Analyze the structure and important features of the Supreme Court
- Explain how the judiciary is checked by the other branches of government

The judiciary is multi-layered with courts at both the national, state, county, and local levels.

Courts in a Federal Structure (layers of courts)



Adding complexity, the court systems sometimes intersect and overlap each other, and no two states are exactly alike in court structure. The organization of state courts does not perfectly mirror the more clear-cut system found at the federal level.¹

Cases heard by the U.S. **Supreme Court** come from two primary pathways: (1) the **circuit courts**, or U.S. courts of appeal (after the cases have originated in the federal **district courts**), and (2) state supreme courts (when there is a substantive federal question in the case).

Precedent set by each ruling, particularly by the Supreme Court, builds on principles set by earlier cases and frames the ongoing decisions of the courts. Reliance on precedent has enabled the federal courts to operate with logic and consistency helping validate their role as the key interpreters of the Constitution and the law—a legitimacy particularly vital in the United States where citizens do not elect federal judges and justices but are subject to their rulings. The U.S. court system operates on the principle of **stare decisis** (let the decision stand) meaning today's decisions are based largely on rulings from the past, and tomorrow's rulings rely on what is decided today. Consistency of precedent ensures greater stability in law and constitutional interpretation contributing to the court system's legitimacy. As former Supreme Court justice Benjamin Cardozo summarized it years ago, "Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts."² The Court

1. Bureau of International Information Programs, United States Department of State. *Outline of the U.S. Legal System*. 2004.
2. Benjamin N. Cardozo. 1921. *The Nature of the Judicial*

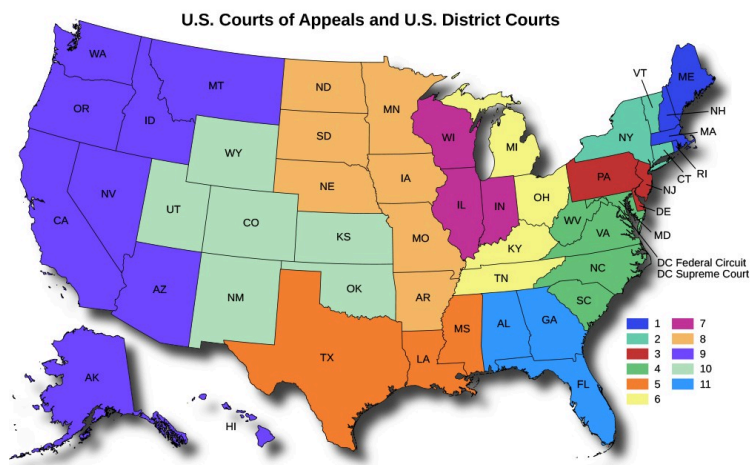
makes a decision based upon numerous factors. If the justices **affirm** the lower court's decision, they declare it valid and allow it to stand.³ When an appellate court sends a case back to a lower court for further proceedings the decision is to **remand**. The lower court is often required to do something differently, but that does not always mean the court's final decision will change.⁴ When an appellate court sets aside (**reverses**) the decision of a lower court because of an error, it is a reversal, which is often followed by a remand. For example, if the defendant argued on appeal that certain evidence should not have been used at trial, and the appeals court agrees, the case will be remanded in order for the trial court to reconsider the case without that evidence.⁵

Process. New Haven: Yale University Press.
[http://www.constitution.org/cmt/cardozo/
jud_proc.htm](http://www.constitution.org/cmt/cardozo/jud_proc.htm).

3. Legal term “affirmed” defined by United States Department of Justice, Offices of the United States Attorneys, Legal Terms Glossary at <https://www.justice.gov/usao/justice-101/glossary>
4. Legal term “remand” defined by United States Department of Justice, Offices of the United States Attorneys, Legal Terms Glossary at <https://www.justice.gov/usao/justice-101/glossary>
5. Legal term “reverse” defined by United States Department of Justice, Offices of the United States Attorneys, Legal Terms Glossary at <https://www.justice.gov/usao/justice-101/glossary>

There are ninety-four U.S. **district courts** in the fifty states and U.S. territories, of which eighty-nine are in the states (at least one in each state). The others are in Washington, DC; Puerto Rico; Guam; the U.S. Virgin Islands; and the Northern Mariana Islands. These are the **original jurisdiction** trial courts of the national system. No district court crosses state lines, and a single judge oversees each one. Some cases are heard by a **petit jury** (jury of peers) and some are **bench trials** (judge acts as both judge and jury).

There are thirteen U.S. **courts of appeals**, or circuit courts of **appellate jurisdiction**, eleven across the nation and two in Washington, DC (the DC circuit and the federal circuit). Each court is overseen by a rotating panel of three judges who review the rulings of the trial (district) courts within their geographic circuit. As authorized by Congress, there are currently 179 judges.



There are thirteen judicial circuits: eleven in the geographical areas marked on the map and two in Washington, DC.

Other federal trial courts exist with specialized jurisdictions—Court of International Trade, Court of Federal Claims,

and U.S. Tax Court. Specialized federal appeals courts include the Court of Appeals for the Armed Forces and the Court of Appeals for Veterans Claims. Cases from any of these courts may also be appealed to the Supreme Court, although that result is very rare.

The Supreme Court of the United States, sometimes abbreviated SCOTUS, is a one-of-a-kind institution. While a look at the Supreme Court typically focuses on the nine justices themselves, they represent only the top layer of an entire branch of government that includes many administrators, lawyers, and assistants who contribute to and help run the overall judicial system. The Court has its own set of rules for choosing cases, and it follows a unique set of procedures for hearing them. Its decisions not only affect the outcome of the individual case before the justices, but they also create lasting impacts on legal and constitutional interpretation for the future.

Supreme Court Structure & Procedure

The original court in 1789 had six justices, but Congress set the number at nine in 1869, and it has remained there ever since. There is one **chief justice**, who is the lead or highest-ranking judge on the Court, and eight **associate justices**. All nine serve lifetime terms, after successful nomination by the president and confirmation by the Senate.



While not formally connected with the public the way elected leaders are, the [Supreme Court](#) nonetheless offers visitors a great deal of information at its official website.

For unofficial summaries of recent Supreme Court cases or news about the Court, visit the [Oyez website](#) or [SCOTUS](#) blog.

The **Supreme Court** begins its annual session on the first Monday in October and ends the following June. Every year, there are literally thousands of people who would like to have their case heard before the Supreme Court, but the justices will select only a handful to be placed on the **docket**, which is the list of cases scheduled on the Court's calendar. The Court typically accepts fewer than 2 percent cases it is asked to review every year.⁶ Case names, written in italics, list the name of a petitioner versus a respondent, as in *Roe v. Wade*, for example.⁷

For a case on appeal, the case name indicates which party lost at the lower level of court: The party unhappy with the lower court's decision in terms of legal or procedural error that is bringing the

6. "Supreme Court Procedures." *United States Courts*. <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (March 1, 2016).

7. *Roe v. Wade*, 410 U.S. 113 (1973).

appeal and is thus the **petitioner**, or the first-named party in the case. For example, in *Brown v. Board of Education* (1954), Oliver Brown was one of the thirteen parents who brought suit against the Topeka public schools for discrimination based on racial segregation.

Most often, the petitioner is asking the Supreme Court to grant a **writ of certiorari**, a request that the lower court send up its record of the case for review. Once a writ of *certiorari* (*cert.* for short) has been granted, the case is scheduled on the Court's docket. The Supreme Court exercises discretion in the cases it chooses to hear, but four of the nine Justices must vote to accept a case. This is called the **Rule of Four**.

For decisions about *cert.*, the Court's Rule 10 (Considerations Governing Review on Writ of Certiorari) takes precedence.⁸ The Court is more likely to grant *certiorari* when there is a conflict on an issue between or among the lower courts. Examples of conflicts include (1) conflicting decisions among different courts of appeals on the same matter, (2) decisions by an appeals court or a state court conflicting with precedent, and (3) state court decisions that conflict with federal decisions. Occasionally, the courts will fast-track a case that has special urgency, such as *Bush v. Gore* in the wake of the 2000 election.⁹

8. "Rule 10. Considerations Governing Review on Certiorari." *Rules of the Supreme Court of the United States*. Adopted April 19, 2013, Effective July 1, 2013. <http://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf>.

9. *Bush v. Gore*, 531 U.S. 98 (2000).

The **solicitor general** is the lawyer who represents the federal government before the Supreme Court: He/she decides which cases (in which the United States is a party) should be appealed from the lower courts. About two-thirds of all Supreme Court cases involve the federal government.¹⁰ The solicitor general determines the position the government will take on a case. The attorneys of his or her office prepare and file

the petitions and briefs, and the solicitor general (or an assistant) presents the oral arguments before the Court.

Once a case has been placed on the docket, **briefs** (short arguments explaining each party's view of the case) must be submitted. People and groups that are not party to the case but are interested in its outcome may file an **amicus curiae** ("friend of the court") brief giving their opinion, analysis, and recommendations.



(a)



(b)

Thurgood Marshall (a), who later served on the Supreme Court, was appointed solicitor general by Lyndon Johnson and was the first African American to hold the post. Donald B. Verrilli Jr. (b) is the forty-sixth solicitor general of the United States, starting his term of office in June 2011 when Elena Kagan left the post to join the Supreme Court.

10. "About the Office." Office of the Solicitor General. The United States Department of Justice. <http://www.justice.gov/osg/about-office-1> (March 1, 2016).

How are decisions made and opinions written?

With briefs filed, the Court hears **oral arguments** in cases from October through April. The proceedings are quite ceremonial. When the Court is in session, the robed justices make a formal entrance into the courtroom to a standing audience and the sound of a banging gavel. The Court's marshal (head of the Court's police force/position similar to bailiff) presents them with a traditional chant: "The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States. Oyez! Oyez! Oyez! [Hear ye!] All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!"¹¹ It has not gone unnoticed that the Court, which has defended the First Amendment's religious protection and the traditional separation of church and state, opens its every public session with a mention of God.

During oral arguments, each side's lawyers have thirty minutes to make their legal case, though the justices often interrupt the presentations with questions. The justices consider oral arguments not as a forum for a lawyer to restate the merits of his or her case as written in the briefs, but as an opportunity to get answers to any questions they may have.¹²

11. "The Court and its Procedures." *Supreme Court of the United States*. May 26, 2015.
12. "Supreme Court Procedures." *United States Courts*. <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (March 1, 2016).

When oral arguments have been concluded, the justices have to decide the case, and they do so in conference, which is held in private twice a week when the Court is in session and once a week when it is not.¹³ The judges take an initial vote in private before the official announcement of their decisions is made public. Oral arguments are open to the public, but cameras are not allowed in the courtroom, so the only picture we get is one drawn by an artist's hand, an illustration or rendering.¹⁴

Many envision the justices formally robed and cloistered away in their chambers, unaffected by the world around them, but the reality is that they are not that isolated, though they lack their own mechanism for enforcement of their rulings and power remains checked and balanced by the other branches, the effect of the justices' opinions on the workings of government, politics, and society in the United States is much more significant than the attention they attract might indicate.

Every Court opinion sets precedent for the future. The Supreme Court's decisions are not always unanimous, however; the published **majority opinion**, or explanation of the justices' decision, is the one with which a majority of the nine justices agree. It can represent a vote as narrow as five in favor to four against. A tied vote is rare but can occur at a time of vacancy, absence, or abstention from a case,

13. "Supreme Court Procedures." *United States Courts*. <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (March 1, 2016).
14. Jonathan Sherman. "End the Supreme Court's Ban on Cameras." *New York Times*. 24 April 2015. <http://www.nytimes.com/2015/04/24/opinion/open-the-supreme-court-to-cameras.html>.

perhaps where there is a conflict of interest. In the event of a tied vote, the decision of the lower court stands.

If he/she is in the majority, the chief justice decides who will write the opinion. If not, the most senior justice ruling with the majority chooses the writer. Likewise, the most senior justice in the dissenting group can assign a member to write the **dissenting opinion**; however, any justice who disagrees with the majority may write a separate dissenting opinion. If a justice agrees with the outcome of the case but not with the majority's reasoning in it, that justice may write a **concurring opinion**.

Dissenting opinions can also be instructive. If the Court's decision, expressed in the written majority opinion, significantly changed precedent or the role/processes of government, dissenting opinions may also garner significant attention.

Consider the Original

(Past Justice John M. Harlan, Transcription of Opinion of the Supreme Court of the United States in *Plessy v. Ferguson*.)

U.S. Supreme Court

PLESSY v. FERGUSON, 163 U.S. 537 (1896)

163 U.S. 537

PLESSY

v.

FERGUSON.

No. 210.

May 18, 1896.

This was a petition for writs of prohibition and certiorari originally filed in the supreme court of the state by Plessy, the plaintiff in error, against the Hon. John H. Ferguson,

judge of the criminal district court for the parish of Orleans, and setting forth, in substance, the following facts:

Mr. Justice HARLAN dissenting.

By the Louisiana statute the validity of which is here involved, all railway companies (other than street-railroad companies) carry passengers in that state are required to have separate but equal accommodations for white and colored persons, 'by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations.' [...]



In a speech delivered in the Ohio House of Representatives in 1886 and later published as The Black Laws, legislator Benjamin W. Arnett described life in segregated Ohio: I have traveled in this free country for twenty hours without anything to eat; not because I had no money to pay for it, but because I was colored. Other passengers of a lighter hue had breakfast, dinner and supper. In traveling we are thrown in "jim crow" cars, denied the privilege of buying a berth in the sleeping coach. This foe of my race stands at the school house door and separates the children, by reason of 'color,' and denies to those who have a visible admixture of African blood in them the blessings of a graded school and equal privileges... We call upon all friends of 'Equal Rights' to assist in this struggle to secure the blessings of untrammelled liberty for ourselves and posterity. B. W. Arnett, The Black Laws, March 10, 1886. African American Perspectives, 1818-1907 By the 1930s, the practice of racial segregation was widespread and vigorously maintained. When

devastating floods hit Arkansas in 1937, for example, white refugees and black refugees were cared for in separate relief facilities. A series of Farm Security Administration photographs documenting the flood demonstrates the pervasive nature of segregation. After hearing arguments by NAACP lawyer Thurgood Marshall, the Supreme Court overruled the Plessy decision on May 17, 1954. In *Brown v. the Board of Education*, a unanimous Court adopted Justice Harlan's position that segregation violated the Thirteenth and Fourteenth Amendments to the Constitution. (Library of Congress at <https://www.loc.gov/item/today-in-history/may-18/>)



On May 18, 1896, the Supreme Court ruled separate-but-equal facilities constitutional on intrastate railroads. For some fifty years, the *Plessy v. Ferguson* decision upheld the principle of racial segregation. Across the country, laws mandated separate accommodations on buses and trains, and in hotels, theaters, and schools. (Water cooler in streetcar terminal, Oklahoma City, Oklahoma, contributed by Russell Lee, photographer, 1903-1986, published July 1939, Library of Congress at <http://hdl.loc.gov/loc.pnp/pp.fsaowi>)

Mr. Justice Strong, delivering the judgment of this court in *Olcott v. Supervisors*, 16 Wall. 678, 694, said: 'That railroads, though constructed by private corporations, and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose whether a state's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a

railroad. Clearly, it could not, unless taking land for such a purpose by such an agency is taking land for public use. [...]

In respect of civil rights, common to all citizens, the constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens

when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States.

The thirteenth amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But, that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the fourteenth amendment, which added greatly to the dignity and glory of American citizenship, and to the security of personal liberty, by declaring that ‘all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside,’ and that ‘no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.’ These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it was declared by the fifteenth amendment that ‘the right of citizens of the

United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude.'

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. [...]

If a state can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street, and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road or street? Why may it not require sheriffs to assign whites to one side of a court room, and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the state require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?

The answer given at the argument to these questions was that regulations of the kind they suggest would be unreasonable, and could not, therefore, stand before the law. [...]

But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class

of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*. [...]

The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race. State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration; for social equality no more exists between two races when traveling in a passenger coach or a public highway than

when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting. [...]

I am of opinion that the state of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that state, and hostile to both the spirit and letter of the constitution of the United States. If laws of like character should be enacted in the several states of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law, would, it is true, have disappeared from our country; but there would remain a power in the states, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom, to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community, called the 'People of the United States,' for whom, and by whom through representatives, our government is administered. Such a system is inconsistent with the guaranty given by the constitution to each state of a republican form of government, and may be stricken down by congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding.

For the reason stated, I am constrained to withhold my assent from the opinion and judgment of the majority.¹⁵

Consider the Original

Past Justice Antonin Scalia offered a dissenting opinion in the recent court decision on same-sex marriage illustrating his opinion on the role of the Supreme Court. Scalia states,

The substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance.¹ [...] So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the

15. (Transcription of Opinion of the Supreme Court of the United States in *Plessy v. Ferguson*.) **U.S. Supreme Court; PLESSY v. FERGUSON, 163 U.S. 537 (1896)**; 163 U.S. 537; PLESSY v. FERGUSON. No. 210. May 18, 1896. <http://www.ourdocuments.gov/doc.php?flash=true&doc=52&page=transcript>

nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court’s claimed power to create “liberties” that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to.¹ Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work.²

The Constitution places some constraints on self-rule—constraints adopted by the People themselves when they ratified the Constitution

and its Amendments. Forbidden are laws “impairing the Obligation of Contracts,”³ denying “Full Faith and Credit” to the “public Acts” of other States,⁴ prohibiting the free exercise of religion,⁵ abridging the freedom of speech,⁶ infringing the right to keep and bear arms,⁷ authorizing unreasonable searches and seizures,⁸ and so forth. Aside from these limitations, those powers “reserved to the States respectively, or to the people”⁹ can be exercised as the States or the People desire. These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove that issue from the political process?

Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author of today’s opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today):

“[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States.”¹⁰ [...]

We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment’s text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment’s ratification. Since there is no doubt whatever that the People never decided to

prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. [...]

This is a naked judicial claim to legislative—indeed, super-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices’ “reasoned judgment.” A system of government that makes that the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. [...] Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers¹⁸ who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans¹⁹), or even a Protestant of any denomination. The

strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as judges, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; they say they are not. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation. [...]

They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when that is called for by their "reasoned judgment." These Justices know that limiting marriage to one man and one woman is contrary to reason; they know that an institution as old as government itself, and accepted by every nation in history until 15 years ago,²¹ cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution. [...]

“The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality.”²³ (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, is a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can “rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.”²⁴ (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?) And we are told that, “[i]n any particular case,” either the Equal Protection or Due Process Clause “may be thought to capture the essence of [a] right in a more accurate and comprehensive way,” than the other, “even as the two Clauses may converge in the identification and definition of the right.”²⁵ (What say? What possible “essence” does substantive due process “capture” in an “accurate and comprehensive way”? It stands for nothing whatever, except those freedoms and entitlements that this Court really likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in

treatment that this Court really dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses “converge in the identification and definition of [a] right,” that is only because the majority’s likes and dislikes are predictably compatible.) I could go on. The world does not expect logic and precision in poetry or inspirational popphilosophy; it demands them in the law. The stuff contained in today’s opinion has to diminish this Court’s reputation for clear thinking and sober analysis.

[...] The Judiciary is the “least dangerous” of the federal branches because it has “neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm” and the States, “even for the efficacy of its judgments.”²⁶ With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the “reasoned judgment” of a bare majority of this Court—we move one step closer to being reminded of our impotence.¹⁶

16. 1Brief for Respondents in No. 14–571, p. 14./2Accord, *Schuette v. BAMN*, 572 U. S. ____ (2014) (plurality opinion) (slip op., at 15–17)./3U. S. Const., Art. I, §10./4Art. IV, §1./5Amdt. 1./6 Ibid./7Amdt. 2./8Amdt. 4./9Amdt. 10./10 *United States v. Windsor*, 570 U. S.

____, ____ (2013) (slip op., at 16) (internal quotation marks and citation omitted)./11 Id., at ____ (slip op., at 17). 12See *Town of Greece v. Galloway*, 572 U. S. ____, ____ – ____ (2014) (slip op., at 7–8). 13 Ante, at 10/14 Ante, at 11./15 Ibid./16 Ante, at 10–11./17 Ante, at 12–18/18The predominant attitude of tall-building lawyers with respect to the questions presented in these cases is suggested by the fact that the American Bar Association deemed it in accord with the wishes of its members to file a brief in support of the petitioners. See Brief for American Bar Association as Amicus Curiae in Nos. 14–571 and 14– 574, pp. 1–5./19See Pew Research Center, *America’s Changing Religious Landscape* 4 (May 12, 2015)./20 *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003)./21 *Windsor*, 570 U. S., at ____ (ALITO, J., dissenting) (slip op., at 7)./22 If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,” I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie./23 Ante, at 13./24 Ante, at 19./25 Ibid./26The *Federalist* No. 78 (A. Hamilton).OCTOBER TERM, 2014 1

Syllabus NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337. SUPREME COURT OF THE UNITED STATES Syllabus OBERGEFELL ET AL. v. HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT No. 14-556. Argued April 28, 2015—Decided June 26, 2015*Cite as: 576 U. S. ____ (2015) 1 SCALIA, J., dissenting SUPREME COURT OF THE UNITED STATES Nos. 14-556, 14-562, 14-571 and 14-574 JAMES OBERGEFELL, ET AL., PETITIONERS 14-556 v. RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.; VALERIA TANCO, ET AL., PETITIONERS 14-562 v. BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.; APRIL DEBOER, ET AL., PETITIONERS 14-571 v. RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.; AND GREGORY BOURKE, ET AL., PETITIONERS 14-574 v. STEVE BESHEAR, GOVERNOR OF KENTUCKY ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT [June 26, 2015](https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf).

*In this type of decision, is the Court creating law based on ideology, desired outcome, or existing applicable law? What is the proper scope of judicial authority?*¹⁷

A justice's decisions are influenced by how he/she defines his/her role as a jurist. Some justices believe strongly in **judicial activism**, aiming to stop actions and laws by other branches of government. Is activism achieving a desired outcome by usurping powers that belong to Congress, ignoring the limitations formulated under the *Constitution* for their branch of government? Is this damaging to the rule of law? Judicial activism often ignores the legislative process, where laws are enacted without the bother of public opinion or debate getting in the way. Activist judges cite cases such as *Brown v. Board of Education of Topeka, Kansas* as proof that activism in the courts is sometimes necessary. Enthusiastic activists try to advocate for judicial activism citing desegregation achieved in two of the cases which employed equal protection clause as an example; however, acts of Congress are the constitutionally supported method for resolution. Does the outcome justify the means as it obfuscates the legal process? Is the rule of law reduced to a whim of any judicial activist who comes along at any given time or political agenda?

Others believe in **judicial restraint**, leading them to defer decisions (and thus policymaking) to the elected branches of government staying focused on a more strict interpretation of the *Constitution* and the Bill of Rights. Judicial restraint encourages judiciary to limit the exercise of their own power, emphasizing that

17. credit for comment to Melody Gillett, Attorney,
Houston, Texas

judges should hesitate to strike down laws unless they are obviously unconstitutional. Courts should esteem all constitutional rights, whether economic, personal and non-economic, identically, thereby requiring the government to prove the necessity and reasonableness of the law, analyze and rigorously scrutinize the government's reasons to intervene otherwise. Starting at the genesis of the problem, and agreeing to the definition of the American legal system as such, the regulation of our system must be rooted in the *Constitution*.

Congress has the ability under the *Constitution* to curtail the judiciary. If Congress refuses, do we have a judiciary rewriting the *Constitution*? Do activist justices anticipate the legislative process? Is this acceptable? If the legal system is bound to the belief in stare decisis—following legal precedent—deferring to legislative process where laws are made, and then not entering into a position where they make law for popularly elected representatives.¹⁸

Justice Anthony Kennedy has said, “An activist court is a court that makes a decision you don’t like.”[\[14\]](#) Justices’ personal beliefs and political attitudes also matter in their decision-making. Although we may prefer to believe a justice can leave political ideology or party identification outside the doors of the courtroom, the reality is that a more liberal-thinking judge may tend to make more liberal decisions and a more conservative-leaning judge may tend toward more conservative ones. The influence of ideology is real, and at a minimum, it often guides presidents to aim for nominees who mirror their own political or ideological image.

And the courts themselves are affected by another “court”—the court of public opinion. Though somewhat isolated from politics and the volatility of the electorate, justices may still be swayed by

18. Credit for comment to Attorney Melody Gillett, Houston, Texas 2016

special-interest pressure, the leverage of elected or other public officials, the mass media, and the general public.

Court decisions are released at different times throughout the Court's term, but all opinions are announced publicly before the Court adjourns for the summer. Some of the most controversial and hotly debated rulings are released near or on the last day of the term and thus are avidly anticipated.

Although the courts' role is interpretive, judges and justices are still constrained by the facts of the case, the Constitution, the relevant laws, and the courts' own precedent.



On June 26, 2015, supporters of marriage equality in front of the U.S. Supreme Court building eagerly await the announcement of a decision in the case of Obergefell v. Hodges (2015). (credit: Matt Popovich)

How do checks and balances work with the judicial branch?

Both the executive and legislative branches check and balance the judiciary in many ways. The president can leave a lasting imprint on the bench through his or her nominations, even long after leaving office. The president may also influence the Court through the solicitor general's involvement or through the submission of amicus curiae briefs in cases in which the United States is not a party.

President Franklin D. Roosevelt even attempted to stack the odds in his favor in 1937, with a “court-packing scheme” in which he tried to get a bill passed through Congress to reorganize the judiciary and enable him to appoint up to six additional judges to the high court. The bill never passed, but other presidents have also been accused of trying similar moves at different courts in the federal system. Most recently, some members of Congress suggested that President Obama was attempting to “pack” the District of Columbia Circuit

Court of Appeals with three nominees. Obama was filling vacancies, not adding judges, but the “packing” term was still employed.¹⁹



A 1937 cartoon mocks the court-packing plan of President Franklin D. Roosevelt (depicted on the far right). Roosevelt was not successful in increasing the number of justices on the Supreme Court, and it remains at nine.

Congress has checks on the judiciary, retaining power to modify the court structure and appellate jurisdiction, and the Senate may accept or reject presidential nominees to the federal courts. Faced with a court ruling that overturns one of its laws, Congress may rewrite the law or even begin a constitutional amendment process.

The most significant check on the Supreme Court is executive and legislative leverage over the implementation and enforcement of its rulings. This process is called judicial implementation. While it is true that courts play a major role in policymaking, they have no mechanism to make their rulings a reality. Remember it was Alexander Hamilton in *Federalist* No. 78 who remarked that the courts had “neither force nor will, but merely judgment.” And even years later, when the 1832 Supreme Court ruled the State of Georgia’s seizing of Native American lands

19. Louis Jacobson. “Is Barack Obama trying to ‘pack’ the D.C. Circuit Court of Appeals?” *Tampa Bay Times*, PolitiFact.com. June 5, 2013. <http://www.politifact.com/truth-o-meter/statements/2013/jun/05/chuck-grassley/barack-obama-trying-pack-dc-circuit-court-appeals/>.

unconstitutional,²⁰ President Andrew Jackson is reported to have said, “John Marshall has made his decision, now let him enforce it,” and the Court’s ruling was basically ignored.²¹ Abraham Lincoln, too, famously ignored Chief Justice Roger B. Taney’s order finding Lincoln’s early Civil War suspension of habeas corpus rights unconstitutional. Thus, court rulings matter only to the extent they are heeded and followed.

The Court relies on the executive to implement or enforce its decisions and on the legislature to fund them.

For example, in 1957, President Dwight D. Eisenhower called out the military by executive order to enforce the Supreme Court’s order to racially integrate the public schools in Little Rock, Arkansas. Eisenhower told the nation: “Whenever normal agencies prove inadequate to the task and it becomes necessary for the executive branch of the federal government to use its powers and authority to uphold federal courts, the president’s responsibility is inescapable.”²² Executive Order 10730 nationalized the Arkansas

20. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

21. “Court History.” *Supreme Court History: The First Hundred Years*. <http://www.pbs.org/wnet/supremecourt/antebellum/history2.html> (March 1, 2016).

22. Dwight D. Eisenhower. “Radio and Television Address to the American People on the Situation in Little Rock.” *Public Papers of the Presidents of the United States: Eisenhower, Dwight D., The American Presidency Project*. September 24, 1957. <http://www.presidency.ucsb.edu/ws/?pid=10909>.

National Guard to enforce desegregation because the governor refused to use the state National Guard troops to protect the black students trying to enter the school.



President Eisenhower sent federal troops to escort nine black students (the “Little Rock Nine”) into an Arkansas high school in 1957 to enforce the Supreme Court’s order outlawing racial segregation in public schools.

The fate of court decisions rests on their credibility, their viability, and the assistance given by the other branches of government. It also relies on tradition and precedent. Although not everyone agrees with the decisions made by the Court, rulings are generally accepted and followed, and the Court is respected as the key

interpreter of the laws and the Constitution. Over time, its rulings have become yet another way policy is legitimately made and justice more adequately served in the United States.

How are judges & justices selected?

On the U.S. Supreme Court, there are nine justices—one chief justice and eight associate justices. Circuit courts each contain three justices, whereas federal district courts have just one judge each. At the federal level, the president nominates a candidate to a judgeship or justice position. The nominee must be confirmed by a majority vote in the U.S. Senate—checks and balances, a function of the Senate’s “advice and consent” role. All judges and justices in the national courts serve life terms.

The president sometimes chooses nominees from a list of candidates maintained by the American Bar Association, a national

professional organization of lawyers.²³ The president's nominee is then discussed (and sometimes hotly debated) in the Senate Judiciary Committee. After a committee vote, the candidate must be confirmed by a majority vote of the full Senate. He/she is then sworn in, taking an oath of office to uphold the *Constitution* and the laws of the United States.

When a vacancy occurs in a lower federal court, by custom, the president consults with that state's U.S. senators before making a nomination. Through such **senatorial courtesy**, senators exert considerable influence on the selection of judges in their state, especially those senators who share a party affiliation with the president. In many cases, a senator can block a proposed nominee just by voicing his or her opposition. Thus, a presidential nominee typically does not get far without the support of the senators from the nominee's home state.

Most presidential appointments to the federal judiciary go unnoticed by the public, but when a president has the rarer opportunity to make a Supreme Court appointment, it draws more attention. That is particularly true now, when many people get their news primarily from the Internet and social media.

23. American Bar Association Coalition for Justice. 2008. "Judicial Selection." In *American Bar Association*, eds. American Judicature Society and Malia Reddick. http://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/Justice/PublicDocuments/judicial_selection_roadmap.authcheckdam.pdf.

First Time	Supreme Court Famous Firsts
Catholic	Roger B. Taney (1836)
Jewish	Louis J. Brandeis (1916)
Former President	William Howard Taft (1921)
African American	Thurgood Marshall (1967)
Woman	Sandra Day O'Connor (1981)
Hispanic	Sonia Sotomayor (2009)

Presidential nominees for the courts typically reflect the chief executive's own ideological position. With a confirmed nominee serving a lifetime appointment, a president's ideological legacy has the potential to live on long after

the end of his or her term.²⁴

The lower courts are more diverse today. The U.S. judiciary has expanded to include women and minorities at both the federal and state levels.²⁵ However, the number of women and people of color on the courts still lags behind the overall number of white men. As of 2009, the federal judiciary consists of 70 percent white men, 15 percent white women, and between 1 and 8 percent African American, Hispanic American, and Asian American men and women.²⁶

24. American Bar Association Coalition for Justice. 2008. "Judicial Selection." In *American Bar Association*, eds. American Judicature Society and Malia Reddick. http://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/Justice/PublicDocuments/judicial_selection_roadmap.authcheckdam.pdf.
25. Bureau of International Information Programs. United States Department of State. *Outline of the U.S. Legal System*. 2004.
26. Russell Wheeler. "The Changing Face of the Federal Judiciary." *Governance Studies at Brookings*. August 2009.

Questions to Consider

1. Is a multi-layered courts system within the federal structure a positive for individuals? Why/why not?
2. Do you believe federal judges should be elected rather than appointed? Why or why not?
3. When it comes to filling judicial positions in the federal courts, do you believe race, gender, religion, and ethnicity should matter? Why or why not?
4. What are the core factors that determine how judges decide in court cases?
5. Discuss some of the difficulties involved in the implementation and enforcement of judicial decisions.
6. In what ways is the court system better suited to protect the individual than are the elected branches of the government?
7. What should be the most important consideration when filling judge and justice positions at the federal level? Why?

http://www.brookings.edu/~media/research/files/papers/2009/8/federal-judiciary-wheeler/08_federal_judiciary_wheeler.pdf.

Terms to Remember

- **affirm**—decision of the court to agree with or uphold a lower court decision
- **amicus curiae**—literally a “friend of the court” and used for a brief filed by someone who is interested in but not party to a case
- **appellate court**—reviews cases already decided by a lower or trial court and that may change the lower court’s decision
- **appellate jurisdiction**—function of the court is to hear appeals on procedural or legal error occurring at lower court or court of original jurisdiction
- **brief**—written legal argument presented to a court by one of the parties in a case
- **chief justice**—highest-ranking justice on the Supreme Court
- **circuit courts** the appeals (appellate) courts of the federal court system that review decisions of the lower (district) courts; courts of appeal
- **concurring opinion**—written decision by a justice who agrees with the Court’s majority opinion but has different reasons for doing so
- **courts of appeals**—the appellate courts of the federal court system that review decisions of the lower (district) courts; also called circuit courts
- **dissenting opinion**—written decision by a justice who disagrees with the majority opinion of the Court
- **district court**—the trial courts of the federal court system where cases are tried, evidence is presented, and witness testimony is heard

- **docket**—the list of cases pending on a court's calendar
- **judicial activism**—judicial philosophy in which a justice is more likely to actively intervene, overturn, or alter actions of the other branches of government
- **judicial restraint**—judicial philosophy in which a justice is more likely to let stand the decisions or actions of the other branches of government
- **majority opinion**—written decision of the Court with which more than half the nine justices agree
- **oral argument**— words spoken before the Supreme Court (usually by lawyers) explaining the legal reasons behind their position in a case and why it should prevail
- **original jurisdiction**—function of court to hear original testimony, cross-examination, viewing of evidence, etc.
- **petitioner**—party unhappy with the lower court's decision bringing the appeal or the first-named party in the case
- **precedent**—the principles or guidelines established by courts in earlier cases that frame the ongoing operation of the courts, steering the direction of the entire system
- **remand**—decision to send a case back to the lower court for further proceedings
- **reverse**—decision to overturn a lower court ruling/ decision
- **Rule of Four**—Supreme Court custom in which a case will be heard when four justices decide to do so
- **senatorial courtesy**—an unwritten custom by which the president consults the senators in the state

before nominating a candidate for a federal vacancy there, particularly for court positions

- **solicitor general**—lawyer who represents the federal government and argues some cases before the Supreme Court
- **stare decisis**—the principle by which courts rely on past decisions and their precedents when making decisions in new cases
- **Supreme Court**—highest federal/national court; original and appellate jurisdiction
- **writ of certiorari**—order calling up the records of the lower court so a case may be reviewed; sometimes abbreviated cert.

3I. U S Courts: Due Process and Equality Under the Law

Consider the Original

From Thomas Jefferson to Isaac H. Tiffany, 4 April 1819...

“Liberty [...] is unobstructed action according to our will; but rightful liberty is unobstructed action according to our will, within the limits drawn around us by the equal rights of others. I do not add ‘within the limits of the law’; because law is often but the tyrant’s will, and always so when it violates the right of an individual.”¹

Courts interpret contractual agreements between parties. Sometimes the parties dispute over the meaning of the contract, and sometimes the dispute concerns an infraction against the rules that hold people accountable to the contract. No matter whether the dispute is about a criminal activity or a civil action, each individual party to the process, **litigant**, is guaranteed a protected right to **due process**. The *Constitution*, the people’s contract with the government, enumerates this protection no matter the race,

1. National Archives: Founders Online at <http://founders.archives.gov/documents/Jefferson/98-01-02-0303>

gender, age, socioeconomic status, or personal ability of any individual involved in a legal dispute. Not only is each individual to receive due process (equity and standardization of procedure), they are also to be treated equally by the judicial system in spite of any factor of birth, situation, or circumstance.

Two Types of Procedural Dispute: Civil and Criminal

Courts hear two different types of disputes: criminal and civil. Under **criminal procedure**, governments establish rules and punishments; laws define conduct that is prohibited because it can harm others and impose punishment. Crimes are usually labeled based on their nature and seriousness; felonies are the more serious crimes. When someone commits a criminal act, the government (state or national, depending on which law has been broken) charges that person with a crime, and the case brought to court contains the name of the charging government, as in *Miranda v. Arizona* discussed below.²

Criminal procedure involves processing (**prosecuting/prosecution**) cases against individuals (**defendant**) accused of harming others including the decision about punishment for criminal actions. A **verdict** (opinion or judgement) of guilt or innocence is sought in criminal cases.

Civil procedure involves two or more private (non-government) parties, at least one of whom (**plaintiff**) alleges harm or civil injury (**tort**) committed by the other (defendant/**respondent**). A decision in favor of one of the parties is sought in civil cases based upon **preponderance of evidence** or which side has the best argument

2. *Miranda v. Arizona*, 384 U.S. 436 (1966).

and evidence. The plaintiff makes a choice of basic trial procedure. The choice is between a **bench trial** (judge presides as both judge and jury) or a **petit jury** trial (random citizens called to serve). The basic steps in both civil and criminal procedure vary according to individual cases and case complexities. The chart below is a basic selection of procedural steps generally associated with the constitutional protection of due process.



In both criminal and civil matters, the courts decide the remedy and resolution of the case, and in all cases, the U.S. Supreme Court is the final court of appeal.

Although the Supreme Court tends to draw the most public attention, it typically hears fewer than one hundred cases every year. About 90 percent of all cases in the U.S. court system are heard

at the state level.³ The federal/national courts handle approximately 2-3 thousand cases a year while state courts adjudicate several million. State courts handle criminal and civil matters (personal injury, malpractice, divorce, family, juvenile, probate, contract disputes, and real estate cases).

The federal courts hear cases involving foreign governments, patents, copyright infringement, Native American rights, maritime law, bankruptcy, or controversies between two or more states. Cases arising from activities across state lines (interstate commerce) are also subject to federal court jurisdiction, as are cases in which the United States is a party. A dispute between two parties not from the same state or nation and in which damages of at least \$75,000 are claimed is handled at the federal level. Such a case is known as a diversity of citizenship case.⁴

It is possible that issues of federal law may start in the state courts before making their way to the federal side. Any case starting at the state and/or local level may make it into the federal system on appeal—but only on points that involve a federal law or question, and usually after all avenues of appeal in the state courts have been exhausted. Consider the case **Miranda v. Arizona**.⁵

3. “State Courts vs. Federal Courts.” *The Judicial Learning Center*. <http://judiciallearningcenter.org/state-courts-vs-federal-courts/> (March 1, 2016).
4. “State Courts vs. Federal Courts.” *The Judicial Learning Center*. <http://judiciallearningcenter.org/state-courts-vs-federal-courts/> (March 1, 2016).
5. *Miranda v. Arizona*, 384 U.S. 436 (1966).”U.S. Court System.” Syracuse University.

Ernesto Miranda, arrested for kidnapping and rape (violations of state law), was convicted and sentenced to prison after a key piece of evidence—his own signed confession—was presented at trial in the Arizona court. On appeal to the Arizona Supreme Court and then the U.S. Supreme Court, the case requested to exclude Miranda's confession on the grounds that its admission was a violation of his constitutional rights. By a slim 5–4 margin, the justices ruled that the confession should be excluded from evidence.

In obtaining it, the police had violated Miranda's Fifth Amendment right against self-incrimination and his Sixth Amendment right to an attorney. Miranda's original conviction was overturned.

The Supreme Court considered only the violation of Miranda's constitutional rights, not whether he was guilty of the crimes with which he was charged. He was retried in state court in 1967, the second time without the confession as evidence, found guilty again based on witness testimony and other evidence, and sent to prison.

Miranda's story is a good example of the tandem operation of the state and federal court systems. His guilt or innocence of the crimes was a matter for the state courts, whereas the constitutional questions raised by his trial were a matter for the federal courts.

Have you ever served on a jury?

Since judges and justices are not elected, we

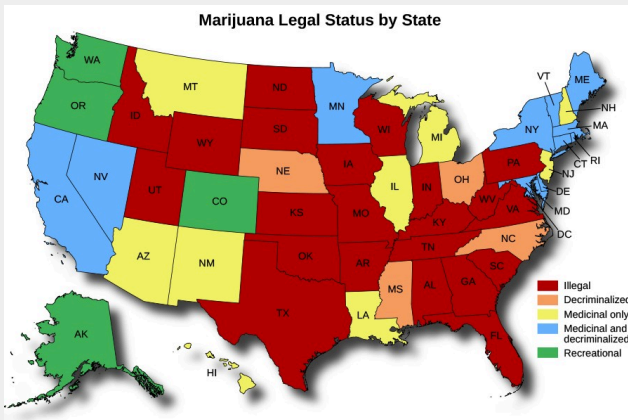
<http://www2.maxwell.syr.edu/plegal/scales/court.html>
(March 1, 2016).

sometimes consider the courts removed from the public; however, this is not always the case. Average citizens may get involved with the courts firsthand as part of their decision-making process. If you have not already been called, you may receive a summons for jury duty from your local court system. You may also be asked to serve federal **jury duty**, such as U.S. district court duty or federal grand jury duty. Local or state jury service is more common.

While your first reaction may be to start planning a way to get out of it, participating in jury service is vital to the operation of the judicial system. It provides individuals in court the chance to be heard and to be tried fairly by a group of their peers. Jury duty has benefits for those who serve as well. You will no doubt come away better informed about how the judicial system works. Who knows? You might even get an unexpected surprise, as some citizens in Dallas, Texas did recently when former President George W. Bush showed up to serve jury duty with them. Prospective jurors participate in the jury selection process called **voir dire**.

Marijuana Laws and the Courts

There are so many differences in marijuana laws between states, and between the states and the national government, that uniform application of treatment in courts across the nation is nearly impossible. What is legal in one state may be illegal in another, and state laws do not cross state geographic boundary lines—but people do. A person residing in any of the fifty states is still subject to federal law.



Marijuana laws vary remarkably across the fifty states. In most states, marijuana use is illegal, as it is under federal law, but some states have decriminalized it, some allow it for medicinal use, and some have done both. Marijuana is currently legal for recreational use in four states, per state law.

Differences can lead, somewhat ironically, to arrests and federal criminal charges for people who have marijuana in states where it is legal, or to federal raids on growers and dispensaries that would otherwise be operating legally under their state's law.

Differences among the states have also prompted a number of lawsuits against states with legalized marijuana. People opposed to state laws seek relief from the courts. They want courts to resolve the contradictions and conflicts between states as well as between states and the national government. Citing concerns over cross-border trafficking, difficulties with law enforcement, and violations of the Constitution's supremacy clause, Nebraska and Oklahoma have petitioned the U.S. Supreme Court to intervene and rule on the legality of Colorado's marijuana law, hoping to get it overturned.⁶

Where you are physically located can affect not only what is allowable and what is not, but also how cases are judged. For decades, political scientists have confirmed that political culture affects the operation of government institutions, and when we add

6. *States of Nebraska and Oklahoma v. State of Colorado*. Motion for Leave to File Complaint, Complaint and Brief in Support. December 2014. <http://www.scribd.com/doc/250506006/Nebraska-Oklahoma-Lawsuit>.

to that the differing political interests and cultures at work within each state, we end up with court systems that vary greatly in their judicial and decision-making processes.⁷

Each state court system operates with its own individual set of biases. People with varying interests, ideologies, behaviors, and attitudes run the disparate legal systems, so the results they produce are not always the same. Moreover, the selection method for judges at the state and local level varies—elected or appointed.

Just as the laws vary across the states, so do judicial rulings and interpretations, and the judges who make them. That means there may not be uniform application of the law—even of the same law—nationwide. We are somewhat bound by geography and do not always have the luxury of picking and choosing the venue for our particular case. So, while having such a decentralized and varied set of judicial operations affects the kinds of cases that make it to the courts and gives citizens alternate locations to get their case heard, it may also lead to disparities in the way they are treated once they get there.

7. Joel B. Grossman and Austin Sarat. 1971. “Political Culture and Judicial Research.” *Washington University Law Review*. 1971 (2) Symposium: Courts, Judges, Politics—Some Political Science Perspectives. http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=2777&context=law_lawreview.

Questions to Consider

1. How do you think differences among the states and differences between federal and state law regarding marijuana use can affect the way a person is treated in court?
2. What, if anything, should be done about disparities in application of the law concerning immigration?
3. What is the main difference between civil and criminal procedure?

Terms to Remember

- **bench trial**—judge acts as both judge and jury (no petit jury of peers)
- **civil procedure**—processing cases between private individuals seeking resolution of disputes regarding non-criminal law private rights and remedies
- **criminal procedure**—processing cases against individuals accused of harming others; punishment for those actions
- **defendant**—individual accused of harming others and involved in the legal process
- **due process**—consistent procedure within the justice system
- **jury duty**—citizens called to hear civil disputes or

criminal cases in the court system; tasked with determining outcome/verdict

- **litigant**—each individual party to a court case; including defendant/respondant, prosecutor, plaintiff
- **Miranda v. Arizona**—case involving criminal procedure, accused persons must be informed of their constitutional rights upon arrest
- **petit jury trial**—12 member jury of citizens, determines verdict/decision
- **plaintiff**—private (non-government) parties alleging harm or civil injury committed by the another (defendant/respondent)
- **preponderance of evidence**—which side has the best argument and evidence
- **prosecution/prosecutor**—Criminal procedure involves processing cases against individuals (defendant) accused of harming others
- **respondent**—party to a court case (litigant) defending against a charge of civil injury
- **tort**—civil injury
- **verdict**—opinion or judgement of guilt or innocence sought in criminal cases
- **voir dire**—jury selection process

PART VII
CONGRESS

32. Congress: Making Laws--Adding to and Changing the Contract



While the Capitol is the natural focus point of Capitol Hill and the workings of Congress, the Capitol complex includes over a dozen buildings, including the House of Representatives office buildings (left), the Senate office buildings (far right), the Library of Congress buildings (lower left), and the Supreme Court (lower right). (credit: modification of work by the Library of Congress)

The framers of the *Constitution* intended that Congress would be the cornerstone of the new republic. After years of tyranny under a king, they had little interest in creating another system with an overly powerful single individual at the top. While recognizing the need for centralization through a stronger national government with an elected executive wielding its own authority, they wanted a strong representative national assembly that would use careful consideration, deliberate action, and constituent representation to carefully draft legislation. Article I of the *Constitution* grants several key powers to Congress--overseeing the budget and financial matters, introducing legislation, confirming or rejecting judicial and executive nominations, and even declaring war.

Today, Congress is the most criticized and possibly the most misunderstood institution.



Three-quarter portrait of Abraham Lincoln standing, holding a book, facing right-1809-1865; Notes- Title from item.- "This picture is a good likeness of the original."- Includes facsimile signatures of Abraham Lincoln, E. S. Cleveland, Hartford, Conn., and Philip Wadsworth, Chicago, Ills.; Repository Library of Congress Prints and Photographs Division Washington, D.C. 20540 USA <http://hdl.loc.gov/loc.pnp/pp.printDigitalIdppmsca19243> //hdl.loc.gov/loc.pnp/ppmsca.19243; Library of Congress Control Number2008680376 Reproduction NumberLC-DIG-ppmsca-19243 (digital file from original) Rights Advisory; No known restrictions on publication.

Consider the Original

from **Abraham Lincoln**

“The people of these United States are the rightful masters of both congresses and courts, not to over-throw the Constitution, but to over-throw the men who pervert that Constitution.”¹

1. <http://loc.gov/teachers/classroommaterials/connections/abraham-lincoln-papers/history3.html>; Title “The people of these United States are the rightful masters of both congresses and courts, not to over-throw the Constitution, but to over-throw the men who pervert that Constitution” / E.B. & E.C. Kellogg, 245 Main Street, Hartford, Conn. E.B. & E.C. Kellogg, Printer. “THE PEOPLE OF THESE UNITED STATES ARE THE RIGHTFUL MASTERS OF BOTH CONGRESSES AND COURTS, NOT TO OVER-THROW THE CONSTITUTION, BUT TO OVER-THROW THE MEN WHO PERVERT THAT CONSTITUTION” / E.B. & E.C. KELLOGG, 245 MAIN STREET, HARTFORD, CONN. [New York: Geo. Whiting, 87 Fulton St, 1864] Image. Retrieved from the Library of Congress, <<https://www.loc.gov/item/2008680376/>>.

Congress: Questions to Consider

1. Briefly explain the benefits and drawbacks of a bicameral system.
2. What are some examples of the enumerated powers granted to Congress in the Constitution?
3. Why does a strong presidency necessarily pull power from Congress?
4. How exactly does Capitol Hill operate?
5. What are the different structures and powers of the House of Representatives and the Senate?
6. How are members of Congress elected?
7. How do they reach their decisions about legislation, budgets, and military action?

33. Congress: How is the legislative branch structured?

Learning Objectives

- Describe the role of Congress in the U.S. constitutional system
- Define bicameralism
- Explain gerrymandering and the apportionment of seats in the House of Representatives
- Discuss the three kinds of powers granted to Congress
- Explain the division of labor in the House and in the Senate
- Describe the way congressional committees develop and advance legislation

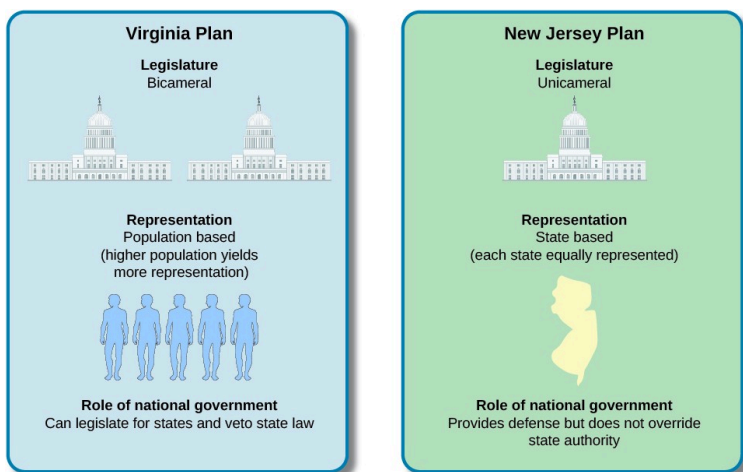
The origins of the U.S. *Constitution* and the convention that brought it into existence are rooted in failure—the failure of the *Articles of Confederation*. After only a handful of years, the states of the union decided that the *Articles* were unworkable. To save the young republic, a convention was called, and delegates were sent to assemble and revise the *Articles*. The Congress we recognize today emerged from the controversies and compromises in this convention.

The Great Compromise: How do we make

representation fair and equitable?

Only a few years after the adoption of the *Articles of Confederation*, the republican experiment seemed on the verge of failure. States deep in debt were printing increasingly worthless paper currency, many were mired in interstate trade battles with each other, and in western Massachusetts a small group of Revolutionary War veterans angry over the prospect of losing their farms broke into armed open revolt against the state. This came to be known as Shays' Rebellion. Many concluded the *Articles of Confederation* were simply not strong enough to keep the young republic together. A convention was called in the spring of 1787 and delegates from all the states (except Rhode Island, which boycotted the convention) were sent to Philadelphia to work out a solution.

The meeting these delegates convened became known as the Constitutional Convention of 1787. Although its prescribed purpose was to revise the *Articles of Confederation*, a number of delegates charted a path toward replacing the Articles entirely. The national legislature had been made up of a single chamber composed of an equal number of delegates from each of the states. Virginia and other large states felt it would be unfair to continue with this equal distribution of power. Virginia's delegates proposed a plan for **bicameralism**, or the division of legislators into two separate assemblies. In this proposed two-chamber Congress, states with larger populations would have more representatives in each chamber. Predictably, smaller states like New Jersey disagreed. They issued their own plan calling for a single-chamber Congress with equal representation by state and more state authority.



A third proposal eventually calmed this storm of debate over allocation of power between large and small states. The Connecticut Compromise, also called the **Great Compromise**, proposed a **bicameral** congress with members apportioned differently in each house. The upper house, the Senate, would have two representatives from each state. In the lower house, the House of Representatives, representation would be proportional to the population in each state.

In the final draft of the U.S. Constitution, the bicameral Congress received a number of powers and limitations. These are outlined in **Article I** ([Appendix B](#)). It describes the minimum age of congresspersons (Section 2), requires that Congress meet at least once a year (Section 4), guarantees members' pay (Section 6), and gives Congress the power to levy taxes, borrow money, and regulate commerce (Section 8). These powers and limitations were the Constitutional Convention's compromised response to the failings of the *Articles of Confederation*.

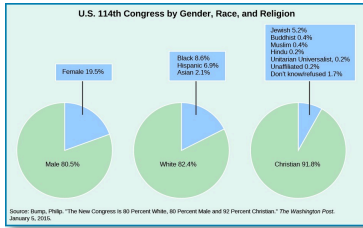
The bicameral structure requires the two chambers to pass identical **bills**, or proposed legislation. After all amending and modifying has occurred, the two houses ultimately must agree on the legislation they send to the president for approval. Passing the same bill in both houses is intentionally difficult. The framers

designed a complex and difficult process for legislation to become law. This challenge serves several important and related functions. First, the difficulty of passing legislation through both houses makes it less likely, though hardly impossible, that Congress will act on emotion or without the necessary deliberation. Second, the bicameral system ensures that large-scale dramatic reform is exceptionally difficult to pass and that the status quo is more likely to hold. Third, the bicameral system makes it difficult for a single faction or interest group to enact laws and restrictions unfairly favoring it.



The [website of the U.S. Congress Visitor Center](#) contains a number of interesting online exhibits and informational facts about the U.S. government's "first branch" (so called because it is described in Article I of the Constitution).

Demographically speaking, Congress as a whole is still imbalanced and remains largely white, male, and wealthy. For example, more than half the U.S. population is female while only 20 percent of Congress is. Congress is also overwhelmingly Christian.



The diversity of the country is not reflected in the U.S. Congress, whose current membership is approximately 80 percent male, 82 percent white, and 92 percent Christian.

Representing Constituents

Congress members' most important function as lawmakers is writing, supporting, and passing bills. And as representatives of their constituents, they are charged with addressing those constituents' interests.

Historically, this job included what some have affectionately called "bringing home the bacon" but what many (usually those with competing interests) call **pork-barrel politics**. As a term and a practice, pork-barrel politics—federal spending on projects designed to benefit a particular district or set of constituents—has been around since the nineteenth century, when barrels of salt pork were both a sign of wealth and a system of reward. While pork-barrel politics are often deplored during election campaigns, and earmarks—funds appropriated for specific projects—are no longer permitted in Congress (see feature box below), legislative control of local appropriations nevertheless still exists. In more formal language, *allocation*, or the influencing of the national budget to help the district or state, can mean securing funds for a specific district's project like an airport, or getting tax breaks for certain types of agriculture or manufacturing.

In ranching, an **earmark** is a small cut on the ear of a cow or other animal to denote ownership. In Congress, an earmark is a mark in a bill that directs some of the bill's funds to be spent on specific projects or for specific tax exemptions. Since the 1980s, the earmark has become a common vehicle for sending money to various projects around the country. Many a road, hospital, and airport can trace its origins back to a few skillfully drafted earmarks.

Relatively few people outside Congress had ever heard of the term

before the 2008 presidential election, when Republican nominee Senator John McCain touted his career-long refusal to use earmarks as a testament to his commitment to reform spending habits in Washington.¹

McCain's criticism of the earmark as a form of corruption cast a shadow over a common legislative practice. As the country sank into recession and Congress tried to use spending bills to stimulate the economy, the public grew more acutely aware of earmarking. Congresspersons became eager to distance themselves from the practice. In fact, the use of earmarks to encourage Republicans to help pass health care reform actually made the bill less popular with the public.

When Republicans took over control of the House in 2011, they outlawed earmarks. But with deadlocks and stalemates becoming more common, some quiet voices have begun asking for their return. They argue that Congress works because representatives can satisfy their responsibilities to their constituents by making deals. The earmarks are those deals. By taking them away Congress has hampered its own ability to "bring home the bacon."

1. "Statement by John McCain on Banning Earmarks," 13 March 2008, <http://www.presidency.ucsb.edu/ws/?pid=90739> (May 15, 2016); "Press Release – John McCain's Economic Plan," 15 April 2008, <http://www.presidency.ucsb.edu/ws/?pid=94082> (May 15, 2016).

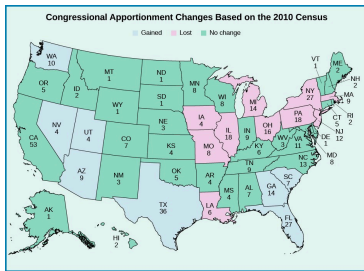
Senate Representation and House Apportionment

The Constitution specifies that every state will have two senators who each serve a six-year term. Therefore, with fifty states in the Union, there are currently one hundred seats in the U.S. Senate. Senators were originally appointed by state legislatures, but in 1913 the Seventeenth Amendment allowed senators to be elected by popular vote in each state. Seats in the House of Representatives are distributed among the states based on population and each member is elected by voters in a specific congressional district. Each state is guaranteed at least one seat in the House.

Redistricting (redrawing boundaries) occurs every ten years, after the U.S. Census has established how many persons live in the United States and where. The boundaries of legislative districts are redrawn as needed to balance the number of voters in each while still maintaining a total of 435 districts. Because local areas can see population growth or decline over time, these boundary adjustments are typically needed every ten years. Based on the 2010 census there are seven states with only one representative (Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming), whereas the most populous state, California, has fifty-three congressional districts. Congressional **apportionment** today is achieved through the *equal proportions method*, which uses a mathematical formula to allocate seats based on U.S. **Census** Bureau population data (counting citizens in each state) gathered every ten years as required by the *Constitution*. At the close of the first U.S. Congress in 1791, there were sixty-five representatives, each representing approximately thirty thousand citizens. As the territory of the United States expanded the population requirement for each new district increased as well. Adjustments (**reapportionment**) occurred,

The Current Congress—Basic Requirements for Office		
	US House of Representatives	US Senate
Total # Members	435	100
Members Per State	1 or more; population based	2 for each; equality based
Term of Office	2 years for a single term	6 years for a single term
Minimum Age	25 years old	30 years old

but the House of Representatives roster continued to grow until it reached 435 members after the 1910 census. Ten years later with the 1920 census and urbanization changing populations across the country, Congress failed to reapportion membership. An agreement was reached in 1929 to permanently cap the number of seats in the House at 435.



Although the total number of seats in the House of Representatives has been capped at 435, the apportionment of seats by state may change each decade following the official census. In this map, we see the changes in seat reapportionment that followed the 2010 Census.

Two remaining problems in the House are the size of each representative's

constituency—the body of voters who elect him or her—and the status of Washington, DC. George Washington advocated for 30,000 people per elected member to retain effective representation in the House. However, today the average number of citizens in a congressional district now tops 700,000. This is arguably too

many for House members to remain in touch with the people. . Further, the approximately 675,000 residents of the federal district of Washington (District of Columbia) do not have voting representation. Like those living in the U.S. territories, they merely have a non-voting delegate.²

2. There are six non-voting delegations representing American Samoa, the District of Columbia, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. While these delegates are not able to vote

The stalemate in the 1920s wasn't the first House reapportionment controversy (or the last). The first incident took place before any apportionment had even occurred, while the process was being discussed at the Constitutional Convention. Representatives from slave-owning states believed their slaves should be counted as part of the total population. States with few or no slaves predictably objected. The eventual compromise (Three-fifths) allowed for each slave (who could not vote) to count as three-fifths of a person for purposes of congressional representation.

Gerrymandering is the manipulation of legislative district boundaries for a particular candidate's or political party's advantage. The term combines the word salamander, a reference to the strange shape of these districts, with the name of Massachusetts governor Elbridge Gerry who signed a redistricting plan in 1812 designed to benefit his party. The practice is legal despite the questionable ethics behind gerrymandering and both major parties have used it to their benefit.

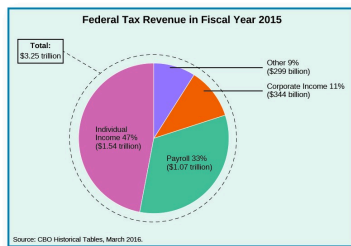
What powers does Congress possess?

Congressional powers can be divided into three types: enumerated, implied, and inherent. An **enumerated power** is a power explicitly stated (written) in the Constitution. An **implied power** is one not specifically detailed in the Constitution but inferred as necessary to achieve the objectives of the national government. An **inherent power**, while not enumerated or implied, must be assumed to exist as a direct result of the country's existence.

on legislation, they may introduce it and are able to vote in congressional committees and on procedural matters.

Article I, Section 8, of the U.S. *Constitution* details the enumerated powers of the legislature. These include the power to levy and collect taxes, declare war, raise an army and navy, coin money, borrow money, regulate commerce among the states and with foreign nations, establish federal courts and bankruptcy rules, establish rules for immigration and naturalization, and issue patents and copyrights. The Constitution includes other powers such as the ability of Congress to override a presidential veto with a two-thirds vote of both houses (Article II, Section 7, in the case of the veto override). The first enumerated power, to levy taxes, is quite possibly the most important power Congress possesses. Without it, enumerated, implied or inherent powers would be largely theoretical. Along with the appropriations (money) power, taxation gives Congress what is known as “the power of the purse.”

Some enumerated powers invested in the Congress specifically serve as checks on the other branches of government. These include Congress’s sole power to introduce legislation, the Senate’s final say on many



presidential nominations and treaties signed by the president, and the House’s ability to impeach or formally accuse the president or other federal officials of wrongdoing (the first step in removing the person from office; the second step, trial and removal, takes place in the U.S. Senate). Each of these powers also grants Congress **oversight** of the actions of the president and his or her administration—that is, the right to review and monitor other bodies such as the executive branch.

Despite the fact that the *Constitution* outlines specific enumerated powers, most of the actions Congress takes on a day-to-day basis are not actually included in this list. The *Constitution* not only gives Congress the power to make laws but also gives it some general direction as to what those laws should accomplish.

The “necessary and proper clause” directs 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.” Laws that regulate banks, establish a minimum wage, and allow for the construction and maintenance of interstate highways are all examples. Today, the overwhelming portion of Congress’s work involves implied powers granted by the necessary and proper clause.

Finally, Congress’s inherent powers are unlike either the enumerated or the implied powers. Inherent powers are not only not mentioned in the Constitution, but they do not even have a convenient clause in the Constitution to provide for them. Instead, they are powers Congress has determined it must assume if the government is going to work at all. These powers are deemed so essential to any functioning government that the framers saw no need to spell them out. Such powers include the power to control borders of the state, the power to expand the territory of the state, and the power to defend itself from internal revolution or coups. These powers are not granted to the Congress, or to any other branch of the government for that matter, but they exist because the country exists.

In the twentieth century, the power struggle between the Congress and the president really began. As the country grew larger and more complex the assumption that government needed to assert regulatory power grew. Further, the president’s powers expanded as commander-in-chief in the realm of foreign policy.

The twin disasters of the Great Depression in the 1930s and World War II, which lasted until the mid-1940s, provided President Franklin D. Roosevelt with a powerful platform to expand presidential power. His popularity and resultant ability to be elected four times allowed him to greatly overshadow Congress. Congress attempted to restrain the power of the presidency through the Twenty-Second Amendment to the Constitution which limits a

president to only two full terms in office.³ Although this limitation is significant it has not held back the tendency for the presidency to assume increased power.

How is Congress structured/organized?

Not all the business of Congress involves bickering, political infighting, government shutdowns, and Machiavellian maneuvering. Congress does get real work done. Traditionally, it does this work in a very methodical way.

Party Leadership

The party leadership in Congress controls the actions of Congress. Leaders are elected by the two-party conferences in each chamber—the House Democratic Conference and House Republican Conference. These conferences meet regularly and separately not only to elect their leaders but also to discuss important issues and strategies for moving policy forward.

3. David M. Jordan. 2011. *FDR, Dewey, and the Election of 1944*. Bloomington: Indiana University Press, 290; Paul G. Willis and George L. Willis. 1952. “The Politics of the Twenty-Second Amendment,” *The Western Political Quarterly* 5, No. 3: 469–82; Paul B. Davis. 1979. “The Results and Implications of the Enactment of the Twenty-Second Amendment,” *Presidential Studies Quarterly* 9, No. 3: 289–303.



(a)



(b)

Republican Mitch McConnell of Kentucky (a), the majority leader in the Senate, and Republican Paul Ryan of Wisconsin (b), the Speaker of the House, are currently the most powerful congressional leaders in their respective chambers.

The most important leadership position in the House is elected by the entire body of representatives—the **Speaker of the House** (the only House officer currently mentioned in the *Constitution*).

The *Constitution* does not require the Speaker to be a member of the House. The Speaker is the presiding officer, the administrative head of the House, the partisan leader of

the majority party in the House, and an elected representative of a single congressional district. Since 1947, the holder of this position has been second in line (after the vice president) to succeed the president in an emergency.

The Speaker serves until his or her party loses a majority of seats, or until he or she is voted out of the position or chooses to step down. The Speaker wields significant power, such as the ability to assign bills to committees and decide when a bill will be presented to the floor for a vote. The Speaker also rules on House procedures, often delegating authority for certain duties to other members. He/she appoints members and chairs to committees, creates **select committees** to fulfill a specific purpose and then disband, and can even select a member to be speaker *pro tempore*, who acts in the Speaker's absence. Finally, when the Senate joins the House in a joint session the Speaker presides over these sessions because they are usually held in the House of Representatives.

Below the Speaker, the majority and minority conferences each elect two leadership positions arranged in hierarchical order. At the top of the hierarchy are the floor leaders of each party. These are generally referred to as the majority and minority leaders. The **minority leader** has a visible if not always a powerful position. As the official leader of the opposition, he or she technically holds

the rank closest to that of the Speaker, makes strategy decisions, and attempts to keep order among the minority party's members. The **majority leader** also has considerable power and historically is in the best position to assume the speakership when the current Speaker steps down.

Below these leaders are the two party's respective **whips**. A whip's job, as the name suggests, is to whip up votes and otherwise enforce party discipline. Whips make the rounds in Congress, telling members the position of the leadership and the collective voting strategy, and sometimes wave various carrots and sticks in front of recalcitrant members to bring them in line. The remainder of the leadership positions include a handful of chairs and assistantships.

The Senate also has majority and minority leaders and whips, each with duties very similar to their counterparts in the House. However, the Senate does not have a Speaker. The duties and powers held by the Speaker in the House fall to the majority leader in the Senate. The Senate's president is actually the elected vice president of the United States, although he/she may vote only in case of a tie. Apart from this and very few other exceptions, the president of the Senate does not actually operate in the Senate. Instead, the *Constitution* allows for the Senate to choose a **president pro tempore**—usually the most senior senator of the majority party—to preside over the Senate. Despite the title, the job is largely powerless. The real power in the Senate is in the hands of the majority leader and the minority leader. The majority leader is the chief spokesperson for the majority party, but unlike in the House he/she does not run the floor alone. Because of the traditions of unlimited debate and the **filibuster**, the majority and minority leaders often occupy the floor together in an attempt to keep things moving along. At times, their interactions are intense and partisan, but for the Senate to get things done, they must cooperate to get the sixty votes needed to run this super-majority legislative institution.

The Committee System

With 535 members in Congress and a seemingly infinite number of domestic, international, economic, agricultural, regulatory, criminal, and military issues to deal with at any given moment, the two chambers must divide their work based on specialization. Congress does this through the committee system. Specialized committees (or subcommittees) in both the House and the Senate are where bills originate and most of the work that sets the congressional agenda takes place. Committees are roughly approximate to a bureaucratic department in the executive branch. There are well over two hundred committees, subcommittees, select committees, and joint committees in the Congress. The core committees are called **standing committees**. There are twenty standing committees in the House and sixteen in the Senate.

Congressional Standing and Permanent Select Committees

House of Representatives	Senate
Agriculture	Agriculture, Nutrition, and Forestry
Appropriations	Appropriations
Armed Services	Armed Services
Budget	Banking, Housing, and Urban Affairs
Education and the Workforce	Budget
Energy and Commerce	Commerce, Science, and Transportation
Ethics	Energy and Natural Resources
Financial Services	Environment and Public Works
Foreign Affairs	Ethics (select)
Homeland Security	Finance
House Administration	Foreign Relations
Intelligence (select)	Health, Education, Labor and Pensions
Judiciary	Homeland Security and Governmental Affairs
Natural Resources	Indian Affairs (select)
Oversight and Government Reform	Intelligence (select)
Rules	Judiciary
Science, Space, and Technology	Rules and Administration
Small Business	Small Business and Entrepreneurship
Transportation and Infrastructure	Veterans' Affairs
Veterans' Affairs	
Ways and Means	

Members of both parties compete for positions on various committees. They are typically filled by majority and minority members to roughly approximate the ratio of majority to minority members in the respective chambers, although committees are

chaired by the majority party. Committees and their chairs have a lot of power in the legislative process, including the ability to stop a bill from going to the floor (the full chamber) for a vote. Indeed, most bills die in committee. But when a committee is eager to develop legislation, it takes a number of methodical steps. It will reach out to relevant agencies for comment on resolutions to the problem at hand and even hold hearings with experts to collect information. In the Senate, committee hearings are also held to confirm presidential appointments. Next the committee meets to discuss amendments and legislative language. Finally the committee will send the bill to the full chamber with a committee report. The report provides the majority opinion supporting the bill, a minority view to the contrary, and estimates of the proposed law's cost and impact.

Four types of committees exist in the House and the Senate. The first is the standing, or permanent, committee. This committee is the first call for proposed bills, fewer than 10 percent of which are reported out of committee to the floor. The second type is the **joint committee**. Joint committee members are appointed from both the House and Senate to explore key issues such as the economy and taxation. However, joint committees have no bill-referral authority whatsoever—they are informational only. A **conference committee** reconciles different bills passed in both the House and Senate. The conference committees are appointed on an ad hoc (temporary) basis when a bill passes the House and Senate in different forms. Ad hoc, special, or select committees are temporary committees set up to address specific topics. These types of committees often conduct special investigations.

Members of Congress bring to their roles different backgrounds, interests, and levels of expertise, and try to match these to committee positions. For example, House members from states with large agricultural interests will seek positions on the Agriculture Committee. Senate members with a background in banking or finance may seek positions on the Senate Finance Committee. Members can request these positions from their chambers'

respective leadership, and the leadership also selects the committee chairs.

Committee chairs are very powerful. They control the committee's budget and agenda, choosing when the committee will meet, when it will hold hearings, and whether it will consider a bill at all. A chair can convene a meeting when members of the minority are absent or adjourn a meeting when things are not progressing as the majority leadership wishes. Chairs can hear a bill even when the rest of the committee objects. They do not hold these powerful positions indefinitely, however. In the House, rules prevent committee chairs from serving more than six consecutive years and from serving as the chair of a subcommittee at the same time. A senator may serve only six years as chair of a committee but may, in some instances, also serve as a chair or ranking member of another committee.

Because the Senate is much smaller than the House, senators hold more committee assignments than House members. There are sixteen standing committees in the Senate, and each position must be filled. In contrast, in the House, with 435 members and only twenty standing committees, committee members have time to pursue a more in-depth review of a policy. House members historically defer to the decisions of committees, while senators tend to view committee decisions as recommendations, often seeking additional discussion that could lead to changes.



Take a look at the [scores of committees](#) in the [House](#) and Senate. The late House Speaker Tip O'Neill once quipped that if you didn't know a new House member's name, you could just call him Mr. Chairperson.

Questions to Consider

1. Briefly explain the benefits and drawbacks of a bicameral system.
2. What are some examples of the enumerated powers granted to Congress in the *Constitution*?
3. Why does a strong presidency necessarily sap power from Congress?
4. How do committees demonstrate a division of labor in Congress based on specialization?

Terms to Remember

apportionment—the process by which seats in the House of Representatives are distributed among the fifty states

bicameralism—the political process that results from dividing a legislature into two separate assemblies

bill—proposed legislation under consideration by a legislature

conference committee—a special type of joint committee

that reconciles different bills passed in the House and Senate so a single bill results

constituency—the body of voters, or constituents, represented by a particular politician

earmark—a mark in a bill that directs some of the bill's funds to be spent on specific projects or for specific tax exemptions

enumerated powers—the powers given explicitly to the federal government by the Constitution to regulate interstate and foreign commerce, raise and support armies, declare war, coin money, and conduct foreign affairs

implied powers—the powers not specifically detailed in the U.S. Constitution but inferred as necessary to achieve the objectives of the national government

inherent powers—the powers neither enumerated nor implied but assumed to exist as a direct result of the country's existence

joint committee—a legislative committee consisting of members from both chambers that investigates certain topics but lacks bill referral authority

majority leader—the leader of the majority party in either the House or Senate; in the House, the majority leader serves under the Speaker of the House, in the Senate, the majority leader is the functional leader and chief spokesperson for the majority party

minority leader—the party member who directs the activities of the minority party on the floor of either the House or the Senate

oversight—the right to review and monitor other bodies such as the executive branch

pork-barrel politics—“bringing home the bacon” or bringing tax dollars/contracts/etc. to the home district of a member of Congress

president pro tempore—the senator who acts in the absence of the actual president of the Senate, who is also the vice president of the United States; the president pro tempore is usually the most senior senator of the majority party

select committee—a small legislative committee created to fulfill a specific purpose and then disbanded; also called an ad hoc, or special, committee

Speaker of the House—the presiding officer of the House of Representatives and the leader of the majority party; the Speaker is second in the presidential line of succession, after the vice president

standing committee—a permanent legislative committee that meets regularly

whip—in the House and in the Senate, a high leadership position whose primary duty is to enforce voting discipline in the chambers and conferences

34. Congress: How do we choose our representatives?

Learning Objectives

- Explain how fundamental characteristics of the House and Senate shape their elections
- Discuss campaign funding and the effects of incumbency
- Analyze the way congressional elections can sometimes become nationalized

The House and Senate operate very differently, partly because their members differ in the length of their terms, as well as in their age and other characteristics.

Who can be elected to Congress?

The U.S. *Constitution* specifies eligibility requirements to serve in the House or Senate. A House member must be a U.S. citizen of at least seven years' standing and at least twenty-five years old. Senators must have nine years' standing as citizens and be at least thirty years old when sworn in. Representatives serve two-year terms, whereas senators serve six-year terms. Per the Supreme Court decision in *U.S. Term Limits v. Thornton* (1995), there are

currently no term limits for either senators or representatives despite many state led efforts to impose them in the mid-1990s.¹

House members are elected by the voters in their specific congressional districts. There are currently 435 congressional districts in the United States and thus 435 House members. Each state has a number of House districts roughly proportional to its share of the total U.S. population, with states guaranteed at least one House member. Two senators are elected by each state.

The structural and other differences between the House and Senate influence the two chambers functions. The House of Representatives has developed a stronger and more structured leadership than the Senate. Because its members serve short two-year terms they must regularly answer to the demands of their constituency when they run for election or reelection. Even House members of the same party in the same state can disagree on issues because of the different interests of their specific districts. Thus, the House can be highly partisan.

In contrast, members of the Senate are furthest removed from the demands and scrutiny of their constituents. Because of their longer six-year terms, they will see every member of the House face his or her constituents multiple times before they themselves seek reelection. Originally, when a state's two U.S. senators were appointed by the state legislature, the Senate chamber's distance from the electorate was even greater. Unlike House members who can seek the narrower interests of their district, senators must maintain a broader appeal across their entire state. In addition, the Senate rules allow individuals to delay or stop legislation they oppose. The heat of popular and sometimes fleeting demands from constituents often glows red hot in the House. The Senate has the flexibility to allow these passions to cool. Dozens of major

1. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

initiatives are passed by the House with a willing president only to be defeated in the Senate.

How are campaigns funded?

Modern political campaigns in the United States are expensive, and they have been growing more so. For example, in 1986, the costs of running a successful House and Senate campaign were \$776,687 and \$6,625,932, respectively, in 2014 dollars. By 2014, those values had shot to \$1,466,533 and \$9,655,660.²

Raising this amount of money requires significant time and effort. Indeed, a presentation for incoming Democratic representatives suggested a daily Washington schedule of five hours reaching out to donors and only three or four hours for actual congressional work. As this advice reveals, raising money for reelection constitutes a large proportion of the work a congressperson does. Has the amount of money in politics truly become a corrupting influence? However, overall the largest share of direct campaign contributions in congressional elections comes from individual donors, who are less influential than the political action committees (PACs) that contribute the remainder and demand their time.³

The complex problem of funding campaigns has a long history in the United States. For nearly the first hundred years of the republic,

2. "The Cost of Winning a House and Senate Seat, 1986–2014," http://www.cfinst.org/pdf/vital/VitalStats_t1.pdf (May 15, 2016).
3. <http://www.opensecrets.org/overview/wherefrom.php> (May 15, 2016).

there were no federal campaign finance laws. Then, between the late nineteenth century and the start of World War I, Congress pushed through a flurry of reforms intended to bring order to the world of campaign finance. These laws made it illegal for politicians to solicit contributions from civil service workers, made corporate contributions illegal, and required candidates to report their fundraising. As politicians and donors soon discovered, however, these laws were full of loopholes and were easily bypassed by those who knew the ins and outs of the system.⁴

Another handful of reform attempts followed in the wake of World War II followed by a lull that ended in the early 1970s with the Federal Election Campaign Act. Among other things, it created the **Federal Election Commission** (FEC), required candidates to disclose where their money was coming from and where they were spending it, limited individual contributions, and provided for public financing of presidential campaigns.

2002 brought another important reform when Senators John McCain (R-AZ) and Russell Feingold (D-WI) successfully sponsored the Bipartisan Campaign Reform Act (BCRA). The **McCain-Feingold Act** limited the use of “soft money,” which is raised for purposes like party-building efforts, get-out-the-vote efforts, and issue-advocacy ads. Unlike “hard money” contributed directly to a candidate, which is heavily regulated and limited, soft money had almost no oversight. It had never been a problem before the mid-1990s, when a number of very imaginative political operatives developed creative ways to spend this money. After that, soft-money donations skyrocketed. But the McCain-Feingold bill brought some scrutiny and control to this type of fundraising.

McCain-Feingold placed limits on total contributions to political parties, prohibited coordination between candidates and PAC

4. <https://www.opensecrets.org/races/summary.php?id=OH08&cycle=2014> (May 15, 2016).

campaigns, and required candidates to include personal endorsements on their political ads. Until 2010, it also limited advertisements run by unions and corporations thirty days before a primary and sixty days before a general election.⁵

The FEC's enforcement of the law invited numerous court cases challenging it. The most controversial decision was handed down by the Supreme Court in 2010, whose ruling on ***Citizens United v. Federal Election Commission*** led to the removal of spending limits on corporations. Justices in the majority argued that the BCRA violated a corporation's free-speech rights.⁶

The *Citizens United* case began as a lawsuit against the FEC filed by Citizens United, a nonprofit organization that wanted to advertise a documentary critical of former senator and Democratic hopeful Hillary Clinton on the eve of the 2008 Democratic primaries. Advertising or showing the film during this time window was prohibited by the McCain-Feingold Act. But the Court found that this type of restriction violated the organization's First Amendment right to free speech. As critics of the decision predicted at the time, the Court thus opened the floodgates to private soft money flowing into campaigns again.

In the wake of the *Citizens United* decision, a new type of advocacy group emerged, the super PAC. A traditional PAC is an organization designed to raise hard money to elect or defeat

5. "Bipartisan Campaign Reform Act of 2002," http://www.fec.gov/pages/bcra/bcra_update.shtml (May 15, 2016); Greg Scott and Gary Mullen, "Thirty Year Report," September 2005, <http://www.fec.gov/info/publications/30year.pdf> (May 15, 2016).

6. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

candidates. Such PACs tended to be run by businesses and other groups, like the Teamsters Union and the National Rifle Association, to support their special interests. They are highly regulated on the amount of money they can take in and spend. Super PACs are not bound by these regulations. While they cannot give money directly to a candidate or a candidate's party, they can raise and spend unlimited funds, and they can spend independently of a campaign or party. In the 2012 election cycle, for example, super PACs spent just over \$600 million dollars and raised about \$200 million more.⁷

At the same time, several limits on campaign contributions have been upheld by the courts and remain in place. Individuals may contribute up to \$2700 per candidate per election. Individuals may also give \$5000 to PACs and \$33,400 to a national party committee. PACs that contribute to more than one candidate are permitted to contribute \$5000 per candidate per election, and up to \$15,000 to a national party. PACs created to give money to only one candidate are limited to only \$2700 per candidate, however.⁸

The amounts are adjusted every two years, based on inflation. These limits are intended to create a more equal playing field for the candidates, so that candidates must raise their campaign funds from a broad pool of contributors.

The Federal Election Commission has strict federal election guidelines on who can contribute, to whom, and how much.

7. "2012 Outside Spending, by Super PAC," <https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&type=S> (May 15, 2016).
8. "Contribution Limits for the 2015-2016 Federal Elections," <http://www.fec.gov/info/contriblimitschart1516.pdf> (May 15, 2016).

Contribution Limits for 2015–2016 Federal Elections					
DONORS	RECIPIENTS				
	Candidate Committee	PAC ¹ (SSF and Nonconnected)	State/ District/ Local Party Committee	National Party Committee	Additional National Party Committee Accounts
Individual	\$2,700* per election	\$5,000 per year	\$10,000 per year (combined)	\$33,400*	\$100,000 per account per year
Candidate Committee	\$2,000 per election	\$5,000 per year	Unlimited Transfers	Unlimited Transfers	
PAC-Multicandidate	\$5,000 per election	\$5,000 per year	\$5,000 per year (combined)	\$15,000 per year	\$45,000 per account per year
PAC-Nonmulticandidate	\$2,700 per election	\$5,000 per year	\$10,000 per year (combined)	\$33,400*	\$100,000 per account per year
State/District/Local Party Committee	\$5,000 per election	\$5,000 per year	Unlimited Transfers		
National Party Committee	\$5,000 per election ³	\$5,000 per year			
<p>* Indexed for inflation in odd-numbered years.</p> <p>1 “PAC” here refers to a committee that makes contributions to other federal political committees. Independent-expenditure-only political committees (sometimes called “super PACs”) may accept unlimited contributions, including from corporations and labor organizations.</p> <p>2 The limits in this column apply to a national party committee’s accounts for: (i) the presidential nominating convention; (ii) election recounts and contests and other legal proceedings; and (iii) national party headquarters buildings. A party’s national committee, Senate campaign committee and House campaign committee are each considered separate national party committees with separate limits. Only a national party committee, not the parties’ national congressional campaign committees, may have an account for the presidential nominating convention.</p> <p>3 Additionally, a national party committee and its Senatorial campaign committee may contribute up to \$46,800 combined per campaign to each Senate candidate.</p> <p>Source: Federal Election Commission. “Contribution Limits for 2015–2016 Federal Elections.” June 25, 2015.</p>					



The [Center for Responsive Politics](#)

reports donation amounts that are required by law to be disclosed to the Federal Elections Commission. One finding is that, counter to conventional wisdom, the vast majority of direct campaign contributions come from individual donors, not from PACs and political parties.

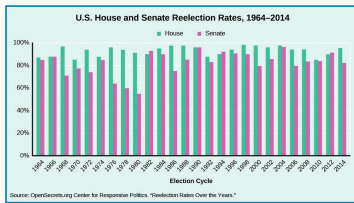
What are the effects of incumbency?

Not surprisingly, the complexities of campaign financing regulations and loopholes is more easily navigated by the ‘experienced’ incumbents in Congress than by newcomers. Incumbents are elected officials who currently hold an office. The amount of money they raise against their challengers demonstrates their advantage. In 2014, for example, the average Senate incumbent raised \$12,144,933, whereas the average inexperienced challenger raised only \$1,223,566.⁹

This is one of the many reasons **incumbents** win a large majority of congressional races each electoral cycle. Incumbents attract more money because people want to give to a winner. In the House, the percentage of incumbents winning reelection has stayed

9. “Incumbent Advantage,” <http://www.opensecrets.org/overview/incumbs.php?cycle=2014> (May 15, 2016).

between 85 and 100 percent for the last half century. The Senate sees slightly more variation given the statewide nature of the race, but it is still a very high majority of incumbents who win reelection. As these rates show, even in the worst political environments incumbents are very difficult to defeat.



The historical difficulty of unseating an incumbent in the House or Senate is often referred to as the *incumbent advantage* or the *incumbency effect*. The financing advantage is a significant part of this

effect, but it is not the only contributor. Incumbents enjoy a much higher level of name recognition. All things being equal, voters are far more likely to select the name they recall seeing on television than the name they hardly know. And donors are more likely to want to give to a proven winner.

The way the party system itself privileges incumbents is even more important. Many congressional districts across the country are “safe seats” in uncompetitive districts, meaning candidates from a particular party are statistically likely to consistently win the seat. Therefore the functional decision in these elections occurs during the primary, not in the general election. Political parties in general prefer to support incumbents because incumbents are considered better candidates, and their record of success supports this conclusion. That said, while the political parties themselves largely control and regulate the primaries, popular individual candidates and challengers sometimes prevail. In recent years as conservative incumbents have been “primaried” by challengers more conservative than they.

Incumbents wield another advantage over their challengers through the state power they have at their

disposal.¹⁰ Sitting congresspersons are responsible for *constituent casework*. Constituents routinely reach out to their congressperson for powerful support to solve complex problems, such as applying for and tracking federal benefits or resolving immigration and citizenship challenges.¹¹

Incumbent members of Congress have paid staff, influence, and access to specialized information that can help their constituents in ways other persons cannot. And congresspersons are not shy about their constituent support. Often, they publicize their casework on their websites or create television advertisements that boast of their helpfulness. Election history demonstrates that this publicity is very effective in garnering voter support.

Local and National Elections

The concept of **collective representation** describes the relationship between Congress and the United States as a whole. That is, it considers whether the institution itself represents the American people, not just whether a particular member of Congress represents his or her district. Predictably, it is far more difficult for Congress to maintain a level of collective representation than it is for individual members of Congress to represent their own

10. David R. Mayhew. 1974. *Congress: The Electoral Connection*. New Haven, CT: Yale University Press.
11. R. Eric Petersen, "Casework in a Congressional Office: Background, Rules, Laws, and Resources," 24 November 2014, <https://www.fas.org/sgp/crs/misc/RL33209.pdf> (May 1, 2016).

constituents. Not only is Congress a mixture of different ideologies, interests, and party affiliations, but the collective constituency of the United States is even more diverse. However, matching the diversity of opinions and interests in the United States with those in Congress would not necessarily work. Indeed, such an attempt could hinder Congress' collective representation. Its rules and procedures require Congress to employ flexibility, bargaining, and concessions. Yet it is this flexibility and concessions, often interpreted as corruption, that drive the high public disapproval ratings of Congress.

The importance of publicizing constituent casework during campaigns supports the popular saying, "All politics is local." This phrase, attributed to former Speaker of the House Tip O'Neill (D-MA), asserts that the most important motivations directing voters are rooted in local concerns. In general, this is true. People naturally feel more driven by the things that affect them daily. Examples are the quality of the roads, availability of good jobs, and cost and quality of public education. Good senators and representatives understand this and seek to influence these issues for their constituents. This is an age-old strategy for success in office and elections.

Political scientists have taken note of some voting patterns that may challenge this common assumption, however. In 1960, political scientist Angus Campbell proposed the **surge-and-decline theory** to explain these patterns.¹²

Campbell noticed that since the Civil War, with the exception of 1934, the president's party has consistently lost seats in Congress during the midterm elections. He proposed that the reason was a surge in political stimulation during presidential elections, which

12. Angus Campbell. 1960. "Surge and Decline: A Study of Electoral Change." *The Public Opinion Quarterly* 24, No. 3: 397–418.

contributes to greater turnout and brings in voters who ordinarily abstain. These voters, Campbell argued, tend to favor the party holding the presidency. In contrast, midterm elections witness the opposite effect. They are less stimulating and have lower turnout because less-active voters stay home. Campbell asserts this shift helps the party not currently occupying the presidency.

In the decades since Campbell's influential theory was published, a number of studies have challenged his conclusions. Nevertheless, the pattern of midterm elections benefiting the president's opposition has persisted.¹³ Only in exceptional years has this pattern been broken: first in 1998 during President Bill Clinton's second term and the Monica Lewinsky scandal, when exit polls indicated most voters opposed the idea of impeaching the president, and then again in 2002, following the 9/11 terrorist attacks and the ensuing declaration of a "war on terror."

The evidence does suggest that national concerns, rather than local ones, can function as powerful motivators at the polls. Consider, for example, the role of the Iraq War in bringing about a Democratic rout of the Republicans in the House in 2006 and in the Senate in 2008. Unlike previous wars in Europe and Vietnam, the war in Iraq was fought by a very small percentage of the population.¹⁴ The vast majority of citizens were not soldiers, few

13. "Midterm congressional elections explained: Why the president's party typically loses," 1 October 2014, <http://journalistsresource.org/studies/politics/elections/voting-patterns-midterm-congressional-elections-why-presidents-party-typically-loses> (May 1, 2016).
14. "A Profile of the Modern Military," 5 October 2011, <http://www.pewsocialtrends.org/2011/10/05/>

had relatives fighting in the war, and most did not know anyone who directly suffered from the prolonged conflict. Voters in large numbers were motivated by the political and economic disaster of the war to vote for politicians they believed would end it.

Congressional elections may be increasingly driven by national issues. Just two decades ago, straight-ticket, party-line voting was still rare across most of the country.¹⁵ In much of the South, which began to vote overwhelmingly Republican in presidential elections during the 1960s and 1970s, Democrats were still commonly elected to the House and Senate. The candidates



Wars typically have the power to nationalize local elections. What makes the Iraq War different is that the overwhelming majority of voters had little to no intimate connection with the conflict and were motivated to vote for those who would end it.
(credit: "Lipton sale"/Wikimedia Commons)

[chapter-6-a-profile-of-the-modern-military/](#) (May 1, 2016).

15. Dhruvil Mehta and Harry Enten, "The 2014 Senate Elections Were the Most Nationalized In Decades," 2 December 2014, <http://fivethirtyeight.com/datalab/the-2014-senate-elections-were-the-most-nationalized-in-decades/> (May 1, 2016); Gregory Giroux, "Straight-Ticket Voting Rises As Parties Polarize," Bloomberg, 29 November 2014, <http://www.bloomberg.com/politics/articles/2014-11-29/straightticket-voting-rises-as-parties-polarize> (May 1, 2016).

themselves and the important local issues, apart from party affiliation, were important drivers in congressional elections. This began to change in the 1980s and 1990s, as Democratic representatives across the region declined. The South is not alone; areas in the Northeast and the Northwest have grown increasingly Democratic. Indeed, the 2014 midterm election was the most nationalized election in many decades. Voters who favor a particular party in a presidential election are now much more likely to also support that same party in House and Senate elections than was the case just a few decades ago.

Questions to Consider

1. What does Campbell's surge-and-decline theory suggest about the outcome of midterm elections?
2. Explain the factors that make it difficult to replace incumbents.

Terms to Remember

collective representation—describes the relationship between Congress and the United States as a whole; whether the institution itself represents the American people, not just whether a particular member of Congress represents his or her district.

incumbents—current office holder

surge-and-decline theory—a theory proposing that the

surge of stimulation occurring during presidential elections subsides during midterm elections, accounting for the differences we observe in turnouts and results

35. Congress: What does legislative procedure look like?

Learning Objectives

- Explain the steps in the classic bill-becomes-law diagram
- Describe the modern legislative processes that alter the classic process in some way

A dry description of the function of congressional leadership and the many committees and subcommittees in Congress may suggest that the drafting and amending of legislation is a finely tuned process refined over time. In reality, however, committees are more likely to kill legislation than to pass it. The last few decades have seen a dramatic transformation in the way Congress does business. Creative interpretations of rules and statutes have turned small loopholes into the large gateways through which much congressional work now gets done.

The Classic Legislative Process

The traditional process by which a bill becomes a law is called the *classic legislative process*. First, legislation must be drafted.

Theoretically, anyone can do this. Successful legislation is often drafted by entities outside of Congress, such as think tank or advocacy groups, or the president. However, Congress is not obligated to read or introduce this legislation, and only a bill *introduced* or sponsored by a member of Congress can hope to become law. Even the president must rely on legislators to introduce his or her legislative agenda.

Technically, bills that raise revenue, like tax bills, must begin in the House. This exception is encoded within the Constitution in Article I, Section 7, which states, “All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.” Yet, despite the seemingly clear language of the Constitution, Congress has found ways to bypass this rule.

Once legislation has been proposed the majority leadership consults with the parliamentarian about which committee to send it to. Each chamber has a *parliamentarian* (advisor, typically a trained lawyer), an expert on the complex chamber rules. While Congress typically follows their advice it is not obligated, and the parliamentarian has no power to enforce their rules interpretation. Once a committee has been selected, the committee chair is empowered to move the bill through the committee process as they see fit. The chair can refer the bill to one of the committee’s subcommittees.

Whether at the full committee level or in one of the subcommittees, the next step is to hold a hearing on the bill. If the chair declines a hearing, this amounts to killing the bill in committee. The hearing provides an opportunity for the committee to hear and evaluate expert opinions on the bill. Experts may include officials from the agency that would be responsible for executing the bill, the bill’s sponsors from Congress, and industry lobbyists, interest groups, and academic or business experts. Typically, the committee will also accept written statements from the public concerning the bill in question. For many bills, the hearing process can be very routine and straightforward.

Next the bill enters the **markup** stage. This is an amending and voting process. In the end, with or without amendments, the committee or subcommittee will vote. If the committee decides not to advance the bill at that time it is tabled. *Tabling a bill* typically means the bill is dead, but with an option to bring it back up for a vote again. If the committee decides to advance the bill it is printed and goes to the chamber, either the House or the Senate. For example, assume that a bill goes first to the House (although the reverse could be true, and, in fact, bills can move simultaneously through both chambers). Before it reaches the House floor, it must first go through the House Committee on Rules. This committee establishes the rules of debate, such as time limits and limits on the number and type of amendments. After these rules have been established, the bill moves through the floor, where it is debated and amendments can be added. Once the limits of debate and amendments have been reached, the House holds a vote. If a simple majority, 50 percent plus 1, votes to advance the bill, it moves out of the House and into the Senate.

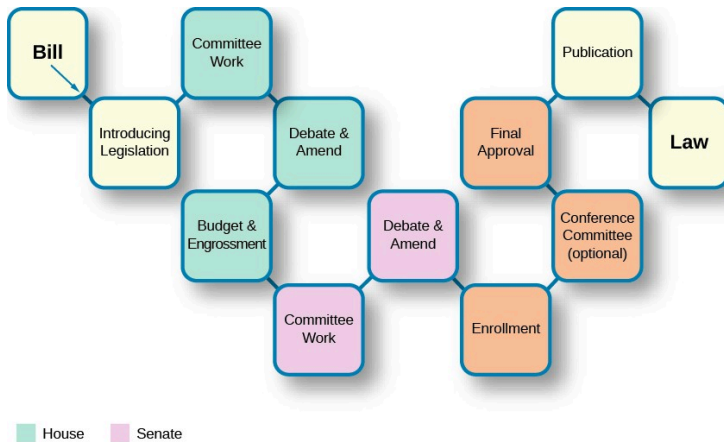
Once in the Senate, the bill is placed on the calendar so it can be debated. More often the Senate will also consider the bill (or a companion version) in its own committees. Since the Senate is much smaller than the House, it can afford to be more flexible in its debate rules. Senators usually allow each other to talk and debate as long as the speaker allows, though they can agree as a body to create time limits. Without limits, debate continues until a motion to table has been offered and voted on.

This flexibility for speaking in the Senate gave rise to a unique tactic, the **filibuster**. The word “filibuster” comes from the Dutch word *vrijbuitter*, which means pirate. The name is appropriate, since a senator who launches a filibuster virtually hijacks the floor of the chamber by speaking for long periods of time, preventing the Senate from closing debate and acting on a bill. The tactic was perfected in the 1850s as Congress wrestled with the complicated issue of slavery. After the Civil War, the use of the filibuster became even more common. Eventually, in 1917, the Senate passed Rule 22, which

allowed the chamber to hold a **cloture** vote to end debate. To invoke cloture, the Senate required a two-thirds majority.

The Senate further weakened the filibuster by reducing the number needed for cloture from two-thirds to three-fifths, or sixty votes, where it remains today (except for judicial nominations for which only fifty-five votes are needed to invoke cloture). Moreover, filibusters are not permitted on the annual budget reconciliation act (the Reconciliation Act of 2010 was a change to ensure passage of healthcare legislation).

Because both the House and the Senate can and often do amend bills, the bills that pass out of each chamber frequently differ. This presents a problem since the Constitution requires that both chambers pass identical bills. One simple solution is for the first chamber to simply accept the bill that ultimately makes it out of the second chamber. Another solution is for the first chamber to further amend the second chamber's bill and send it back to the second chamber. Congress typically takes one of these two options, but about one in every eight bills cannot be reconciled. These bills must be sent to a conference committee that negotiates a reconciliation both chambers can accept without amendment. Only then can the bill progress to the president's desk for signature or veto. If the president does veto the bill, both chambers must gather a two-thirds vote to override the veto and force the president to sign it. If the two-thirds threshold in each chamber cannot be reached, the bill dies.



The process by which a bill becomes law is long and complicated, but it is designed to ensure that in the end all parties are satisfied with the bill's provisions.



For one look at the classic legislative process, visit [YouTube](#) to view “I’m Just a Bill” from the ABC Schoolhouse Rock! series.

Current Legislative Procedure Is Different

For much of the nation’s history, the process described above was the standard method by which a bill became a law. Over the course of the last three and a half decades, however, changes in rules

and procedure have enabled alternate routes. Collectively, these different routes constitute what some political scientists have described as a new but unorthodox legislative process. According to political scientist Barbara Sinclair, the primary trigger for the shift away from the classic legislative route was the budget reforms of the 1970s. The 1974 Budget and Impoundment Control Act gave Congress a mechanism for making large and all-encompassing budget decisions. In the years that followed, the budget process gradually became the vehicle for creating comprehensive policy changes. One large step in this transformation occurred in 1981 when President Ronald Reagan's administration suggested using the budget to push through his economic reforms.

By attaching the reforms to the budget resolution Congress could force an up or down (yea or nay) vote on the whole package. Such a packaged bill is called an *omnibus bill*.¹ Creating and voting for an **omnibus bill** allows Congress to quickly accomplish policy changes that would have required many votes and political capital over much time. This and successive similar uses of the budget process appealed to many in Congress. During the contentious and ideologically divided 1990s, the budget process became the common problem-solving mechanism in the legislature, thus laying the groundwork for the way legislation works today.

An important characteristic feature of modern legislating is the greatly expanded power and influence of the party leadership over the control of bills. One reason for this change was the heightened partisanship that stretches back to the 1980s and is still with us today. With such high political stakes, the party leadership is reluctant to simply allow the committees to work things out on their own. In the House, the leadership uses special rules to guide bills

1. Glen S. Krutz. 2001. *Hitching a Ride: Omnibus Legislating in the U.S. Congress*. Columbus, OH: Ohio State University Press.

through the legislative process and toward a particular outcome. Uncommon just a few decades ago, these now widely used rules restrict debate and options, and are designed to focus the attention of members to party priorities and agendas.

The practice of multiple referrals, with which entire bills or portions of those bills are referred to more than one committee, greatly weakened the different specialization monopolies committees held primarily in the House but also to an extent in the Senate. With less control over the bills, committees naturally reached out to the leadership for assistance. As a testament to its increasing control, the leadership may sometimes avoid committees altogether, preferring to work things out on the floor. And even when bills move through the committees, the leadership often seeks to adjust the legislation before it reaches the floor.

Another feature of the modern legislative process, exclusively in the Senate, is the application of the modern filibuster. Unlike the traditional filibuster, in which a senator took the floor and held it for as long as possible, the modern filibuster is actually a perversion of the cloture rules adopted to control the filibuster. When partisanship is high, as it has been frequently, the senators can request cloture before any bill can get a vote. This has the effect of increasing the number of votes needed for a bill to advance from a simple majority of fifty-one to a super majority of sixty. The effect is to give the Senate minority great power to obstruct if it is inclined to do so.

ago.

Questions to Consider

1. Briefly explain the difference between the classic model of legislating and the modern process.

2. The framers of the Constitution designed the Senate to filter the output of the sometimes hasty House.
3. Do you think this was a wise idea? Why or why not?
4. Congress has consistently expanded its own power to regulate commerce among and between the states.
5. Should Congress have this power or should the Supreme Court reel it in? Why?
6. What does the trend toward descriptive representation suggest about what constituents value in their legislature?
7. How might Congress overcome the fact that such representation does not always best serve constituents' interests?
8. What factors contributed most to the transformation away from the classic legislative process and toward the new style?

Terms to Remember

cloture—a parliamentary process to end a debate in the Senate, as a measure against the filibuster; invoked when three-fifths of senators vote for the motion

filibuster—a parliamentary maneuver used in the Senate to extend debate on a piece of legislation as long as possible, typically with the intended purpose of obstructing or killing it

mark—the amending and voting process in a congressional committee

omnibus bill—a packaged bill

PART VIII

THE PRESIDENT

36. The President: Who is upholding the law?



On January 20, 2009, crowds of people waited on the National Mall in the cold to see the inauguration of Barack Obama. (credit left: modification of work by Teddy Wade; credit right: modification of work by Cecilio Ricardo)

The presidency is the most visible position in the U.S. government. During the Constitutional Convention of 1787, delegates accepted the need to empower a relatively strong and vigorous chief executive—bound by checks from the other branches as well as the Constitution. Presidents must work with the other branches to be effective.

The President: Questions to Consider

1. What are the powers, opportunities, and limitations of the presidency?
2. How does the chief executive lead in our

contemporary political system?

3. What guides his or her actions, including unilateral actions?
4. If it is most effective to work with others to get things done, how does the president do so?
5. What can get in the way of coordination and compromise between branches?

37. The President: What are the powers, structure and function of the executive branch?

Learning Objectives

- Explain the reason for the design of the executive branch and its plausible alternatives
- Analyze the way presidents have expanded presidential power and why
- Identify the limitations on a president's power
- Explain how incoming and outgoing presidents peacefully transfer power
- Describe how new presidents fill positions in the executive branch
- Discuss how incoming presidents use their early popularity to advance larger policy solutions
- Identify the power presidents have to effect change without congressional cooperation
- Analyze how different circumstances influence the way presidents use unilateral authority
- Explain how presidents persuade others in the political system to support their initiatives

Since its invention at the Constitutional Convention of 1787, the

presidential office has gradually become more powerful, giving the president more leadership options at home and abroad. The chief executive's role has evolved as presidents have confronted challenges in domestic and foreign policy in war and peace, and with the overall rise of the federal government's power.

Why do we need a chief executive?

The *Articles of Confederation* did not provide for an executive branch, although they did use the term “president” to designate the presiding officer of the Confederation Congress, who also handled other administrative duties.¹ The presidency was proposed early in the Constitutional Convention in Philadelphia by Virginia's Edmund Randolph, as part of James Madison's proposal for a federal government, which became known as the Virginia Plan.

Madison offered a rather sketchy outline of the executive branch, leaving unspecified whether what he termed the “national executive” would be an individual or a set of people. He proposed that Congress select the executive, whose powers and authority and even service term length were left largely undefined. He also proposed a “council of revision” consisting of the national executive



(a)



(b)

Alexander Hamilton (a), who had served under General George Washington (b) during the Revolutionary War, argued for a strong executive in Federalist No. 70. Indeed, ten other Federalist Papers discuss the role of the presidency.

1. Articles of Confederation, Article XI, 1781.

and members of the national judiciary, which would review laws passed by the legislature and have the power of veto.²

Early deliberations agreed that the executive would be a single person, elected for a single term of seven years by the legislature, empowered to veto legislation, and subject to impeachment and removal by the legislature. William Paterson proposed an alternate model, typically referred to as the small-state or New Jersey Plan. This plan called for merely amending the *Articles of Confederation* to create an executive branch comprised of a committee elected by a unicameral Congress for a single term. This executive committee would be particularly weak because it could be removed from power at any point if a majority of state governors desired. Far more extreme was Alexander Hamilton's suggestion that the executive power be entrusted to a single individual. This individual would be chosen by electors, would serve for life, and would exercise broad powers including the ability to veto legislation, negotiate treaties, grant pardons in all cases except treason, and serve as commander-in-chief of the armed forces.

2. Jack Rakove and Susan Zlomke. 1987. "James Madison and the Independent Executive," *Presidential Studies Quarterly* 17, No. 2: 293–300.



Washington / painted by T. Hicks N.A. ; engraved by H. Wright Smith.
Summary: Print showing George Washington, full-length portrait, standing, facing slightly left, with Mount Vernon in the left background. Contributor Names:
Smith, Henry Wright, 1828-, engraver; Hicks, Thomas, 1823-1890, artist; "Creating the United States," the Library of Congress, Washington, D.C., 2011-2012; <http://hdl.loc.gov/loc.pnp/pp.print>; Digital Id; pga 03318; [//hdl.loc.gov/loc.pnp/pga.03318](http://hdl.loc.gov/loc.pnp/pga.03318) pga 03319; [//hdl.loc.gov/loc.pnp/pga.03319](http://hdl.loc.gov/loc.pnp/pga.03319); Rights Advisory: No known restrictions on publication.

Consider the Original

Letter From George Washington to Major General Robert
Howe

17 August 1779

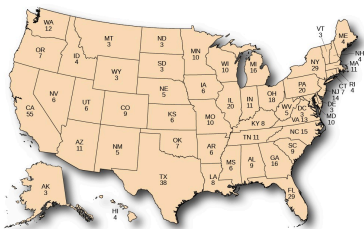
“Few men have virtue to withstand the highest bidder.”

To Major General Robert Howe; National Archives,
[Founders.archives.gov/documents/Washington/
03-22-02-0139](https://founders.archives.gov/documents/Washington/03-22-02-0139)

Debate and discussion continued throughout the summer. Delegates eventually settled upon a single executive but could not decide how to select that person. Pennsylvania’s James Wilson first proposed the direct election of the president. When delegates rejected this, he suggested that electors, chosen throughout the nation, should select the executive. Over time Wilson’s idea gained ground with delegates who were uneasy at the idea of a legislative election and the potential for intrigue and corruption. The idea of a shorter term of service combined with eligibility for reelection also gained support. The framers struggled to find the proper balance between giving the president the necessary power to perform the job versus opening the way for a president to abuse power and act like a monarch on the other.

Soon the **Electoral College** emerged as the way to select a president. This process is discussed more fully in the chapter on elections. Today, the Electoral College consists of a body of 538 people called electors, each representing one of the fifty states or the District of Columbia, who formally cast votes for the election of the president and vice president. In forty-eight states and the District of Columbia, the candidate who wins the popular vote in

November receives all the state's electoral votes. In two states, Nebraska and Maine, the electoral votes are divided: The candidate who wins the popular vote in the state gets two electoral votes, but the winner of each congressional district also receives an electoral vote.



This map shows the distribution by state of delegate votes available in the 2016 national election. The number of Electoral College votes granted to each state equals the total number of representatives and senators that state has in the U.S. Congress or, in the case of Washington, DC, as many electors as it would have if it were a state. The number of representatives may fluctuate based on state population, which is determined every ten years by the U.S. Census.

In the original design implemented for the first four presidential elections (1788–89, 1792, 1796, and 1800), the electors cast two ballots (but only one could go to a candidate from the elector's state), and the person who received a majority won the election. The second-place finisher became vice president. Should no candidate receive a majority of the votes cast, the House of Representatives would select the president, with each state casting a single vote, while the Senate chose

the vice president.

While George Washington was elected president twice with this approach, the design resulted in controversy in several later elections. These controversies resulted in the Twelfth Amendment, which couples a particular presidential candidate with that candidate's running mate in a unified ticket.³

The Twelfth Amendment has worked fairly well since. But this

3. Tadahisa Kuroda. 1994. *The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787-1804*. Westport, CT: Greenwood Publishing.

arrangement has not been foolproof. For example, the amendment created a separate ballot for the vice president but left the rules for electors largely intact. One of those rules states that the two votes the electors cast cannot both be for “an inhabitant of the same state with themselves.”⁴ This rule means that an elector from Louisiana, for example, could not cast votes for a presidential candidate and a vice presidential candidate who were both from Louisiana; that elector could vote for only one of them. The rule meant to encourage electors from powerful states to look for a more diverse pool of candidates. But what would happen in a close election where the members of the winning ticket were both from the same state?

The nation almost found out in 2000. In the presidential election of that year, the Republican ticket won the election by a very narrow electoral margin. To win the presidency or vice presidency, a candidate must get 270 electoral votes (a majority). George W. Bush and Dick Cheney won by the skin of their teeth with just 271. Both, however, were living in Texas. This should have meant that Texas's 32 electoral votes could have gone to only one or the other. Cheney anticipated this problem and had earlier registered to vote in Wyoming, where he was originally from and where he had served as a representative years earlier.⁵ It's hard to imagine that the 2000 presidential election could have been even more complicated than it was, but thanks to that seemingly innocuous rule in **Article II** of the Constitution, that was a real possibility.

Despite provisions for the election of a vice president (to serve in case of the president's death, resignation, or removal through impeachment), and apart from the suggestion that the vice

4. U.S. Constitution, Article II, Section 1.

5. Alan Clendenning, “Court: Cheney Is Wyoming Resident,” ABC News, 7 December 2000, <http://abcnews.go.com/Politics/story?id=122289&page=1> (May 1, 2016).

president should be responsible for presiding over the Senate, the framers left the vice president's role undeveloped. As a result, the influence of the vice presidency has varied dramatically depending on the role the vice president is given by the president.



Read about [James Madison's evolving views](#) of the presidency and the Electoral College.

The delegates also outlined who was eligible for election and how Congress might remove the president. Article II of the *Constitution* delineates the requirements—the chief executive must be at least thirty-five years old and a “natural born” citizen of the United States (or a citizen at the time of the Constitution's adoption) who has been an inhabitant of the United States for at least fourteen years.⁶ While Article II also states that the term of office is four years and does not expressly limit the number of times a person might be elected president, after Franklin D. Roosevelt was elected four times (from 1932 to 1944), the new Twenty-Second Amendment limited the presidency to two four-year terms.

An important means of ensuring that no president could become tyrannical was to build into the *Constitution* a clear process for removing the chief executive—**impeachment**. Impeachment is the act of charging a government official with serious wrongdoing; the *Constitution* calls this wrongdoing high crimes and misdemeanors. The method the framers designed required two steps and both

6. U.S. Constitution, Article II, Section 1.

chambers of the Congress. First, the House of Representatives could impeach the president by a simple majority vote. In the second step, the Senate could remove him or her from office by a two-thirds majority, with the chief justice of the Supreme Court presiding over the trial. Upon conviction and removal of the president, if that occurred, the vice president would become president.

Three presidents have faced impeachment proceedings in the House; none has been both impeached by the House and removed by the Senate. In the wake of the Civil War, President Andrew Johnson faced congressional contempt for decisions made during Reconstruction. President Richard Nixon faced a likely impeachment in the House for his cover-up of key information relating to the 1972 break-in at the Democratic Party's campaign headquarters at the Watergate hotel and apartment complex. Nixon may have also been removed by the Senate, since there was strong bipartisan consensus for his impeachment and removal. Instead, he resigned before the House and Senate could exercise their constitutional prerogatives.

The most recent impeachment was of President Bill Clinton, charged with perjury and obstruction of justice for false testimony as a defendant in a sexual harassment lawsuit. House Republicans felt his affair with intern Monica Lewinsky and initial public denial of it was worthy of impeachment. House Democrats disagreed and called for a simple censure. Clinton's Senate trial acquitted him for lack of the two-thirds support.

Impeachment remains a rare event and removal has never occurred. The fact that a president *can* be impeached and removed is a reminder of the executive role in the broader system of shared powers.

The *Constitution* that emerged from the deliberations in Philadelphia treated the powers of the presidency concisely. The president is commander-in-chief of the armed forces of the United States, negotiate treaties with the advice and consent of the Senate, and receive representatives of foreign nations. Charged to "take care that the laws be faithfully executed," the president was given

broad power to pardon those convicted of federal offenses, except for officials removed through the impeachment process.⁷

The chief executive presents to Congress information about the state of the union; calls Congress into session when needed; vetos legislation if necessary (although a two-thirds supermajority in both houses of Congress can override that veto); makes recommendations for legislation and policy and calls on the department heads to provide reports and offer opinions.

The president also nominates federal judges, including Supreme Court justices, as well as other federal officials, and makes appointments to fill military and diplomatic posts. There are many judicial appointments and nominations of other federal officials. In recent decades two-term presidents have nominated well over three hundred federal judges while in office.⁸ New presidents nominate close to five hundred top officials to their Executive Office of the President, key agencies (such as the Department of Justice), and regulatory commissions (such as the Federal Reserve Board), whose appointments require Senate majority approval.⁹

From George Washington on, presidents began acting to expand

7. U.S. Constitution, Article II, Section 3.

8. “Judgeship Appointments By President,” <http://www.uscourts.gov/judges-judgeships/authorized-judgeships/judgeship-appointments-president> (May 1, 2016).

9. G. Calvin Mackenzie, “The Real Invisible Hand: Presidential Appointees in the Administration of George W. Bush,” <http://www.whitehousetransitionproject.org/wp-content/uploads/2016/03/PresAppt-GWB.pdf> (May 1, 2016).

both formal and informal powers. Washington established a **cabinet** or group of advisors to help him administer his duties, consisting of the most senior appointed officers of the executive branch. Today, the heads of the fifteen executive departments serve as the president's advisers.¹⁰ As the United States sought to take a stand in the evolving European conflicts, In 1793 President Washington issued a neutrality proclamation extending his rights as diplomat-in-chief far more broadly than had at first been conceived.

Actions of the Executive

The president's power to grow agencies like the Secret Service and the Federal Bureau of Investigation matched the growth of the federal bureaucracy. Presidents further developed the concept of **executive privilege** as the right to withhold information from Congress, the judiciary, or the public. This right, not enumerated in the *Constitution*, was first asserted by George Washington to curtail inquiry into executive branch actions.¹¹ The more general defense of its use by White House officials and attorneys ensures that the president can secure candid advice from his advisors and staff members.

Over time presidents have increased use of their unilateral powers, including **executive orders**. Constitutionally, presidents may issue executive orders 1) in order to carry out an enumerated power as commander-in-chief; 2) in order to implement laws with

10. <https://www.justice.gov/> about (May 1, 2016).

11. Mark J. Rozel. 1999. "The Law': Executive Privilege: Definition and Standards of Application," *Presidential Studies Quarterly* 29, No. 4: 918–30.

power specifically delegated by Congress; and 3) in order to carry on the internal business of the executive branch. Executive orders establishing rules binding on states and/or the people are constitutionally problematic. Only Congress has the authority to make laws under the constitutionally assigned separation of powers, . The president's role is to implement the laws. Now presidents offer their own interpretation of legislation via signing statements (discussed later in this chapter) directed to the bureaucratic entity charged with implementation. For foreign policy, Congress permitted the widespread use of **executive agreements** to formalize international relations, so long as important matters still came through the Senate in the form of treaties.¹²

Recent presidents have continued to rely upon a broadening definition of war powers to act unilaterally at home and abroad. Finally, presidents, often with Congress's blessing through the formal delegation of authority, have taken the lead in framing budgets, negotiating budget compromises, and at times impounding funds to advance policy objectives.

The office has grown and developed as the nation has. Whereas most important decisions were once made at the state and local levels, the increasing complexity and size of the domestic economy have led people in the United States to look to the federal government more often for solutions. Concurrently the rising profile of the United States on the international stage elevates the president as the leader of the nation, as diplomat-in-chief, and as commander-in-chief. Finally, with the rise of electronic mass media, a president who once depended on newspapers and official

12. Glen S. Krutz and Jeffrey S. Peake. 2009. *Treaty Politics and the Rise of Executive Agreements: International Commitments in a System of Shared Powers*. Ann Arbor: University of Michigan Press.

documents to distribute information beyond an immediate audience can now bring that message directly to the people via radio, television, and social media.

Presidential Powers

A president's powers can be divided into two categories: direct actions through the formal institutional powers of the office and informal powers of persuasion and negotiation essential to working with the legislative branch. When a president governs alone through direct action, it may break a policy deadlock or establish new grounds for action, but it may also spark opposition that might have been handled differently through negotiation and discussion. Moreover, such decisions are subject to court challenge, legislative reversal, or revocation by a successor president. What may seem to be a sign of strength is often more properly understood as an independent action in the wake of a failure through the legislative process, or an admission that such an effort would prove futile. When it comes to national security, international negotiations, or war, the president has many more opportunities to act directly and in some cases must do so when circumstances require quick and decisive action.

Domestic Policy

The president may not be able to appoint key members of his or her administration without Senate confirmation, but he or she can demand the resignation or removal of cabinet officers, high-ranking appointees (such as ambassadors), and members of the presidential staff. During Reconstruction, Congress tried to curtail the president's removal power with the Tenure of Office Act (1867),

which required Senate concurrence to remove presidential nominees who took office upon Senate confirmation. Andrew Johnson's violation of that legislation led to his 1868 impeachment. Subsequent presidents secured legislative modifications before the Supreme Court ruled in 1926 that the Senate had no right to impair the president's removal power.¹³ In the case of Senate failure to approve presidential nominations, the president is empowered to issue recess appointments (made while the Senate is in recess) that continue in force until the end of the next session of the Senate (unless the Senate confirms the nominee).

The president also exercises the **power of pardon** without conditions. Once used sparingly—apart from Andrew Johnson's wholesale pardons of former Confederates during the Reconstruction period—the pardon power has become more visible in recent decades. President Harry S. Truman issued over two thousand pardons and commutations, more than any other post-World War II president.¹⁴ President Gerald Ford has the unenviable



In 1974, President Ford became the first and still the only president to pardon a previous president (Richard Nixon). Here he is speaking before the House Judiciary Subcommittee on Criminal Justice meeting explaining his reasons. While the pardon was unpopular with many and may have cost Ford the election two years later, his constitutional power to issue it is indisputable. (credit: modification of work by the Library of Congress)

13. *Myers v. United States*, 272 U.S. 52 (1925).

14. "Bush Issues Pardons, but to a Relative Few," *New York Times*, 22 December 2006, <http://www.nytimes.com/2006/12/22/washington/22pardon.html>.

reputation of being the only president to pardon another president (his predecessor Richard Nixon, who resigned after the Watergate scandal). While not as generous as Truman, President Jimmy Carter also issued a great number of pardons, including several for draft dodging during the Vietnam War. President Reagan was reluctant to use the pardon, as was President George H. W. Bush. President Clinton pardoned few people for much of his presidency, but did make several last-minute controversial pardons. To date, Barack Obama has seldom used his power to pardon.¹⁵

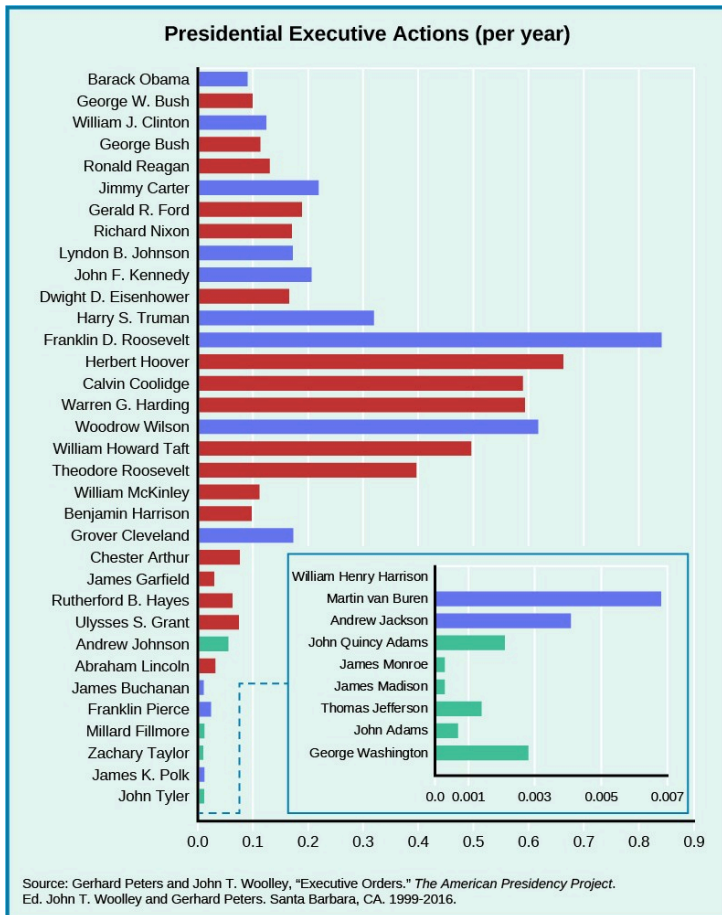
Presidents may choose to issue executive orders or proclamations to achieve policy goals. Executive orders usually direct government agencies to pursue a certain course in the absence of congressional action. The executive memorandum is a more subtle version pioneered by recent presidents but attracts less attention. Many of the most famous executive orders have come in times of war or invoke the president's authority as commander-in-chief, including Franklin Roosevelt's order permitting the internment of Japanese Americans in 1942 and Harry Truman's directive desegregating the armed forces (1948). The most famous presidential proclamation was Abraham Lincoln's Emancipation Proclamation (1863), which declared slaves in areas under Confederate control to be free (with a few exceptions).

Executive orders are subject to court rulings or changes in policy enacted by Congress. During the Korean War, the Supreme Court revoked Truman's order seizing the steel industry.¹⁶ These orders

15. U.S. Department of Justice. "Clemency Statistics." <https://www.justice.gov/pardon/clemency-statistics> (May 1, 2016).

16. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

are also subject to reversal by presidents who succeed them, and recent presidents have wasted little time reversing the orders of their predecessors. Sustained executive orders, which are those not overturned in courts, typically have some prior legitimizing authority from Congress. Without prior authority, an executive order is more likely to be overturned by a later president. Consequently this tool has become less common.



Executive actions were unusual until the late nineteenth century. They became common in the first half of the twentieth century but have been growing less popular for the last few decades because they often get overturned in court if the Congress has not given the president prior delegated authority.

Executive Order 9066

Following the attacks at Pearl Harbor in 1941, many in the United States feared that Japanese Americans on the West Coast might form a fifth column (a hostile group working from the inside) to aid a Japanese invasion. These fears mingled with existing anti-Japanese sentiment across the country and created a paranoia over the West Coast. To calm fears and prevent any real fifth-column actions, President Franklin D. Roosevelt signed Executive Order 9066, authorizing the removal of people from military areas as necessary. When the military dubbed the entire West Coast a military area, it effectively allowed for the removal of more than 110,000 Japanese Americans from their homes. These people, many of them U.S. citizens, were moved to relocation camps in the nation's interior for two and a half years.¹⁷

17. Julie Des Jardins, "From Citizen to Enemy: The Tragedy of Japanese Internment," <http://www.gilderlehrman.org/history-by-era/world-war-ii/essays/from-citizen-enemy-tragedy-japanese-internment> (May 1, 2016).

The overwhelming majority of Japanese Americans felt shamed by the actions of the Japanese empire and willingly went along with the policy to demonstrate their loyalty to the United States. But at least one Japanese American refused. His name was Fred Korematsu, and he went into hiding in California rather than be taken to the internment camps with his family. He was soon discovered, turned over to the military, and sent to the internment camp in Utah that held his family. But his challenge to the internment system and the president's executive order continued.

In 1944, Korematsu's case was heard by the Supreme Court. In a 6–3 decision, the Court ruled against him, arguing that the administration had the constitutional power to sign the order because of the need to protect U.S. interests against the threat of espionage.¹⁸ Forty-four years after this decision, President Reagan issued an official apology for the internment and provided



This sign appeared outside a store in Oakland, California, owned by a Japanese American after the bombing of Pearl Harbor in 1941. After the president's executive order, the store was closed and the owner evacuated to an internment camp for the duration of the war. (credit: the Library of Congress)

18. *Korematsu v. United States*, 323 U.S. 214 (1944).

some compensation to the survivors. In 2011, the Justice Department went a step further by filing a notice officially recognizing that the solicitor general of the United States acted in error by arguing to uphold the executive order. (The solicitor general is the official who argues cases for the U.S. government before the Supreme Court.)¹⁹

What do the Korematsu case and the internment of over 100,000 Japanese Americans suggest about the extent of the president's war powers? What does this episode in U.S. history suggest about the weaknesses of constitutional checks on executive power during times of war?

19. Ilya Somin, "Justice Scalia on Kelo and Korematsu," *Washington Post*, 8 February 2014, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/08/justice-scalia-on-ke-lo-and-korematsu/>.



To learn more about the relocation and confinement of Japanese Americans during World War II, visit [Heart Mountain](#) online.

Presidents have also used the line-item veto and signing statements to alter or influence the application of the laws they sign. A **line-item veto** keeps the majority of a spending bill unaltered but nullifies specific lines of spending within it. While some states allow their governors the line-item veto, the president acquired this power only in 1996 after Congress passed a law permitting it. President Clinton used the tool sparingly. However, those entities losing the federal funding he lined out brought suit. They included the City of New York and the Snake River Potato Growers in Idaho.²⁰ The Supreme Court heard their claims together and just sixteen months later declared the line-item veto unconstitutional.²¹ Subsequent presidents have asked Congress to draft a constitutional line-item veto law although none have succeeded.

On the other hand, **signing statements** are issued by a president when agreeing to legislation indicating how the chief executive will

20. Glen S. Krutz. 2001. *Hitching a Ride: Omnibus Legislating in the U.S. Congress*. Columbus, OH: Ohio State University Press.

21. *Clinton v. City of New York*, 524 U.S. 417 (1998).

interpret and enforce that legislation. Signing statements are less powerful than vetoes, though congressional opponents have complained that they derail legislative intent. Signing statements have been used by presidents since at least James Monroe, but became far more common in recent years.

National Security, Foreign Policy, and War

Presidents are more likely to justify the use of executive orders in cases of national security or as part of their war powers. In addition to mandating emancipation and the internment of Japanese Americans, presidents have issued orders to protect the homeland from internal threats. Most notably, Lincoln ordered the suspension of the privilege of the writ of habeas corpus in 1861 and 1862 before seeking congressional legislation to undertake such an act. Presidents hire and fire military commanders; they also use their power as commander-in-chief to aggressively deploy U.S. military force. Congress rarely has taken the lead over the course of history, with the War of 1812 being the lone exception. Pearl Harbor was a salient case where Congress did make a clear and formal declaration when asked by FDR. However, since World War II, it has been the president and not Congress who has taken the lead in engaging the United States in military action outside the nation's boundaries, most notably in Korea, Vietnam, and the Persian Gulf.



By landing on an aircraft carrier and wearing a flight suit to announce the end of major combat operations in Iraq in 2003, President George W. Bush was carefully emphasizing his presidential power as commander-in-chief. (credit: Tyler J. Clements)

Presidents also issue executive agreements with foreign powers. Executive agreements are formal agreements negotiated between two countries but not ratified by a legislature as a treaty must be. As such, they are not treaties under U.S. law, which require two-thirds of the Senate for ratification. Treaties, presidents have found, are particularly difficult to get ratified. And with the fast pace and complex demands of modern foreign policy, concluding treaties with countries can be a tiresome and burdensome chore. That said, some executive agreements do require some legislative approval, such as those that commit the United States to make payments and thus are restrained by the congressional power of the purse. But for the most part, executive agreements signed by the president require no congressional action and are considered enforceable as long as the provisions of the executive agreement do not conflict with current domestic law.



The [American Presidency Project](#) has gathered data outlining presidential activity, including measures for executive orders and signing statements.

The Power of Persuasion

The framers of the *Constitution*, concerned about the excesses of British monarchical power, made sure to design the presidency within a network of checks and balances controlled by the other branches of the federal government. Such checks and balances encourage consultation, cooperation, and compromise in policymaking. This is most evident at home, where the *Constitution* makes it difficult for either Congress or the chief executive to prevail unilaterally, at least when it comes to constructing policy. Although much is made of political stalemate and obstructionism in national political deliberations today, the framers did not want to make it too easy to get things done without a great deal of support for such initiatives.

It is left to the president to employ a strategy of negotiation, persuasion, and compromise in order to secure policy achievements in cooperation with Congress. In 1960, political scientist Richard Neustadt put forward the thesis that presidential power is the power to persuade, a process that takes many forms and is

expressed in various ways.²² Yet the successful employment of this technique can lead to significant and durable successes. For example, legislative achievements tend to be of greater duration because they are more difficult to overturn or replace, as the case of health care reform under President Barack Obama suggests. Obamacare has faced court cases and repeated (if largely symbolic) attempts to gut it in Congress. Overturning it will take a new president who opposes it, together with a Congress that can pass the dissolving legislation.

In some cases, cooperation is essential, as when the president nominates and the Senate confirms persons to fill vacancies on the Supreme Court, an increasingly contentious area of friction between branches. While Congress cannot populate the Court on its own, it can frustrate the president's efforts to do so. Presidents who seek to prevail through persuasion, according to Neustadt, target Congress, members of their own party, the public, the bureaucracy, and, when appropriate, the international community and foreign leaders. Of these audiences, perhaps the most obvious and challenging is Congress.



Read “Power Lessons for Obama” at this [website](#) to learn more about applying Richard Neustadt’s framework to the leaders of today.

22. Richard E. Neustadt. 1960. *Presidential Power and the Modern Presidents* New York: Wiley.

Much depends on the balance of power within Congress: Should the opposition party hold control of both houses, it will be difficult indeed for the president to realize his or her objectives, especially if the opposition is intent on frustrating all initiatives. However, even control of both houses by the president's own party is no guarantee of success or even of productive policymaking. For example, neither Bill Clinton nor Barack Obama achieved all they desired despite having favorable conditions for the first two years of their presidencies. In times of divided government (when one party controls the presidency and the other controls one or both chambers of Congress), it is up to the president to cut deals and make compromises that will attract support from at least some members of the opposition party without excessively alienating members of his or her own party. Both Ronald Reagan and Bill Clinton proved effective in dealing with divided government—indeed, Clinton scored more successes with Republicans in control of Congress than he did with Democrats in charge.

It is more difficult to persuade members of the president's own party or the public to support a president's policy without risking the dangers inherent in going public. There is precious little opportunity for private persuasion while also going public in such instances, at least directly. The way the president and his or her staff handle media coverage of the administration may afford some opportunities for indirect persuasion of these groups. It is not easy to persuade the federal bureaucracy to do the president's bidding unless the chief executive has made careful appointments. When it comes to diplomacy, the president must relay some messages privately while offering incentives, both positive and negative, in order to elicit desired responses, although at times, people heed only the threat of force and coercion.

While presidents may choose to go public in an attempt to put pressure on other groups to cooperate, most of the time they “stay private” as they attempt to make deals and reach agreements out of the public eye. The tools of negotiation have changed over time.

Once chief executives played patronage politics, rewarding friends while attacking and punishing critics as they built coalitions of support. But the advent of civil service reform in the 1880s systematically deprived presidents of that option and reduced its scope and effectiveness. Although the president may call upon various agencies for assistance in lobbying for proposals, such as the Office of Legislative Liaison with Congress, it is often left to the chief executive to offer incentives and rewards. Some of these are symbolic, like private meetings in the White House or an appearance on the campaign trail. The president must also find common ground and make compromises acceptable to all parties, thus enabling everyone to claim they secured something they wanted.

Complicating Neustadt's model, however, is that many of the ways he claimed presidents could shape favorable outcomes require going public, which as we have seen can produce mixed results. Political scientist Fred Greenstein, on the other hand, touted the advantages of a "hidden hand presidency," in which the chief executive did most of the work behind the scenes, wielding both the carrot and the stick.²³ Greenstein singled out President Dwight Eisenhower as particularly skillful in such endeavors.

Opportunity and Legacy

What often shapes a president's performance, reputation, and ultimately legacy depends on circumstances that are largely out of his or her control. Did the president prevail in a landslide or was it a closely contested election? Did he or she come to office as the

23. Fred I. Greenstein. 1982. *The Hidden-Hand Presidency: Eisenhower as Leader*. New York: Basic Books.

result of death, assassination, or resignation? How much support does the president's party enjoy, and is that support reflected in the composition of both houses of Congress, just one, or neither? Will the president face a Congress ready to embrace proposals or poised to oppose them? Whatever a president's ambitions, it will be hard to realize them in the face of a hostile or divided Congress, and the options to exercise independent leadership are greater in times of crisis and war than when looking at domestic concerns alone.

Then there is what political scientist Stephen Skowronek calls "political time."²⁴ Some presidents take office at times of great stability with few concerns. Unless there are radical or unexpected changes, a president's options are limited, especially if voters hoped for a simple continuation of what had come before. Other presidents take office at a time of crisis or when the electorate is looking for significant changes. Then there is both pressure and opportunity for responding to those challenges. Some presidents, notably Theodore Roosevelt, openly bemoaned the lack of any such crisis, which Roosevelt deemed essential for him to achieve greatness as a president.

People in the United States claim they want a strong president. What does that mean? At times, scholars point to presidential independence, even defiance, as evidence of strong leadership. Thus, vigorous use of the veto power in key situations can cause observers to judge a president as strong and independent, although far from effective in shaping constructive policies. Nor is such defiance and confrontation always evidence of presidential leadership skill or greatness, as the case of Andrew Johnson should remind us. When is effectiveness a sign of strength, and when are we confusing being headstrong with being strong? Sometimes,

24. Stephen Skowronek. 2011. *Presidential Leadership in Political Time: Reprise and Reappraisal*. Lawrence, KS: University Press of Kansas.

historians and political scientists see cooperation with Congress as evidence of weakness, as in the case of Ulysses S. Grant, who was far more effective in garnering support for administration initiatives than scholars have given him credit for.

These questions overlap with those concerning political time and circumstance. While domestic policymaking requires far more give-and-take and a fair share of cajoling and collaboration, national emergencies and war offer presidents far more opportunity to act vigorously and at times independently. This phenomenon often produces the rally around the flag effect, in which presidential popularity spikes during international crises. A president must always be aware that politics, according to Otto von Bismarck, is the art of the possible, even as it is his or her duty to increase what might be possible by persuading both members of Congress and the general public of what needs to be done.

Finally, presidents often leave a legacy that lasts far beyond their time in office. Sometimes, this is due to the long-term implications of policy decisions. Critical to the notion of legacy is the shaping of the Supreme Court as well as other federal judges. Long after John Adams left the White House in 1801, his appointment of John Marshall as chief justice shaped American jurisprudence for over three decades. No wonder confirmation hearings have grown more contentious in the cases of highly visible nominees. Other legacies are more difficult to define, although they suggest that, at times, presidents cast a long shadow over their successors. It was a tough act to follow George Washington, and in death, Abraham Lincoln's presidential stature grew to extreme heights. Theodore and Franklin D. Roosevelt offered models of vigorous executive leadership, while the image and style of John F. Kennedy and Ronald Reagan influenced and at times haunted or frustrated successors. Nor is this impact limited to chief executives deemed successful: Lyndon Johnson's Vietnam and Richard Nixon's Watergate offered cautionary tales of presidential power gone wrong, leaving behind legacies that include terms like *Vietnam syndrome* and the tendency to add the suffix “-gate” to scandals and controversies.



(a)



(b)

The youth and glamour that John F. Kennedy and first lady Jacqueline brought to the White House in the early 1960s (a) helped give rise to the legend of “one brief shining moment that was Camelot” after Kennedy’s presidency was cut short by his assassination on November 22, 1963. Despite a tainted legacy, President Richard Nixon gives his trademark “V for Victory” sign as he leaves the White House on August 9, 1974 (b), after resigning in the wake of the Watergate scandal.

The Executive Branch: Structure and Function

It is one thing to win an election; it is quite another to govern, as many frustrated presidents have discovered. Critical to a president’s success in office is the ability to make a deft transition from the previous administration,

including naming a cabinet and filling other offices. The new chief executive must also fashion an agenda, which he or she will often preview in general terms in an inaugural address. Presidents usually embark upon their presidency benefitting from their own and the nation’s renewed hope and optimism, although often unrealistic expectations set the stage for subsequent disappointment.

Transition and Appointments

In the immediate aftermath of the election, the incoming and outgoing administrations work together to help facilitate the transfer of power. While the General Services Administration oversees the logistics of the process, such as office assignments, information technology, and the assignment of keys, prudent candidates typically prepare for a possible victory by appointing members of a transition team during the lead-up to the general election. The success of the team’s actions becomes apparent on

inauguration day, when the transition of power takes place in what is often a seamless fashion, with people evacuating their offices (and the White House) for their successors.

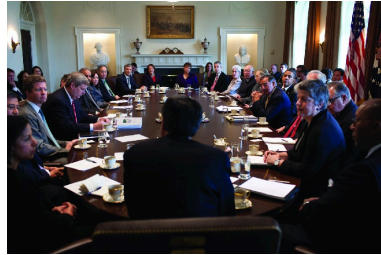


Read about [presidential transitions](#) as well as explore other topics related to the transfer of power at the White House Transition Project website.

Among the president-elect's more important tasks is the selection of a cabinet. George Washington's cabinet was made up of only four people, the attorney general and the secretaries of the Departments of War, State, and the Treasury. Currently, however, there are fifteen members of the cabinet, including the Secretaries of Labor, Agriculture, Education, and others. The most important members—the heads of the Departments of Defense, Justice, State, and the Treasury (echoing Washington's original cabinet)—receive the most attention from the president, the Congress, and the media. These four departments have been referred to as the inner cabinet, while the others are called the outer cabinet. When selecting a cabinet, presidents consider ability, expertise, influence, and reputation. More recently, presidents have also tried to balance political and demographic representation (gender, race, religion, and other considerations) to produce a cabinet that is capable as well as descriptively representative, meaning that those in the cabinet look like the U.S. population (see the chapter on bureaucracy and the term “representative bureaucracy”). A recent president who explicitly stated this as his goal was Bill Clinton, who talked about an “E.G.G. strategy” for senior-level appointments,

where the E stands for ethnicity, G for gender, and the second G for geography.

Once the new president has been inaugurated and can officially nominate people to fill cabinet positions, the Senate confirms or rejects these nominations. At times, though rarely, cabinet nominations have failed to be confirmed or have even been withdrawn because of questions raised about the past behavior of the nominee.²⁵



The Cabinet Room, shown here during a cabinet meeting on January 31, 2012, adjoins the Oval Office in the West Wing of the White House.

Prominent examples of such withdrawals were Senator John Tower for defense secretary (George H. W. Bush) and Zoe Baird for attorney general (Bill Clinton): Senator Tower's indiscretions involving alcohol and womanizing led to concerns about his fitness to head the military and his rejection by the Senate,²⁶ whereas Zoe Baird faced controversy and withdrew her nomination when it was revealed, through what the press dubbed "Nannygate," that house

25. Glen S. Krutz, Richard Fleisher, and Jon R. Bond. 1998. "From Abe Fortas to Zoe Baird." *American Political Science Review* 92, No. 4: 871–882.
26. Michael Oreskes. 1989. "Senate Rejects Tower, 53–47; First Cabinet Veto since '59; Bush Confers on New Choice," *New York Times*, 10 March 1989, <http://www.nytimes.com/1989/03/10/us/senate-rejects-tower-53-47-first-cabinet-veto-since-59-bush-confers-new-choice.html>.

staff of hers were undocumented workers. However, these cases are rare exceptions to the rule, which is to give approval to the nominees that the president wishes to have in the cabinet. Other possible candidates for cabinet posts may decline to be considered for a number of reasons, from the reduction in pay that can accompany entrance into public life to unwillingness to be subjected to the vetting process that accompanies a nomination.

Also subject to Senate approval are a number of non-cabinet subordinate administrators in the various departments of the executive branch, as well as the administrative heads of several agencies and commissions. These include the heads of the Internal Revenue Service, the Central Intelligence Agency, the Office of Management and Budget, the Federal Reserve, the Social Security Administration, the Environmental Protection Agency, the National Labor Relations Board, and the Equal Employment Opportunity Commission. **The Office of Management and Budget (OMB)** is the president's own budget department. In addition to preparing the executive budget proposal and overseeing budgetary implementation during the federal fiscal year, the OMB oversees the actions of the executive bureaucracy.

Not all the non-cabinet positions are open at the beginning of an administration, but presidents move quickly to install their preferred choices in most roles when given the opportunity. Finally, new presidents usually take the opportunity to nominate new ambassadors, whose appointments are subject to Senate confirmation. New presidents make thousands of new appointments in their first two years in office. All the senior cabinet agency positions and nominees for all positions in the Executive Office of the President are made as presidents enter office or when positions become vacant during their presidency. Federal judges serve for life. Therefore, vacancies for the federal courts and the U.S. Supreme Court occur gradually as judges retire.

Throughout much of the history of the republic, the Senate has closely guarded its constitutional duty to consent to the president's nominees, although in the end it nearly always confirms them. Still,

the Senate does occasionally hold up a nominee. Benjamin Fishbourn, President George Washington's nomination for a minor naval post, was rejected largely because he had insulted a particular senator.²⁷

Other presidential selections are not subject to Senate approval, including the president's personal staff (whose most important member is the White House chief of staff) and various advisers (most notably the national security adviser). The **Executive Office of the President**, created by Franklin D. Roosevelt (FDR), contains a number of advisory bodies, including the Council of Economic Advisers, the National Security Council, the OMB, and the Office of the Vice President. Presidents also choose political advisers, speechwriters, and a press secretary to manage the politics and the message of the administration. In recent years, the president's staff has become identified by the name of the place where many of its members work: the West Wing of the White House. These people serve at the pleasure of the president, and often the president reshuffles or reforms his staff during his term. Just as government bureaucracy has expanded over the centuries, so has the White House staff, which under Abraham Lincoln numbered a handful of private secretaries and a few minor functionaries. A recent report pegged the number of employees working within the White House over 450.²⁸ When the staff in nearby executive buildings of the

27. Mark J. Rozell, William D. Pederson, Frank J. Williams. 2000. *George Washington and the Origins of the American Presidency*. Portsmouth, NH: Greenwood Publishing Group, 17.

28. Jennifer Liberto, "It pays to work for the White House," CNN Money, 2 July 2014, <http://money.cnn.com/2014/>

Executive Office of the President are added in, that number increases four-fold.

No Fun at Recess: Dueling Loopholes and the Limits of Presidential Appointments

When Supreme Court justice Antonin Scalia died unexpectedly in early 2016, many in Washington braced for a political sandstorm of obstruction and accusations. Such was the record of Supreme Court nominations during the Obama administration and, indeed, for the last few decades. Nor is this phenomenon restricted to nominations for the highest court in the land. The Senate has been known to occasionally block or slow appointments not because the quality of the nominee was in question but rather as a general protest against the policies of the president and/or as part of the increasing partisan bickering that occurs when the presidency is controlled by one political party and the Senate by the other. This occurred, for example, when the Senate initially refused to nominate anyone to head the Consumer Financial Protection Bureau, established

07/02/news/economy/white-house-salaries/ (May 1, 2016).

in 2011, because Republicans disliked the existence of the bureau itself.

Such political holdups, however, tend to be the exception rather than the rule. For example, historically, nominees to the presidential cabinet are rarely rejected. And each Congress oversees the approval of around four thousand civilian and sixty-five thousand military appointments from the executive branch.

Gary P. Gershman. 2008. *The Legislative Branch of Federal Government: People, Process, and Politics*. Santa Barbara, CA: ABC-CLIO.

The overwhelming majority of these are confirmed in a routine and systematic fashion, and only rarely do holdups occur. But when they do, the Constitution allows for a small presidential loophole called the recess appointment. The relevant part of Article II, Section 2, of the Constitution reads:

“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”

The purpose of the provision was to give the president the power to temporarily fill vacancies during times when the Senate was not in session and could not act. But presidents have typically used this loophole to get around a Senate that is inclined to either obstruct or be cautious. Presidents Bill Clinton and George W. Bush made 139 and 171 recess appointments, respectively. President Obama has made far fewer recess

appointments; as of May 1, 2015, he had made only thirty-two.²⁹ One reason this number is so low is another loophole the Senate began using at the end of George W. Bush's presidency, the pro forma session.

A pro forma session is a short meeting held with the understanding that no work will be done. These sessions have the effect of keeping the Senate officially in session while functionally in recess. In 2012, President Obama decided to ignore the pro forma session and make four recess appointments anyway. The Republicans in the Senate were furious and contested the appointments. Eventually, the Supreme Court had the final say in a 2014 decision that declared unequivocally that "the Senate is in session when it says it is."³⁰

For now at least, the court's ruling means that the president's loophole and the Senate's loophole cancel each other out. It seems they have found the middle ground whether they like it or not.

29. Bruce Drake, "Obama lags his predecessors in recess appointments," 13 January 2014, <http://www.pewresearch.org/fact-tank/2014/01/13/obama-lags-his-predecessors-in-recess-appointments/> (May 1, 2016).

30. *National Labor Relations Board v. Canning*, 573 U.S. ____ (2014).

What might have been the legitimate original purpose of the recess appointment loophole? Do you believe the Senate is unfairly obstructing by effectively ending recesses altogether so as to prevent the president from making appointments without its approval? Are you aware that both parties resort to such tactics when in power and complain when they are in the minority?

The most visible, though arguably the least powerful, member of a president's cabinet is the vice president. Throughout most of the nineteenth and into the twentieth century, the vast majority of vice presidents took very little action in the office unless fate intervened. Few presidents consulted with their running mates. Indeed, until the twentieth century, many presidents had little to do with the naming of their running mate at the nominating convention. The office was seen as a form of political exile, and that motivated Republicans to name Theodore Roosevelt as William McKinley's running mate in 1900. The strategy was to get the ambitious politician out of the way while still taking advantage of his popularity. This scheme backfired, however, when McKinley was assassinated and Roosevelt became president.



(a)



(b)

In September 1901, President William McKinley's assassination, shown here in a sketch by T. Dart Walker (a), made forty-two-year-old vice president Theodore Roosevelt (b) the youngest person to ever assume the office of U.S. president.

Vice presidents were often sent on minor missions or used as mouthpieces for the administration, often with a sharp edge. Richard Nixon's vice president Spiro Agnew is an example. But in the 1970s, starting with Jimmy Carter, presidents made a far more conscious effort to make their vice presidents part of the governing team, placing them

in charge of increasingly important issues. Sometimes, as in the case of Bill Clinton and Al Gore, the partnership appeared to be smooth if not always harmonious. In the case of George W. Bush and his very experienced vice president Dick Cheney, observers speculated whether the vice president might have exercised too much influence. Barack Obama's choice for a running mate and subsequent two-term vice president, former Senator Joseph Biden, was picked for his experience, especially in foreign policy. President Obama relied on Vice President Biden for advice throughout his tenure. In any case, the vice presidency is no longer quite as weak as it once was, and a capable vice president can do much to augment the president's capacity to govern across issues if the president so desires.³¹

31. Amy C. Gaudion and Douglas Stuart, "More Than Just a Running Mate," *The New York Times*, 19 July 2012, <http://campaignstops.blogs.nytimes.com/2012/07/19/more-than-just-a-running-mate/>.

Forging an Agenda

Having secured election, the incoming president must soon decide how to deliver upon what was promised during the campaign. The chief executive must set priorities, chose what to emphasize, and formulate strategies to get the job done. He or she labors under the shadow of a measure of presidential effectiveness known as the first hundred days in office, a concept popularized during Franklin Roosevelt's first term in the 1930s. While one hundred days is possibly too short a time for any president to boast of any real accomplishments, most presidents do recognize that they must address their major initiatives during their first two years in office. This is the time when the president is most powerful and is given the benefit of the doubt by the public and the media (aptly called the honeymoon period), especially if he or she enters the White House with a politically aligned Congress, as Barack Obama did. However, recent history suggests that even one-party control of Congress and the presidency does not ensure efficient policymaking. This difficulty is due as much to divisions within the governing party as to obstructionist tactics skillfully practiced by the minority party in Congress. Democratic president Jimmy Carter's battles with a Congress controlled by Democratic majorities provide a good case in point.

The incoming president must deal to some extent with the outgoing president's last budget proposal. While some modifications can be made, it is more difficult to pursue new initiatives immediately. Most presidents are well advised to prioritize what they want to achieve during the first year in office and not lose control of their agenda. At times, however, unanticipated events can determine policy, as happened in 2001 when nineteen hijackers perpetrated the worst terrorist attack in U.S. history and transformed U.S. foreign and domestic policy in dramatic ways.

Moreover, a president must be sensitive to what some scholars

have termed “political time,” meaning the circumstances under which he or she assumes power. Sometimes, the nation is prepared for drastic proposals to solve deep and pressing problems that cry out for immediate solutions, as was the case following the 1932 election of FDR at the height of the Great Depression. Most times, however, the country is far less inclined to accept revolutionary change. Being an effective president means recognizing the difference.³²

The first act undertaken by the new president—the delivery of an **inaugural address**—can do much to set the tone for what is intended to follow. While such an address may be an exercise in rhetorical inspiration, it also allows the president to set forth priorities within the overarching vision of what he or she intends to do. Abraham Lincoln used his inaugural addresses to calm rising concerns in the South that he would act to overturn slavery. Unfortunately, this attempt at appeasement fell on deaf ears, and the country descended into civil war. Franklin Roosevelt used his first inaugural address to boldly proclaim that the country need not fear the change that would deliver it from the grip of the Great Depression, and he set to work immediately enlarging the federal government to that end. John F. Kennedy, who entered the White House at the height of the Cold War, made an appeal to talented young people around the country to help him make the world a better place. He followed up with new institutions like the Peace Corps, which sends young citizens around the world to work as secular missionaries for American values like democracy and free enterprise.

32. Stephen Skowronek. 2011. *Presidential Leadership in Political Time: Reprise and Reappraisal*. Lawrence: University Press of Kansas.



Listen to [clips](#) of the most famous inaugural address in presidential history at the *Washington Post* website.

Questions to Consider

1. How did presidents who served in the decades directly after Washington expand the powers of the presidency?
2. What factors contributed to the growth of presidential power in the twentieth century?
3. How do presidents work to fulfill their campaign promises once in office?
4. How have the methods presidents use to negotiate with their party and the opposition changed over time?
5. What strategies can presidents employ to win people over to their way of thinking?
6. What are the opportunities and limitations for presidential leadership in the contemporary political system?
7. How have presidents used their position to increase the power of the office?
8. What role has technology played in increasing the power and reach of presidents?
9. Under what conditions will presidents use direct

action?

10. When might they prefer passing a formal policy through Congress as a bill?
11. What do the conditions under which presidents decide to make public pleas suggest about the limits of presidential power?

Terms to Remember

cabinet—a group of advisors to the president, consisting of the most senior appointed officers of the executive branch who head the fifteen executive departments

executive agreement—an international agreement between the president and another country made by the executive branch and without formal consent by the Senate

Executive Office of the President—the administrative organization that reports directly to the president and made up of important offices, units, and staff of the current president and headed by the White House chief of staff

executive order—a rule or order issued by the president without the cooperation of Congress and having the force of law

executive privilege—the president's right to withhold information from Congress, the judiciary, or the public

impeachment—the act of charging a government official

with serious wrongdoing, which in some cases may lead to the removal of that official from office

line-item veto—a power created through law in 1996 and overturned by the Supreme Court in 1998 that allowed the president to veto specific aspects of bills passed by Congress while signing into law what remained

Office of Management and Budget (OMB)—an office within the Executive Office of the President charged with producing the president's budget, overseeing its implementation, and overseeing the executive bureaucracy

rally around the flag effect—a spike in presidential popularity during international crises

signing statement—a statement a president issues with the intent to influence the way a specific bill the president signs should be enforced

38. The President: How do we select and elect a president?

Learning Objectives

- Describe changes over time in the way the president and vice president are selected
- Identify the stages in the modern presidential selection process
- Assess the advantages and disadvantages of the Electoral College

The process of electing a president every four years has evolved over time. This evolution has resulted from attempts to correct the procedures first offered by the framers of the *Constitution* and as a result of political parties' rising power as gatekeepers to the presidency. Over the last several decades, the manner by which parties have chosen candidates has trended away from congressional caucuses and conventions and towards a drawn-out series of state contests, called primaries and caucuses, which begin in the winter prior to the November general election.

Selecting the Candidate: The Party Process

The framers of the *Constitution* made no provision in the document for the establishment of political parties. Indeed, parties were not

necessary to select the first president, since George Washington ran unopposed. Following the first election of Washington, the political party system gained steam and power in the electoral process, creating separate nomination and general election stages. Early on, the power to nominate presidents for office bubbled up from the party operatives in the various state legislatures and toward what was known as the king caucus or congressional caucus. The *caucus* or large-scale gathering was made up of legislators in the Congress who met informally to decide on nominees from their respective parties. In somewhat of a countervailing trend in the general election stage of the process, by the presidential election of 1824, many states were using popular elections to choose their electors. This became important in that election when Andrew Jackson won the popular vote and the largest number of electors, but the presidency was given to John Quincy Adams instead. Out of the frustration of Jackson's supporters emerged a powerful two-party system that took control of the selection process.¹

In the decades that followed, party organizations, party leaders, and workers met in national conventions to choose their nominees, sometimes after long struggles that took place over multiple ballots. In this way, the political parties kept a tight control on the selection of a candidate. In the early twentieth century, however, some states began to hold primaries, elections in which candidates vied for the support of state delegations to the party's nominating convention. Over the course of the century, the primaries gradually became a far more important part of the process, though the party leadership still controlled the route to nomination through the convention system. This has changed in recent decades, and now a majority of the delegates are chosen through primary elections, and the party

1. Daniel Myron Greene. 1908. "The Evolution of the National Political Convention," *The Sewanee Review* 16, No. 2: 228–32.

conventions themselves are little more than a widely publicized rubber-stamping event.

The rise of the presidential primary and caucus system as the main means by which presidential candidates are selected has had a number of anticipated and unanticipated consequences. For one, the campaign season has grown longer and more costly. In 1960, John F. Kennedy declared his intention to run for the presidency just eleven months before the general election. Compare this to Hillary Clinton, who announced her intention to run nearly two years before the 2008 general election. Today's long campaign seasons are seasoned with a seemingly ever-increasing number of debates among contenders for the nomination. In 2016, when the number of candidates for the Republican nomination became large and unwieldy, two debates among them were held, in which only those candidates polling greater support were allowed in the more important prime-time debate. The runners-up spoke in the other debate.

Finally, the process of going straight to the people through primaries and caucuses has created some opportunities for party outsiders to rise. Neither Ronald Reagan nor Bill Clinton was especially popular with the party leadership of the Republicans or the Democrats (respectively) at the outset. The outsider phenomenon has been most clearly demonstrated, however, in the 2016 presidential nominating process, as those distrusted by the party establishment, such as Senator Ted Cruz and Donald Trump, who never before held political office, raced ahead of party favorites like Jeb Bush early in the primary process.



Senator Ted Cruz (R-TX), though disliked by the party establishment, was able to rise to the top in the Iowa caucuses in 2016. Ultimately, Cruz bowed out of the race when Donald Trump effectively clinched the nomination in Indiana in early May 2016. (credit: Michael Vaden)

Primaries offer tests of candidates' popular appeal, while state caucuses testify to their ability to mobilize and organize grassroots support among committed followers. Primaries also reward candidates in different ways, with some giving the winner all the state's convention delegates, while others distribute delegates proportionately according to the distribution of voter support. Finally, the order in which the primary elections and caucus selections are held shape the overall race.²

Currently, the Iowa caucuses and the New Hampshire primary occur first (**frontloading**). These early contests tend to shrink the field as candidates who perform poorly leave the race. At other times in the campaign process, some states will maximize their impact on the race by holding their primaries on the same day that other states do. The media has dubbed these critical groupings "Super Tuesdays," "Super Saturdays," and so on. They tend to occur later in the nominating process as parties try to force the voters to coalesce around a single nominee.

The rise of the primary has also displaced the convention itself as the place where party regulars choose their standard bearer. Once true contests in which party leaders fought it out to elect a candidate, by the 1970s, party conventions more often than not simply served to rubber-stamp the choice of the primaries. By the 1980s, the convention drama was gone, replaced by a long, televised commercial designed to extol the party's greatness. Without the drama and uncertainty, major news outlets have steadily curtailed their coverage of the conventions, convinced that few people are interested. The 2016 elections seem to support the idea that the primary process produces a nominee rather than party insiders. Outsiders Donald Trump on the Republican side and Senator Bernie

2. Marty Cohen. 2008. *The Party Decides: Presidential Nominations before and after Reform*. Chicago: University of Chicago.

Sanders on the Democratic side had much success despite significant concerns about them from party elites. Whether this pattern could be reversed in the case of a closely contested selection process remains to be seen.



Traditional party conventions, like the Republican national convention in 1964 pictured here, could be contentious meetings at which the delegates made real decisions about who would run. These days, party conventions are little more than long promotional events. (credit: the Library of Congress)

The General Election

Early presidential elections, conducted along the lines of the original process outlined in the Constitution, proved unsatisfactory. So long as George Washington was a candidate, his election was a foregone conclusion. But it took some manipulation of the votes of electors to ensure that

the second-place winner (and thus the vice president) did not receive the same number of votes. When Washington declined to run again after two terms, matters worsened. In 1796, political rivals John Adams and Thomas Jefferson were elected president and vice president, respectively. Yet the two men failed to work well together during Adams's administration, much of which Jefferson spent at his Virginia residence at Monticello. As noted earlier in this chapter, the shortcomings of the system became painfully evident in 1800, when Jefferson and his running mate Aaron Burr finished tied, thus leaving it to the House of Representatives to elect Jefferson.³

3. James Roger Sharp. 2010. *The Deadlocked Election of 1800: Jefferson, Burr, and the Union in the Balance*. Lawrence: University Press of Kansas.

The Twelfth Amendment, ratified in 1804, provided for the separate election of president and vice president as well as setting out ways to choose a winner if no one received a majority of the electoral votes. Only once since the passage of the Twelfth Amendment, during the election of 1824, has the House selected the president under these rules, and only once, in 1836, has the Senate chosen the vice president. In several elections, such as in 1876 and 1888, a candidate who received less than a majority of the popular vote has claimed the presidency, including cases when the losing candidate secured a majority of the popular vote. The most recent case was the 2000 election, in which Democratic nominee Al Gore won the popular vote, while Republican nominee George W. Bush won the Electoral College vote and hence the presidency.

The Electoral College is a process, not a place. The founding fathers established it in the [Constitution](#) as a compromise between election of the President by a vote in Congress and election of the President by a popular vote of qualified citizens.

The Electoral College process consists of the [selection of the electors](#), the meeting of the electors where they vote for President and Vice President, and the counting of the electoral votes by Congress.

The Electoral College consists of 538 electors. A majority of 270 electoral votes is required to elect the President. Your state's entitled allotment of electors equals the number of members in its Congressional delegation: one for each member in the House of Representatives plus two for your Senators. Read more about [the allocation of electoral votes](#).

Not everyone is satisfied with how the Electoral College fundamentally shapes the election, especially in cases such as those noted above, when a candidate with a minority of the popular vote claims victory over a candidate who drew more popular support. Yet movements for electoral reform, including proposals for a

straightforward nationwide direct election by popular vote, have gained little traction.⁴

Supporters of the current system defend it as a manifestation of federalism, arguing that it also guards against the chaos inherent in a multiparty environment by encouraging the current two-party system. They point out that under a system of direct election, candidates would focus their efforts on more populous regions and ignore others.⁵ Critics, on the other hand, charge that the current system negates the one-person, one-vote basis of U.S. elections, subverts majority rule, works against political participation in states deemed safe for one party, and might lead to chaos should an elector desert a candidate, thus thwarting the popular will. Despite all this, the system remains in place. It appears that many people are more comfortable with the problems of a flawed system than with the uncertainty of change.⁶

4. National Archives and Records Administration—What is the Electoral College?<https://www.archives.gov/federal-register/electoral-college/about.html>
5. John Samples, “In Defense of the Electoral College,” 10 November 2000, <http://www.cato.org/publications/commentary/defense-electoral-college> (May 1, 2016).
6. Clifton B. Parker, “Now We Know Why It’s Time to Dump the Electoral College,” *The Fiscal Times*, 12 April 2016, <http://www.thefiscaltimes.com/2016/04/12/Now-We-Know-Why-It-s-Time-Dump-Electoral-College>.

Electoral College Reform

Following the 2000 presidential election, when then-governor George W. Bush won by a single electoral vote and with over half a million fewer individual votes than his challenger, astonished voters called for **Electoral College** reform. Years later, however, nothing of any significance had been done. The absence of reform in the wake of such a problematic election is a testament to the staying power of the Electoral College.

Those who insist that the Electoral College should be reformed argue that its potential benefits pale in comparison to the way the Electoral College depresses voter turnout and fails to represent the popular will. In addition to favoring small states, since individual votes there count more than in larger states due to the mathematics involved in the distribution of electors, the Electoral College results in a significant number of “safe” states that receive no real electioneering, such that nearly 75 percent of the country is ignored in the general election.

One potential solution to the problems with the Electoral College is to scrap it all together and replace it with the popular vote. The popular vote would be the aggregated totals of the votes in the fifty states and District of Columbia, as certified by the head election official of each state. A second solution often mentioned is to make the Electoral College proportional. That is, as

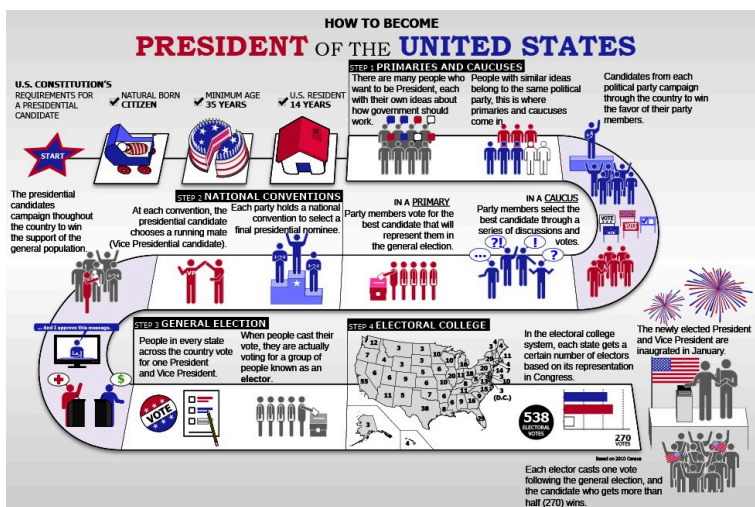
each state assigns its electoral votes, it would do so based on the popular vote percentage in their state, rather than the winner-take-all approach almost all the states use today.

A third alternative for Electoral College reform has been proposed by an organization called National Popular Vote. The National Popular Vote movement is an interstate compact between multiple states that sign onto the compact. Once a combination of states constituting 270 Electoral College votes supports the movement, each state entering the compact pledges all of its Electoral College votes to the national popular vote winner. This reform does not technically change the Electoral College structure, but it results in a mandated process that makes the Electoral College reflect the popular vote. Thus far, eleven states with a total of 165 electoral votes among them have signed onto the compact.

The general election usually features a series of debates between the presidential contenders as well as a debate among vice presidential candidates. Because the stakes are high, quite a bit of money and resources are expended on all sides. Attempts to rein in the mounting costs of modern general-election campaigns have proven ineffective. Nor has public funding helped to solve the problem.⁷

7. Jason Scott-Sheets, “Public financing is available for presidential candidates. So what’s not to like about free

In addition, political action committees (PACs), supposedly focused on issues rather than specific candidates, seek to influence the outcome of the race by supporting or opposing a candidate according to the PAC's own interests. But after all the spending and debating is done, those who have not already voted by other means set out on the first Tuesday following the first Monday in November to cast their votes. Several weeks later, the electoral votes are counted and the president is formally elected.



The process of becoming president has become an increasingly longer one, but the underlying steps remain largely the same. (credit: modification of work by the U. S. General Services Administration, Federal Citizen Information Center, Ifrah Syed)

money?" 14 April 2016, <http://www.opensecrets.org/news/2016/04/public-financing-is-available-for-presidential-candidates-so-whats-not-to-like-about-free-money/>.

Questions to Consider

1. What problems exist with the Electoral College?
2. In what ways does the current Electoral College system protect the representative power of small states and less densely populated regions?
3. Why might it be important to preserve these protections?

Terms to Remember

Electoral College—a process; established by the founders as a compromise between election of the President by a vote in Congress and election of the President by a popular vote of qualified citizens

frontloading—states allowed to hold primaries ahead of the majority of states

39. The President: What is the public presidency?

Learning Objectives

- Explain how technological innovations have empowered presidents
- Identify ways in which presidents appeal to the public for approval
- Explain how the role of first ladies changed over the course of the twentieth century

With the advent of motion picture newsreels and voice recordings in the 1920s, presidents began to broadcast their message to the general public. Franklin Roosevelt, while not the first president to use the radio, adopted this technology to great effect. Over time, as radio gave way to newer and more powerful technologies like television, the Internet, and social media, other presidents have been able magnify their voices to an even-larger degree. Presidents now have far more tools at their disposal to shape public opinion and build support for policies. However, the choice to “go public” does not always lead to political success; it is difficult to convert popularity in public opinion polls into political power. Moreover, the modern era of information and social media empowers opponents at the same time that it provides opportunities for presidents.

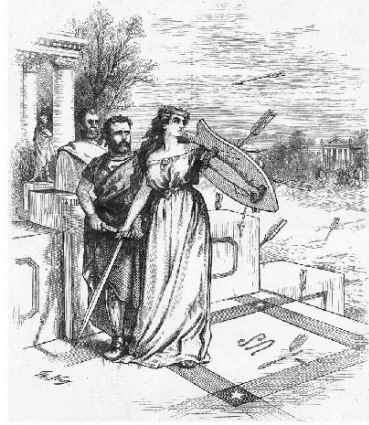
The Shaping of the Modern Presidency

From the days of the early republic through the end of the nineteenth century, presidents were limited in the ways they could reach the public to convey their perspective and shape policy. Inaugural addresses and messages to Congress, while circulated in newspapers, proved clumsy devices to attract support, even when a president used plain, blunt language. Some presidents undertook tours of the nation, notably George Washington and Rutherford B. Hayes. Others promoted good relationships with newspaper editors and reporters, sometimes going so far as to sanction a pro-administration newspaper. One president, Ulysses S. Grant, cultivated political cartoonist Thomas Nast to present the president's perspective in the pages of the magazine *Harper's Weekly*.¹ Abraham Lincoln experimented with public meetings recorded by newspaper reporters and public letters that would appear in the press, sometimes after being read at public gatherings. Most presidents gave speeches, although few proved to have much immediate impact, including Lincoln's memorable Gettysburg Address.

1. Wendy Wick Reaves. 1987. "Thomas Nast and the President," *American Art Journal* 19, No. 1: 61–71.



(a)



(b)

While President Abraham Lincoln was not the first president to be photographed, he was the first to use the relatively new power of photography to enhance his power as president and commander-in-chief. Here, Lincoln poses with Union soldiers (a) during his visit to Antietam, Maryland, on October 3, 1862. President Ulysses S. Grant cultivated a relationship with popular cartoonist Thomas Nast, who often depicted the president in the company of “Lady Liberty” (b) in addition to relentlessly attacking his opponent Horace Greeley.

Rather, most presidents exercised the power of patronage (or appointing people who are loyal and help them out politically) and private deal-making to get what they wanted at a time when Congress usually held the upper hand in such transactions. But even that presidential power began to decline with the emergence of civil service reform in the later nineteenth century, which led to most government officials being hired on their merit instead of through patronage. Only when it came to diplomacy and war were presidents able to exercise authority on their own, and even then, institutional as well as political restraints limited their independence of action.

Theodore Roosevelt came to the presidency in 1901, at a time when movie newsreels were becoming popular. Roosevelt, who had always excelled at cultivating good relationships with the print

media, eagerly exploited this new opportunity as he took his case to the people with the concept of the presidency as **bully pulpit**, a platform from which to push his agenda to the public. His successors followed suit, and they discovered and employed new ways of transmitting their message to the people in an effort to gain public support for policy initiatives. With the popularization of radio in the early twentieth century, it became possible to broadcast the president's voice into many of the nation's homes. Most famously, FDR used the radio to broadcast his thirty "fireside chats" to the nation between 1933 and 1944.

In the post-World War II era, television began to replace radio as the medium through which presidents reached the public. This technology enhanced the reach of the handsome young president John F. Kennedy and the trained actor Ronald Reagan. At the turn of the twentieth century, the new technology was the Internet. The extent to which this mass media technology can enhance the power and reach of the president has yet to be fully realized.

Other presidents have used advances in transportation to take their case to the people. Woodrow Wilson traveled the country to advocate formation of the League of Nations. However, he fell short of his goal when he suffered a stroke in 1919 and cut his tour short. Both Franklin Roosevelt in the 1930s and 1940s and Harry S. Truman in the 1940s and 1950s used air travel to conduct diplomatic and military business. Under President Dwight D. Eisenhower, a specific plane, commonly called Air Force One, began carrying the president around the country and the world. This gives the president the ability to take his message directly to the far corners of the nation at any time.

Going Public: Promise and Pitfalls

The concept of going public involves the president delivering a major television address in the hope that Americans watching the

address will be compelled to contact their House and Senate member and that such public pressure will result in the legislators supporting the president on a major piece of legislation. Technological advances have made it more efficient for presidents to take their messages directly to the people than was the case before mass media. Presidential visits can build support for policy initiatives or serve political purposes, helping the president reward supporters, campaign for candidates, and seek reelection. It remains an open question, however, whether choosing to go public actually enhances a president's political position in battles with Congress. Political scientist George C. Edwards goes so far as to argue that taking a president's position public serves to polarize political debate, increase public opposition to the president, and complicate the chances to get something done. It replaces deliberation and compromise with confrontation and campaigning. Edwards believes the best way for presidents to achieve change is to keep issues private and negotiate resolutions that preclude partisan combat. Going public may be more effective in rallying supporters than in gaining additional support or changing minds.²

2. George C. Edwards. 2016. *Predicting the Presidency: The Potential of Persuasive Leadership*. Princeton: Princeton University Press; George C. Edwards and Stephen J. Wayne. 2003. *Presidential Leadership: Politics and Policy Making*. Belmont, CA: Wadsworth/Thomson Learning.



With the advent of video technology and cable television, the power of the president to reach huge audiences increased exponentially. President Ronald Reagan, shown here giving one of his most famous speeches in Berlin, was an expert at using technology to help mold and project his presidential image to the public. His training as an actor certainly helped in this regard.



Today, it is possible for the [White House](#) to take its case directly to the people via websites like White House Live, where the public can watch live press briefings and speeches.

The First Lady: A Secret Weapon?

The president is not the only member of the First Family who often attempts to advance an agenda by going public. First ladies increasingly exploited the opportunity to gain public support for an issue of deep interest to them. Before 1933, most first ladies served as private political advisers to their husbands. In the 1910s, Edith Bolling Wilson took a more active but still private role assisting her husband, President Woodrow Wilson, afflicted by a stroke, in the last years of his presidency. However, as the niece of one president and the wife of another, it was Eleanor Roosevelt in the 1930s and 1940s who opened the door for first ladies to do something more.

Eleanor Roosevelt took an active role in championing civil rights, becoming in some ways a bridge between her husband and the civil rights movement. She coordinated meetings between FDR and members of the NAACP, championed antilynching legislation, openly defied segregation laws, and pushed the Army Nurse Corps to allow black women in its ranks. She also wrote a newspaper column and had a weekly radio show. Her immediate successors returned to the less visible role held by her predecessors, although in the early 1960s, Jacqueline Kennedy gained attention for her efforts to refurbish the White House along historical lines, and Lady Bird Johnson in the mid- and late 1960s endorsed an effort to beautify public spaces and highways in the United States. She also established the foundations of what came to be known as the **Office of the First Lady**, complete with a news reporter, Liz Carpenter, as her press secretary.

Betty Ford took over as first lady in 1974 and became an avid advocate of women's rights, proclaiming that she was pro-choice when it came to abortion and lobbying for the ratification of the Equal Rights Amendment (ERA). She shared with the public the news of her breast cancer diagnosis and subsequent mastectomy. Her successor, Rosalynn Carter, attended several cabinet meetings

and pushed for the ratification of the ERA as well as for legislation addressing mental health issues.

The increasing public political role of the first lady continued in the 1980s with Nancy Reagan's "Just Say No" antidrug campaign and in the early 1990s with Barbara Bush's efforts on behalf of literacy. The public role of the first lady reach a new level with Hillary Clinton in the 1990s when her husband put her in charge of his efforts to achieve health



On November 19, 1977, Rosalynn Carter (center left) and Betty Ford (center right) attended a rally in favor of the passage of the Equal Rights Amendment.

care reform, a controversial decision that did not meet with political success. Her successors, Laura Bush in the first decade of the twenty-first century and Michelle Obama in the second, returned to the roles played by predecessors in advocating less controversial policies: Laura Bush advocated literacy and education, while Michelle Obama has emphasized physical fitness and healthy diet and exercise. Nevertheless, the public and political profiles of first ladies remain high, and in the future, the president's spouse will have the opportunity to use that unelected position to advance policies that might well be less controversial and more appealing than those pushed by the president.

Questions to Consider

1. In what ways have first ladies expanded the role of their office over the twentieth century?
2. How were presidents in the eighteenth and

nineteenth centuries likely to reach the public? Were these methods effective?

Terms to Remember

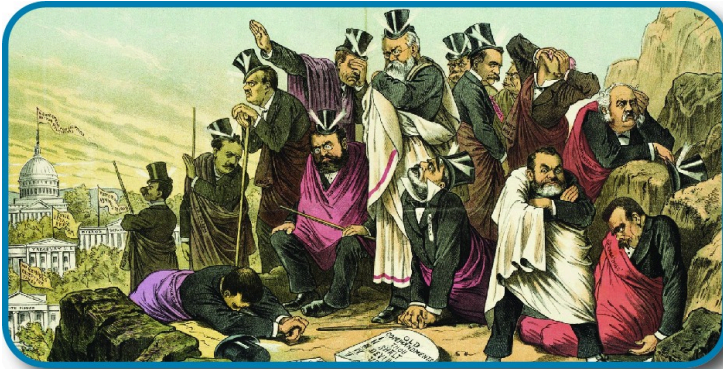
bully pulpit—Theodore Roosevelt's notion of the presidency as a platform from which the president could push an agenda

going public—a term for when the president delivers a major television address in the hope that public pressure will result in legislators supporting the president on a major piece of legislation

PART IX

THE BUREAUCRACY

40. The Bureaucracy: The Executive Branch, Bureaucrats and Civil Service



This 1885 cartoon reflects the disappointment of office seekers who were turned away from bureaucratic positions they believed their political commitments had earned them. It was published just as the U.S. bureaucracy was being transformed from the spoils system to the merit system.

What does the word “bureaucracy” conjure in your mind? For many, it evokes inefficiency, corruption, red tape, and government overreach. For others, it triggers very different images—of professionalism, helpful and responsive service, and government management. Your experience with bureaucrats and the administration of government probably informs your response to the term. The ability of bureaucracy to inspire both revulsion and admiration is one of several features that make it a fascinating object of study.

More than that, the many arms of the federal bureaucracy, often considered the fourth branch of government, are valuable

components of the federal system. Without this administrative structure, staffed by nonelected workers who possess particular expertise to carry out their jobs, government could not function the way citizens need it to. That does not mean, however, that bureaucracies are perfect.

Questions to Consider

1. What roles do professional government employees carry out?
2. Who are they, and how and why do they acquire their jobs?
3. How do they run the programs of government enacted by elected leaders?
4. Who makes the rules of a bureaucracy?

4I. The Bureaucracy: Policy Implementation

Learning Objectives

- Define bureaucracy and bureaucrat
- Identify the reasons people undertake civil service

Throughout history, both small and large nations have elevated certain types of nonelected workers to positions of relative power within the governmental structure. Collectively, these essential workers are called the bureaucracy. A **bureaucracy** is an administrative group of nonelected officials charged with carrying out functions connected to a series of policies and programs. In the United States, the bureaucracy began as a very small collection of individuals. Over time, however, it grew to be a major force in political affairs. Indeed, it grew so large that politicians in modern times have ridiculed it to great political advantage. However, the country's many **bureaucrats** or **civil servants**, the individuals who work in the bureaucracy, fill necessary and even instrumental roles in every area of government: from high-level positions in foreign affairs and intelligence collection agencies to clerks and staff in the smallest regulatory agencies. They are hired, or sometimes appointed, for their expertise in carrying out the functions and programs of the government.

What Does a Bureaucracy Do?

Modern society relies on the effective functioning of government to provide public goods, enhance quality of life, and stimulate economic growth. The activities by which government achieves these functions include—but are not limited to—taxation, homeland security, immigration, foreign affairs, and education. The more society grows and the need for government services expands, the more challenging bureaucratic management and **public administration** becomes. Public administration is both the implementation of public policy in government bureaucracies and the academic study that prepares civil servants for work in those organizations.

The classic version of a bureaucracy is hierarchical and can be described by an organizational chart that outlines the separation of tasks and worker specialization while also establishing a clear unity of command by assigning each employee to only one boss. Moreover, the classic bureaucracy employs a division of labor under which work is separated into smaller tasks assigned to different people or groups. Given this definition, bureaucracy is not unique to government but is also found in the private and nonprofit sectors. That is, almost all organizations are bureaucratic regardless of their scope and size; although public and private organizations differ in some important ways. For example, while private organizations are responsible to a superior authority such as an owner, board of directors, or shareholders, federal governmental organizations answer equally to the president, Congress, the courts, and ultimately the public. The underlying goals of private and public organizations also differ. While private organizations seek to survive by controlling costs, increasing market share, and realizing a profit, public organizations find it more difficult to measure the elusive goal of operating with efficiency and effectiveness.

Bureaucracy may seem like a modern invention, but bureaucrats have served in governments for nearly as long as governments have

existed. Archaeologists and historians point to the sometimes elaborate bureaucratic systems of the ancient world, from the Egyptian scribes who recorded inventories to the biblical tax collectors who kept the wheels of government well greased.¹ In Europe, government bureaucracy and its study emerged before democracies did. In contrast, in the United States, a democracy and the Constitution came first, followed by the development of national governmental organizations as needed, and then finally the study of U.S. government bureaucracies and public administration emerged.²

In fact, the long pedigree of bureaucracy is an enduring testament to the necessity of administrative organization. More recently, modern bureaucratic management emerged in the eighteenth century from Scottish economist Adam Smith's support for the efficiency of the division of labor and from Welsh reformer Robert Owen's belief that employees are vital instruments in the functioning of an organization. However, it was not until the mid-1800s that the German scholar Lorenz von Stein argued for public administration as both a theory and a practice since its

1. For general information on ancient bureaucracies see Amanda Summer. 2012. "The Birth of Bureaucracy". *Archaeology* 65, No. 4: 33–39; Clyde Curry Smith. 1977. "The Birth of Bureaucracy". *The Bible Archaeologist* 40, No. 1: 24–28; Ronald J. Williams. 1972. "Scribal Training in Ancient Egypt," *Journal of the American Oriental Society* 92, No. 2: 214–21.
2. Richard Stillman. 2009. *Public Administration: Concepts and Cases*. 9th edition. Boston: Wadsworth Cengage Learning.

knowledge is generated and evaluated through the process of gathering evidence. For example, a public administration scholar might gather data to see whether the timing of tax collection during a particular season might lead to higher compliance or returns. Credited with being the father of the science of public administration, von Stein opened the path of administrative enlightenment for other scholars in industrialized nations.

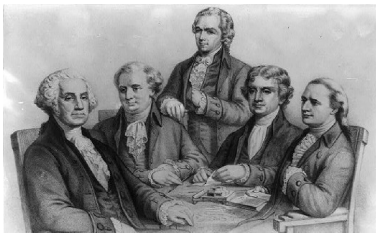
The Origins of the U.S. Bureaucracy

In the early U.S. republic, the bureaucracy was quite small. This is understandable since the American Revolution was largely a revolt against executive power and the British imperial administrative order. Nevertheless, while neither the word “bureaucracy” nor its synonyms appear in the text of the Constitution, the document does establish a few broad channels through which the emerging government could develop the necessary bureaucratic administration.

For example, Article II, Section 2, provides the president the power to appoint officers and department heads. In the following section, the president is further empowered to see that the laws are “faithfully executed.” More specifically, Article I, Section 8, empowers Congress to establish a post office, build roads, regulate commerce, coin money, and regulate the value of money. Granting the president and Congress such responsibilities appears to anticipate a bureaucracy of some size. Yet the design of the bureaucracy is not described, and it does not occupy its own section of the Constitution as bureaucracy often does in other countries’ governing documents; the design and form were left to be established in practice.

Under President George Washington, the bureaucracy remained small enough to accomplish only the necessary tasks at

hand.³ Washington's tenure saw the creation of the Department of State to oversee international issues, the Department of the Treasury to control coinage, and the Department of War to administer the armed forces. The employees within these three departments, in addition to the growing postal service, constituted the major portion of the federal bureaucracy for the first three decades of the republic. Two developments, however, contributed to the growth of the bureaucracy well beyond these humble beginnings.



The cabinet of President George Washington (far left) consisted of only four individuals: the secretary of war (Henry Knox, left), the secretary of the treasury (Alexander Hamilton, center), the secretary of state (Thomas Jefferson, right), and the attorney general (Edmund Randolph, far right). The small size of this group reflected the small size of the U.S. government in the late eighteenth century. (credit: modification of work by the Library of Congress)

The first development was the rise of centralized party politics in the 1820s. Under Democratic President Andrew Jackson, many thousands of party loyalists filled the ranks of the bureaucratic offices around the country. This was the beginning of the **spoils system**, in which political appointments were transformed into political patronage doled out by the president on the basis of party loyalty.⁴

3. For the early origins of the U.S. bureaucracy see Michael Nelson. 1982. "A Short, Ironic History of American National Bureaucracy," *The Journal of Politics* 44 No. 3: 747-78.

4. Daniel Walker Howe. 2007. *What Hath God Wrought: The*

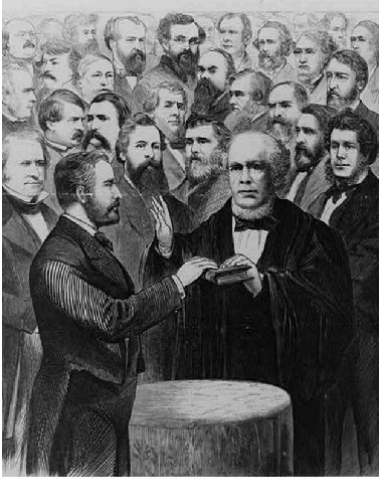
Political **patronage** is the use of state resources to reward individuals for their political support. The term “spoils” here refers to paid positions in the U.S. government. As the saying goes, “to the victor,” in this case the incoming president, “go the spoils.” It was assumed that government would work far more efficiently if the key federal posts were occupied by those already supportive of the president and his policies. This system served to enforce party loyalty by tying the livelihoods of the party faithful to the success or failure of the party. The number of federal posts the president sought to use as appropriate rewards for supporters swelled over the following decades.

The Fall of Political Patronage

Patronage had the advantage of putting political loyalty to work by making the government quite responsive to the electorate and keeping election turnout robust because so much was at stake. However, the spoils system also had a number of obvious disadvantages. It was a reciprocal system. Clients who wanted positions in the civil service pledged their political loyalty to a particular patron who then provided them with their desired positions. These arrangements directed the power and resources of government toward perpetuating the reward system. They replaced the system that early presidents like Thomas Jefferson had fostered, in which the country’s intellectual and economic elite rose to the highest levels of the federal bureaucracy based on their relative

Transformation of America, 1815–1848. Oxford: Oxford University Press, 334.

merit.⁵ Criticism of the spoils system grew, especially in the mid-1870s, after numerous scandals rocked the administration of President Ulysses S. Grant.



(a)

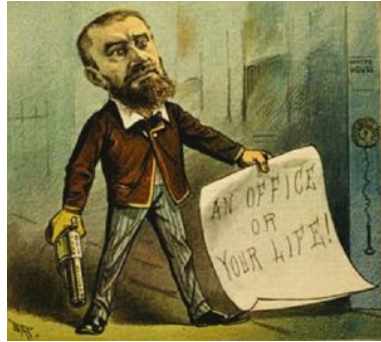


(b)

Caption: It was under President Ulysses S. Grant, shown in this engraving being sworn in by Chief Justice Samuel P. Chase at his inauguration in 1873 (a), that the inefficiencies and opportunities for corruption embedded in the spoils system reached their height. Grant was famously loyal to his supporters, a characteristic that—combined with postwar opportunities for corruption—created scandal in his administration. This political cartoon from 1877 (b), nearly half a century after Andrew Jackson was elected president, ridicules the spoils system that was one of his legacies. In it he is shown riding a pig, which is walking over “fraud,” “bribery,” and “spoils” and feeding on “plunder.” (credit a, b: modification of work by the Library of Congress)

5. Jack Ladinsky. 1966. “Review of Status and Kinship in the Higher Civil Service: Standards of Selection in the Administrations of John Adams, Thomas Jefferson, and Andrew Jackson,” *American Sociological Review* 31 No. 6: 863–64.

As the negative aspects of political patronage continued to infect bureaucracy in the late nineteenth century, calls for civil service reform grew louder. Those supporting the patronage system held that their positions were well earned; those who condemned it argued that federal legislation was needed to ensure jobs were awarded on the basis of merit. Eventually, after President James Garfield had been assassinated by a disappointed office seeker, Congress responded to cries for reform with the **Pendleton Act**, also called the **Civil Service Reform**



In 1881, after the election of James Garfield, a disgruntled former supporter of his, the failed lawyer Charles J. Guiteau, shot him in the back. Guiteau (pictured in this cartoon of the time) had convinced himself he was due an ambassadorship for his work in electing the president. The assassination awakened the nation to the need for civil service reform. (credit: modification of work by the Library of Congress)

Act of 1883. The act established the Civil Service Commission, a centralized agency charged with ensuring that the federal government's selection, retention, and promotion practices were based on open, competitive examinations in a **merit system**.⁶ The

6. For more on the Pendleton Act and its effects see Sean M. Theriault. 2003. "Patronage, the Pendleton Act, and the Power of the People," *The Journal of Politics* 65 No. 1: 50–68; Craig V. D. Thornton. 1983. "Review of Centenary Issues of the Pendleton Act of 1883: The Problematic Legacy of Civil Service Reform," *Journal of Policy Analysis and Management* 2 No. 4: 653–53.

passage of this law sparked a period of social activism and political reform that continued well into the twentieth century.

The Bureaucracy Comes of Age

The late nineteenth and early twentieth centuries were a time of great bureaucratic growth in the United States: The Interstate Commerce Commission was established in 1887, the Federal Reserve Board in 1913, the Federal Trade Commission in 1914, and the Federal Power Commission in 1920.

New programs require bureaucrats to run them, and the national bureaucracy has ballooned.⁷ For example, Reagan and Congress increased the defense budget dramatically over the course of the 1980s.⁸

7. For more on LBJ and the Great Society see: John A. Andrew. 1998. *Lyndon Johnson and the Great Society*. Chicago: Ivan R Dee; Julian E. Zelizer. 2015. *The Fierce Urgency of Now: Lyndon Johnson, Congress, and the Battle for the Great Society*. New York: Penguin Press.

8. John Mikesell. 2014. *Fiscal Administration*, 9th ed. Boston: Cengage.

“The Nine Most Terrifying Words in the English Language”

The two periods of increased bureaucratic growth in the United States, the 1930s and the 1960s, accomplished far more than expanding the size of government. They transformed politics in ways that continue to shape political debate today. While the bureaucracies created in these two periods served important purposes, many at that time and even now argue that the expansion came with unacceptable costs, particularly economic costs. The common argument that bureaucratic regulation smothers capitalist innovation was especially powerful in the Cold War environment of the 1960s, 70s, and 80s. But as long as voters felt they were benefiting from the bureaucratic expansion, as they typically did, the political winds supported continued growth.

In the 1970s, however, Germany and Japan were thriving economies in positions to compete with U.S. industry. This competition, combined with technological advances and the beginnings of computerization, began to eat away at American prosperity. Factories began to close, wages began to stagnate, inflation climbed, and the future seemed a little less bright. In this environment, tax-paying workers were less likely to support generous welfare programs designed to end poverty. They felt these

bureaucratic programs were adding to their misery in order to support unknown others.

When Ronald Reagan ran for president in 1980, his criticism of bureaucratic waste in Washington carried him to a landslide victory. Even as late as 1986, he continued to rail against the Washington bureaucracy, once declaring famously that “the nine most terrifying words in the English language are: I’m from the government, and I’m here to help.”

Questions to Consider

1. Briefly explain the underlying reason for the emergence of the spoils system.
2. Why might people be more sympathetic to bureaucratic growth during periods of prosperity?
3. In what way do modern politicians continue to stir up popular animosity against bureaucracy to political advantage? Is it effective? Why or why not?

Terms to Remember

bureaucracy—an administrative group of nonelected

officials charged with carrying out functions connected to a series of policies and programs

bureaucrats—the civil servants or political appointees who fill nonelected positions in government and make up the bureaucracy

civil servants—the individuals who fill nonelected positions in government and make up the bureaucracy; also known as bureaucrats

merit system—a system of filling civil service positions by using competitive examinations to value experience and competence over political loyalties

patronage—the use of government positions to reward individuals for their political support

public administration—the implementation of public policy as well as the academic study that prepares civil servants to work in government

spoils system—a system that rewards political loyalties or party support during elections with bureaucratic appointments after victory

42. The Bureaucracy: Structure and Function

Learning Objectives

- Understand the basic structure of the executive branch and the bureaucracy.
- Examine the various groups that assist the president in implementing laws, rules and regulations.
- Know the difference between the various types of bureaucratic agencies.

Turning a spoils system bureaucracy into a merit-based civil service, while desirable, comes with a number of different consequences. The patronage system tied the livelihoods of civil service workers to their party loyalty and discipline. Severing these ties, as has occurred in the United States over the last century and a half, has transformed the way bureaucracies operate. Without the patronage network, bureaucracies form their own motivations. These motivations, sociologists have discovered, are designed to benefit and perpetuate the bureaucracies themselves.

Bureaucracies are complex institutions designed to accomplish specific tasks. This complexity, and the fact that they are organizations composed of human beings, can make it challenging for us to understand how bureaucracies work.

Bureaucracies are naturally competitive and power-hungry. This means bureaucrats, especially at the highest levels, recognize that

limited resources are available to feed bureaucracies, so they will work to enhance the status of their own bureaucracy to the detriment of others.

This effort can sometimes take the form of merely emphasizing to Congress the value of their bureaucratic task, but it also means the bureaucracy will attempt to maximize its budget by depleting all its allotted resources each year. This ploy makes it more difficult for legislators to cut the bureaucracy's future budget, a strategy that succeeds at the expense of thrift. In this way, the bureaucracy will eventually grow far beyond what is necessary and create bureaucratic waste that would otherwise be spent more efficiently among the other bureaucracies.

Other theorists have come to the conclusion that the extent to which bureaucracies compete for scarce resources is not what provides the greatest insight into how a bureaucracy functions. Rather, it is the absence of competition.

Similarities exist between a bureaucracy like the Internal Revenue Service (IRS) and a private monopoly like a regional power company or internet service provider that has no competitors. Such organizations are frequently criticized for waste, poor service, and a low level of client responsiveness. Consider, for example, the Bureau of Consular Affairs (BCA), the federal bureaucracy charged with issuing passports to citizens. There is no other organization from which a U.S. citizen can legitimately request and receive a passport, a process that normally takes several weeks. Thus there is no reason for the BCA to become more efficient or more responsive or to issue passports any faster.

Types of Bureaucratic Organizations

A bureaucracy is a particular government unit established to accomplish a specific set of goals and objectives as authorized by a legislative body. In the United States, the federal bureaucracy

enjoys a great degree of autonomy compared to those of other countries. This is in part due to the sheer size of the federal budget, approximately \$3.5 trillion as of 2015.¹ And because many of its agencies do not have clearly defined lines of authority—roles and responsibilities established by means of a chain of command—they also are able to operate with a high degree of autonomy. However, many agency actions are subject to judicial review. In *Schechter Poultry Corp. v. United States* (1935), the Supreme Court found that agency authority seemed limitless.² Yet, not all bureaucracies are alike. In the U.S. government, there are four general types: cabinet departments, independent executive agencies, regulatory agencies, and government corporations.

Cabinet Departments

There are currently fifteen cabinet departments in the federal government. Cabinet departments are major executive offices that are directly accountable to the president. They include the Departments of State, Defense, Education, Treasury, and several others. Occasionally, a department will be eliminated when government officials decide its tasks no longer need direct presidential and congressional oversight, such as happened to the Post Office Department in 1970.

Each cabinet department has a head called a secretary, appointed by the president and confirmed by the Senate. These secretaries

1. Congressional Budget Office Report, <https://www.cbo.gov/publication/44172> (June 6, 2016).

2. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

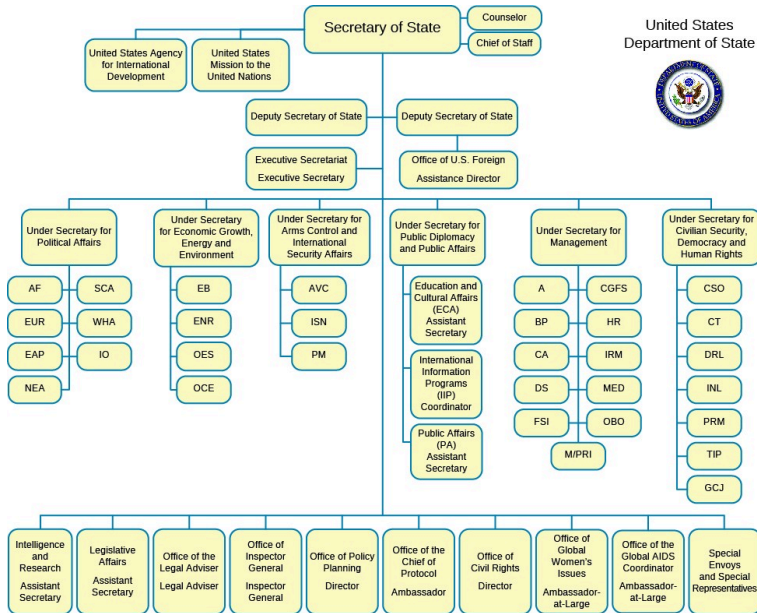
report directly to the president, and they oversee a huge network of offices and agencies that make up the department. They also work in different capacities to achieve each department's mission-oriented functions. Within these large bureaucratic networks are a number of undersecretaries, assistant secretaries, deputy secretaries, and many others. The Department of Justice is the one department that is structured somewhat differently. Rather than a secretary and undersecretaries, it has an attorney general, an associate attorney general, and a host of different bureau and division heads.

Members of the Cabinet		
Department	Year Created	Purpose
State	1789	Oversees matters related to foreign policy and international issues relevant to the country
Treasury	1789	Oversees the printing of U.S. currency, collects taxes, and manages government debt
Justice	1870	Oversees the enforcement of U.S. laws, matters related to public safety, and crime prevention
Interior	1849	Oversees the conservation and management of U.S. lands, water, wildlife, and energy resources
Agriculture	1862	Oversees the U.S. farming industry, provides agricultural subsidies, and conducts food inspections
Commerce	1903	Oversees the promotion of economic growth, job creation, and the issuing of patents
Labor	1913	Oversees issues related to wages, unemployment insurance, and occupational safety
Defense	1947	Oversees the many elements of the U.S. armed forces, including the Army, Navy, Marine Corps, and Air Force
Health and Human Services	1953	Oversees promotion of public health by providing essential human services and enforcing food and drug laws
Housing and Urban Development	1965	Oversees matters related to U.S. housing needs, works to increase homeownership, and increases access to affordable housing
Transportation	1966	Oversees the country's many networks of national transportation
Energy	1977	Oversees matters related to the country's energy needs, including energy security and technological innovation
Education	1980	Oversees public education, education policy, and relevant education research

Veterans Affairs	1989	Oversees the services provided to U.S. veterans, including health care services and benefits programs
Homeland Security	2002	Oversees agencies charged with protecting the territory of the United States from natural and human threats

Individual cabinet departments are composed of numerous levels of bureaucracy. These levels descend from the department head in a mostly hierarchical pattern and consist of essential staff, smaller offices, and bureaus. Their tiered, hierarchical structure allows large bureaucracies to address many different issues by deploying dedicated and specialized officers. For example, below the secretary of state are a number of undersecretaries. These include undersecretaries for political affairs, for management, for economic growth, energy, and the environment, and many others. Each controls a number of bureaus and offices. Each bureau and office in turn oversees a more focused aspect of the undersecretary's field of specialization. For example, below the undersecretary for public diplomacy and public affairs are three bureaus: educational and cultural affairs, public affairs, and international information programs. Frequently, these bureaus have even more specialized departments under them. Under the bureau of educational and cultural affairs are the spokesperson for the Department of State and his or her staff, the Office of the Historian, and the United States Diplomacy Center.³

3. <http://www.state.gov/r/pa/ei/rls/dos/436.htm> (June 6, 2016).



The multiple levels of the Department of State each work in a focused capacity to help the entire department fulfill its larger goals. (credit: modification of work by the U. S. Department of State)



Created in 1939 by President Franklin D. Roosevelt to help manage the growing responsibilities of the White House, the [Executive Office of the President](#) still works today to “provide the President with the support that he or she needs to govern effectively.”

Independent Executive Agencies and Regulatory Agencies

Like cabinet departments, **independent executive agencies** report directly to the president, with heads appointed by the president. Unlike the larger cabinet departments, however, independent agencies are assigned far more focused tasks. These agencies are considered independent because they are not subject to the regulatory authority of any specific department. They perform vital functions and are a major part of the bureaucratic landscape of the United States—providing information or services. Some prominent independent agencies are the Central Intelligence Agency (CIA), which collects and manages intelligence vital to national interests and the National Aeronautics and Space Administration (NASA), charged with developing technological innovation for the purposes of space exploration.

The **independent regulatory agency** emerged in the late nineteenth century as a product of the push to control the benefits and costs of industrialization. The first regulatory agency was the Interstate Commerce Commission (ICC), charged with regulating that most identifiable and prominent symbol of nineteenth-century industrialism, the railroad. Other regulatory agencies, such as the Commodity Futures



While the category “independent executive agency” may seem very ordinary, the actions of some of these agencies, like NASA, are anything but. (credit: NASA)

Trading Commission, which regulates U.S. financial markets and the Federal Communications Commission, which regulates radio and television, have largely been created in the image of the ICC. The

Securities and Exchange Commission (SEC) illustrates well the potential power of such agencies. The SEC's mission has expanded significantly in the digital era beyond mere regulation of stock floor trading.

Government Corporations

Agencies formed by the federal government to administer a quasi-business enterprise are called **government corporations**. They exist because the services they provide are partly subject to market forces and tend to generate enough profit to be self-sustaining, but they also fulfill a vital service the government has an interest in maintaining. Unlike a private corporation, a government corporation does not have stockholders. Instead, it has a board of directors and managers. This distinction is important because whereas a private corporation's profits are distributed as dividends, a government corporation's profits are dedicated to perpetuating the enterprise. Unlike private businesses, which pay taxes to the federal government on their profits, government corporations are exempt from taxes.

The most widely used government corporation is the U.S. Postal Service. Once a cabinet department, it was transformed into a government corporation in the early 1970s. Another widely used government corporation is the National Railroad Passenger Corporation, which uses the trade name Amtrak. Amtrak was the government's response to the decline in passenger rail travel in the 1950s and 1960s as the automobile came to dominate. Recognizing the need to maintain a passenger rail service despite dwindling

profits, the government consolidated the remaining lines and created Amtrak.⁴



Had the U.S. government not created Amtrak in the 1970s, passenger rail service might have ceased to exist in the United States. (credit: the Library of Congress)

Bureaucrats must implement and administer a wide range of policies and programs as established by congressional acts or presidential orders. Depending upon the agency's mission, a bureaucrat's roles and responsibilities vary greatly, from regulating corporate business and protecting the environment to printing money and purchasing office supplies. Bureaucrats are

government officials subject to legislative regulations and procedural guidelines. Because they play a vital role in modern society, they hold managerial and functional positions in government; they form the core of most administrative agencies. Although many top administrators are far removed from the masses, many interact with citizens on a regular basis.

Given the power bureaucrats have to adopt and enforce public policy, they must follow several legislative regulations and procedural guidelines. A *regulation* is a rule that permits government to restrict or prohibit certain behaviors among individuals and corporations. Bureaucratic rulemaking is a complex process that will be covered in more detail in the following section, but the rulemaking process typically creates *procedural guidelines*, or more formally, *standard operating procedures*. These are the rules

4. David C. Nice. 1998. *Amtrak: the history and politics of a national railroad*. Boulder, CO: Lynne Rienner.

that lower-level bureaucrats must abide by regardless of the situations they face.

Elected officials are regularly frustrated when bureaucrats seem not follow the path they intended. As a result, the bureaucratic process becomes inundated with **red tape**. This is the name for the procedures and rules that must be followed to get something done. Citizens frequently criticize the seemingly endless networks of red tape they must navigate in order to effectively utilize bureaucratic services, although these devices are really meant to ensure the bureaucracies function as intended.

Questions to Consider

1. Why might the executive branch create a government corporation?
2. What is the difference between an IEA and an IRA?

Terms to Remember

government corporation (GC)—a corporation that fulfills an important public interest and is therefore overseen by government authorities to a much larger degree than private businesses

independent executive agency (IEA)—bureaucratic agency providing information or service to the public

independent regulatory agency (IRA)—bureaucratic agency enforcing government regulations/rules

red tape—the mechanisms, procedures, and rules that must be followed to get something done

43. The Bureaucracy: Who is in control?

Learning Objectives

- Explain the way Congress, the president, bureaucrats, and citizens provide meaningful oversight over the bureaucracies
- Identify the ways in which privatization has made bureaucracies both more and less efficient

As our earlier description of the State Department demonstrates, bureaucracies are incredibly complicated. Understandably, then, the processes of rulemaking and bureaucratic oversight are equally complex. Elected leaders and citizens have developed laws and institutions to help rein in bureaucracies that become either too independent, corrupt, or both.

Consider the Original

|| **Federalist No. 70** ||

The Executive Department Further Considered

From the New York Packet
Tuesday, March 18, 1788.

Author: **Alexander Hamilton**

To the People of the State of New York:

THERE is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government. The enlightened well-wishers to this species of government must at least hope that the supposition is destitute of foundation; since they can never admit its truth, without at the same time admitting the condemnation of their own principles. Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman story, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of Dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.

There can be no need, however, to multiply arguments or examples on this head. A feeble Executive implies a feeble execution of the government. A feeble execution is but

another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.

Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic Executive, it will only remain to inquire, what are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety in the republican sense? And how far does this combination characterize the plan which has been reported by the convention?

The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.

The ingredients which constitute safety in the republican sense are, first, a due dependence on the people, secondly, a due responsibility. [...]

Federalist No. 70, "The Executive Department Further Considered, March 18, 1788 by Alexander Hamilton;
[https://www.congress.gov/resources/display/content/
The+Federalist+Papers#TheFederalistPapers-70](https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-70)

Bureaucratic Rulemaking

Once the particulars of implementation have been spelled out in the legislation authorizing a new program, bureaucracies move to enact it. When they encounter grey areas, many follow the federal **negotiated rulemaking** process to propose a solution, that is, detailing how particular new federal policies, regulations, and/or

programs will be implemented in the agencies. Congress cannot possibly legislate on that level of detail, so the experts in the bureaucracy do so.

Negotiated rulemaking is a relatively recently developed bureaucratic device that emerged from the criticisms of bureaucratic inefficiencies in the 1970s, 1980s, and 1990s.¹ Before it was adopted, bureaucracies used a procedure called *notice-and-comment rulemaking*. This practice required that agencies attempting to adopt rules publish their proposal in the *Federal Register*, the official publication for all federal rules and proposed rules. By publishing the proposal, the bureaucracy was fulfilling its obligation to allow the public time to comment. But rather than encouraging the productive interchange of ideas, the comment period had the effect of creating an adversarial environment in which different groups tended to make extreme arguments for rules that would support their interests. As a result, administrative rulemaking became too lengthy, too contentious, and too likely to provoke litigation in the courts.



The *Federal Register* was once available only in print. Now, however, it is available online and is far easier to navigate and use. Have a [look](#) at all the important information the government's journal posts online.

1. Philip J. Harter. 1982. "Negotiating Regulations: A Cure for Malaise," *Georgetown Law Journal*, 71, No. 1.



Reformers argued that these inefficiencies needed to be corrected. They proposed the *negotiated rulemaking process*, often referred to as regulatory negotiation, or “reg-neg” for short. This process was codified in the Negotiated Rulemaking Acts of 1990 and 1996, which encouraged agencies to employ negotiated rulemaking procedures. While negotiated rulemaking is required in only a handful of agencies and plenty still use the traditional process, others have recognized the potential of the new process and have adopted it.

In negotiated rulemaking, neutral advisors known as convenors put together a committee of those who have vested interests in the proposed rules. The convenors then set about devising procedures for reaching a consensus on the proposed rules. The committee uses these procedures to govern the process through which the committee members discuss the various merits and demerits of the proposals. With the help of neutral mediators, the committee eventually reaches a general consensus on the rules.

Government Bureaucratic Oversight

The ability for bureaucracies to develop their own rules and in many ways control their own budgets has often been a matter of great concern for elected leaders. As a result, elected leaders have employed a number of strategies and devices to control public administrators in the bureaucracy.

Congress is particularly empowered to apply oversight of the federal bureaucracy because of its power to control funding and approve presidential appointments. The various bureaucratic agencies submit annual summaries of their activities and budgets for the following year, and



In this photograph, Lois Lerner, the former director of the Internal Revenue Service's Exempt Organizations Unit, sits before an oversight committee in Congress following a 2013 investigation. On the advice of her attorney, Lerner invoked her Fifth Amendment right not to incriminate herself and refused to answer questions.

committees and subcommittees in both chambers regularly hold hearings to question the leaders of the various bureaucracies. These hearings are often tame, practical, fact-finding missions. Occasionally, however, when a particular bureaucracy has committed or contributed to a blunder of some magnitude, the hearings can become quite animated and testy.

This occurred in 2013 following the realization by Congress that the IRS had selected for extra scrutiny certain groups that had applied for tax-exempt status. While the error could have been a mere mistake or have resulted from any number of reasons, many in Congress became enraged at the thought that the IRS might

purposely use its power to inconvenience citizens and their groups.² The House directed its Committee on Oversight and Government Reform to launch an investigation into the IRS, during which time it interviewed and publicly scrutinized a number of high-ranking civil servants.



The mission of the U.S. House Oversight Committee is to “ensure the efficiency, effectiveness, and accountability of the federal government and all its agencies.” The committee is an important congressional check on the power of the bureaucracy. Visit the [website](#) for more information about the U.S. House Oversight Committee.

Perhaps Congress’s most powerful oversight tool is the **Government Accountability Office (GAO)**.³ The GAO is an agency that provides Congress, its committees, and the heads of the executive agencies with auditing, evaluation, and investigative services. It is designed to operate in a fact-based and nonpartisan manner to deliver important oversight information where and when it is needed. The GAO’s role is to produce reports, mostly at the insistence of Congress. In the approximately nine hundred reports it completes

2. <https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf> (May 1, 2016).
3. <http://www.gao.gov/> (May 1, 2016).

per year, the GAO sends Congress information about budgetary issues for everything from education, health care, and housing to defense, homeland security, and natural resource management.⁴ Since it is an office within the federal bureaucracy, the GAO also supplies Congress with its own annual performance and accountability report. This report details the achievements and remaining weaknesses in the actions of the GAO for any given year.

Apart from Congress, the president also executes oversight over the extensive federal bureaucracy through a number of different avenues. Most directly, the president controls the bureaucracies by appointing the heads of the fifteen cabinet departments and of many independent executive agencies, such as the CIA, the EPA, and the Federal Bureau of Investigation. These cabinet and agency appointments go through the Senate for confirmation.

The other important channel through which the office of the president conducts oversight over the federal bureaucracy is the Office of Management and Budget (OMB).⁵ The primary responsibility of the OMB is to produce the president's annual budget for the country. With this huge responsibility, however, comes a number of other responsibilities. These include reporting to the president on the actions of the various executive departments and agencies in the federal government, overseeing the performance levels of the bureaucracies, coordinating and reviewing federal regulations for the president, and delivering executive orders and presidential directives to the various agency heads.

4. <http://www.gao.gov/about/products/about-gao-reports.html> (May 1, 2016).

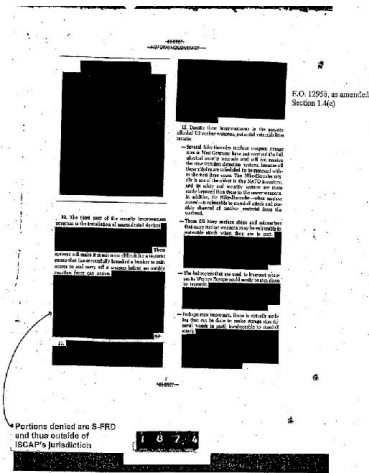
5. <https://www.whitehouse.gov/omb> (May 1, 2016).

Citizen Bureaucratic Oversight

A number of laws passed in the decades between the end of the Second World War and the late 1970s have created a framework through which citizens can exercise their own bureaucratic oversight. The two most important laws are the **Freedom of Information Act** of 1966 and the Government in **Sunshine Act** of 1976.⁶ Like many of the modern bureaucratic reforms in the United States, both emerged during a period of heightened skepticism about government activities.

The first, the Freedom of Information Act of 1966 (FOIA), emerged in the early years of the Johnson presidency as the United States was conducting secret Cold War missions around the world, the U.S. military was becoming increasingly mired in the conflict in Vietnam, and questions were still swirling around the Kennedy assassination. FOIA provides journalists and the general public the right to request records from various federal agencies. These agencies are required by law to release that information unless it qualifies for one of nine exemptions. These exceptions cite sensitive issues related to national security or foreign policy, internal personnel rules, trade secrets, violations of personnel privacy rights, law enforcement information, and oil well data. FOIA also compels agencies to post some types of information for the public regularly without being requested.

6. <https://www.law.cornell.edu/uscode/text/5/552>;
<https://www.gpo.gov/fdsys/pkg/STATUTE-90/pdf/STATUTE-90-Pg1241.pdf> (June 6, 2016).



As this CIA document shows, even information released under FOIA can be greatly restricted by the agencies releasing it. The black marks (**redacting**) cover information the CIA deemed particularly sensitive.

In fiscal year 2015, the government received 713,168 FOIA requests, with just three departments—Defense, Homeland Security, and Justice—accounting for more than half those queries.⁷ The Center for Effective Government analyzed the fifteen federal agencies that receive the most FOIA requests and concluded that they generally struggle to implement public disclosure rules. In its latest report, published in 2015 and using 2012 and 2013 data (the most recent available), ten of the

fifteen did not earn satisfactory overall grades, scoring less than seventy of a possible one hundred points.⁸

The Government in Sunshine Act of 1976 is different from FOIA in that it requires all multi-headed federal agencies to hold their meetings in a public forum on a regular basis. The name “Sunshine Act” is derived from the old adage that “sunlight is the best disinfectant”—the implication being that governmental and bureaucratic corruption thrive in secrecy but shrink when exposed to the light of public scrutiny. The act defines a meeting as any

7. www.foia.gov (May 1, 2016).

8. <http://www.foreffectivegov.org/access-to-information-scorecard-2015/> (May 1, 2016).

gathering of agency members in person or by phone, whether in a formal or informal manner.

Like FOIA, the Sunshine Act allows for exceptions. These include meetings where classified information is discussed, proprietary data has been submitted for review, employee privacy matters are discussed, criminal matters are brought up, and information would prove financially harmful to companies were it released. Citizens and citizen groups can also follow rulemaking and testify at hearings held around the country on proposed rules. The rulemaking process and the efforts by federal agencies to keep open records and solicit public input on important changes are examples of responsive bureaucracy.

Government Privatization

When those in government speak of privatization, they are often referring to one of a host of different models that incorporate the market forces of the private sector into the function of government to varying degrees.⁹ These include using contractors to supply goods and/or services, distributing government vouchers with which citizens can purchase formerly government-controlled services on the private market, supplying government grants to private organizations to administer government programs, collaborating with a private entity to finance a government program, and even fully divesting the government of a function and

9. Kevin R. Kosar. "Privatization and the Federal Government: An Introduction," *CRS Report for Congress*, December 28, 2006. <https://www.fas.org/sgp/crs/misc/RL33777.pdf> (June 16, 2016).

directly giving it to the private sector. We will look at three of these types of privatization shortly.

Divestiture, or full privatization, occurs when government services are transferred, usually through sale, from government bureaucratic control into an entirely market-based, private environment. At the federal level this form of privatization is very rare, although it does occur. Consider the Student Loan Marketing Association, often referred to by its nickname, Sallie Mae. When it was created in 1973, it was designed to be a government entity for processing federal student education loans. Over time, however, it gradually moved further from its original purpose and became increasingly private. Sallie Mae reached full privatization in 2004.¹⁰ Another example is the U.S. Investigations Services, Inc., which was once the investigative branch of the Office of Personnel Management (OPM) until it was privatized in the 1990s. At the state level, however, the privatization of roads, public utilities, bridges, schools, and even prisons has become increasingly common as state and municipal authorities look for ways to reduce the cost of government.

One of the most important forms of bureaucratic oversight comes from inside the bureaucracy itself. Those within are in the best position to recognize and report on misconduct. But bureaucracies tend to jealously guard their reputations and are generally resistant to criticism from without and from within. This can create quite a problem for insiders who recognize and want to report mismanagement and even criminal behavior. The personal cost of doing the right thing can be prohibitive.¹¹ For a typical

10. <https://www.salliemae.com/about/who-we-are/history/> (June 16, 2016).

11. Alan K. Campbell. 1978. "Civil Service Reform: A New Commitment." *Public Administration Review* 38 No. 2, 99.

bureaucrat faced with the option of reporting corruption and risking possible termination or turning the other way and continuing to earn a living, the choice is sometimes easy.

Under heightened skepticism due to government inefficiency and outright corruption in the 1970s, government officials began looking for solutions. When Congress drafted the **Civil Service Reform Act** of 1978, it specifically included rights for federal **whistleblowers**, those who publicize misdeeds committed within a bureaucracy or other organization, and set up protection from reprisals. The act's Merit Systems Protection Board is a quasi-judicial institutional board headed by three members appointed by the president and confirmed by the Senate that hears complaints, conducts investigations into possible abuses, and institutes protections for bureaucrats who speak out.¹² Over time, Congress and the president have strengthened these protections with additional acts. These include the **Whistleblower Protection Act** of 1989 and the **Whistleblower Protection Enhancement Act** of 2012, which further compelled federal agencies to protect whistleblowers who reasonably perceive that an institution or the people in the institution are acting inappropriately.

12. Campbell, "Civil Service Reform," 100.



In 2013, Edward Snowden, an unknown computer professional working under contract within the National Security Agency, copied and released to the press classified information that revealed an expansive and largely illegal secret surveillance network the government was operating within the United States. Fearing reprisals, Snowden fled to Hong Kong and then Moscow. Some argue that his actions were irresponsible and he should be prosecuted. Others champion his actions and hold that without them, the illegal spying would have continued. Regardless, the Snowden case reveals important weaknesses in whistleblower protections in the United States. (credit: modification of work by Bruno Sanchez-Andrade Nuño)

Questions to Consider

1. Briefly explain the advantages of negotiated rulemaking.
2. What concerns might arise when Congress

delegates decision-making authority to unelected leaders, sometimes called the fourth branch of government?

3. In what ways might the patronage system be made more efficient?
4. Does the use of bureaucratic oversight staff by Congress and by the OMB constitute unnecessary duplication? Why or why not?
5. Which model of bureaucracy best explains the way the government currently operates? Why?
6. Do you think Congress and the president have done enough to protect bureaucratic whistleblowers? Why or why not?

Terms to Remember

negotiated rulemaking—a rulemaking process in which neutral advisors convene a committee of those who have vested interests in the proposed rules and help the committee reach a consensus on them

privatization—measures that incorporate the market forces of the private sector into the function of government to varying degrees

whistleblower—a person who publicizes misdeeds committed within a bureaucracy or other organization

PART X

DOMESTIC POLICY

44. Domestic Policy: Actors, Issues and Disputes



Minnesota Tea Party members protest in 2011, demanding repeal of the recently enacted Patient Protection and Affordable Care Act. Protests against expanding the federal government's role in the economy. (credit: modification of work by "Fibonacci Blue"/Flickr)

On March 25, 2010, both chambers of Congress passed the Health Care and Education Reconciliation Act (HCERA).¹ The story of the HCERA, which expanded and improved some provisions of the Patient Protection and Affordable Care Act (ACA), is a complicated tale of insider politics in which the Democratic Party was able to enact sweeping health care and higher education reforms over fierce Republican opposition. Some people laud the HCERA as an example of getting things done in the face of partisan gridlock in

1. "H.R. 4872 — Health Care and Education Reconciliation Act of 2010," <https://www.congress.gov/bill/111th-congress/house-bill/4872> (March 1, 2016).

Congress; others see it a case of government power run amok. Regardless of your view, the HCERA vividly demonstrates public policymaking in action.

Each of the individual actors and institutions in the U.S. political system, such as the president, Congress, the courts, interest groups, and the media, gives us an idea of the component parts of the system and their functions. But in the study of public policy, we look at the larger picture and see all the parts working together to make laws that ultimately affect citizens and their communities.

Domestic Policy: Questions to Consider

1. What is public policy?
2. How do different areas of policy differ, and what roles do policy analysts and advocates play?
3. What programs does the national government currently provide?
4. How do budgetary policy and politics operate?

45. Domestic Policy: What is public policy?

Learning Objectives

- Explain the concept of public policy
- Discuss examples of public policy in action

It is easy to imagine that when designers engineer a product, like a car, they do so with the intent of satisfying the consumer. But the design of any complicated product must take into account the needs of regulators, transporters, assembly line workers, parts suppliers, and myriad other participants in the manufacture and shipment process. And manufacturers must also be aware that consumer tastes are fickle: A gas-guzzling sports car may appeal to an unmarried twenty-something with no children; but what happens to product satisfaction when gas prices fluctuate, or the individual gets married and has children?

In many ways, the process of designing domestic policy isn't that much different. The government, just like auto companies, needs to ensure that its citizen-consumers have access to an array of goods and services. And just as in auto companies, a wide range of actors is engaged in figuring out how to do it. Sometimes, this process effectively provides policies that benefit citizens. But just as often, the process of policymaking is muddled by the demands of competing interests with different opinions about society's needs or the role that government should play in meeting them. To

understand why, we begin by thinking about what we mean by the term “public policy.”

Public Policy Defined

One approach to thinking about **public policy** is to see it as the broad strategy government uses to do its job. More formally, it is the relatively stable set of purposive governmental actions that address matters of concern to some part of society.¹ This description is useful in that it helps to explain both what public policy is and what it isn't. First, public policy is a guide to legislative action that is more or less fixed for long periods of time, not just short-term fixes or single legislative acts. Policy also doesn't happen by accident, and it is rarely formed simply as the result of the campaign promises of a single elected official, even the president. While elected officials are often important in shaping policy, most policy outcomes are the result of considerable debate, compromise, and refinement that happen over years and are finalized only after input from multiple institutions within government as well as from interest groups and the public.

Public policy deals with issues of concern to some segment of society. Governments frequently interact with individual actors like citizens, corporations, or other countries. They may even pass highly specialized pieces of legislation, known as private bills, which confer specific privileges on individual entities. But public policy covers only those issues that are of interest to larger segments of society or that directly or indirectly affect society as a whole. Paying off the loans of a specific individual would not be public policy, but

1. James E. Anderson. 2000. *Public Policymaking: An Introduction*, 4th ed. Boston: Houghton Mifflin.

creating a process for loan forgiveness available to certain types of borrowers (such as those who provide a public service by becoming teachers) would certainly rise to the level of public policy.

A final important characteristic of public policy is that it is more than just the actions of government; it also includes the behaviors or outcomes that government action creates. Policy can even be made when government refuses to act in ways that would change the status quo when circumstances or public opinion begin to shift.²

Public Policy as Outcomes

Governments rarely want to keep their policies a secret. Elected officials want to be able to take credit for the things they have done to help their constituents, and their opponents are all too willing to cast blame when policy initiatives fail. We can therefore think of policy as the formal expression of what elected or appointed officials are trying to accomplish.

2. E. E. Schattschneider. 1960. *The Semi-Sovereign People*. New York: Holt, Rinehart & Winston.



President Obama signs a 2009 executive order to accelerate the federal government's recruitment and hiring of returning veterans.

Typically, elected and even high-ranking appointed officials lack either the specific expertise or tools needed to successfully create and implement public policy on their own. They turn instead to the vast government bureaucracy to provide policy guidance. For example, when Congress passed the Clean Water Act (1972), it dictated that steps should be taken to improve water quality throughout the country. But it ultimately left it to the bureaucracy to figure out exactly how 'clean' water needed to be. In doing so, Congress provided the Environmental Protection Agency (EPA) with discretion to determine how much pollution is allowed in U.S. waterways.

Even the best-intended policies can have unintended consequences and may even ultimately harm someone, if only those who must pay for the policy through higher taxes. While policy pronouncements and bureaucratic actions are certainly meant to rationalize policy, it is whether a given policy helps or hurts constituents (or is perceived to do so) that ultimately determines how voters will react toward the government in future elections.

The Social Safety Net

During the Great Depression of the 1930s, the United States created a set of policies and programs that constituted a social safety net for the millions who had lost their jobs, their homes, and their savings. Under President Franklin Delano Roosevelt, the federal government began programs like the Work Progress Administration and Civilian Conservation Corps to combat unemployment and the Home Owners' Loan Corporation to refinance Depression-related mortgage debts. As the effects of the Depression eased, the government phased out many of these programs. Other programs, like Social Security or the minimum wage, remain an important part of the way the government takes care of the vulnerable members of its population. The federal government has also added further social support programs, like Medicaid, Medicare, and the Special Supplemental Nutrition Program for Women, Infants, and Children, to ensure a baseline or minimal standard of living for all, even in the direst of times.



In 1937, during the Great Depression, families in Calipatria, California, waited in line for relief checks, part of the federal government's newly introduced social safety net. (credit: modification of work by the Library of Congress)

In recent decades, however, some have criticized these safety net programs for inefficiency and for incentivizing welfare dependence. They deride “government leeches” who use food stamps to buy lobster or other seemingly inappropriate items. Critics deeply resent the use of taxpayer money to relieve social problems like unemployment and poverty; workers who may themselves be struggling to put food on the table or pay the mortgage feel their hard-earned money should not support other families. “If I can get by without government support,” the reasoning goes, “those welfare families can do the same. Their poverty is not my problem.”

So where should the government draw the line? While there have been some instances of welfare fraud, the welfare reforms of the 1990s have made long-term dependence on the federal government less likely as the welfare safety net was pushed to the states. And with the income gap between the richest and the poorest at its highest level in history, this topic is likely to continue to receive much discussion in the coming years.

Where is the middle ground in the public policy argument over the social safety net? How can the government protect its most vulnerable citizens without placing an undue burden on others?



Explore [historical data on United States budgets and spending](#) from 1940 to the present from the Office of Management and Budget.

Question to Consider

1. What are some of the challenges to getting a new public policy considered and passed as law?

Term to Remember

public policy—the broad strategy government uses to do its job; the relatively stable set of purposive governmental behaviors that address matters of concern to some part of society

46. Domestic Policy: Categorizing Public Policy

Learning Objectives

- Describe the different types of goods in a society
- Identify key public policy domains in the United States
- Compare the different forms of policy and the way they transfer goods within a society

The idea of public policy is by its very nature a politically contentious one. Among the differences between American liberals and conservatives are the policy preferences prevalent in each group. Modern liberals tend to feel very comfortable with the idea of the government shepherding progressive social and economic reforms, believing that these will lead to outcomes more equitable and fair for all members of society. Conservatives, on the other hand, often find government involvement onerous and overreaching. They feel society would function more efficiently if oversight of most “public” matters were returned to the private sphere. Before digging too deeply into a discussion of the nature of public policy in the United States, let us look first at why so many aspects of society come under the umbrella of public policy to begin with.

Different Types of Goods

Think for a minute about what it takes to make people happy and satisfied. As we live our daily lives, we experience a range of physical, psychological, and social needs that must be met in order for us to be happy and productive. At the very least, we require food, water, and shelter. In very basic subsistence societies, people acquire these through farming crops, digging wells, and creating shelter from local materials. People also need social interaction with others and the ability to secure goods they acquire, lest someone else try to take them. As their tastes become more complex, they may find it advantageous to exchange their items for others; this requires not only a mechanism for barter but also a system of transportation. The more complex these systems are, the greater the range of items people can access to keep them alive and make them happy. However, this increase in possessions also creates a stronger need to secure what they have acquired.



This Library of Congress photo shows an early nineteenth-century subsistence farm in West Virginia, which once included crops, livestock, and an orchard. (credit: modification of work by the Library of Congress)

Economists use the term *goods* to describe the range of commodities, services, and systems that help us satisfy our wants or needs. This term can certainly apply to the food you eat or the home you live in, but it can also describe the systems of transportation or public safety used to protect them. Most of the goods you interact with in your daily life are *private goods*, which means that they can be owned by a

particular person or group of people, and are excluded from use by others, typically by means of a price. For example, your home or apartment is a private good reserved for your own use because you

pay rent or make mortgage payments for the privilege of living there. Further, **private goods** are finite and can run out if overused, even if only in the short term. The fact that private goods are excludable and finite makes them tradable. A farmer who grows corn, for instance, owns that corn, and since only a finite amount of corn exists, others may want to trade their goods for it if their own food supplies begin to dwindle.

Type of Good	Description of Types of Goods in Society
private	goods provided by private businesses & groups used only by those who pay for them (cars, flat screen televisions, personal computers, etc.)
public	goods provided by taxpayers to government that anyone can use/no fees charged (education, water, most roads and bridges, etc.)
common	goods that all people may use but that are of limited supply (ocean fish, fresh water, etc.)
toll	goods that are available to many people but used only by those who can pay the fee (toll roads, private schools, toll bridges, etc.)

Proponents of free-market economics believe that the market forces of supply and demand, working without any government involvement, are the most effective way for markets to operate. One of the basic principles of free-market economics is that for just about any good that can be privatized, the most efficient means for exchange is the marketplace. A well-functioning market will allow producers of goods to come together with consumers of goods to negotiate a trade. People facilitate trade by creating a currency—a common unit of exchange—so they do not need to carry around everything they may want to trade at all times. As long as there are several providers or sellers of the same good, consumers can negotiate with them to find a price they are willing to pay. As long as there are several buyers for a seller’s goods, providers can negotiate with them to find a price buyers are willing to accept. And, the logic goes, if prices begin to rise too much, other sellers will enter the marketplace, offering lower prices.

A second basic principle of free-market economics is that it is largely unnecessary for the government to protect the value of

private goods. Farmers who own land used for growing food have a vested interest in protecting their land to ensure its continued production. Business owners must protect the reputation of their business or no one will buy from them. And, to the degree that producers need to ensure the quality of their product or industry, they can accomplish that by creating a group or association that operates outside government control. In short, industries have an interest in self-regulating to protect their own value. According to free-market economics, as long as everything we could ever want or need is a private good, and so long as every member of society has some ability to provide for themselves and their families, public policy regulating the exchange of goods and services is really unnecessary.

Some people in the United States argue that the self-monitoring and self-regulating incentives provided by the existence of private goods mean that sound public policy requires very little government action. Known as libertarians, these individuals believe government almost always operates less efficiently than the private sector (the segment of the economy run for profit and not under government control), and that government actions should therefore be kept to a minimum.

Even as many in the United States recognize the benefits provided by private goods, we have increasingly come to recognize problems with the idea that all social problems can be solved by exclusively private ownership. First, not all goods can be classified as strictly private. Can you really consider the air you breathe to be private? Air is a difficult good to privatize because it is not excludable—everyone can get access to it at all times—and no matter how much of it you breathe, there is still plenty to go around. Geographic regions like forests have environmental, social, recreational, and aesthetic value that cannot easily be reserved for private ownership. Resources like migrating birds or schools of fish may have value if hunted or fished, but they cannot be owned due to their migratory nature. Finally, national security provided by the

armed forces protects all citizens and cannot reasonably be reserved for only a few.

These are all examples of what economists call *public goods*, sometimes referred to as collective goods. Unlike private property, they are not excludable and are essentially infinite. Forests, water, and fisheries, however, are a type of public good called *common goods*, which are not excludable but may be finite. The problem with both public and **common goods** is that since no one owns them, no one has a financial interest in protecting their long-term or future value. Without government regulation, a factory owner can feel free to pollute the air or water, since he or she will have no responsibility for the pollution once the winds or waves carry it somewhere else. Without government regulation, someone can hunt all the migratory birds or deplete a fishery by taking all the fish, eliminating future breeding stocks that would maintain the population. The situation in which individuals exhaust a common resource by acting in their own immediate self-interest is called the *tragedy of the commons*.

A second problem with strict adherence to free-market economics is that some goods are too large, or too expensive, for individuals to provide them for themselves. Consider the need for a marketplace: Where does the marketplace come from? How do we get the goods to market? Who provides the roads and bridges? Who patrols the waterways? Who provides security? Who ensures the regulation of the currency? No individual buyer or seller could accomplish this. The very nature of the exchange of private goods requires a system that has some of the openness of public or



Air pollution billows from a power plant before the installation of emission control equipment for the removal of sulfur dioxide and particulate matter. Can you see why uncontrolled pollution is an example of the “tragedy of the commons”?

common goods, but is maintained by either groups of individuals or entire societies.

Economists consider goods like cable TV, cellphone service, and private schools to be **toll goods**. Toll goods are similar to public goods in that they are open to all and theoretically infinite if maintained, but they are paid for or provided by some outside (nongovernment) entity. Many people can make use of them, but only if they can pay the price. The name “toll goods” comes from the fact that, early on, many toll roads were in fact privately owned commodities. Even today, states from Virginia to California have allowed private companies to build public roads in exchange for the right to profit by charging tolls.¹

So long as land was plentiful, and most people in the United States lived a largely rural subsistence lifestyle, the difference between private, public, common, and toll goods was mostly academic. But as public lands increasingly became private through sale and settlement, and as industrialization and the rise of mass production allowed monopolies and oligopolies to become more influential, support for public policies regulating private entities grew. By the beginning of the twentieth century, led by the Progressives, the United States had begun to search for ways to govern large businesses that had managed to distort market forces by monopolizing the supply of goods. And, largely as a result of the Great Depression, people wanted ways of developing and protecting public goods that were fairer and more equitable than had existed before. These forces and events led to the increased regulation of

1. David Milkenberg, “Private Toll Road Investors Shift Revenue Risk to States,” 26 November 2013. <http://www.bloomberg.com/news/articles/2013-11-27/private-toll-road-investors-shift-revenue-risk-to-states> (March 1, 2016).

public and common goods, and a move for the public sector—the government—to take over of the provision of many toll goods.

Classic Types of Policy

Public policy, then, ultimately boils down to determining the distribution, allocation, and enjoyment of public, common, and toll goods within a society. While the specifics of policy often depend on the circumstances, two broad questions all policymakers must consider are a) who pays the costs of creating and maintaining the goods, and b) who receives the benefits of the goods? When private goods are bought and sold in a market place, the costs and benefits go to the participants in the transaction. Your landlord benefits from receipt of the rent you pay, and you benefit by having a place to live. But non-private goods like roads, waterways, and national parks are controlled and regulated by someone other than the owners, allowing policymakers to make decisions about who pays and who benefits.

In 1964, Theodore Lowi argued that it was possible to categorize policy based upon the degree to which costs and benefits were concentrated on the few or diffused across the many. One policy category, known as distributive policy, tends to collect payments or resources from many but concentrates direct benefits on relatively few. Highways are often developed through distributive policy. Distributive policy is also common when society feels there is a social benefit to individuals obtaining private goods such as higher education that offer long-term benefits, but the upfront cost may be too high for the average citizen.

One example of the way distributive policy works is the story of the Transcontinental Railroad. In the 1860s, the U.S. government began to recognize the value of building a robust railroad system to move passengers and freight around the country. A particular goal was connecting California and the other western territories

acquired during the 1840s war with Mexico to the rest of the country. The problem was that constructing a nationwide railroad system was a costly and risky proposition. To build and support continuous rail lines, private investors would need to gain access to tens of thousands of miles of land, some of which might be owned by private citizens. The solution was to charter two private corporations—the Central Pacific and Union Pacific Railroads—and provide them with resources and land grants to facilitate the construction of the railroads.² Through these grants, publicly owned land was distributed to private citizens, who could then use it for their own gain. However, a broader public gain was simultaneously being provided in the form of a nationwide transportation network.



In an example of distributive policy, the Union Pacific Railroad was given land and resources to help build a national railroad system. Here, its workers construct the Devil's Gate Bridge in Utah in 1869.

The same process operates in the agricultural sector, where various

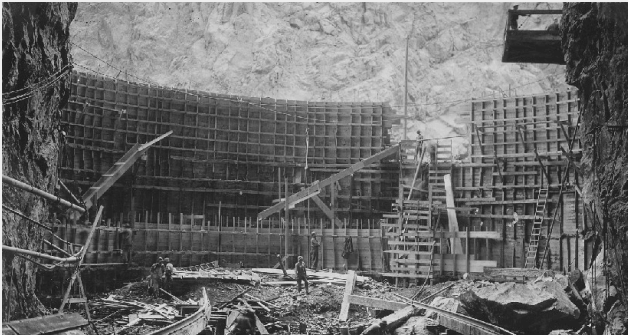
2. <http://www.history.com/topics/inventions/transcontinental-railroad> (March 1, 2016).

federal programs help farmers and food producers through price supports and crop insurance, among other forms of assistance. These programs help individual farmers and agriculture companies stay afloat and realize consistent profits. They also achieve the broader goal of providing plenty of sustenance for the people of the United States, so that few of us have to “live off the land.”

The Hoover Dam: The Federal Effort to Domesticate the Colorado River

As westward expansion led to development of the American Southwest, settlers increasingly realized that they needed a way to control the frequent floods and droughts that made agriculture difficult in the region. As early as 1890, land speculators had tried diverting the Colorado River for this purpose, but it wasn't until 1922 that the U.S. Bureau of Reclamation (then called the Reclamation Service) chose the Black Canyon as a good location for a dam to divert the river. Since it would affect seven states (as well as Mexico), the federal government took the lead on the project, which eventually cost \$49 million and more than one hundred lives. The dam faced significant opposition from members of other states, who felt its massive price tag

(almost \$670 million in today's dollars³) benefitted only a small group, not the whole nation. However, in 1928, Senator Hiram Johnson and Representative Phil Swing, both Republicans from California, won the day. Congress passed the Boulder Canyon Project Act, authorizing the construction of one of the most ambitious engineering feats in U.S. history. The Hoover Dam, completed in 1935, served the dual purposed of generating hydroelectric power and irrigating two million acres of land from the resulting reservoir (Lake Mead).



Workers construct the Hoover Dam, a distributive policy project, in Nevada in 1932.

3. <http://www.dollartimes.com/inflation/inflation.php?amount=49&year=1919> (March 1, 2016).

Was the construction of the Hoover Dam an effective expression of public policy? Why or why not?



Visit this [site](#) to see how the U.S. Bureau of Reclamation (USBR) presented the construction of the Hoover Dam. How would you describe the bureau's perspective?

American Rivers is an advocacy group whose goal is to protect and restore rivers, including the Colorado River. How does this group's view of the [Hoover Dam](#) differ from that of the USBR?

Other examples of **distributive policy** support citizens' efforts to achieve "the American Dream." American society recognizes the benefits of having citizens who are financially invested in the country's future. Among the best ways to encourage this investment are to ensure that citizens are highly educated and have the ability to acquire high-cost private goods such as homes and businesses. However, very few people have the savings necessary to pay upfront for a college education, a first home purchase, or the start-up costs of a business. To help out, the government has created a range of incentives that everyone in the country pays for through taxes but that directly benefit only the recipients. Examples include grants (such as Pell grants), tax credits and deductions, and subsidized or federally guaranteed loans. Each of these programs aims to achieve a policy outcome. Pell grants exist to help students graduate from

college, whereas Federal Housing Administration mortgage loans lead to home ownership.

While distributive policy, according to Lowi, has diffuse costs and concentrated benefits, **regulatory policy** features the opposite arrangement, with concentrated costs and diffuse benefits. A relatively small number of groups or individuals bear the costs of regulatory policy, but its benefits are expected to be distributed broadly across society. As you might imagine, regulatory policy is most effective for controlling or protecting public or common resources. Among the best-known examples are policies designed to protect public health and safety, and the environment. These regulatory policies prevent manufacturers or businesses from maximizing their profits by excessively polluting the air or water, selling products they know to be harmful, or compromising the health of their employees during production.

In the United States, nationwide calls for a more robust regulatory policy first grew loud around the turn of the twentieth century and the dawn of the Industrial Age. Investigative journalists—called *muckrakers* by politicians and business leaders who were the focus of their investigations—began to expose many of the ways in which manufacturers were abusing the public trust. Although various forms of corruption topped the list of abuses, among the most famous muckraker exposés was *The Jungle*, a 1906 novel by Upton Sinclair that focused on unsanitary working conditions and unsavory business practices in the meat-packing industry.⁴ This work and others like it helped to spur the passage of the Pure Food and Drug Act (1906) and ultimately led to the creation of government agencies such as the U.S. Food and Drug Administration

4. Upton Sinclair. 1906. *The Jungle*. New York: Grosset and Dunlap.

(FDA).⁵ The nation's experiences during the depression of 1896 and the Great Depression of the 1930s also led to more robust regulatory policies designed to improve the transparency of financial markets and prevent monopolies from forming.

A final type of policy is **redistributive policy**, so named because it redistributes resources in society from one group to another. That is, according to Lowi, the costs are concentrated and so are the benefits, but different groups bear the costs and enjoy the benefits. Most redistributive policies are intended to have a sort of “Robin Hood” effect; their goal is to transfer income and wealth from one group to another such that everyone enjoys at least a minimal standard of living. Typically, the wealthy and middle class pay into the federal tax base, which then funds need-based programs that support low-income individuals and families. A few examples of redistributive policies are Head Start (education), Medicaid (health care), Temporary Assistance for Needy Families (TANF, income support), and food programs like the Supplementary Nutritional Aid Program (SNAP). The government also uses redistribution to incentivize specific behaviors or aid small groups of people. Pell grants to encourage college attendance and tax credits to encourage home ownership are other examples of redistribution.

Questions to Consider

1. Of the types of goods introduced in this section, which do you feel is the most important to the public

5. <http://www.fda.gov/AboutFDA/WhatWeDo/History/> (March 1, 2016).

- generally and why?
2. Which public policies are most important and why?

Terms to Remember

distributive policy—a policy that collect payments or resources broadly but concentrates direct benefits on relatively few

redistributive policy—a policy in which costs are born by a relatively small number of groups or individuals, but benefits are expected to be enjoyed by a different group in society

regulatory policy—a policy that regulates companies and organizations in a way that protects the public

47. Domestic Policy: Policy Arenas

Learning Objectives

- Identify the key domestic arenas of public policy
- Describe the major social safety net programs
- List the key agencies responsible for promoting and regulating U.S. business and industry

In practice, public policy consists of specific programs that provide resources to members of society, create regulations that protect U.S. citizens, and attempt to equitably fund the government. We can broadly categorize most policies based on their goals or the sector of society they affect, although many, such as food stamps, serve multiple purposes. Implementing these policies costs hundreds of billions of dollars each year, and understanding the goals of this spending and where the money goes is of vital importance to citizens and students of politics alike.

Social Welfare Policy

The U.S. government began developing a social welfare policy during the Great Depression of the 1930s. By the 1960s, social welfare had become a major function of the federal government—one to which most public policy funds are

devoted—and had developed to serve several overlapping functions. First, social welfare policy is designed to ensure some level of equity in a democratic political system based on competitive, free-market economics. During the Great Depression, many politicians came to fear that the high unemployment and low-income levels plaguing society could threaten the stability of democracy, as was happening in European countries like Germany and Italy. The assumption in this thinking is that democratic systems work best when poverty is minimized. In societies operating in survival mode, in contrast, people tend to focus more on short-term problem-solving than on long-term planning. Second, social welfare policy creates an automatic stimulus for a society by building a **safety net** that can catch members of society who are suffering economic hardship through no fault of their own. For an individual family, this safety net makes the difference between eating and starving; for an entire economy, it could prevent an economic recession from sliding into a broader and more damaging depression.

One of the oldest and largest pieces of social welfare policy is Social Security, which cost the United States about \$845 billion in 2014 alone.¹ These costs are offset by a 12.4 percent payroll tax on all wages up to \$118,500; employers and workers who are not self-employed split the bill for each worker, whereas the self-employed pay their entire share.²

1. “An Update to the Budget and Economic Outlook: 2014 to 2024,” 27 August 2014. <https://www.cbo.gov/publication/45653> (March 1, 2016).
2. “Update 2016,” <https://www.ssa.gov/pubs/EN-05-10003.pdf> (March 1, 2016).

Social Security was conceived as a solution to several problems inherent to the Industrial Era economy. First, by the 1920s and 1930s, an increasing number of workers were earning their living through manual or day-wage labor that depended on their ability to engage in physical activity. As their bodies weakened with age or if they were injured, their ability to provide for themselves and



In 1930, when this Ford automotive plant opened in Long Beach, California, American workers had few economic protections to rely on if they were injured or could not maintain such physical activity as they aged.

their families was compromised. Second, and of particular concern, were urban widows. During their working years, most American women stayed home to raise children and maintain the household while their husbands provided income. Should their husbands die or become injured, these women had no wage-earning skills with which to support themselves or their families.

Social Security addresses these concerns with three important tools. First and best known is the retirement benefit. After completing a minimum number of years of work, American workers may claim a form of pension upon reaching retirement age. It is often called an **entitlement** program since it guarantees benefits to a particular group, and virtually everyone will eventually qualify for the plan given the relatively low requirements for enrollment. The amount of money a worker receives is based loosely on his or her lifetime earnings. Full retirement age was originally set at sixty-five, although changes in legislation have increased it to sixty-

seven for workers born after 1959.³ A valuable added benefit is that, under certain circumstances, this income may also be claimed by the survivors of qualifying workers, such as spouses and minor children, even if they themselves did not have a wage income.

A second Social Security benefit is a disability payout, which the government distributes to workers who become unable to work due to physical or mental disability. To qualify, workers must demonstrate that the injury or incapacitation will last at least twelve months. A third and final benefit is Supplemental Security Income, which provides supplemental income to adults or children with considerable disability or to the elderly who fall below an income threshold.



President George W. Bush discusses Social Security in Florida at the outset of his second term in 2005.

During the George W. Bush administration, Social Security became a highly politicized topic as the Republican Party sought to find a way of preventing what experts predicted would be the impending collapse of the Social Security system. In 1950, the ratio of workers paying into

the program to beneficiaries receiving payments was 16.5 to 1. By 2013, that number was 2.8 to 1 and falling. Most predictions in fact suggest that, due to continuing demographic changes including slower population growth and an aging population, by 2033, the amount of revenue generated from payroll taxes will no longer be sufficient to cover costs. The Bush administration proposed avoiding this by privatizing the program, in effect, taking it out of the government's hands and making individuals' benefits variable

3. <https://www.ssa.gov/planners/retire/ageincrease.html> (March 1, 2016).

instead of defined. The effort ultimately failed, and Social Security's long-term viability continues to remain uncertain. Numerous other plans for saving the program have been proposed, including raising the retirement age, increasing payroll taxes (especially on the wealthy) by removing the \$118,500 income cap, and reducing payouts for wealthier retirees. None of these proposals have been able to gain traction, however.

While Social Security was designed to provide cash payments to sustain the aged and disabled, Medicare and Medicaid were intended to ensure that vulnerable populations have access to health care. Medicare, like Social Security, is an entitlement program funded through payroll taxes. Its purpose is to make sure that senior citizens and retirees have access to low-cost health care they might not otherwise have, because most U.S. citizens get their health insurance through their employers. Medicare provides three major forms of coverage: a guaranteed insurance benefit that helps cover major hospitalization, fee-based supplemental coverage that retirees can use to lower costs for doctor visits and other health expenses, and a prescription drug benefit. Medicare faces many of the same long-term challenges as Social Security, due to the same demographic shifts. Medicare also faces the problem that health care costs are rising significantly faster than inflation. In 2014, Medicare cost the federal government almost \$597 billion.⁴

4. "The Facts on Medicare Spending and Financing," <http://kff.org/medicare/fact-sheet/medicare-spending-and-financing-fact-sheet/> (March 1, 2016); "National Health Expenditure Fact Sheet," <https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html> (March 1, 2016).

Medicaid is a formula-based, health insurance program, which means beneficiaries must demonstrate they fall within a particular income category. Individuals in the Medicaid program receive a fairly comprehensive set of health benefits, although access to health care may be limited because fewer providers accept payments from the program (it pays them less for services than does Medicare). Medicaid differs dramatically from Medicare in that it is partially funded by states, many of which have reduced access to the program by setting the income threshold so low that few people qualify. The ACA (2010) sought to change that by providing more federal money to the states if they agreed to raise minimum income requirements. Many states have refused, which has helped to keep the overall costs of Medicaid lower, even though it has also left many people without health coverage they might receive if they lived elsewhere. Total costs for Medicaid in 2014 were about \$492 billion, about \$305 billion of which was paid by the federal government.⁵

Collectively, Social Security, Medicare, and Medicaid make up the lion's share of total federal government spending, almost 50 percent in 2014 and more than 50 percent in 2015. Several other smaller programs also provide income support to families. Most of these are formula-based, or means-tested, requiring citizens to meet certain maximum income requirements in order to qualify. A few examples are TANF, SNAP (also called food stamps), the unemployment insurance program, and various housing assistance programs. Collectively, these programs add up to a little over \$480 billion.

5. "National Health Expenditure Fact Sheet," <https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html> (March 1, 2016).

Science, Technology, and Education

After World War II ended, the United States quickly realized that it had to address two problems to secure its fiscal and national security future. The first was that more than ten million servicemen and women needed to be reintegrated into the workforce, and many lacked appreciable work skills. The second problem was that the United States' success in its new conflict with the Soviet Union depended on the rapid development of a new, highly technical military-industrial complex. To confront these challenges, the U.S. government passed several important pieces of legislation to provide education assistance to workers and research dollars to industry. As the needs of American workers and industry have changed, many of these programs have evolved from their original purposes, but they still remain important pieces of the public policy debate.

Much of the nation's science and technology policy benefits its military, for instance, in the form of research and development funding for a range of defense projects. The federal government still promotes research for civilian uses, mostly through the National Science Foundation, the National Institutes of Health, the National Aeronautics and Space Administration (NASA), and the National Oceanic and Atmospheric Administration. Recent debate over these agencies has focused on whether government funding is necessary or if private entities would be better suited. For example, although NASA



NASA launches the space shuttle Discovery from the Kennedy Space Center in 2007. Should the private sector fund space exploration programs rather than the government? (credit: NASA)

continues to develop a replacement for the now-defunct U.S. space shuttle program, much of its workload is currently being performed by private companies working to develop their own space launch, resupply, and tourism programs.

The problem of trying to direct and fund the education of a modern U.S. workforce is familiar to many students of American government. Historically, education has largely been the job of the states. While they have provided a very robust K-12 public education system, the national government has never moved to create an equivalent system of national higher education academies or universities as many other countries have done. As the need to keep the nation competitive with others became more pressing, however, the U.S. government did step in to direct its education

dollars toward creating greater equity and ease of access to the existing public and private systems.

The overwhelming portion of the government's education money is spent on student loans, grants, and work-study programs. Resources are set aside to cover job-retraining programs for individuals who lack private-sector skills or who need to be retrained to meet changes in the economy's demands for the labor force. National policy toward elementary and secondary education programs has typically focused on increasing resources available to school districts for nontraditional programs (such as preschool and special needs), or helping poorer schools stay competitive with wealthier institutions.

Business Stimulus and Regulation

A final key aspect of domestic policy is the growth and regulation of business. The size and strength of the economy is very important to politicians whose jobs depend on citizens' believing in their own future prosperity. At the same time, people in the United States want to live in a world where they feel safe from unfair or environmentally damaging business practices. These desires have forced the government to perform a delicate balancing act between programs that help grow the economy by providing benefits to the business sector and those that protect consumers, often by curtailing or regulating the business sector.

Two of the largest recipients of government aid to business are agriculture and energy. Both are multi-billion dollar industries concentrated in rural and/or electorally influential states. Because voters are affected by the health of these sectors every time they pay their grocery or utility bill, the U.S. government has chosen to provide significant agriculture and energy subsidies to cover the risks inherent in the unpredictability of the weather and oil exploration. Government subsidies also protect these industries'

profitability. These two purposes have even overlapped in the government's controversial decision to subsidize the production of ethanol, a fuel source similar to gasoline but generated from corn.

When it comes to regulation, the federal government has created several agencies responsible for providing for everything from worker safety (OSHA, the Occupational Safety and Health Administration), to food safety (FDA), to consumer protection, where the recently created Bureau of Consumer Protection ensures that businesses do not mislead consumers with deceptive or manipulative practices. Another prominent federal agency, the EPA, is charged with ensuring that businesses do not excessively pollute the nation's air or waterways. A complex array of additional regulatory agencies governs specific industries such as banking and finance, which are detailed later in this chapter.



The policy areas we've described so far fall far short of forming an exhaustive list. This [site](#) contains the major topic categories of substantive policy in U.S. government, according to the Policy Agendas Project. View subcategories by clicking on the major topic categories.

Questions to Consider

1. What societal ills are social welfare programs

- designed to address?
2. What is the difference between a private and a public good?
 3. How is regulatory policy different from redistributive policy?

Terms to Remember

entitlement—a program that guarantees benefits to members of a specific group or segment of the population from contributions by those receiving the entitlement benefit or from US taxpayers who received a benefit from the recipients' service or contribution

means-tested—a program providing a benefit to low-income individuals from US taxpayers

Medicaid—a health insurance program for low-income citizens from US taxpayers

Medicare—an entitlement health insurance program for older people and retirees who no longer get health insurance through their work

safety net—a way to provide for members of society experiencing economic hardship

Social Security—a social welfare policy for people who no longer receive an income from employment

48. Domestic Policy: Who are the policymakers?

Learning Objectives

- Identify types of policymakers in different issue areas
- Describe the public policy process

Many Americans were concerned when Congress began debating the ACA. As the program took shape, some people felt the changes it proposed were being debated too hastily, would be implemented too quickly, or would summarily give the government control over an important piece of the U.S. economy—the health care industry. Ironically, the government had been heavily engaged in providing health care for decades. More than 50 percent of all health care dollars spent were being spent by the U.S. government well before the ACA was enacted. As you have already learned, Medicare was created decades earlier. Despite protesters' resistance to government involvement in health care, there is no keeping government out of Medicare; the government IS Medicare.

What many did not realize is that few if any of the proposals that eventually became part of the ACA were original. While the country was worried about problems like terrorism, the economy, and conflicts over gay rights, armies of individuals were debating the best ways to fix the nation's health care delivery. Two important but overlapping groups defended their preferred policy changes: policy advocates and policy analysts.

Policy Advocates

Take a minute to think of a policy change you believe would improve some condition in the United States. Now ask yourself this: “Why do I want to change this policy?” Are you motivated by a desire for justice? Do you feel the policy change would improve your life or that of members of your community? Is your sense of morality motivating you to change the status quo? Would your profession be helped? Do you feel that changing the policy might raise your status?



In 2010, members of PETA (People for the Ethical Treatment of Animals) demonstrate against a local zoo. As policy advocates, PETA's members often publicize their position on how animals should be treated.

Most people have some policy position or issue they would like to see altered. One of the reasons the news media are so enduring is that citizens have a range of opinions on public policy, and they are very interested in debating how a given change would improve their lives or the country's. But despite their interests, most people do little more than vote or occasionally contribute to a political campaign. A few people, however, become **policy advocates** by actively working to propose or maintain public policy.

One way to think about policy advocates is to recognize that they hold a normative position on an issue, that is, they have a conviction about what should or ought to be done. The best public policy, in their view, is one that accomplishes a specific goal or outcome. For this reason, advocates often begin with an objective and then try to shape or create proposals that help them accomplish that goal. Facts, evidence, and analysis are important tools for convincing policymakers or the general public of the benefits of their proposals. Private citizens often find themselves in advocacy positions,

particularly if they are required to take on leadership roles in their private lives or in their organizations. The most effective advocates are usually hired professionals who form lobbying groups or think tanks to promote their agenda.



First Lady Michelle Obama shows her AARP membership card on her fiftieth birthday in January 2014. AARP is a major policy advocate for older people and retirees.

A lobbying group that frequently takes on advocacy roles is AARP (formerly the American Association of Retired Persons). AARP's primary job is to convince the government to provide more public resources and services to senior citizens, often through regulatory or redistributive politics. Chief among its goals are lower health care costs and the safety of Social Security pension payments. These aims put AARP

in the Democratic Party's electoral coalition, since Democrats have historically been stronger advocates for Medicare's creation and expansion. In 2002, for instance, Democrats and Republicans were debating a major change to Medicare. The Democratic Party supported expanding Medicare to include free or low-cost prescription drugs, while the Republicans preferred a plan that would require seniors to purchase drug insurance through a private insurer. The government would subsidize costs, but many seniors would still have substantial out-of-pocket expenses. To the surprise of many, AARP supported the Republican proposal.

While Democrats argued that their position would have provided a better deal for individuals, AARP reasoned that the Republican plan had a much better chance of passing. The Republicans controlled the House and looked likely to reclaim control of the Senate in the upcoming election. Then-president George W. Bush was a Republican and would almost certainly have vetoed the

Democratic approach. AARP's support for the legislation helped shore up support for Republicans in the 2002 midterm election and also help convince a number of moderate Democrats to support the bill (with some changes), which passed despite apparent public disapproval. AARP had done its job as an advocate for seniors by creating a new benefit it hoped could later be expanded, rather than fighting for an extreme position that would have left it with nothing.¹

Not all policy advocates are as willing to compromise their positions. It is much easier for a group like AARP to compromise over the amount of money seniors will receive, for instance, than it is for an evangelical religious group to compromise over issues like abortion, or for civil rights groups to accept something less than equality. Nor are women's rights groups likely to accept pay inequality as it currently exists. It is easier to compromise over financial issues than over our individual views of morality or social justice.

Policy Analysts

A second approach to creating public policy is a bit more objective. Rather than starting with what ought to happen and seeking ways to make it so, **policy analysts** try to identify all the possible choices available to a decision maker and then gauge their impacts if

1. Thomas R. Oliver, Philip R. Lee, and Helene L. Lipton. 2004. "A Political History of Medicare and Prescription Drug Coverage," *Milbank Quarterly* 82, No. 2: 283–354, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2690175/>.

implemented. The goal of the analyst is not really to encourage the implementation of any of the options; rather, it is to make sure decision makers are fully informed about the implications of the decisions they do make.

Understanding the financial and other costs and benefits of policy choices requires analysts to make strategic guesses about how the public and governmental actors will respond. For example, when policymakers are considering changes to health care policy, one very important question is how many people will participate. If very few people had chosen to take advantage of the new health care plans available under the ACA marketplace, it would have been significantly cheaper than advocates proposed, but it also would have failed to accomplish the key goal of increasing the number of insured. But if people who currently have insurance had dropped it to take advantage of ACA's subsidies, the program's costs would have skyrocketed with very little real benefit to public health. Similarly, had all states chosen to create their own marketplaces, the cost and complexity of ACA's implementation would have been greatly reduced.

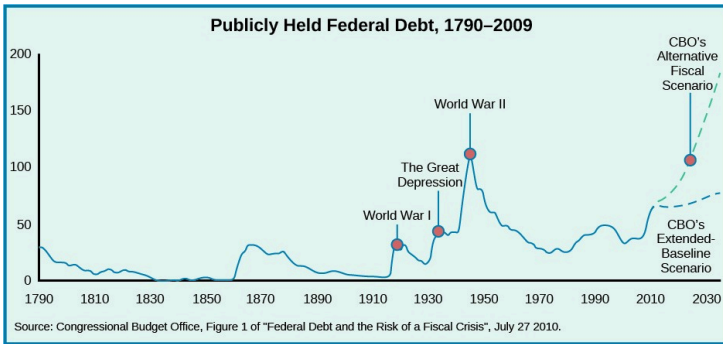
Because advocates have an incentive to understate costs and overstate benefits, policy analysis tends to be a highly politicized aspect of government. It is critical for policymakers and voters that policy analysts provide the most accurate analysis possible. A number of independent or semi-independent think tanks have sprung up in Washington, DC, to provide assessments of policy options. Most businesses or trade organizations also employ their own policy-analysis wings to help them understand proposed changes or even offer some of their own. Some of these try to be as impartial as possible. Most, however, have a known bias toward policy advocacy. The Cato Institute, for example, is well known and highly respected policy analysis group that both liberal and conservative politicians have turned to when considering policy options. But the Cato Institute has a known libertarian bias; most of the problems it selects for analysis have the potential for private sector solutions. This means its analysts tend to include the rosiest

assumptions of economic growth when considering tax cuts and to overestimate the costs of public sector proposals.



The [RAND Corporation](#) has conducted objective policy analysis for corporate, nonprofit, and government clients since the mid-twentieth century. What are some of the policy areas it has explored?

Both the Congress and the president have tried to reduce the bias in policy analysis by creating their own theoretically nonpartisan policy branches. In Congress, the best known of these is the **Congressional Budget Office**, or CBO. Authorized in the 1974 Congressional Budget and Impoundment Control Act, the CBO was formally created in 1975 as a way of increasing Congress's independence from the executive branch. The CBO is responsible for scoring the spending or revenue impact of all proposed legislation to assess its net effect on the budget. In recent years, it has been the CBO's responsibility to provide Congress with guidance on how to best balance the budget. The formulas that the CBO uses in scoring the budget have become an important part of the policy debate, even as the group has tried to maintain its nonpartisan nature.



The Congressional Budget Office (CBO) is responsible for studying the impact of all proposed legislation to assess its net effect on the budget and tracking federal debt. For example, this 2010 CBO chart shows federal debt held by the public as a percentage of gross domestic product from 1790 through 2010 and projected to 2035.

In the executive branch, each individual department and agency is technically responsible for its own policy analysis. The assumption is that experts in the Federal Communications Commission or the Federal Elections Commission are best equipped to evaluate the impact of various proposals within their policy domain. Law requires that most regulatory changes made by the federal government also include the opportunity for public input so the government can both gauge public opinion and seek outside perspectives.

Executive branch agencies are usually also charged with considering the economic impact of regulatory action, although some agencies have been better at this than others. Critics have frequently singled out the EPA and OSHA for failing to adequately consider the impact of new rules on business. Within the White House itself, the Office of Management and Budget (OMB) was created to “serve the President of the United States in implementing his [or her] vision” of policy. Policy analysis is important to the

OMB's function, but as you can imagine, it frequently compromises its objectivity during policy formulation.



How do the [OMB](#) and the [CBO](#) compare when it comes to impartiality?

Preparing to Be a Policymaker

What is your passion?
Is there an aspect of society you think should be changed? Become a public policy advocate for it! One way to begin is by petitioning the Office of the President. In years

past, citizens wrote letters to express grievances or policy preferences. Today, you can visit We the People, the White House online petitions platform. At this government site, you can search for petitions related to your cause or post your own. If your petition gets enough signatures, the White House will issue a response. The petitions range from serious to silly, but



**YOUR VOICE IN
OUR GOVERNMENT**

The White House petition website encourages citizens to participate in the democratic process.

the process is an important way to speak out about the policies that are important to you.

Follow-up activity: Choose an issue you are passionate about. Visit [We the People](#) to see if there is already a petition there concerning your chosen issue. If so, join the community promoting your cause. If not, create your own petition and try to gather enough signatures to receive an official response.

The Policy Process

The **policy process** contains four sequential stages: (1) agenda setting, (2) policy enactment, (3) policy implementation, and (4) evaluation. Given the sheer number of issues already processed by the government, called the continuing agenda, and the large number of new proposals being pushed at any one time, it is typically quite difficult to move a new policy all the way through the process.

Agenda setting is the crucial first stage of the public policy process. Agenda setting has two subphases: problem identification and alternative specification. Problem identification identifies the issues that merit discussion. Not all issues make it onto the governmental agenda because there is only so much attention that government can pay. Thus, one of the more important tasks for a policy advocate is to frame his or her issue in a compelling way that

raises a persuasive dimension or critical need.² For example, health care reform has been attempted on many occasions over the years. One key to making the topic salient has been to frame it in terms of health care access, highlighting the percentage of people who do not have health insurance.

Alternative specification, the second subphase of agenda setting, considers solutions to fix the difficulty raised in problem identification. For example, government officials may agree in the problem subphase that the increase in childhood obesity presents a societal problem worthy of government attention. However, the solution can be complex, and people who otherwise agree might come into conflict over what the best answer is. Alternatives might range from reinvestment in school physical education programs and health education classes, to taking soda and candy machines out of the schools and requiring good nutrition in school lunches. Agenda setting ends when a given problem has been selected, a solution has been paired with that problem, and the solution goes to the decision makers for a vote. Acid rain provides another nice illustration of agenda setting and the problems and solutions subphases. Acid rain is a widely recognized problem that did not make it on to the governmental policy agenda until Congress passed the Air Quality Act of 1967, long after environmental groups started asking for laws to regulate pollution.

In the second policy phase, enactment, the elected branches of government typically consider one specific solution to a problem and decide whether to pass it. This stage is the most visible one and usually garners the most press coverage. And yet it is somewhat anticlimatic. By the time a specific policy proposal (a solution) comes out of agenda setting for a yes/no vote, it can be something of a foregone conclusion that it will pass.

2. Bryan D. Jones and Frank R. Baumgartner. 2005. *The Politics of Attention*. Chicago: University of Chicago Press.

Once the policy has been enacted—usually by the legislative and/or executive branches of the government, like Congress or the president at the national level or the legislature or governor of a state—government agencies do the work of actually implementing it. On a national level, policy implementation can be either top-down or bottom-up. In top-down implementation, the federal government dictates the specifics of the policy, and each state implements it the same exact way. In bottom-up implementation, the federal government allows local areas some flexibility to meet their specific challenges and needs.³

Evaluation, the last stage of the process, should be tied directly to the policy's desired outcomes. Evaluation essentially asks, "How well did this policy do what we designed it to do?" The answers can sometimes be surprising. In one hotly debated case, the United States funded abstinence-only sex education for teens with the goal of reducing teen pregnancy. A 2011 study published in the journal *PLoS One*, however, found that abstinence-only education actually *increased* teen pregnancy rates.⁴ The information from the evaluation stage can feed back into the other stages, informing future decisions and creating a public policy cycle.

3. Daniel Mazmanian and Paul Sabatier. 1989. *Implementation and Public Policy*. Washington, DC: Rowman and Littlefield.
4. Kathrin F. Stanger-Hall and David W. Hall. 2011. "Abstinence-Only Education and Teen Pregnancy Rates: Why We Need Comprehensive Sex Education in the U.S.," *PLoS One* October 14, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3194801/>.

Question to Consider

1. In the implementation phase of the policy process, is it better to use a top-down approach or a bottom-up approach on Federal policies? Why?

Terms to Remember

Congressional Budget Office—(CBO) the congressional office that scores the spending or revenue impact of all proposed legislation to assess its net effect on the budget

policy advocates—people who actively work to propose or maintain public policy

policy analysts—people who identify all possible choices available to a decision maker and assess the potential impact of each

49. Domestic Policy: How are budgeting and tax policy implemented?

Learning Objectives

- Discuss economic theories that shape U.S. economic policy
- Explain how the government uses fiscal policy tools to maintain a healthy economy
- Analyze the taxing and spending decisions made by Congress and the president
- Discuss the role of the Federal Reserve Board in monetary policy

A country spends, raises, and regulates money in accordance with its values. In all, the federal government's budget for 2016 was \$3.8 trillion. This chapter has provided a brief overview of some of the budget's key areas of expenditure, and thus some insight into modern American values. But these values are

only part of the budgeting story. Policymakers make considerable effort to ensure that long-term priorities are protected from the



Strategists discuss the budget in the Roosevelt Room of the White House in 2009.

heat of the election cycle and short-term changes in public opinion. The decision to put some policymaking functions out of the reach of Congress also reflects economic philosophies about the best ways to grow, stimulate, and maintain the economy. The role of politics in drafting the annual budget is indeed large, but we should not underestimate the challenges elected officials face as a result of decisions made in the past.

Approaches to the Economy

Until the 1930s, most policy advocates argued that the best way for the government to interact with the economy was through a hands-off approach formally known as *laissez-faire* economics. These policymakers believed the key to economic growth and development was the government's allowing private markets to operate efficiently. Proponents of this school of thought believed private investors were better equipped than governments to figure out which sectors of the economy were most likely to grow and which new products were most likely to be successful. They also tended to oppose government efforts to establish quality controls or health and safety standards, believing consumers themselves would punish bad behavior by not trading with poor corporate citizens. Finally, *laissez-faire* proponents felt that keeping government out of the business of business would create an automatic cycle of economic growth and contraction. Contraction phases in which there is no economic growth for two consecutive quarters, called recessions, would bring business failures and higher unemployment. But this condition, they believed, would correct itself on its own if the government simply allowed the system to operate.

The Great Depression challenged the *laissez-faire* view, however. When President Franklin Roosevelt came to office in 1933, the United States had already been in the depths of the Great

Depression for several years, since the stock market crash of 1929. Roosevelt sought to implement a new approach to economic regulation known as Keynesianism. Named for its developer, the economist John Maynard Keynes, Keynesian economics argues that it is possible for a recession to become so deep, and last for so long, that the typical models of economic collapse and recovery may not work. Keynes suggested that economic growth was closely tied to the ability of individuals to consume goods. It didn't matter how or where investors wanted to invest their money if no one could afford to buy the products they wanted to make. And in periods of extremely high unemployment, wages for newly hired labor would be so low that new workers would be unable to afford the products they produced.

Keynesianism counters this problem by increasing government spending in ways that improve consumption. Some of the proposals Keynes suggested were payments or pension for the unemployed and retired, as well as tax incentives to encourage consumption in the middle class. His reasoning was that these individuals would be most likely to spend the money they received by purchasing more goods, which in turn would encourage production and investment. Keynes argued that the wealthy class of producers and employers had sufficient capital to meet the increased demand of consumers that government incentives would stimulate. Once consumption had increased and capital was flowing again, the government would reduce or eliminate its economic stimulus, and any money it had borrowed to create it could be repaid from higher tax revenues.

Keynesianism dominated U.S. fiscal or spending policy from the 1930s to the 1970s. By the 1970s, however, high inflation began to slow economic growth. There were a number of reasons, including higher oil prices and the costs of fighting the Vietnam War. However, some economists, such as Arthur Laffer, began to argue that the social welfare and high tax policies created in the name of Keynesianism were overstimulating the economy, creating a situation in which demand for products had outstripped investors'

willingness to increase production.¹ They called for an approach known as supply-side economics, which argues that economic growth is largely a function of the productive capacity of a country. Supply-siders have argued that increased regulation and higher taxes reduce the incentive to invest new money into the economy, to the point where little growth can occur. They have advocated reducing taxes and regulations to spur economic growth.

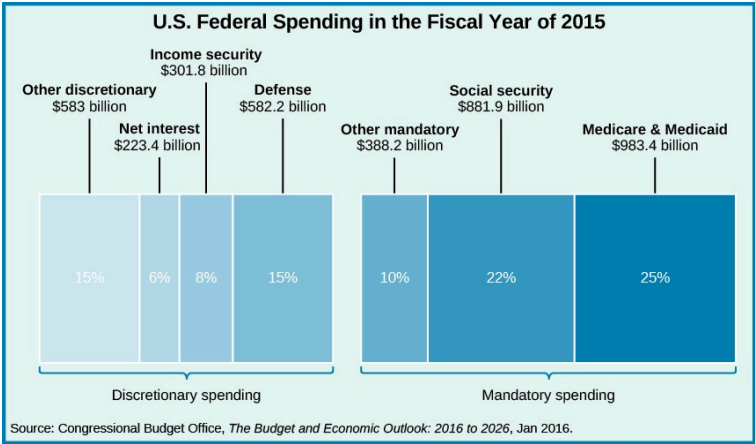
Mandatory Spending vs. Discretionary Spending

The desire of Keynesians to create a minimal level of aggregate demand, coupled with a Depression-era preference to promote social welfare policy, led the president and Congress to develop a federal budget with spending divided into two broad categories: mandatory and discretionary. Of these, **mandatory spending** is the larger, consisting of about \$2.3 trillion of the projected 2015 budget, or roughly 57 percent of all federal expenditures.²

The overwhelming portion of mandatory spending is earmarked for entitlement programs guaranteed to those who meet certain qualifications, usually based on age, income, or disability. These programs, discussed above, include Medicare and Medicaid, Social Security, and major income security programs such as unemployment insurance and SNAP. The costs of programs tied to

1. Arthur B. Laffer, Stephen Moore and Peter J. Tanous. 2009. *The End of Prosperity: How Higher Taxes Will Doom the Economy*. New York: Simon & Schuster.
2. “Mandatory Spending in 2015: An Infographic,” 6 January 2016. www.cbo.gov/publication/51111 (March 1, 2016).

age are relatively easy to estimate and grow largely as a function of the aging of the population. Income and disability payments are a bit more difficult to estimate. They tend to go down during periods of economic recovery and rise when the economy begins to slow down, in precisely the way Keynes suggested. A comparatively small piece of the mandatory spending pie, about 10 percent, is devoted to benefits designated for former federal employees, including military retirement and many Veterans Administration programs.



This chart of U.S. federal spending for 2015 shows the proportions of mandatory and discretionary spending, about 57 percent and 43 percent, respectively.

Congress is ultimately responsible for setting the formulas for mandatory payouts, but as we saw in the earlier discussion regarding Social Security, major reforms to entitlement formulas are difficult to enact. As a result, the size and growth of mandatory spending in future budgets are largely a function of previous legislation that set the formulas up in the first place. So long as supporters of particular programs can block changes to the formulas, funding will continue almost on autopilot. Keynesians support this mandatory spending, along with other elements of social welfare policy, because they help maintain a minimal level

of consumption that should, in theory, prevent recessions from turning into depressions, which are more severe downturns.

Portions of the budget not devoted to mandatory spending are categorized as **discretionary spending** because Congress must pass legislation to authorize money to be spent each year. About 50 percent of the approximately \$1.2 trillion set aside for discretionary spending each year pays for most of the operations of government, including employee salaries and the maintenance of federal buildings. It also covers science and technology spending, foreign affairs initiatives, education spending, federally provided transportation costs, and many of the redistributive benefits most people in the United States have come to take for granted.³ The other half of discretionary spending—and the second-largest component of the total budget—is devoted to the military. (Only Social Security is larger.) Defense spending is used to maintain the U.S. military presence at home and abroad, procure and develop new weapons, and cover the cost of any wars or other military engagements in which the United States is currently engaged.

3. “Discretionary Spending in 2015: An Infographic,” 6 January 2016. www.cbo.gov/publication/51112 (March 1, 2016).



The war in Afghanistan, ongoing since 2001, has cost the United States billions of dollars in discretionary military spending authorized by Congress every year.

In theory, the amount of revenue raised by the national government should be equal to these expenses, but with the exception of a brief period from 1998 to 2000, that has not been the case. The economic recovery from the 2007–2009 recession, and budget control efforts implemented since then, have managed to cut the annual **deficit**—the amount by which expenditures are greater than revenues—by more than half. However, the amount of money the U.S. government needed to borrow to pay its bills in 2016 was still in excess of \$400 billion.⁴ This was in addition to the country’s almost \$19 trillion of total **debt**—the amount of money the government owes its creditors—at the end of 2015, according to the Department of the Treasury.

Balancing the budget has been a major goal of both the Republican and Democratic parties for the past several decades, although the

4. “The Federal Budget in 2015: An Infographic,” 6 January 2016. www.cbo.gov/publication/51110 (March 1, 2016).

parties tend to disagree on the best way to accomplish the task. One frequently offered solution, particularly among supply-side advocates, is to simply cut spending. This has proven to be much easier said than done. If Congress were to try to balance the budget only through discretionary spending, it would need to cut about one-third of spending on programs like defense, higher education, agriculture, police enforcement, transportation, and general government operations. Given the number and popularity of many of these programs, it is difficult to imagine this would be possible. To use spending cuts alone as a way to control the deficit, Congress will almost certainly be required to cut or control the costs of mandatory spending programs like Social Security and Medicare—a radically unpopular step.

Tax Policy

The other option available for balancing the budget is to increase revenue. All governments must raise revenue in order to operate. The most common way is by applying some sort of tax on residents (or on their behaviors) in exchange for the benefits the government provides. As necessary as taxes are,



A U.S. marine fills out an income tax form. Income taxes in the United States are progressive taxes.

however, they are not without potential downfalls. First, the more money the government collects to cover its costs, the less residents are left with to spend and invest. Second, attempts to raise revenues through taxation may alter the behavior of residents in ways that are counterproductive to the state and the broader economy. Excessively taxing necessary and desirable behaviors like

consumption (with a sales tax) or investment (with a capital gains tax) will discourage citizens from engaging in them, potentially slowing economic growth. The goal of tax policy, then, is to determine the most effective way of meeting the nation's revenue obligations without harming other public policy goals.

As you would expect, Keynesians and supply-siders disagree about which forms of tax policy are best. Keynesians, with their concern about whether consumers can really stimulate demand, prefer **progressive taxes** systems that increase the effective tax rate as the taxpayer's income increases. This policy leaves those most likely to spend their money with more money to spend. For example, in 2015, U.S. taxpayers paid a 10 percent tax rate on the first \$18,450 of income, but 15 percent on the next \$56,450 (some income is excluded).⁵

The rate continues to rise, to up to 39.6 percent on any taxable income over \$464,850. These brackets are somewhat distorted by the range of tax credits, deductions, and incentives the government offers, but the net effect is that the top income earners pay a greater portion of the overall income tax burden than do those at the lowest tax brackets. According to the Pew Research Center, based on tax returns in 2014, 2.7 percent of filers made more than \$250,000. Those 2.7 percent of filers paid 52 percent of the income tax paid.⁶

5. "2015 Federal Tax Rates, Personal Exemptions, and Standard Deductions," <http://www.irs.com/articles/2015-federal-tax-rates-personal-exemptions-and-standard-deductions> (March 1, 2016).
6. "High income Americans pay most income taxes, but enough to be 'fair'?" <http://www.pewresearch.org/fact-tank/2016/04/13/high-income-americans-pay-most-income-taxes-but-enough-to-be-fair/> (March 1, 2016).

Supply-siders, on the other hand, prefer **regressive tax** systems, which lower the overall rate as individuals make more money. This does not automatically mean the wealthy pay less than the poor, simply that the percentage of their income they pay in taxes will be lower. Consider, for example, the use of **excise taxes** on specific goods or services as a source of revenue.⁷ Sometimes called “sin taxes” because they tend to be applied to goods like alcohol, tobacco, and gasoline, excise taxes have a regressive quality, since the amount of the good purchased by the consumer, and thus the tax paid, does not increase at the same rate as income. A person who makes \$250,000 per year is likely to purchase more gasoline than a person who makes \$50,000 per year. But the higher earner is not likely to purchase *five times more* gasoline, which means the proportion of his or her income paid out in gasoline taxes is less than the proportion for a lower-earning individual.

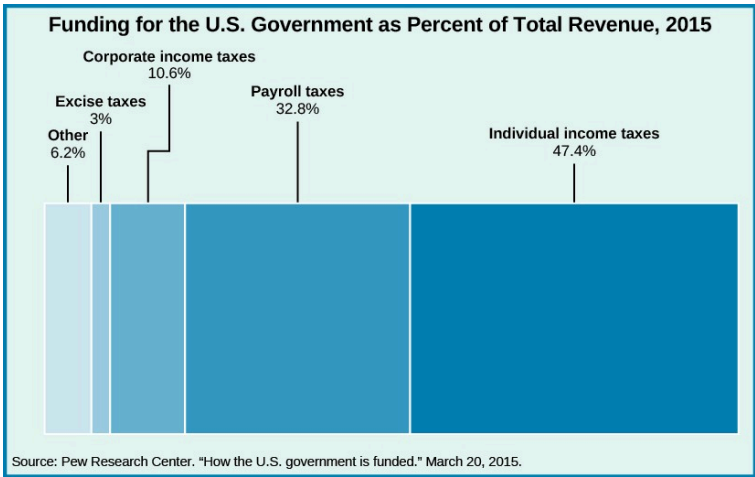


A gas station shows fuel prices over \$3.00 a gallon in 2005, shortly after Hurricane Katrina disrupted gas production in the Gulf of Mexico. Taxes on gasoline that are based on the quantity purchased are regressive taxes.

7. “Excise tax,” <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Excise-Tax> (March 1, 2016).

Another example of a regressive tax paid by most U.S. workers is the payroll tax that funds Social Security. While workers contribute 7.65 percent of their income to pay for Social Security and their employers pay a matching amount, in 2015, the payroll tax was applied to only the first \$118,500 of income. Individuals who earned more than that, or who made money from other sources like investments, saw their overall tax rate fall as their income increased.

In 2015, the United States raised about \$3.2 trillion in revenue. Income taxes (\$1.54 trillion), payroll taxes on Social Security and Medicare (\$1.07 trillion), and excise taxes (\$98 billion) make up three of the largest sources of revenue for the federal government. When combined with corporate income taxes (\$344 billion), these four tax streams make up about 95 percent of total government revenue. The balance of revenue is split nearly evenly between revenues from the Federal Reserve and a mix of revenues from import tariffs, estate and gift taxes, and various fees or fines paid to the government.

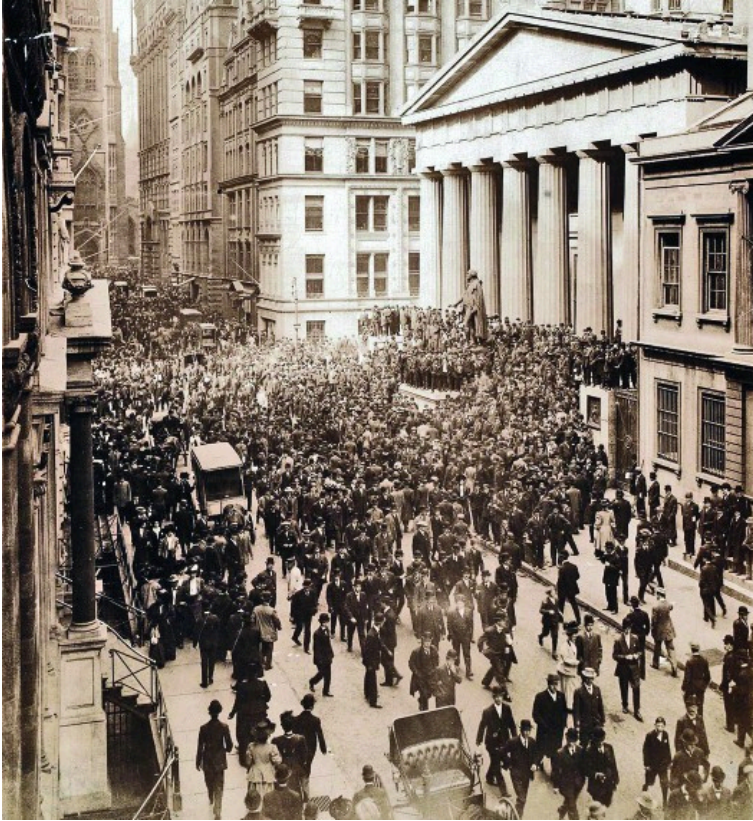


The Federal Reserve Board and Interest Rates

Financial panics arise when too many people, worried about the

solvency of their investments, try to withdraw their money at the same time. Such panics plagued U.S. banks until 1913, when Congress enacted the Federal Reserve Act. The act established the Federal Reserve System, also known as the Fed, as the central bank of the United States. The Fed's three original goals to promote were maximum employment, stable prices, and moderate long-term interest rates.⁸ All of these goals bring stability. The Fed's role is now broader and includes influencing monetary policy (the means by which the nation controls the size and growth of the money supply), supervising and regulating banks, and providing them with financial services like loans.

8. "U.S. Code § 225a – Maintenance of long run growth of monetary and credit aggregates," <https://www.law.cornell.edu/uscode/text/12/225a> (March 1, 2016).



Investors crowd Wall Street during the Bankers Panic of 1907.

The Federal Reserve System is overseen by a board of governors, known as the Federal Reserve Board. The president of the United States appoints the seven governors, each of whom serves a fourteen-year term (the terms are staggered). A chair and vice chair lead the board for terms of four years each. The most important work of the board is participating in the Federal Open Market Committee to set monetary policy, like interest rate levels and macroeconomic policy. The board also oversees a network of twelve

regional Federal Reserve Banks, each of which serves as a “banker’s bank” for the country’s financial institutions.



Do you think you have what it takes to be chair of the Federal Reserve Board? Play this [game](#) and see how you fare!

Questions to Consider

1. When times are tough economically, what can the government do to get the economy moving again?
2. What might indicate that a government is passing the policies the country needs?
3. If you had to define the poverty line, what would you expect people to be able to afford just above that line? For those below that line, what programs should the government offer to improve quality of life?
4. What is the proper role of the government in regulating the private sector so people are protected from unfair or dangerous business practices? Why?
5. Is it realistic to expect the U.S. government to balance its budget? Why or why not?
6. What in your view is the most important policy issue facing the United States? Why is it important and which specific problems need to be solved?

7. What are some suggested solutions to the anticipated Social Security shortfall? Why haven't these solutions tended to gain support?
8. Whose role is more important in a democracy, the policy advocate's or the policy analyst's? Why?
9. Which stage of the policy progress is the most important and why?

Terms to Remember

debt—the total amount the government owes across all years

deficit—the annual amount by which expenditures are greater than revenues

discretionary spending—government spending that Congress must pass legislation to authorize each year

excise taxes—taxes applied to specific goods or services as a source of revenue

mandatory spending—government spending earmarked for entitlement programs guaranteeing support to those who meet certain qualifications

progressive tax—a tax that tends to increase the effective tax rate as the wealth or income of the tax payer increases

recession—a temporary contraction of the economy in which there is no economic growth for two consecutive quarters

regressive tax-a tax applied at a lower overall rate as individuals' income rises

PART XI

FOREIGN POLICY

50. Foreign Policy: Actors, Issues and Disputes



U.S. president Barack Obama and Russian president Vladimir Putin shake hands for the cameras during the G8 Summit held June 17–18, 2013, at Lough Erne in Northern Ireland.

The U.S. government interacts with a large number of international actors, from other governments to private organizations, to fight global problems like terrorism and human trafficking, and to meet many other national foreign policy goals such as encouraging trade and protecting the environment. Sometimes these goals are conflicting. Perhaps because of these realities, the president is in many ways the leader of the foreign policy domain. When the United States wishes to discuss important issues with other nations, the president (or a representative such as the secretary of state) typically does the talking, as when President Barack Obama visited with Russian president Vladimir Putin in 2013.

Do not let this image mislead you. While the president is the country's foreign policy leader, Congress also has many foreign policy responsibilities, including approving treaties and agreements,

allocating funding, making war, and confirming ambassadors. These and various other activities constitute the patchwork quilt that is U.S. foreign policy.

Foreign Policy: Questions to Consider

1. How are foreign and domestic policymaking different, and how are they linked?
2. What are the main foreign policy goals of the United States?
3. How do the president and Congress interact in the foreign policy realm?
4. In what different ways might foreign policy be pursued?

51. Foreign Policy: Basics and International Actors

Learning Objectives

- Explain what foreign policy is and how it differs from domestic policy
- Identify the objectives of U.S. foreign policy
- Describe the different types of foreign policy
- Identify the U.S. government's main challenges in the foreign policy realm

When we consider policy as our chapter focus, we are looking broadly at the actions the U.S. government carries out for particular purposes. In the case of foreign policy, that purpose is to manage its relationships with other nations of the world. Another distinction is that policy results from a course of action or a pattern of actions over time, rather than from a single action or decision. For example, U.S. foreign policy with Russia has been forged by several presidents, as well as by cabinet secretaries, House and Senate members, and foreign policy agency bureaucrats. Policy is also purposive, or intended to do something; that is, policymaking is not random. When the United States enters into an international agreement with other countries on aims such as free trade or nuclear disarmament, it does so for specific reasons. With that general definition of policy established, we shall now dig deeper into the specific domain of U.S. foreign policy.

Consider the Original

George Washington's Farewell Address¹

United States 19th September 1796

Friends, & Fellow-Citizens.

[page 25 of the address...] Against the insidious wiles of foreign influence, (I conjure you to believe me fellow citizens,) the jealousy of a free people ought to be constantly awake; since history and experience prove that foreign influence is one of the most baneful foes of Republican Government. But that jealousy to be useful must be impartial; else it becomes the instrument of the very influence to be avoided, instead of a defence against it. Excessive partiality for one foreign nation and excessive

1. Originally published in David C. Claypoole's *American Daily Advertiser* on September 19, 1796, Washington devoted much of the address to domestic issues of the time, warning against the rise of political parties and sectionalism as a threat to national unity. In the area of foreign affairs, Washington called for America "to steer clear of permanent alliances with any portion of the foreign world." at Library of Congress; <http://memory.loc.gov/cgi-bin/ampage?collId=mgw2&fileName=gwpage024.db&recNum=228>

dislike of another, cause those whom they actuate to see danger only on one side, and serve to veil and even second the arts of influence on the other. Real Patriots, who may resist the intrigues of the favourite, are liable to become suspected and odious; while its tools and dupes usurp the applause & confidence of the people, to surrender their interests.

The Great rule of conduct for us, in regard to foreign Nations is in extending our commercial relations to have with them as little *political* connection as possible.

Go: Washington

Foreign Policy Basics

What is foreign policy? We can think of it on several levels, as “the goals that a state’s officials seek to attain abroad, the values that give rise to those objectives, and the means or instruments used to pursue



Domestic issues can sometimes become international ones when it comes to such topics as foreign trade. Here, President George W. Bush shakes hands with legislators and administration officials after signing the Central American Free Trade Agreement (CAFTA) Implementation Act on August 2, 2005.

them.”² This definition highlights some of the key topics in U.S. foreign policy, such as national goals abroad and the manner in which the United States tries to achieve them. Note too that we distinguish foreign policy, which is externally focused, from domestic policy, which sets strategies internal to the United States, though the two types of policies can become quite intertwined. So, for example, one might talk about Latino politics as a domestic issue when considering educational policies designed to increase the number of Hispanic Americans who attend and graduate from a U.S. college or university.³

However, as demonstrated in the primary debates leading up to the 2016 election, Latino politics can quickly become a foreign policy matter when considering topics such as immigration from and foreign trade with countries in Central America and South America.⁴ What are the objectives of U.S. foreign policy? While the

2. Eugene R. Wittkopf, Christopher M. Jones, and Charles W. Kegley, Jr. 2007. *American Foreign Policy: Pattern and Process*, 7th ed. Belmont, CA: Thomson Wadsworth.
3. Michelle Camacho Liu. 2011. *Investing in Higher Education for Latinos: Trends in Latino College Access and Success*. Washington, DC: National Conference of State Legislatures. <http://www.ncsl.org/documents/educ/trendsinlatinosuccess.pdf> (May 12, 2016).
4. Charlene Barshefsky and James T. Hill. 2008. *U.S.–Latin America Relations: A New Direction for a New Reality*. Washington, DC: Council on Foreign Relations. i.cfr.org/content/publications/attachments/LatinAmerica_TF.pdf (May 12, 2016).

goals of a nation's foreign policy are always open to debate and revision, there are nonetheless four main goals to which we can attribute much of what the U.S. government does in the foreign policy realm: (1) the protection of the U.S. and its citizens, (2) the maintenance of access to key resources and markets, (3) the preservation of a balance of power in the world, and (4) the protection of human rights and democracy.

The first goal is the protection of the United States and the lives of its citizens, both while they are in the United States and when they travel abroad. Related to this security goal is the aim of protecting the country's allies, or countries with which the United States is friendly and mutually supportive. In the international sphere, threats and dangers can take several forms, including military threats from other nations or terrorist groups and economic threats from boycotts and high tariffs on trade.

In an economic boycott, the United States ceases trade with another country unless or until it changes a policy to which the United States objects. Ceasing trade means U.S. goods cannot be sold in that country and its goods cannot be sold in the United States. For example, in recent years the United States and other countries implemented an economic boycott of Iran as it escalated the development of its nuclear energy program. The recent Iran nuclear deal is a pact in which Iran agrees to halt nuclear development while the United States and six other countries lift economic sanctions to again allow trade with Iran. Barriers to trade also include tariffs, or fees charged for moving goods from one country to another. Protectionist trade policies raise tariffs so that it becomes difficult for imported goods, now more expensive, to compete on price with domestic goods. Free trade agreements seek to reduce these trade barriers.

The second main goal of U.S. foreign policy is to ensure the nation maintains access to key resources and markets across the world. Resources include natural resources, such as oil, and economic resources, including the infusion of foreign capital investment for U.S. domestic infrastructure projects like buildings, bridges, and

weapons systems. Of course, access to the international marketplace also means access to goods that American consumers might want, such as Swiss chocolate and Australian wine. U.S. foreign policy also seeks to advance the interests of U.S. business, to both sell domestic products in the international marketplace and support general economic development around the globe (especially in developing countries).

A third main goal is the preservation of a balance of power in the world. An ideal **balance of power** means no one nation or region is much more powerful militarily than are the countries of the rest of the world. The achievement of a perfect balance of power is probably not possible, but general stability, or predictability in the operation of governments, strong institutions, and the absence of violence within and between nations may be. For much of U.S. history, leaders viewed world stability through the lens of Europe. If the European continent was stable, so too was the world. During the Cold War era that followed World War II, stability was achieved by the existence of dual superpowers, the United States and the Soviet Union, and by the real fear of the nuclear annihilation of which both were capable. Until approximately 1989–1990, advanced industrial democracies aligned themselves behind one of these two superpowers.



President Barack Obama, along with French president François Hollande and Paris mayor Anne Hidalgo, place roses on the makeshift memorial in front of the Bataclan concert hall, one of the sites targeted in the Paris terrorist attacks of November 13, 2015.

Today, in the post-Cold War era, many parts of Europe are politically more free than they were during the years of the Soviet bloc, and there is less fear of nuclear war than when the United States and the Soviet Union had missiles pointed at each other for four straight decades. However, despite the mostly stabilizing presence of the European Union (EU), which now has

twenty-eight member countries, several wars have been fought in Eastern Europe and the former Soviet Union. Moreover, the EU itself faces some challenges, including a vote in the United Kingdom to leave the EU, the ongoing controversy about how to resolve the national debt of Greece, and the crisis in Europe created by thousands of refugees from the Middle East.

Carefully planned acts of terrorism in the United States, Asia, and Europe have introduced a new type of enemy into the balance of power equation—nonstate or nongovernmental organizations, such as al-Qaeda and ISIS (or ISIL), consisting of various terrorist cells located in many different countries and across all continents.

The fourth main goal of U.S. foreign policy is the protection of human rights and democracy. The payoff of stability that comes from other U.S. foreign policy goals is peace and tranquility. While certainly looking out for its own strategic interests in considering foreign policy strategy, the United States nonetheless attempts to support international peace through many aspects of its foreign policy, such as foreign aid, and through its support of and participation in international organizations such as the United Nations, the North Atlantic Treaty Organization (NATO), and the Organization of American States.

The **United Nations (UN)** is one of many international organizations in the world today. The main institutional bodies of the UN are the General Assembly and the Security Council. The General Assembly includes all member nations and admits new members and approves the UN budget by a two-thirds majority. The Security Council includes fifteen countries, five of which are permanent members (including the United States) and ten that are nonpermanent and rotate on a five-year-term basis. The entire membership is bound by decisions of the Security Council, which makes all decisions related to international peace and security. Two other important units of the UN are the International Court of Justice in The Hague (Netherlands) and the UN Secretariat, which includes the Secretary-General of the UN and the UN staff directors and employees.

The Creation of the United Nations

One of the unique and challenging aspects of global affairs is the fact that no world-level authority exists to mandate when and how the world's nations interact. After the failed attempt by President Woodrow Wilson and others to formalize a "League of Nations" in the wake of World War I in the 1920s, and on the heels of a worldwide depression that began in 1929, came World War II, history's deadliest military conflict. Now, in the early decades of the twenty-first century, it is common to think of the September 11 terrorist attacks in 2001 as the big game-changer. Yet while 9/11 was hugely significant in the United States and abroad, World War II was even more so. The December 1941 Japanese attack on Pearl Harbor (Hawaii) was a comparable surprise-style attack that plunged the United States into war.

The scope of the conflict, fought in Europe and the Pacific Ocean, and Hitler's nearly successful attempt to take over Europe entirely, struck fear in minds and hearts. The war brought about a sea change in international relations and governance, from the Marshall Plan to rebuild Europe, to NATO that created a cross-national military shield for Western Europe, to the creation of the UN in 1945, when the representatives of fifty countries met and signed the Charter of the United Nations in San Francisco, California.



On June 26, 2015, House minority leader Nancy Pelosi (D-CA) joined UN secretary-general Ban Ki-moon, California governor Jerry Brown, and other dignitaries to commemorate the seventieth anniversary of the adoption of the UN Charter in San Francisco. (credit: modification of work by “Nancy Pelosi”/Flickr)

Today, the United Nations, headquartered in New York City, includes 193 of the 195 nations of the world. It is a voluntary association to which member nations pay dues based on the size of their economy. The UN’s main purposes are to maintain peace and security, promote human rights and social progress, and develop friendly relationships among nations.

Follow-up activity: In addition to facilitating collective decision-making on world matters, the UN carries out many different programs. Go to the [UN website](#) to find information about three different UN programs that are carried out around the world.

An ongoing question for the United States in waging the war against

terrorism is to what degree it should work in concert with the UN to carry out anti-terrorism initiatives around the world in a multilateral manner, rather than pursuing a “go it alone” strategy of unilateralism. The fact that the U.S. government has such a choice suggests the voluntary nature of the United States (or another country) accepting world-level governance in foreign policy. If the United States truly felt bound by UN opinion regarding the manner in which it carries out its war on terrorism, it would approach the UN Security Council for approval.

Another cross-national organization to which the United States is tied, and that exists to forcefully represent Western allies and in turn forge the peace, is the **North Atlantic Treaty Organization (NATO)**. NATO was formed after World War II as the Cold War between East and West started to emerge. While more militaristic in approach than the United Nations, NATO has the goal of protecting the interests of Europe and the West and the assurance of support and defense from partner nations. However, while it is a strong military coalition, it has not sought to expand and take over other countries. Rather, the peace and stability of Europe are its main goals. NATO initially included only Western European nations and the United States. However, since the end of the Cold War, additional countries from the East, such as Turkey, have entered into the NATO alliance.

Besides participating in the UN and NATO, the United States also distributes hundreds of billions of dollars each year in foreign aid to improve the quality of life of citizens in developing countries. The United States may also forgive the foreign debts of these countries. By definition, developing countries are not modernized in terms of infrastructure and social services and thus suffer from instability. Helping them modernize and develop stable governments is intended as a benefit to them and a prop to the stability of the world. An alternative view of U.S. assistance is that there are more nefarious goals at work, that perhaps it is intended to buy influence in developing countries, secure a position in the region, obtain access to resources, or foster dependence on the United States.

The United States pursues its four main foreign policy goals through several different foreign policy types, or distinct substantive areas of foreign policy in which the United States is engaged. These types are trade, diplomacy, sanctions, military/defense, intelligence, foreign aid, and global environmental policy.

Trade policy is the way the United States interacts with other countries to ease the flow of commerce and goods and services between countries. A country is said to be engaging in **protectionism** when it does not permit other countries to sell goods and services within its borders, or when it charges them very high tariffs (or import taxes) to do so. At the other end of the spectrum is a **free trade** approach, in which a country allows the unfettered flow of goods and services between itself and other countries. At times the United States has been free trade-oriented, while at other times it has been protectionist. Perhaps its most free trade-oriented move was the 1991 implementation of the **North American Free Trade Agreement** (NAFTA). This pact removed trade barriers and other transaction costs levied on goods moving between the United States, Mexico, and Canada.

Critics see a free trade approach as problematic and instead advocate for protectionist policies that shield U.S. companies and their products against cheaper foreign products that might be imported here. One of the more prominent recent examples of protectionist policies occurred in the steel industry, as U.S. companies in the international steel marketplace struggled with competition from Chinese factories in particular.

The **balance of trade** is the relationship between a country's inflow and outflow of goods. The United States sells many goods and services around the world, but overall it maintains a trade deficit, in which more goods and services are coming in from other countries than are going out to be sold overseas. The current U.S. trade deficit is \$37.4 billion, which means the value of what the United States imports from other countries is much larger than the

value of what it exports to other countries.⁵ This trade deficit has led some to advocate for protectionist trade policies.

For many, foreign policy is synonymous with diplomacy. **Diplomacy** is the establishment and maintenance of a formal relationship between countries that governs their interactions on matters as diverse as tourism, the taxation of goods they trade, and the landing of planes on each other's runways. While diplomatic relations are not always rosy, when they are operating it does suggest that things are going well between the countries. Diplomatic relations are formalized through the sharing of ambassadors. Ambassadors are country representatives who live and maintain an office (known as an embassy) in the other country. Just as exchanging ambassadors formalizes the bilateral relationship between countries, calling them home signifies the end of the relationship. Diplomacy tends to be the U.S. government's first step when it tries to resolve a conflict with another country.

To illustrate how international relations play out when countries come into conflict, consider what has become known as the Hainan Island incident. In 2001, a U.S. spy plane collided with a Chinese jet fighter near Chinese airspace, where U.S. planes were not authorized to be. The Chinese jet fighter crashed and the pilot died. The U.S. plane made an emergency landing on the island of Hainan. China retrieved the aircraft and captured the U.S. pilots. U.S. ambassadors then attempted to negotiate for their return. These negotiations were slow and ended up involving officials of the president's cabinet, but they ultimately worked. Had they not succeeded, an escalating set of options likely would have included diplomatic sanctions (removal of ambassadors), economic sanctions (such as an embargo on trade and the flow of money between the

5. U.S. Census Bureau, "Foreign Trade: U.S. International Trade Data" <https://www.census.gov/foreign-trade/data/index.html> (May 12, 2016).

countries), minor military options (such as establishment of a no-fly zone just outside Chinese airspace), or more significant military options (such as a focused campaign to enter China and get the pilots back). Nonmilitary tools to influence another country, like economic sanctions, are referred to as **soft power**, while the use of military power is termed **hard power**.⁶

At the more serious end of the foreign policy decision-making spectrum, and usually as a last resort when diplomacy fails, the U.S. military and defense establishment exists to provide the United States the ability to wage war against other state and nonstate actors. Such war can be offensive, as were the Iraq War in 2003 and the 1989 removal of Panamanian leader Manuel Noriega. Or it can be defensive,



President George H. W. Bush greets U.S. troops stationed in Saudi Arabia on Thanksgiving Day in 1990. The first troops were deployed there in August 1990, as part of Operation Desert Shield, which was intended to build U.S. military strength in the area in preparation for an eventual military operation.

as a means to respond to aggression from others, such as the Persian Gulf War in 1991, also known as Operation Desert Storm. The potential for military engagement, and indeed the scattering about the globe of hundreds of U.S. military installations, can also be a potential source of foreign policy strength for the United States. On the other hand, in the world of diplomacy, such an approach can be seen as imperialistic by other world nations.

Intelligence policy is related to defense and includes the overt and covert gathering of information from foreign sources that might be

6. Joseph S. Nye, Jr. 2005. *Soft Power: The Means to Success in World Politics*. Washington, DC: Public Affairs.

of strategic interest to the United States. The intelligence world, perhaps more than any other area of foreign policy, captures the imagination of the general public. Many books, television shows, and movies entertain us (with varying degrees of accuracy) through stories about U.S. intelligence operations and people.

Foreign aid and global environmental policy are the final two foreign policy types. With both, as with the other types, the United States operates as a strategic actor with its own interests in mind, but here it also acts as an international steward trying to serve the common good. With foreign aid, the United States provides material and economic aid to other countries, especially developing countries, in order to improve their stability and their citizens' quality of life. This type of aid is sometimes called humanitarian aid; in 2013 the U.S. contribution totaled \$32 billion. Military aid is classified under military/defense or national security policy (and totaled \$8 billion in 2013). At \$40 billion the total U.S. foreign aid budget for 2013 was sizeable, though it represented less than 1 percent of the entire federal budget.⁷

Global environmental policy addresses world-level environmental matters such as climate change and global warming, the thinning of the ozone layer, rainforest depletion in areas along the Equator,

7. U.S. Agency for International Development, "U.S. Overseas Loans and Grants (Greenbook)," <https://explorer.usaid.gov/reports-greenbook.html> (June 18, 2016); C. Eugene Emery Jr., and Amy Sherman. 2016. "Marco Rubio says foreign aid is less than 1 percent of federal budget," *Politifact*, 11 March 2016. www.politifact.com/truth-o-meter/statements/2016/mar/11/marco-rubio/marco-rubio-says-foreign-aid-less-1-percent-federal/.

and ocean pollution and species extinction. The United States' commitment to such issues has varied considerably over the years. For example, the United States was the largest country not to sign the 1997 Kyoto Protocol on greenhouse gas emissions. However, few would argue that the U.S. government has not been a leader on global environmental matters.

Unique Challenges in Foreign Policy

U.S. foreign policy is a massive and complex enterprise. What are its unique challenges for the country?

First, there exists no true world-level authority dictating how the nations of the world should relate to one another. If one nation negotiates in bad faith or lies to another, there is no central world-level government authority to sanction that country. This makes diplomacy and international coordination an ongoing bargain as issues evolve and governmental leaders and nations change. Foreign relations are certainly made smoother by the existence of cross-national voluntary associations like the United Nations, the Organization of American States, and the African Union. However, these associations do not have strict enforcement authority over specific nations, unless a group of member nations takes action in some manner (which is ultimately voluntary).

The **European Union** is the single supranational entity (transnational government) with some real and significant authority over its member nations. Adoption of its common currency, the euro, brings with it sovereignty concessions from countries on a variety of matters, and the EU's economic and environmental regulations are the strictest in the world. Yet even the EU has enforcement issues, as evidenced by the battle within its ranks to force member Greece to reduce its national debt or the recurring problem of Spain overfishing in the North Atlantic Ocean.

International relations take place in a relatively open venue in

which it is seldom clear how to achieve collective action among countries generally or between the United States and specific other nations in particular. When does it make sense to sign a multinational pact and when doesn't it? Is a particular bilateral economic agreement truly as beneficial to the United States as to the other party, or are we giving away too much in the deal? These are open and complicated questions, which the various schools of thought discussed later in the chapter will help us answer.

A second challenge for the United States is the widely differing views among countries about the role of government in people's lives. The government of hardline communist North Korea regulates everything in its people's lives every day. At the other end of the spectrum are countries with little government activity at all, such as parts of the island of New Guinea. In between is a vast array of diverse approaches to governance. Countries like Sweden provide cradle-to-grave human services programs like health care and education that in some parts of India are minimal at best. In Egypt, the nonprofit sector provides many services rather than the government. The United States relishes its tradition of freedom and the principle of limited government, but practice and reality can be somewhat different. In the end, it falls somewhere in the middle of this continuum because of its focus on law and order, educational and training services, and old-age pensions and health care in the form of Social Security and Medicare.

The challenge of pinpointing the appropriate role of government may sound more like a domestic than a foreign policy matter, and to some degree it is an internal choice about the way government interacts with the people. Yet the internal (or domestic) relationship between a government and its people can often become intertwined with foreign policy. For example, the narrow stance on personal liberty that Iran has taken in recent decades led other countries to impose economic sanctions that crippled the country internally. Some of these sanctions have eased in light of the new nuclear deal with Iran. So the domestic and foreign policy realms are intertwined in terms of what we view as national priorities—whether they

consist of nation building abroad or infrastructure building here at home, for example. This latter choice is often described as the “guns versus butter” debate.

A third, and related, unique challenge for the United States in the foreign policy realm is other countries’ varying ideas about the appropriate form of government. These forms range from democracies on one side to various authoritarian (or nondemocratic) forms of government on the other. Relations between the United States and democratic states tend to operate more smoothly, proceeding from the shared core assumption that government’s authority comes from the people. Monarchies and other nondemocratic forms of government do not share this assumption, which can complicate foreign policy discussions immensely. People in the United States often assume that people who live in a nondemocratic country would prefer to live in a democratic one. However, in some regions of the world, such as the Middle East, this does not seem to be the case—people often prefer having stability within a nondemocratic system over changing to a less predictable democratic form of government. Or they may believe in a theocratic form of government. And the United States does have formal relations with some more totalitarian and monarchical governments, such as Saudi Arabia, when it is in U.S. interests to do so.

A fourth challenge is that many new foreign policy issues transcend borders. That is, there are no longer simply friendly states and enemy states. Problems around the world that might affect the United States, such as terrorism, the international slave trade, and climate change, originate with groups and issues that are not country-specific. They are transnational. So, for example, while we can readily name the enemies of the Allied forces in World War II (Germany, Italy, and Japan), the U.S. war against terrorism has been aimed at terrorist groups that do not fit neatly within the borders of any one country with which the United States could quickly interact to solve the problem. Intelligence-gathering and focused military intervention are needed more than traditional diplomatic

relations, and relations can become complicated when the United States wants to pursue terrorists within other countries' borders. An ongoing example is the use of U.S. drone strikes on terrorist targets within the nation of Pakistan, in addition to the 2011 campaign that resulted in the death of Osama bin Laden, the founder of al-Qaeda.



President Barack Obama (second from left) with Vice President Joe Biden (far left), Secretary of State Hillary Clinton (second from right), Secretary of Defense Robert Gates (far right), and other national security advisers in the Situation Room of the White House, watching the successful raid on Osama bin Laden's compound on May 1, 2011.

The fifth and final unique challenge is the varying conditions of the countries in the world and their effect on what is possible in terms of foreign policy and diplomatic relations. Relations between the United States and a stable industrial democracy are going to be easier than between the United States and an unstable developing country being run by a military junta (a group that has taken control of the government by force). Moreover, an unstable country will be more focused on establishing internal stability than on broader world concerns like environmental policy. In fact, developing

countries are temporarily exempt from the requirements of certain treaties while they seek to develop stable industrial and governmental frameworks.



The [Council on Foreign Relations](#) is one of the nation's oldest organizations that exist to promote thoughtful discussion on U.S. foreign policy.

Questions to Consider

1. What are two key differences between domestic policymaking and foreign policymaking?
2. What tools may the president use for conducting foreign policy and achieving foreign policy objectives?
3. What is the general purpose of the UN? NATO? the EU?

Terms to Remember

balance of power—a situation in which no one nation or

region is much more powerful militarily than any other in the world

balance of trade—the relationship between a country's inflow and outflow of goods

Cold War—the period from shortly after World War II until approximately 1989–1990 when advanced industrial democracies divided behind the two superpowers (East: Soviet Union, West: United States) and the fear of nuclear war abounded

diplomacy—the establishment and maintenance of a formal relationship between countries

foreign policy—a government's goals in dealing with other countries or regions and the strategy used to achieve them

free trade—a policy in which a country allows the unfettered flow of goods and services between itself and other countries

hard power—the use or threat of military power to influence the behavior of another country

North Atlantic Treaty Organization (NATO)—a cross-national military organization with bases in Belgium and Germany formed to maintain stability in Europe

protectionism—a policy in which a country does not permit other countries to sell goods and services within its borders or charges them very high tariffs (import taxes) to do so

soft power—nonmilitary tools used to influence another country, such as economic sanctions

United Nations (UN)—an international organization of

nation-states that seeks to promote peace, international relations, and economic and environmental programs

52. Foreign Policy: Tools or Instruments

Learning Objectives

- Describe the outputs of broadly focused U.S. foreign policy
- Describe the outputs of sharply focused U.S. foreign policy
- Analyze the role of Congress in foreign policy

The decisions or outputs of U.S. foreign policy vary from presidential directives about conducting drone strokes to the size of the overall foreign relations budget passed by Congress, and from presidential summits with other heads of state to U.S. views of new policies considered in the UN Security Council. In this section, we consider the outputs of foreign policy produced by the U.S. government, beginning with broadly focused decisions and then discussing more sharply focused strategies. Drawing this distinction brings some clarity to the array of different policy outcomes in foreign policy. Broadly focused decisions typically take longer to formalize, bring in more actors in the United States and abroad, require more resources to carry out, are harder to reverse, and hence tend to have a lasting impact. Sharply focused outputs tend to be processed quickly, are often unilateral moves by the president, have a shorter time horizon, are easier for subsequent decision-makers to reverse, and hence do not usually have so lasting an impact as broadly focused foreign policy outputs.

Broadly Focused Foreign Policy Outputs

Broadly focused foreign policy outputs not only span multiple topics and organizations, but they also typically require large-scale spending and take longer to implement than sharply focused outputs. In the realm of broadly focused outputs, we will consider public laws, the periodic reauthorization of the foreign policy agencies, the foreign policy budget, international agreements, and the appointment process for new executive officials and ambassadors.

Public Laws

When we talk about new laws enacted by Congress and the president, we are referring to public laws. *Public laws*, sometimes called statutes, are policies that affect more than a single individual. All policies enacted by Congress and the president are public laws, except for a few dozen each year. They differ from *private laws*, which require some sort of action or payment by a specific individual or individuals named in the law.

Many statutes affect what the government can do in the foreign policy realm, including the National Security Act, the Patriot Act, the Homeland Security Act, and the War Powers Resolution. The National Security Act governs the way the government shares and stores information, while the Patriot Act (passed immediately after 9/11) clarifies what the government may do in collecting information about people in the name of protecting the country. The Homeland Security Act of 2002 authorized the creation of a massive new federal agency, the Department of Homeland Security, consolidating powers that had been under the jurisdiction of several different agencies. Their earlier lack of coordination may have

prevented the United States from recognizing warning signs of the 9/11 terrorist attacks.

The **War Powers Resolution** was passed in 1973 by a congressional override of President Richard Nixon's veto. The bill was Congress's attempt to reassert itself in war-making. Congress has the power to declare war, but it had not formally done so since Japan's 1941 attack on Pearl Harbor brought the United States into World War II. Yet the United States had entered several wars since that time, including in Korea, in Vietnam, and in focused military campaigns such as the failed 1961 Bay of Pigs invasion of Cuba. The War Powers Resolution created a new series of steps to be followed by presidents in waging military conflict with other countries.

Its main feature was a requirement that presidents get approval from Congress to continue any military campaign beyond sixty days. To many, however, the overall effect was actually to strengthen the role of the president in war-making. After all, the law clarified that presidents could act on their own for sixty days before getting authorization from Congress to continue, and many smaller-scale conflicts are over within sixty days. Before the War Powers Resolution, the first approval for war was supposed to come from Congress. In theory, Congress, with its constitutional war powers, could act to reverse the actions of a president once the sixty days have passed. However, a clear disagreement between Congress and the president, especially once an initiative has begun and there is a "rally around the flag" effect, is relatively rare. More likely are tough questions about the campaign to which continuing congressional funding is tied.

Reauthorization

All federal agencies, including those dedicated to foreign policy, face reauthorization every three to five years. If not reauthorized, agencies lose their legal standing and the ability to spend federal

funds to carry out programs. Agencies typically are reauthorized, because they coordinate carefully with presidential and congressional staff to get their affairs in order when the time comes. However, the reauthorization requirements do create a regular conversation between the agency and its political principals about how well it is functioning and what could be improved.

The federal budget process is an important annual tradition that affects all areas of foreign policy. The foreign policy and defense budgets are part of the discretionary budget, or the section of the national budget that Congress vets and decides on each year. Foreign policy leaders in the executive and legislative branches must advocate for funding from this budget, and while foreign policy budgets are usually renewed, there are enough proposed changes each year to make things interesting. In addition to new agencies, new cross-national projects are proposed each year to add to infrastructure and increase or improve foreign aid, intelligence, and national security technology.

Agreements

International agreements represent another of the broad-based foreign policy instruments/tools. The United States finds it useful to enter into **international agreements** with other countries for a variety of reasons and on a variety of different subjects. These agreements run the gamut from bilateral agreements about tariffs to multinational agreements among dozens of countries about the treatment of prisoners of war. One recent multinational pact was the seven-country Iran Nuclear Agreement in 2015, intended to limit nuclear development in Iran in exchange for the lifting of long-standing economic sanctions on that country.



The ministers of foreign affairs and other officials from China, France, Germany, the European Union, Iran, Russia, and the United Kingdom join Secretary of State John Kerry (far right) in April 2015 to announce the framework that would lead to the multinational Iran Nuclear Agreement. (credit: modification of work by the U.S. Department of State)

The format that an international agreement takes has been the point of considerable discussion in recent years. The U.S. Constitution outlines the **treaty** process in Article II. The president negotiates a treaty, the Senate consents to the treaty by a two-thirds vote, and finally the president ratifies it. Despite that constitutional clarity, today over 90 percent of the international agreements into which the United States enters are not treaties but rather executive agreements.¹

Executive agreements are negotiated by the president, and in

1. Glen S. Krutz and Jeffrey S. Peake. 2009. *Treaty Politics and the Rise of Executive Agreements: International Commitments in a System of Shared Powers*. Ann Arbor, MI: University of Michigan Press.

the case of sole executive agreements, they are simultaneously approved by the president as well. On the other hand, congressional-executive agreements, like the North American Free Trade Agreement (NAFTA), are negotiated by the president and then approved by a simple majority of the House and Senate (rather than a two-thirds vote in the Senate as is the case for a treaty). In the key case of *United States v. Pink* (1942), the Supreme Court ruled that executive agreements were legally equivalent to treaties provided they did not alter federal law.² Most executive agreements are not of major importance and do not spark controversy, while some, like the Iran Nuclear Agreement, generate considerable debate. Many in the Senate thought the Iran deal should have been completed as a treaty rather than as a sole executive agreement.

Treaty or Executive Agreement?

Should new international agreements into which the United States enters be forged through the Article II treaty process of the U.S. Constitution, or through executive agreements? This question arose again in 2015 as the Iran Nuclear Agreement was being completed. That pact required Iran to halt further nuclear development and agree to nuclear inspections, while the United States and five other signatories lifted long-standing economic sanctions on Iran. The debate over

2. *United States v. Pink*, 315 U.S. 203 (1942).

whether the United States should have entered the agreement and whether it should have been a treaty rather than an executive agreement was conducted in the news media and on political comedy shows like *The Daily Show*.

Your view on the form of the pact will depend on how you see executive agreements being employed. Do presidents use them to circumvent the Senate (as the “evasion hypothesis” suggests)? Or are they an efficient tool that saves the Senate Committee on Foreign Relations the work of processing hundreds of agreements each year?

Politicians’ opinions about the form of the Iran Nuclear Agreement fell along party lines. Democrats accepted the president’s decision to use an executive agreement to finalize the pact, which they tended to support. Republicans, who were overwhelmingly against the pact, favored the use of the treaty process, which would have allowed them to vote the deal down. In the end, the president used an executive agreement and the pact was enacted. The downside is that an executive agreement can be reversed by the next president. Treaties are much more difficult to undo because they require a new process to be undertaken in the Senate in order for the president to gain approval.

Which approach do you favor for the Iran Nuclear Agreement, an executive agreement or a treaty? Why?

Appointments

The last broad type of foreign policy output consists of the foreign policy appointments made when a new president takes office. Typically, when the party in the White House changes, more new appointments are made than when the party does not change, because the incoming president wants to put in place people who share his or her agenda. This was the case in 2001 when Republican George W. Bush succeeded Democrat Bill Clinton, and again in 2009 when Democrat Barack Obama succeeded Bush.

Most foreign policy–related appointments, such as secretary of state and the various undersecretaries and assistant secretaries, as well as all ambassadors, must be confirmed by a majority vote of the Senate. Presidents seek to nominate people who know the area to which they’re being appointed and who will be loyal to the president rather than to the bureaucracy in which they might work. They also want their nominees to be readily confirmed. As we will see in more detail later in the chapter, an isolationist group of appointees will run the country’s foreign policy agencies very differently than a group that is more internationalist in its outlook. Isolationists might seek to pull back from foreign policy involvement around the globe, while internationalists would go in the other direction, toward more involvement and toward acting in conjunction with other countries.



(a)



(b)



(c)

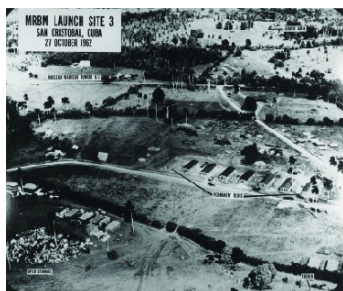
Madeleine Albright (a), the first female secretary of state, was nominated by President Bill Clinton and unanimously confirmed by the Senate 99–0. Colin Powell (b), nominated by George W. Bush, was also unanimously confirmed. Condoleezza Rice (c) had a more difficult road, earning thirteen votes against, the most for any secretary of state nominee since Henry Clay in 1825. According to Senator Barbara Boxer (D-CA), senators wanted “to hold Dr. Rice and the Bush administration accountable for their failures in Iraq and in the war on terrorism.”

Sharply Focused Foreign Policy Outputs

In addition to the broad-based foreign policy outputs above, which are president-led with some involvement from Congress, many other decisions need to be made. These sharply focused foreign policy outputs tend to be exclusively the province of the president, including the deployment of troops and/or intelligence agents in a crisis, executive summits between the president and other heads of state on targeted matters of foreign policy, presidential use of military force, and emergency funding measures to deal with foreign policy crises. These measures of foreign policy are more quickly enacted and demonstrate the “energy and dispatch” that Alexander Hamilton, writing in the *Federalist Papers*, saw as inherent in the institution of the presidency. Emergency spending does involve Congress through its power of the purse, but Congress tends to give presidents what they need to deal with emergencies. That said, the framers were consistent in wanting checks and

balances sprinkled throughout the *Constitution*, including in the area of foreign policy and war powers. Hence, Congress has several roles, as discussed at points throughout this chapter.

Perhaps the most famous foreign policy emergency was the Cuban Missile Crisis in 1962. With the Soviet Union placing nuclear missiles in Cuba, just a few hundred miles from Florida, a Cold War standoff with the United States escalated. The Soviets at first denied the existence of the missiles, but U.S. reconnaissance flights proved they were there, gathering photographic evidence that was presented at the UN. The Soviets stood firm, and U.S. foreign policy leaders debated their approach. Some in the military were pushing for aggressive action to take out the missiles and the installation in Cuba, while State Department officials favored a diplomatic route. President John F. Kennedy ended up taking the recommendation of a special committee, and the United States implemented a naval blockade of Cuba that subtly forced the Soviets' hands. The Soviets agreed to remove their Cuban missiles and the United States in turn agreed six months later to remove its missiles from Turkey.



(a)



(b)

This low-level U.S. Navy photograph of San Cristobal, Cuba, clearly shows one of the sites built to launch intermediate-range missiles at the United States (a). As the date indicates, it was taken on the last day of the Cuban Missile Crisis. Following the crisis, President Kennedy (far right) met with the reconnaissance pilots who flew the Cuban missions (b). (credit a: modification of work by the National Archives and Record Administration)



Listen to [President Kennedy's speech](#) announcing the naval blockade the United States imposed on Cuba, ending the Cuban Missile Crisis of 1962.

Another form of focused foreign policy output is the presidential summit. Often held at the Presidential Retreat at Camp David, Maryland, these meetings bring together the president and one or more other heads of state. Presidents use these types of summits when they and their visitors need to dive deeply into important issues that are not quickly solved. An example is the 1978 summit that led to the Camp David Accords, in which President Jimmy Carter, Egyptian president Anwar El Sadat, and Israeli prime minister Menachem Begin met privately for twelve days at Camp David negotiating a peace process for the two countries, which had been at odds with each other in the Middle East. Another example is the Malta Summit between President George H. W. Bush and Soviet leader Mikhail Gorbachev, which took place on the island of Malta over two days in December 1989. The meetings were an important symbol of the end of the Cold War, the Berlin Wall having come down just a few months earlier.



(a)



(b)

President Jimmy Carter meets with Egypt's Anwar El Sadat (left) and Israel's Menachem Begin (right) at Camp David in 1978 (a). President George H. W. Bush (right) dines with Mikhail Gorbachev (left) at the Malta Summit in 1989 (b). (credit b: modification of work by the National Archives and Records Administration)

Another focused foreign policy output is the military use of force. Since the 1941 Pearl Harbor attacks and the immediate declaration of war by Congress that resulted, all such initial uses of force have been authorized by the president. Congress in many cases has subsequently supported additional military action, but the president has been the instigator. While there



One example of a sharply focused foreign policy output is the use of the U.S. military abroad. Here, the Air Force fighter jets used to enforce a 2011 no-fly zone over Libya return to a NATO air base in northeastern Italy. (credit: Tierney P. Wilson)

has sometimes been criticism, Congress has never acted to reverse presidential action. As discussed above, the **War Powers Resolution** clarified that the first step in the use of force was the president's, for the first sixty days. A recent example of the military use of force was the U.S. role in enforcing a no-fly zone over Libya in 2011, which included kinetic strikes—or active engagement of the enemy—to protect anti-government forces on the ground. U.S. fighter jets flew out of Aviano Air Base in northern Italy.

The final example of a focused foreign policy input is the passage

of an emergency funding measure for a specific national security task. Congress tends to pass at least one emergency spending measure per year, which must be signed by the president to take effect, and it often provides funding for domestic disasters. However, at times foreign policy matters drive an emergency spending measure, as was the case right after the 9/11 attacks. In such a case, the president or the administration proposes particular amounts for emergency foreign policy plans.

Question to Consider

1. Which types of foreign policy outputs have more impact, broadly conceived ones or sharply focused ones? Why?

Terms to Remember

congressional executive agreement—an international agreement that is not a treaty and that is negotiated by the president and approved by a simple majority of the House and Senate

sole executive agreement—an international agreement that is not a treaty and that is negotiated and approved by the president acting alone

treaty—an international agreement entered by the United States that requires presidential negotiation with other

nation(s), consent by two-thirds of the Senate, and final ratification by the president

53. Foreign Policy: Institutional Relations

Learning Objectives

- Describe the use of shared power in U.S. foreign policymaking
- Explain why presidents lead more in foreign policy than in domestic policy
- Discuss why individual House and Senate members rarely venture into foreign policy
- List the actors who engage in foreign policy

Institutional relationships in foreign policy constitute a paradox. On the one hand, there are aspects of foreign policymaking that necessarily engage multiple branches of government and a multiplicity of actors. Indeed, there is a complexity to foreign policy that is bewildering, in terms of both substance and process. On the other hand, foreign policymaking can sometimes call for nothing more than for the president to make a formal decision, quickly endorsed by the legislative branch. This section will explore the institutional relationships present in U.S. foreign policymaking.

Foreign Policy and Shared Power

While presidents are more empowered by the Constitution in

foreign than in domestic policy, they nonetheless must seek approval from Congress on a variety of matters; chief among these is the basic budgetary authority needed to run foreign policy programs. Indeed, most if not all of the foreign policy instruments described earlier in this chapter require interbranch approval to go into effect. Such approval may sometimes be a formality, but it is still important. Even a sole executive agreement often requires subsequent funding from Congress in order to be carried out, and funding calls for majority support from the House and Senate. Presidents lead, to be sure, but they must consult with and engage the Congress on many matters of foreign policy. Presidents must also delegate a great deal in foreign policy to the bureaucratic experts in the foreign policy agencies. Not every operation can be run from the West Wing of the White House.

At bottom, the United States is a separation-of-powers political system with authority divided among executive and legislative branches, including in the foreign policy realm. The table shows the formal roles of the president and Congress in conducting foreign policy.

Roles of the President and Congress in Conducting Foreign Policy		
Policy Output	Presidential Role	Congressional Role
Public laws	Proposes, signs into law	Proposes, approves for passage
Agency reauthorizations	Proposes, signs into law	Approves for passage
Foreign policy budget	Proposes, signs into law	Authorizes/ appropriates for passage
Treaties	Negotiates, ratifies	Senate consents to treaty (two-thirds)
Sole executive agreements	Negotiates, approves	None (unless funding is required)
Congressional-executive agreements	Negotiates	Approves by majority vote
Declaration of war	Proposes	Approves by majority vote
Military use of force	Carries out operations at will (sixty days)	Approves for operations beyond sixty days
Presidential appointments	Nominates candidates	Senate approves by majority vote

The main lesson of the table is that nearly all major outputs of foreign policy require a formal congressional role in order to be carried out. Foreign policy might be done by executive say-so in times of crisis and in the handful of sole executive agreements that actually pertain to major issues (like the Iran Nuclear Agreement). In general, however, a consultative relationship between the branches in foreign policy is the usual result of their constitutional sharing of power. A president who ignores Congress on matters of foreign policy and does not keep them briefed may find later interactions on other matters more difficult. Probably the most extreme version of this potential dynamic occurred during the Eisenhower presidency. When President Dwight D. Eisenhower used too many executive agreements instead of sending key ones to the Senate as treaties, Congress reacted by considering a constitutional amendment (the

Bricker Amendment) that would have altered the treaty process as we know it. Eisenhower understood the message and began to send more agreements through the process as treaties.¹

Shared power creates an incentive for the branches to cooperate. Even in the midst of a crisis, such as the Cuban Missile Crisis in 1962, it is common for the president or senior staff to brief congressional leaders in order to keep them up to speed and ensure the country can stand unified on international matters. That said, there are areas of foreign policy where the president has more discretion, such as the operation of intelligence programs, the holding of foreign policy summits, and the mobilization of troops or agents in times of crisis. Moreover, presidents have more power and influence in foreign policymaking than they do in domestic policymaking. It is to that power that we now turn.

The Two Presidencies Thesis

When the media cover a domestic controversy, such as social unrest or police brutality, reporters consult officials at different levels and in branches of government, as well as think tanks and advocacy groups. In contrast, when an international event occurs, such as a terrorist bombing in Paris or Brussels, the media flock predominately to one actor—the president of the United States—to get the official U.S. position.

In the realm of foreign policy and international relations, the president occupies a leadership spot that is much clearer than in the realm of domestic policy. This dual domestic and international role has been described by the two presidencies thesis. This theory

1. Krutz and Peake. *Treaty Politics and the Rise of Executive Agreements*.

originated with University of California–Berkeley professor Aaron Wildavsky and suggests that there are two distinct presidencies, one for foreign policy and one for domestic policy, and that presidents are more successful in foreign than domestic policy. Let's look at the reasoning behind this thesis.

The Constitution names the president as the commander-in-chief of the military, the nominating authority for executive officials and ambassadors, and the initial negotiator of foreign agreements and treaties. The president is the agenda-setter for foreign policy and may move unilaterally in some instances. Beyond the Constitution, presidents were also gradually given more authority to enter into international agreements without Senate consent by using the executive agreement. We saw above that the passage of the War Powers Resolution in 1973, though intended as a statute to rein in executive power and reassert Congress as a check on the president, effectively gave presidents two months to wage war however they wish. Given all these powers, we have good reason to expect presidents to have more influence and be more successful in foreign than in domestic policy.

A second reason for the stronger foreign policy presidency has to do with the informal aspects of power. In some eras, Congress will be more willing to allow the president to be a clear leader and speak for the country. For instance, the Cold War between the Eastern bloc countries (led by the Soviet Union) and the West (led by the United States and Western European allies) prompted many to want a single actor to speak for the United States. A willing Congress allowed the president to take the lead because of urgent circumstances. Much of the Cold War also took place when the parties in Congress included more moderates on both sides of the aisle and the environment was less partisan than today. A phrase often heard at that time was, "Partisanship stops at the water's edge." This means that foreign policy matters should not be subject to the bitter disagreements seen in party politics.



(a)



(b)

President John F. Kennedy gives a speech about freedom in the shadow of the Berlin Wall (a). The wall was erected in 1963 by East Germany to keep its citizens from defecting to West Berlin. On September 14, 2001, President George W. Bush promises justice at the site of the destroyed World Trade Center in New York City (b). Rescue workers responded by chanting “U.S.A., U.S.A.!” (credit a: modification of work by the John F. Kennedy Library)

Does the thesis's expectation of a more successful foreign policy presidency apply today? While the president still has stronger foreign policy powers than domestic powers, the governing context has changed in two key ways. First, the Cold War ended in 1989 with the demolition of the Berlin Wall, the subsequent disintegration of the Soviet Union, and the eventual opening up of Eastern European territories to independence and democracy. These dramatic changes removed the competitive superpower aspect of the Cold War, in which the United States and the USSR were dueling rivals on the world stage. The absence of the Cold War has led to less of a rally-behind-the-president effect in the area of foreign policy.

Second, beginning in the 1980s and escalating in the 1990s, the Democratic and Republican parties began to become polarized in Congress. The moderate members in each party all but disappeared, while more ideologically motivated candidates began to win election to the House and later the Senate. Hence, the Democrats in Congress became more liberal on average, the Republicans became more conservative, and the moderates from each party, who had been able to work together, were edged out. It became increasingly likely that the party opposite the president in Congress might be

more willing to challenge his initiatives, whereas in the past it was rare for the opposition party to publicly stand against the president in foreign policy.

Finally, several analysts have tried applying the two presidencies thesis to contemporary presidential-congressional relationships in foreign policy. Is the two presidencies framework still valid in the more partisan post-Cold War era? The answer is mixed. On the one hand, presidents are more successful on foreign policy votes in the House and Senate, on average, than on domestic policy votes. However, the gap has narrowed. Moreover, analysis has also shown that presidents are opposed more often in Congress, even on the foreign policy votes they win.²

Democratic leaders regularly challenged Republican George W. Bush on the Iraq War and it became common to see the most senior foreign relations committee members of the Republican Party opposing the foreign policy positions of Democratic president Barack Obama. Such challenging of the president by the opposition party simply didn't happen during the Cold War.

Therefore, it seems presidents no longer enjoy unanimous foreign policy support as they did in the early 1960s. They have to work harder to get a consensus and are more likely to face opposition. Still, because of their formal powers in foreign policy, presidents are overall more successful on foreign policy than on domestic policy.

The Perspective of House and Senate Members

Congress is a bicameral legislative institution with 100 senators

2. Jon Bond, Richard Fleisher, Stephen Hanna, and Glen S. Krutz. 2000. "The Demise of the. Two Presidencies," *American Politics Quarterly* 28, No. 1: 3-25.

serving in the Senate and 435 representatives serving in the House. How interested in foreign policy are typical House and Senate members?

While key White House, executive, and legislative leaders monitor and regularly weigh in on foreign policy matters, the fact is that individual representatives and senators do so much less often. Unless there is a foreign policy crisis, legislators in Congress tend to focus on domestic matters, mainly because there is not much to be gained with their constituents by pursuing foreign policy matters.³

Domestic policy matters resonate more strongly with the voters at home. A sluggish economy, increasing health care costs, and crime matter more to them than U.S. policy toward North Korea, for example. In an open-ended Gallup poll question from early 2016 about the “most important problem” in the United States, fewer than 15 percent of respondents named a foreign policy topic (half of those respondents mentioned immigration). These results suggest that foreign policy is not at the top of many voters’ minds. In the end, legislators must be responsive to constituents in order to be good representatives and to achieve reelection.⁴

However, some House and Senate members do wade into foreign policy matters. First, congressional party leaders in the majority and minority parties speak on behalf of their institution and their party on all types of issues, including foreign policy. Some House and Senate members ask to serve on the foreign policy committees, such as the Senate Committee on Foreign Relations, the House

3. James M. McCormick. 2010. *American Foreign Policy and Process*, 5th ed. Boston: Wadsworth.
4. The Gallup Organization, “Most Important Problem,” <http://www.gallup.com/poll/1675/most-important-problem.aspx> (May 12, 2016).

Foreign Affairs Committee, and the two defense committees. These members might have military bases within their districts or states and hence have a constituency reason for being interested in foreign policy. Legislators might also simply have a personal interest in foreign policy matters that drives their engagement in the issue. Finally, they may have ambitions to move into an executive branch position that deals with foreign policy matters, such as secretary of state or defense, CIA director, or even president.



(a)



(b)

Senator Bob Corker (R-TN) (a), the chairman of the Senate Committee on Foreign Relations, and Senator Ben Cardin (D-MD) (b), the ranking Democrat on the committee, each addressed Secretary of State John Kerry during the February 2016 discussion of the Obama administration's 2017 federal budget hearings. (credit a, b: modification of work by the U.S. Department of State)

Let People Know What You Think!

Most House and Senate members do not engage in foreign policy because there is no electoral benefit to doing so. Thus, when citizens become involved, House members and senators will take notice. Research by

John Kingdon on roll-call voting and by Richard Hall on committee participation found that when constituents are activated, their interest becomes salient to a legislator and he or she will respond.⁵

One way you can become active in the foreign policy realm is by writing a letter or e-mail to your House member and/or your two U.S. senators about what you believe the U.S. foreign policy approach in a particular area ought to be. Perhaps you want the United States to work with other countries to protect dolphins from being accidentally trapped in tuna nets. You can also state your position in a letter to the editor of your local newspaper, or post an opinion on the newspaper's website where a related article or op-ed piece appears. You can share links to news coverage on Facebook or Twitter and consider joining a foreign policy interest group such as Greenpeace.

When you engaged in foreign policy discussion as suggested above, what type of response did you receive?

5. John W. Kingdon. 1973. *Congressmen's Voting Decisions*. New York: Harper & Row; Richard Hall. 1996. *Participation in Congress*. New Haven, CT: University of Yale Press.



websites.

For more information on the two key congressional committees on U.S. foreign policy, visit the [Senate Committee on Foreign Relations](#) and the [House Foreign Affairs Committee](#)

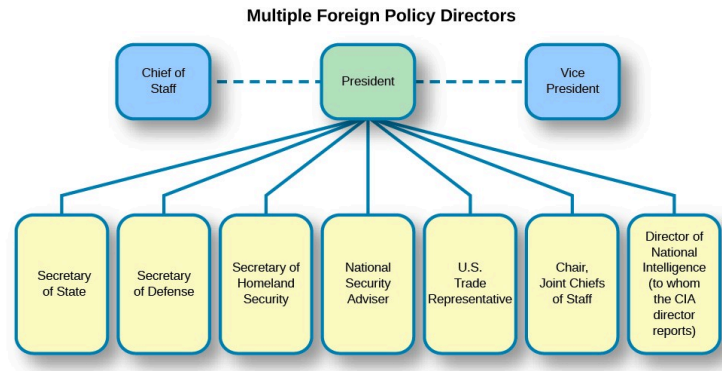
The Many Actors in Foreign Policy

A variety of actors carry out the various and complex activities of U.S. foreign policy: White House staff, executive branch staff, and congressional leaders.

The White House staff members engaged in foreign policy are likely to have very regular contact with the president about their work. The national security advisor heads the president's **National Security Council**, a group of senior-level staff from multiple foreign policy agencies, and is generally the president's top foreign policy advisor. Also reporting to the president in the White House is the director of the Central Intelligence Agency (CIA). Even more important on intelligence than the CIA director is the director of national intelligence, a position created in the government reorganizations after 9/11, who oversees the entire intelligence community in the U.S. government. The Joint Chiefs of Staff consist of six members, one each from the Army, Navy, Air Force, and Marines, plus a chair and vice chair. The chair of the Joint Chiefs of Staff is the president's top uniformed military officer. In contrast, the secretary of defense is head of the entire Department of Defense but is a nonmilitary civilian. The U.S. trade representative

develops and directs the country's international trade agenda. Finally, within the Executive Office of the President, another important foreign policy official is the director of the president's Office of Management and Budget (OMB). The OMB director develops the president's yearly budget proposal, including funding for the foreign policy agencies and foreign aid.

In addition to those who work directly in the White House or Executive Office of the President, several important officials work in the broader executive branch and report to the president in the area of foreign policy. Chief among these is the secretary of state. The secretary of state is the nation's chief diplomat, serves in the president's cabinet, and oversees the Foreign Service. The secretary of defense, who is the civilian (nonmilitary) head of the armed services housed in the Department of Defense, is also a key cabinet member for foreign policy (as mentioned above). A third cabinet secretary, the secretary of homeland security, is critically important in foreign policy, overseeing the massive Department of Homeland Security.



The final group of official key actors in foreign policy are in the U.S. Congress. The Speaker of the House, the House minority leader, and the Senate majority and minority leaders are often given updates on foreign policy matters by the president or the

president's staff. They are also consulted when the president needs foreign policy support or funding. However, the experts in Congress who are most often called on for their views are the committee chairs and the highest-ranking minority members of the relevant House and Senate committees. In the House, that means the Foreign Affairs Committee and the Committee on Armed Services. In the Senate, the relevant committees are the Committee on Foreign Relations and the Armed Services Committee. These committees hold regular hearings on key foreign policy topics, consider budget authorizations, and debate the future of U.S. foreign policy.

Question to Consider

1. What do you think about a cabinet secretary serving presidents from two different political parties? Is this a good idea? Why or why not?

Terms to Remember

National Security Council—(NSC) advisors to the president on issues of foreign policy and national security

two presidencies thesis—the thesis by Wildavsky that there are two distinct presidencies, one for foreign and one for domestic policy, and that presidents are more successful in foreign than domestic policy

54. Foreign Policy: Approaches

Learning Objectives

- Explain classic schools of thought on U.S. foreign policy
- Describe contemporary schools of thought on U.S. foreign policy
- Delineate the U.S. foreign policy approach with Russia and China

Frameworks and theories help us make sense of the environment of governance in a complex area like foreign policy. A variety of schools of thought exist about how to approach foreign policy, each with different ideas about what “should” be done. These approaches also vary in terms of what they assume about human nature, how many other countries ought to be involved in U.S. foreign policy, and what the tenor of foreign policymaking ought to be. They help us situate the current U.S. approach to many foreign policy challenges around the world.

Classic Approaches

A variety of traditional concepts of foreign policy remain helpful today as we consider the proper role of the United States in, and its

approach to, foreign affairs. These include isolationism, the idealism versus realism debate, liberal internationalism, hard versus soft power, and the grand strategy of U.S. foreign policy.

Foreign Policy	Description of Policy Position
isolationism	country stays out of foreign entanglements; keeps to itself; non-involvement
containment	country tries to limit spread of opposing ideological viewpoint or military expansion
preemption	country uses threat of or actual use of force to promote policy goals
retaliatory	country counters measures taken by another country; economic, political, military
selective engagement	country maintains military presence; engagement through alliances & installations
intervention	country intervenes for humanitarian reasons; economic aid, health resources, etc.
interdependence	country ties itself to other countries through political, economic & defense policies

From the end of the Revolutionary War in the late eighteenth century until the early twentieth century, **isolationism**—whereby a country stays out of foreign entanglements and keeps to itself—was a popular stance in U.S. foreign policy. Among the founders, Thomas Jefferson especially was an advocate of isolationism or non-involvement. He thought that by keeping to itself, the United States stood a better chance of becoming a truly free nation. This fact is full of irony, because Jefferson later served as ambassador to France and president of the United States, both roles that required at least some attention to foreign policy. Still, Jefferson’s ideas had broad support. After all, Europe was where volatile changes were occurring. The new nation was tired of war, and there was no reason for it to be entangled militarily with anyone. Indeed, in his farewell address, President George Washington famously warned against the creation of “entangling alliances.”¹

1. “George Washington’s Farewell Address.” 1796. New

Despite this legacy, the United States was pulled squarely into world affairs with its entry into World War I. But between the Armistice in 1918 that ended that war and U.S. entry into World War II in 1941, isolationist sentiment returned, based on the idea that Europe should learn to govern its own affairs. Then, after World War II, the United States engaged the world stage as one of two superpowers and the military leader of Europe and the Pacific. Isolationism never completely went away, but now it operated in the background. Again, Europe seemed to be the center of the problem, while political life in the United States seemed calmer somehow.

The end of the Cold War opened up old wounds as a variety of smaller European countries sought independence and old ethnic conflicts reappeared. Some in the United States felt the country should again be isolationist as the world settled into a new political arrangement, including a vocal senator, Jesse Helms (R-NC), who was against the United States continuing to be the military “policeman” of the world. Helms was famous for opposing nearly all treaties brought to the Senate during his tenure. Congressman Ron Paul (R-TX) and his son Senator Rand Paul (R-KY) were both isolationist candidates for the presidency (in 2008 and 2016, respectively); both thought the United States should retreat from foreign entanglements, spend far less on military and foreign policy, and focus more on domestic issues.

At the other end of the spectrum is liberal internationalism. Liberal internationalism advocates a foreign policy approach in which the United States becomes proactively engaged in world affairs. Its adherents assume that liberal democracies must take the lead in creating a peaceful world by cooperating as a community of nations and creating effective world structures such as the United

Haven, CT: School Avalon Project, Yale Law Library.
http://avalon.law.yale.edu/18th_century/washing.asp
(May 12, 2016).

Nations. To fully understand liberal internationalism, it is helpful to understand the idealist versus realist debate in international relations. Idealists assume the best in others and see it as possible for countries to run the world together, with open diplomacy, freedom of the seas, free trade, and no militaries. Everyone will take care of each other. There is an element of idealism in liberal internationalism, because the United States assumes other countries will also put their best foot forward. A classic example of a liberal internationalist is President Woodrow Wilson, who sought a League of Nations to voluntarily save the world after World War I.

Realists assume that others will act in their own self-interest and hence cannot necessarily be trusted. They want a healthy military and contracts between countries in case others want to wiggle out of their commitments. Realism also has a place in liberal internationalism, because the United States approaches foreign relationships with open eyes and an emphasis on self-preservation.

Soft power, or diplomacy, with which the United States often begins a foreign policy relationship or entanglement, is in line with liberal internationalism and idealism, while hard power, which allows the potential for military force, is the stuff of realism. For example, at first the United States was rather isolationist in its approach to China, assuming it was a developing country of little impact that could safely be ignored. Then President Nixon opened up China as an area for U.S. investment, and an era of open diplomatic relations began in the early 1970s. As China modernized and began to dominate the trade relationship



President Nixon and First Lady Patricia Nixon visited the Great Wall on their 1972 trip to China. The Chinese showed them the sights and hosted a banquet for them in the Great Hall of the People. Nixon was the first U.S. president to visit China following the Communist victory in the civil war in 1949. (credit: National Archives and Records Administration)

with the United States, many came to see it through a realist lens and to consider whether China's behavior really warranted its beneficial most-favored-nation trading status.

The final classic idea of foreign policy is the so-called grand strategy—employing all available diplomatic, economic, and military resources to advance the national interest. The grand strategy invokes the possibility of hard power, because it relies on developing clear strategic directions for U.S. foreign policy and the methods to achieve those goals, often with military capability attached. The U.S. foreign policy plan in Europe and Asia after World War II reflects a grand strategy approach. In order to stabilize the world, the United States built military bases in Italy, Germany, Spain, England, Belgium, Japan, Guam, and Korea. It still operates nearly all these, though often under a multinational arrangement such as

NATO. These bases help preserve stability on the one hand, and U.S. influence on the other.

More Recent Schools of Thoughts

Two particular events in foreign policy caused many to change their views about the proper approach to U.S. involvement in world affairs. First, the debacle of U.S. involvement in the civil war in Vietnam in the years leading up to 1973 caused many to rethink the country's traditional **containment** approach to the Cold War. Containment was the U.S. foreign policy goal of limiting the spread of communism. In Vietnam the United States supported one governing faction within the country (democratic South Vietnam), whereas the Soviet Union supported the opposing governing faction (communist North Vietnam). The U.S. military approach of battlefield engagement did not translate well to the jungles of Vietnam, where "guerilla warfare" predominated.

Skeptics became particularly pessimistic about liberal internationalism given how poorly the conflict in Vietnam had played out. U.S. military forces withdrew from South Vietnam in 1973, and Saigon, its capital, fell to North Vietnam and the communists eighteen months later. Many of those pessimists then became neoconservatives on foreign policy.

Neoconservatives believe that rather than exercising restraint and always using international organizations as the path to international outcomes, the United States should aggressively use its might to promote its values and ideals around the world. The aggressive use (or threat) of hard power is the core value of neoconservatism. Acting unilaterally is acceptable in this view, as is adopting a preemptive strategy in which the United States intervenes militarily before the enemy can



Heading to a going-away party for departing defense secretary Donald Rumsfeld in December 2006, former president George W. Bush (left) walks with then-vice president (and former secretary of defense) Dick Cheney (center), the prototypical twenty-first century foreign policy neoconservative. Rumsfeld is on the right. (credit: modification of work by D. Myles Cullen)

make its move. **Preemption** is a new idea; the United States has tended to be **retaliatory** in its use of military force, as in the case of Pearl Harbor at the start of World War II. Examples of neoconservatism in action are the 1980s U.S. campaigns in Central American countries to turn back communism under President Ronald Reagan, the Iraq War of 2003 led by President George W. Bush and his vice president Dick Cheney, and the current use of drones as counterterrorism weapons during the Obama administration.

Neo-isolationism, like earlier isolationism, advocates keeping free of foreign entanglements. Yet no advanced industrial democracy completely separates itself from the rest of the world. Foreign markets beckon, tourism helps spur economic development at home and abroad, and global environmental challenges require cross-national conversation. In the twenty-first century, neo-isolationism means distancing the United States from the United Nations and other international organizations that get in the way. The strategy of **selective engagement**—retaining a strong military

presence and remaining engaged across the world through alliances and formal installations—is used to protect the national security interests of the United States. However, this strategy also seeks to avoid being the world’s policeman.

The second factor that changed minds about twenty-first century foreign policy is the rise of elusive new enemies who defy traditional designations. Rather than countries, these enemies are terrorist groups such as al-Qaeda and ISIS (or ISIL) that spread across national boundaries. A hybrid approach to U.S. foreign policy that uses multiple schools of thought as circumstances warrant may thus be the wave of the future. President Obama has often taken a hybrid approach. In some respects, he has been a liberal internationalist seeking to put together broad coalitions to carry out world business. At the same time, his sending teams of troops and drones to take out terrorist targets in other legitimate nation-states without those states’ approval fits with a neoconservative approach. Finally, President Obama’s desire to not be the “world’s policeman” makes it appear he has followed selective engagement.



Several interest groups debate what should happen in U.S. foreign policy, many of which are included in this [list](#) compiled by the Council on Foreign Relations.

U.S. Foreign Policy in the Cold War and with China

The foreign policy environment from the end of World War II until the end of the Cold War in 1990 was dominated by a duel of superpowers between the United States and its Western allies on the one hand and the Soviet Union and the communist bloc of countries in the East on the other. Both superpowers developed thousands of weapons of mass destruction and readied for a potential world war to be fought with nuclear weapons. That period was certainly challenging and ominous at times, but it was simpler than the present era. Nations knew what team they were on, and there was generally an incentive to not go to war because it would lead to the unthinkable—the end of the Earth as we know it, or mutually assured destruction. The result of this logic, essentially a standoff between the two powers, is sometime referred to as nuclear deterrence.

When the Soviet Union imploded and the Cold War ended, it was in many ways a victory for the West and for democracy. However, once the bilateral nature of the Cold War was gone, dozens of countries sought independence and old ethnic conflicts emerged in several regions of the world, including Eastern Europe. This new era holds great promise, but it is in many ways more complex than the Cold War. The rise of cross-national terrorist organizations further complicates the equation because the enemy hides within the borders of potentially dozens of countries around the globe. In summary, the United States pursues a variety of topics and goals in different areas of the world in the twenty-first century.

The Soviet Union dissolved into many component parts after the Cold War, including Russia, various former Soviet republics like Georgia and Ukraine, and smaller nation-states in Eastern Europe, such as the Czech Republic. The general approach of the United States has been to encourage the adoption of democracy and economic reforms in these former Eastern bloc countries. Many of

them now align with the EU and even with the West's cross-national military organization, NATO. With freedoms can come conflict, and there has been much of that in these fledgling countries as opposition coalitions debate how the future course should be charted, and by whom. Under President Vladimir Putin, Russia is again trying to strengthen its power on the country's western border, testing expansionism while invoking Russian nationalism. The United States is adopting a defensive position and trying to prevent the spread of Russian influence. The EU and NATO factor in here from the standpoint of an internationalist approach.

In many ways the more visible future threat to the United States is China, the potential rival superpower of the future. A communist state that has also encouraged much economic development, China has been growing and modernizing for more than thirty years. Its nearly 1.4 billion citizens are stepping onto the world economic stage with other advanced industrial nations. In addition to fueling an explosion of industrial domestic development, public and private Chinese investors have spread their resources to every continent and most countries of the world. Indeed, Chinese investors lend money to the United States government on a regular basis, as U.S. domestic borrowing capacity is pushed to the limit in most years.

Many in the United States are worried by the lack of freedom and human rights in China. During the Tiananmen Square massacre in Beijing on June 4, 1989, thousands of pro-democracy protestors were arrested and many were killed as Chinese authorities fired into the crowd and tanks crushed people who attempted to wall them out. Over one thousand more dissidents were arrested in the following weeks as the Chinese government investigated the planning of the protests in the square. The United States instituted minor sanctions for a time, but President George H. W. Bush chose not to remove the most-favored-nation trading status of this long-time economic partner. Most in the U.S. government, including leaders in both political parties, wish to engage China as an economic partner at the same time that they keep a watchful eye on

its increasing influence around the world, especially in developing countries.

Elsewhere in Asia, the United States has good relationships with most other countries, especially South Korea and Japan, which have both followed paths the United States favored after World War II. Both countries embraced democracy, market-oriented economies, and the hosting of U.S. military bases to stabilize the region. North Korea, however, is another matter. A closed, communist, totalitarian regime, North Korea has been testing nuclear bombs in recent decades, to the concern of the rest of the world. Like China many decades earlier, India is a developing country with a large population that is expanding and modernizing. Unlike China, India has embraced democracy, especially at the local level.



You can plot U.S. government attention to different types of policy matters (including international affairs and foreign aid and its several dozen more focused subtopics) by using the online [trend analysis tool](#) at the Comparative Agendas Project.

Questions to Consider

1. What are the pros and cons of the neoconservative foreign policy approach followed in recent decades?
2. In your view, what are the best ways to get the

community of nations working together?

3. What are the three most important foreign policy issues facing the United States today? Why?
4. Which is more important as an influencer of foreign policy, the president or a cabinet department like the Department of State or Defense? Why?
5. What do you think is the most advantageous school of thought for the United States to follow in foreign policy in the future? Why?
6. If you were president and wanted to gather support for a new foreign policy initiative, which three U.S. foreign policy actors would you approach and why?

Terms to Remember

containment—the effort by the United States and Western European allies, begun during the Cold War, to prevent the spread of communism

isolationism—a foreign policy approach that advocates a nation's staying out of foreign entanglements and keeping to itself

internationalism—a foreign policy approach of becoming proactively engaged in world affairs by cooperating in a community of nations

neo-isolationism—a policy of distancing the United States from the United Nations and other international

organizations, while still participating in the world economy

selective engagement—a policy of retaining a strong military presence and remaining engaged across the world

PART XII

PUBLIC OPINION

55. Public Opinion: How is it formed?



On April 15 (or “tax day”), 2010, members of the Tea Party movement rallied at the Minnesota State Capitol in St. Paul in favor of smaller government and against the Affordable Care Act (left). Two years later, supporters of the law (right) demonstrated in front of the U.S. Supreme Court during oral arguments in *National Federation of Independent Business v. Sebelius*. (credit left: modification of work by “Fibonacci Blue”/Flickr; credit right: modification of work by LaDawna Howard)

Learning Objectives

- Define public opinion and political socialization
- Explain the process and role of political socialization in the U.S. political system
- Compare the ways in which citizens learn political information
- Explain how beliefs and ideology affect the formation of public opinion

The collection of public opinion through polling and interviews is a part of American political culture. Politicians want to know what the public thinks. Campaign managers want to know how citizens will vote. Media members seek to write stories about what Americans want. Every day, polls take the pulse of the people and report the results. Why do we care what people think?

What Is Public Opinion?

Public opinion is a collection of popular views about something, perhaps a person, a local or national event, or a new idea. For example, each day, a number of polling companies call Americans at random to ask whether they approve or disapprove of the way the president is guiding the economy.¹

When situations arise internationally, polling companies survey whether citizens support U.S. intervention in places like Syria or

1. Gallup. 2015. "Gallup Daily: Obama Job Approval." *Gallup*. June 6, 2015. <http://www.gallup.com/poll/113980/Gallup-Daily-Obama-Job-Approval.aspx> (February 17, 2016); Rasmussen Reports. 2015. "Daily Presidential Tracking Poll." *Rasmussen Reports* June 6, 2015. http://www.rasmussenreports.com/public_content/politics/obama_administration/daily_presidential_tracking_poll (February 17, 2016); Roper Center. 2015. "Obama Presidential Approval." *Roper Center*. June 6, 2015. <http://www.ropercenter.uconn.edu/polls/presidential-approval/> (February 17, 2016).

Ukraine. These individual opinions are collected together to be analyzed and interpreted for politicians and the media. The analysis examines how the public feels or thinks, so politicians can use the information to make decisions about their future legislative votes, campaign messages, or propaganda.

But where do people's opinions come from? Most citizens base their political opinions on their beliefs² and their attitudes, both of which begin to form in childhood. *Beliefs* are closely held ideas that support our values and expectations about life and politics. For example, the idea that we are all entitled to equality, liberty, freedom, and privacy is a belief most people in the United States share. We may acquire this belief by growing up in the United States or by having come from a country that did not afford these valued principles to its citizens.

Our attitudes are also affected by our personal beliefs and represent the preferences we form based on our life experiences and values. A person who has suffered racism or bigotry may have a skeptical attitude toward the actions of authority figures.

Over time, our beliefs and our attitudes about people, events, and ideas will become a set of norms, or accepted ideas, about what we may feel should happen in our society or what is right for the government to do in a situation. In this way, attitudes and beliefs form the foundation for opinions.

Political Socialization

At the same time that our beliefs and attitudes are forming during childhood, we are also being socialized; that is, we are learning

2. V. O. Key, Jr. 1966. *The Responsible Electorate*. Harvard University: Belknap Press.

from many information sources about the society and community in which we live and how we are to behave in it. **Political socialization** is the process by which we are trained to understand and join a country's political world, and, like most forms of socialization, it starts when we are very young. We may first become aware of politics by watching a parent or guardian vote, for instance, or by hearing presidents and candidates speak on television or the Internet, or seeing adults honor the American flag at an event. As socialization continues, we are introduced to basic political information in school. We recite the Pledge of Allegiance and learn about the Founding Fathers, the Constitution, the two major political parties, the three branches of government, and the economic system.



(a)



(b)

Political socialization begins early. Hans Enoksen, former prime minister of Greenland, receives a helping hand at the polls from five-year-old Pipaluk Petersen (a). Intelligence Specialist Second Class Tashawbaba McHerrin (b) hands a U.S. flag to a child visiting the USS Enterprise during Fleet Week in Port Everglades, Florida. (credit a: modification of work by Leiff Josefsen; credit b: modification of work by Matthew Keane, U.S. Navy)

By the time we complete school, we have usually acquired the

information necessary to form political views and be contributing members of the political system.³

Our political ideology, made up of the attitudes and beliefs that help shape our opinions on political theory and policy, is rooted in who we are as individuals. Our ideology may change subtly as we grow older and are introduced to new circumstances or new information, but our underlying beliefs and attitudes are unlikely to change very much, unless we experience events that profoundly affect us. For example, family members of 9/11 victims became more Republican and more political following the terrorist attacks.⁴

Similarly, young adults who attended political protest rallies in the 1960s and 1970s were more likely to participate in politics in general than their peers who had not protested.⁵

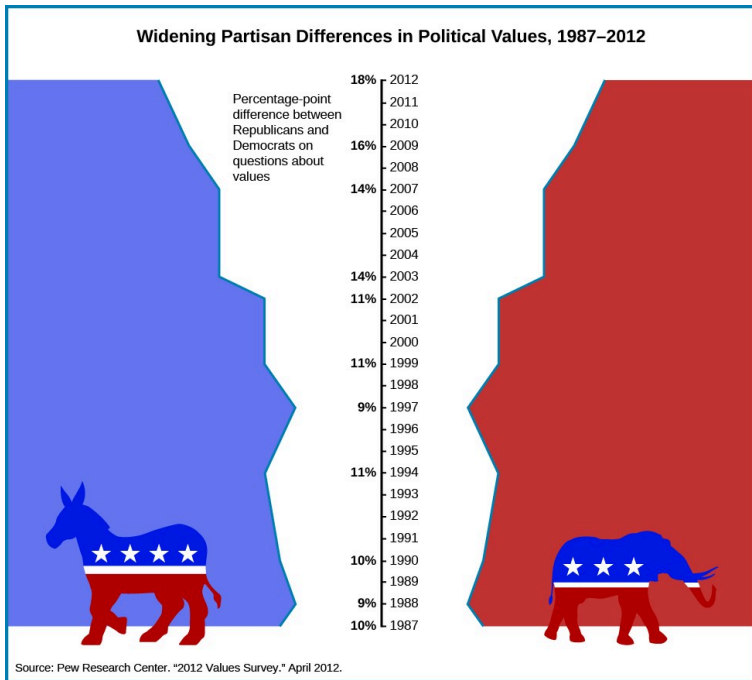
Today, polling agencies have noticed that citizens' beliefs have become far more polarized, or widely opposed, over the last decade.⁶

3. John Zaller. 1992. *The Nature and Origins of Mass Opinion*. Cambridge: Cambridge University Press.
4. Eitan Hersh. 2013. "Long-Term Effect of September 11 on the Political Behavior of Victims' Families and Neighbors." *Proceedings of the National Academy of Sciences of the United States of America* 110 (52): 20959–63.
5. M. Kent Jennings. 2002. "Generation Units and the Student Protest Movement in the United States: An Intra- and Intergenerational Analysis." *Political Psychology* 23 (2): 303–324.
6. Pew Research Center. 2014. "Political Polarization in the

To track this polarization, Pew Research conducted a study of Republican and Democratic respondents over a twenty-five-year span. Every few years, Pew would poll respondents, asking them whether they agreed or disagreed with statements. These statements are referred to as “value questions” or “value statements,” because they measure what the respondent values. Examples of statements include “Government regulation of business usually does more harm than good,” “Labor unions are necessary to protect the working person,” and “Society should ensure all have equal opportunity to succeed.” After comparing such answers for twenty-five years, Pew Research found that Republican and Democratic respondents are increasingly answering these questions very differently. This is especially true for questions about the government and politics. In 1987, 58 percent of Democrats and 60 percent of Republicans agreed with the statement that the government controlled too much of our daily lives. In 2012, 47 percent of Democrats and 77 percent of Republicans agreed with the statement. This is an example of polarization, in which members of one party see government from a very different perspective than the members of the other party.⁷

American Public.” *Pew Research Center*. June 12, 2014. <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/> (February 17, 2016).

7. Pew Research Center. 2015. “American Values Survey.” *Pew Research Center*. <http://www.people-press.org/values-questions/> (February 17, 2016).



Over the years, Democrats and Republicans have moved further apart in their beliefs about the role of government. In 1987, Republican and Democratic answers to forty-eight values questions differed by an average of only 10 percent, but that difference has grown to 18 percent over the last twenty-five years.

According to some scholars, shifts led partisanship to become more polarized than in previous decades, as more citizens began thinking of themselves as conservative or liberal rather than moderate.⁸

8. Joseph Bafumi and Robert Shapiro. 2009. "A New Partisan Voter." *The Journal of Politics* 71 (1): 1–24.

Socialization Agents

An **agent of political socialization** is a source of political information intended to help citizens understand how to act in their political system and how to make decisions on political matters. The information may help a citizen decide how to vote, where to donate money, or how to protest decisions made by the government.

The most prominent agents of socialization are family and school. Other influential agents are social groups, such as religious institutions and friends, and the media. Political socialization is not unique to the United States. Many nations have realized the benefits of socializing their populations. China, for example, stresses nationalism in schools as a way to increase national unity.⁹

In the United States, one benefit of socialization is that our political system enjoys diffuse support, which is support characterized by a high level of stability in politics, acceptance of the government as legitimate, and a common goal of preserving the system.¹⁰

These traits keep a country steady, even during times of political or social upheaval. But diffuse support does not happen quickly, nor does it occur without the help of agents of political socialization.

For many children, family is the first introduction to politics. Children may hear adult conversations at home and piece together

9. Liping Weng. 2010. "Shanghai Children's Value Socialization and Its Change: A Comparative Analysis of Primary School Textbooks." *China Media Research* 6 (3): 36–43.

10. David Easton. 1965. *A Systems Analysis of Political Life*. New York: John Wiley.

the political messages their parents support. They often know how their parents or grandparents plan to vote, which in turn can socialize them into political behavior such as political party membership.¹¹

Children who accompany their parents on Election Day in November are exposed to the act of voting and the concept of civic duty, which is the performance of actions that benefit the country or community. Families active in community projects or politics make children aware of community needs and politics.

Introducing children to these activities has an impact on their future behavior. Both early and recent findings suggest that children adopt some of the political beliefs and attitudes of their parents.¹²

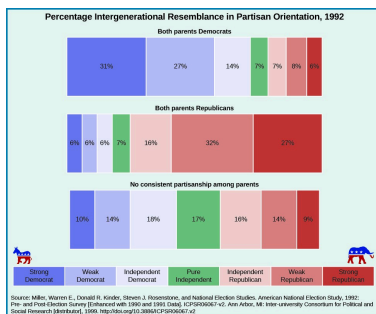
11. Angus Campbell, Philip Converse, Warren Miller, and Donald Stokes. 2008. *The American Voter: Unabridged Edition*. Chicago: University of Chicago Press. Michael S. Lewis-Beck, William G. Jacoby, Helmut Norpoth, and Herbert F. Weisberg. 2008. *American Vote Revisited*. Ann Arbor: University of Michigan Press.
12. Russell Dalton. 1980. "Reassessing Parental Socialization: Indicator Unreliability versus Generational Transfer." *American Political Science Review* 74 (2): 421–431.

While family provides an informal political education, schools offer a more formal and increasingly important one. We are also socialized outside our homes and schools. When citizens attend religious ceremonies, as 70 percent of Americans in a recent survey

claimed,¹³ they are socialized to adopt beliefs that affect their politics. Religion leaders often

teach on matters of life, death, punishment, and obligation, which translate into views on political issues such as abortion, euthanasia, the death penalty, and military involvement abroad.

Friends and peers too have a socializing effect on citizens. Communication networks are based on trust and common interests, so when we receive information from friends and neighbors, we often readily accept it because we trust them.¹⁴



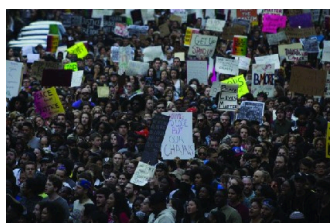
A parent's political orientation often affects the political orientation of his or her child.

13. Michael Lipka. 2013. "What Surveys Say about Workshop Attendance—and Why Some Stay Home." Pew Research Center. September 13, 2013. <http://www.pewresearch.org/fact-tank/2013/09/13/what-surveys-say-about-worship-attendance-and-why-some-stay-home/> (February 17, 2016).

14. Arthur Lupia and Mathew D. McCubbins. 1998. *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* New York: Cambridge University Press. John Barry Ryan. 2011. "Social Networks as a Shortcut to

Information transmitted through social media like Facebook is also likely to have a socializing effect. Friends “like” articles and information, sharing their political beliefs and information with one another. Media—newspapers, television, radio, and the Internet—also socialize citizens through the information they provide. For a long time, the media served as gatekeepers of our information, creating reality by choosing what to present. If the media did not cover an issue or event, it was as if it did not exist. With the rise of the Internet and social media, however, traditional media have become less powerful agents of this kind of socialization.

Another way the media socializes audiences is through framing, or choosing the way information is presented. Framing can affect the way an event or story is perceived. Candidates described with negative adjectives, for instance, may do poorly on Election Day.¹⁵



(a)



(b)

Images of protestors from the Baltimore “uprising” (a) and from the Baltimore “riots” (b) of April 25, 2015. (credit a: modification of work by Pete Santilli Live Stream/YouTube; credit b: modification of work by “Newzulu”/YouTube)

Correct Voting.” *American Journal of Political Science* 55 (4): 753–766.

15. Sarah Bowen. 2015. “A Framing Analysis of Media Coverage of the Rodney King Incident and Ferguson, Missouri, Conflicts.” *Elon Journal of Undergraduate Research in Communications* 6 (1): 114–124.

Socialization and Ideology

The socialization process leaves citizens with attitudes and beliefs that create a personal **ideology**. Ideologies depend on attitudes and beliefs, and on the way we prioritize each belief over the others. Most citizens hold a great number of beliefs and attitudes about government action. Many think government should provide for the common defense, in the form of a national military. They also argue that government should provide services to its citizens in the form of free education, unemployment benefits, and assistance for the poor.

When asked how to divide the national budget, Americans reveal priorities that divide public opinion. Should we have a smaller military and larger social benefits, or a larger military budget and limited social benefits? This is the *guns versus butter* debate, which assumes that governments have a finite amount of money and must choose whether to spend a larger part on the military or on social programs. The choice forces citizens into two opposing groups.

Divisions like these appear throughout public opinion. Assume we have four different people named Garcia, Chin, Smith, and Dupree. Garcia may believe that the United States should provide a free education for every citizen all the way through college, whereas Chin may believe education should be free only through high school. Smith might believe children should be covered by health insurance at the government's expense, whereas Dupree believes all citizens should be covered. In the end, the way we prioritize our beliefs and what we decide is most important to us determines whether we are on the liberal or conservative end of the political spectrum, or somewhere in between.

Ideologies and the Ideological Spectrum

One useful way to look at ideologies is to place them on a spectrum that visually compares them based on what they prioritize. Liberal ideologies are traditionally put on the left and conservative ideologies on the right. (This placement dates from the French Revolution and is why liberals are called left-wing and conservatives are called right-wing.)

Ideological Label	Generalized Description of Ideological Viewpoint
Populism	traditional on social behavior; expanded public services and govt. \$\$ spending
Libertarianism	very little constraint on social behavior; limited govt. intervention; limited \$\$ spending
Liberalism	remove constraints on social behavior; increase govt. role in \$\$ issues
Conservatism	traditions of social behavior; limited government control of \$\$ issues; rule of law
Socialism	govt. enforces social and economic equality; govt. provides goods and services
Communism	common ownership of all property, production, etc.
Fascism	total control by ruling elites of both private and public lives of citizens

Liberalism supports the right to make decisions without what are seen as traditional constraints on social behavior. Liberalism supports intervention in society and the economy, ideally in the promotion of equality. Liberals expect government to provide social and educational programs to help everyone have a chance to succeed. Modern liberals may prefer larger government role in society, with more government control over spending/fiscal issues and less social constraint on individual behavior.

Conservatism supports a belief in the rule of law and maintaining a safe and organized society. Ideally, conservatives assume government will protect individual liberties. Conservative governments attempt to hold tight to the traditions of a nation by balancing individual rights with the good of the community.

Modern conservatives may prefer a smaller government that limits control of the economy, allowing the market and business to determine prices, wages, and supply. Conservatives traditionally support less government spending/more fiscal restraint and more traditional religious social values.

Libertarianism supports individual rights and limited government intervention in private life and personal economic decisions. Government exists to maintain freedom and life, so its main function is to ensure domestic peace and national defense. Libertarians also believe the national government should maintain a military in case of international threats, but that it should not engage in setting minimum wages or ruling in private matters, like same-sex marriage or the right to abortion.¹⁶

Populism, in theory, supports the rights of the people and control of government by the people. The definition of populism varies widely, however, the basic view of a populist typically aligns with conservatism on social issues and liberalism on fiscal/monetary issues. A distrust of elites is usually also part of populist views on the proper scope of government.

Socialism, in theory, supports government authority to promote social and economic equality within the country. Socialists believe government should provide everyone with practically everything-expanded services and public programs including health care, housing and groceries, childhood education, and inexpensive college tuition. Socialism sees the government as a way to ensure all citizens receive equal outcomes.

Communism, in theory, promotes common ownership of all property, means of production, and materials. This means that the government, or states, should own the property, farms, manufacturing, and businesses. Inequality of income, in which some

16. Libertarian Party. 2014. "Libertarian Party Platform." June. <http://www.lp.org/platform> (February 17, 2016).

citizens earn millions of dollars a year and other citizens merely hundreds, is prevented by instituting wage controls or by abandoning currency altogether. Communism presents a problem, however, because the practice differs from the theory. The theory assumes the move to communism is supported and led by the proletariat, or the workers and citizens of a country.¹⁷ Human rights violations by governments of actual Communist countries make it appear the movement has been driven not by the people, but by leadership.

Fascism, in theory, promotes total control of the country by the ruling party or political leader. This form of government will run the economy, the military, society, and culture, and often tries to control the private lives of its citizens. Authoritarian leaders control the politics, military, and government of a country, and often the economy as well.

People can sometimes be a mix of ideological positions depending on the exact issue under discussion.



Where do your beliefs come from? The Pew Research Center offers a [typology quiz](#) to help you find out. Ask a friend or family member to answer a few questions with you and compare results. What do you

17. Frederick Engels. 1847. *The Principles of Communism*. Trans. Paul Sweezy. <https://www.marxists.org/archive/marx/works/1847/11/prin-com.htm> (February 17, 2016).

think about government regulation? The military? The economy? Now compare your results. Are you both liberal? Conservative? Moderate?

Public Opinion: Questions to Consider

1. Where do your beliefs originate?
2. Which agents of socialization will have the strongest impact on an individual?

Terms to Remember

agent of political socialization—a person or entity that teaches and influences others about politics through use of information

communism—a political and economic system ideology where government promotes common ownership of all property, means of production, and materials to prevent the exploitation of workers; in practice, most communist governments use force to maintain control

conservatism—a political ideology that prioritizes individual liberties, preferring a smaller government that stays out of the economy

fascism—a political system of total control by the ruling party or political leader over the economy, the military, society, and culture and often the private lives of citizens

ideology—beliefs and values shared by members of a group

liberalism—a political ideology based on belief in government intervention to support increased economic equality and less control of personal belief and behavior

libertarianism—a political ideology which supports individual rights and limited government intervention in private life and personal economic decisions

political socialization—the process of learning the norms and practices of a political system through others and societal institutions

populism—a political ideology which supports the rights of the people and control of government by the people

public opinion—a collection of opinions of an individual or a group of individuals on a topic, person, or event

socialism—a political and economic system in which government uses its authority to promote social and economic equality

56. Public Opinion: How is it measured?

Learning Objectives

- Explain how information about public opinion is gathered
- Identify common ways to measure and quantify public opinion
- Analyze polls to determine whether they accurately measure a population's opinions

Polling has changed over the years. The first opinion poll was taken in 1824; it asked voters how they voted as they left their polling places. Informal polls are called **straw polls**, and they informally collect opinions of a non-random population or group. Newspapers and social media continue the tradition of unofficial polls, mainly because interested readers want to know how elections will end. Facebook and online newspapers often offer informal, pop-up quizzes that ask a single question about politics or an event. The poll is not meant to be formal, but it provides a general idea of what the readership thinks.

Tracking polls are typically conducted repeatedly over a period of time and by going back to the same group of respondents. These polls often follow an incumbent office holder (like the president) or a policy issue, making trends observable

Modern public opinion polling is relatively new, only eighty years old. These polls are far more sophisticated than straw polls and

are carefully designed to probe what we think, want, and value. The information they gather may be relayed to politicians or newspapers, and is analyzed by statisticians and social scientists. As the media and politicians pay more attention to the polls, an increasing number are put in the field every week.

Taking a Poll

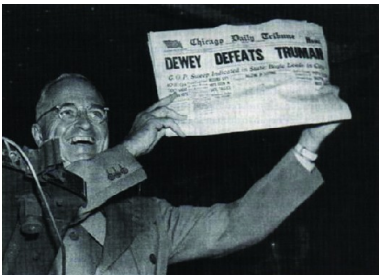
Most public opinion polls aim to be accurate, but this is not an easy task. From design to implementation, polls are complex and require careful planning and care. Our history is littered with examples of polling companies producing results that incorrectly predicted public opinion due to poor survey design or bad polling methods.

In 1936, *Literary Digest* continued its tradition of polling citizens to determine who would win the presidential election. The magazine sent opinion cards to people who had a subscription, a phone, or a car registration. Only some of the recipients sent back their cards. The result? Alf Landon was predicted to win 55.4 percent of the popular vote; in the end, he received only 38 percent.¹

A few years later, Thomas Dewey lost the 1948 presidential election to Harry Truman, despite polls showing Dewey far ahead and Truman destined to lose. In 1948, pollsters did not poll up to the day of the election, relying on old numbers that did not include a late shift in voter opinion. Zogby's polls did not represent likely voters and incorrectly predicted who would vote and for whom. These examples reinforce the need to use scientific methods when conducting polls, and to be cautious when reporting the results.

1. Arthur Evans, "Predict Landon Electoral Vote to be 315 to 350," *Chicago Tribune*, 18 October 1936.

Most polling companies employ statisticians and methodologists trained in conducting polls and analyzing data. A number of criteria must be met if a poll is to be completed scientifically. First, the methodologists identify the desired population, or group, of respondents they want to interview. For example, if the goal is to project who will win the presidency, citizens from across the United States should



Polling process errors can lead to incorrect predictions. On November 3, the day after the 1948 presidential election, a jubilant Harry S. Truman triumphantly displays the inaccurate headline of the Chicago Daily Tribune announcing Thomas Dewey's supposed victory (credit: David Erickson/Flickr).

be interviewed. If we wish to understand how voters in Colorado will vote on a proposition, the population of respondents should only be Colorado residents. When surveying on elections or policy matters, many polling houses will interview only respondents who have a history of voting in previous elections, because these voters are more likely to go to the polls on Election Day. Politicians are more likely to be influenced by the opinions of proven voters than of everyday citizens. Once the desired population has been identified, the researchers will begin to build a sample that is both random and representative.

Type of Poll	Description of Poll
straw	informal collection of opinion; non-random; not representative; pop-up question
tracking	repeated over time with same group of respondents; following policy or person
exit	taken as voters leave/exit the polling locations after an election
push	poll uses leading questions in an attempt to get a predetermined answer; may be used to influence a targeted audience with the skewed polling data
Type of Sample	Description of Sample
random	limited number of people from overall population selected; each person in overall population examined has equal chance of being chosen to participate in the poll
representative	group whose demographic distribution is similar to the overall population sought for the poll

A **random sample** consists of a limited number of people from the overall population, selected in such a way that each has an equal chance of being chosen. In the early years of polling, telephone numbers of potential respondents were arbitrarily selected from various areas to avoid regional bias. While landline phones allow polls to try to ensure randomness, the increasing use of cell phones makes this process difficult. Cell phones, and their numbers, are portable and move with the owner. To prevent errors, polls that include known cellular numbers may screen for zip codes and other geographic indicators to prevent regional bias. A **representative sample** consists of a group whose demographic distribution is similar to that of the overall population. For example, nearly 51 percent of the U.S. population is female.² To match this demographic distribution of women, any poll intended to measure what most Americans think about an issue should survey a sample containing slightly more women than men.

Pollsters try to interview a set number of citizens to create a reasonable sample of the population. This sample size will vary based on the size of the population being interviewed and the level of accuracy the pollster wishes to reach. If the poll is trying to reveal the opinion of a state or group, such as the opinion of Wisconsin voters about changes to the education system, the sample size may vary from five hundred to one thousand respondents and produce results with relatively low error. For a poll to predict what Americans think nationally, such as about the White House's policy on greenhouse gases, the sample size should be larger.

A larger sample makes a poll more accurate, because it will have

2. United States Census Bureau. 2012. "Age and Sex Composition in the United States: 2012." *United States Census Bureau*. <http://www.census.gov/population/age/data/2012comp.html> (February 17, 2016).

relatively fewer unusual responses and be more representative of the actual population. Pollsters do not interview more respondents than necessary, however. Increasing the number of respondents will increase the accuracy of the poll, but once the poll has enough respondents to be representative, increases in accuracy become minor and are not cost-effective.³

When the sample represents the actual population, the poll's accuracy will be reflected in a lower margin of error. The **margin of error** is a number that states how far the poll results may be from the actual opinion of the total population of citizens. The lower the margin of error, the more predictive the poll. Large margins of error are problematic. For example, if a poll that claims Hillary Clinton is likely to win 30 percent of the vote in the 2016 New York Democratic primary has a margin of error of ± 6 , it tells us that Clinton may receive as little as 24 percent of the vote ($30 - 6$) or as much as 36 percent ($30 + 6$). A lower margin of error is clearly desirable because it gives us the most precise picture of what people actually think or will do.

With many polls out there, how do you know whether a poll is a good poll and accurately predicts what a group believes? First, look for the numbers. Polling companies include the margin of error, polling dates, number of respondents, and population sampled to show their scientific reliability. Was the poll recently taken? Is the

3. Michael W. Link and Robert W. Oldendick. 1997. "Good" Polls / "Bad" Polls—How Can You Tell? Ten Tips for Consumers of Survey Research." *South Carolina Policy Forum*. <http://www.ipspr.sc.edu/publication/Link.htm> (February 17, 2016); Pew Research Center. 2015. "Sampling." Pew Research Center. <http://www.pewresearch.org/methodology/u-s-survey-research/sampling/> (February 17, 2016).

question clear and unbiased? Was the number of respondents high enough to predict the population? Is the margin of error small? It is worth looking for this valuable information when you interpret poll results. While most polling agencies strive to create quality polls, other organizations want fast results and may prioritize immediate numbers over random and representative samples. For example, instant polling is often used by news networks to quickly assess how well candidates are performing in a debate.

Technology and Polling

The days of randomly walking neighborhoods and phone book cold-calling to interview random citizens are gone. Scientific polling has made interviewing more deliberate. Historically, many polls were conducted in person, yet this was expensive and yielded problematic results.

In some situations and countries, face-to-face interviewing still exists. Exit polls, focus groups, and some public opinion polls occur in which the interviewer and respondents communicate in person. Exit polls are conducted in person, with an interviewer standing near a polling location and requesting information as voters leave the polls. Focus groups often select random respondents from local shopping places or pre-select respondents from Internet or phone surveys. The respondents show up to observe or discuss topics and are then surveyed.



On November 6, 2012, the Connect2Mason.com team conducts exit surveys at the polls on the George Mason University campus. (credit: Mason Votes/Flickr).

When organizations like Gallup or Roper decide to conduct face-to-face public opinion polls, however, it is a time-consuming and expensive process. The organization must randomly select households or polling locations within neighborhoods, making sure there is a representative household or location in each neighborhood.⁴

Then it must survey a representative number of neighborhoods from within a city. At a polling location, interviewers may have directions on how to randomly select voters of varied demographics. If the interviewer is looking to interview a person in a home, multiple attempts are made to reach a respondent if he or she does not answer. Gallup conducts face-to-face interviews in areas where less than 80 percent of the households in an area have phones, because it gives a more representative sample.⁵

News networks use face-to-face techniques to conduct exit polls on Election Day.

Most polling now occurs over the phone or through the Internet.

4. “Roper Center. 2015. “Polling Fundamentals – Sampling.” Roper. <http://www.ropercenter.uconn.edu/support/polling-fundamentals-sampling/> (February 17, 2016).
5. Gallup. 2015. “How Does the Gallup World Poll Work?” Gallup. <http://www.gallup.com/178667/gallup-world-poll-work.aspx> (February 17, 2016).

Some companies, like Harris Interactive, maintain directories that include registered voters, consumers, or previously interviewed respondents. If pollsters need to interview a particular population, such as political party members or retirees of a specific pension fund, the company may purchase or access a list of phone numbers for that group. Other organizations, like Gallup, use random-digit-dialing (RDD), in which a computer randomly generates phone numbers with desired area codes. Using RDD allows the pollsters to include respondents who may have unlisted and cellular numbers.⁶

Questions about ZIP code or demographics may be asked early in the poll to allow the pollsters to determine which interviews to continue and which to end early.

The interviewing process is also partly computerized. Many polls are now administered through computer-assisted telephone interviewing (CATI) or through robo-polls. A CATI system calls random telephone numbers until it reaches a live person and then connects the potential respondent with a trained interviewer. As the respondent provides answers, the interviewer enters them directly into the computer program. These polls may have some errors if the interviewer enters an incorrect answer. The polls may also have reliability issues if the interviewer goes off the script or answers respondents' questions.

Robo-polls are entirely computerized. A computer dials random or pre-programmed numbers and a prerecorded electronic voice administers the survey. The respondent listens to the question and possible answers and then presses numbers on the phone to enter responses. Proponents argue that respondents are more honest without an interviewer. However, these polls can suffer from error if the respondent does not use the correct keypad number to answer

6. Gallup. 2015. "Does Gallup Call Cellphones?" *Gallup*. <http://www.gallup.com/poll/110383/does-gallup-call-cell-phones.aspx> (February 17, 2016).

a question or misunderstands the question. Robo-polls may also have lower response rates, because there is no live person to persuade the respondent to answer. There is also no way to prevent children from answering the survey. Lastly, the Telephone Consumer Protection Act (1991) made automated calls to cell phones illegal, which leaves a large population of potential respondents inaccessible to robo-polls.⁷

The latest challenges in telephone polling come from the shift in phone usage. A growing number of citizens, especially younger citizens, use only cell phones, and their phone numbers are no longer based on geographic areas. The millennial generation (currently aged 18–33) is also more likely to text than to answer an unknown call, so it is harder to interview this demographic group. Polling companies now must reach out to potential respondents using email and social media to ensure they have a representative group of respondents.

Yet, the technology required to move to the Internet and handheld devices presents further problems. Web surveys must be designed to run on a varied number of browsers and handheld devices. Online polls cannot detect whether a person with multiple email accounts or social media profiles answers the same poll multiple times, nor can they tell when a respondent misrepresents demographics in the poll or on a social media profile used in a poll. These factors also make it more difficult to calculate response rates or achieve a representative sample. Yet, many companies are

7. Mark Blumenthal, “The Case for Robo-Pollsters: Automated Interviewers Have Their Drawbacks, But Fewer Than Their Critics Suggest,” *National Journal*, 14 September 2009.

working with these difficulties, because it is necessary to reach younger demographics in order to provide accurate data.⁸

Problems in Polling

For a number of reasons, polls may not produce accurate results. Two important factors a polling company faces are timing and human nature. Unless you conduct an **exit poll** during an election and interviewers stand at the polling places on Election Day to ask voters how they voted, there is always the possibility the poll results will be wrong. The simplest reason is that if there is time between the poll and Election Day, a citizen might change his or her mind, lie, or choose not to vote at all. Timing is very important during elections, because surprise events can shift enough opinions to change an election result. Of course, there are many other reasons why polls, even those not time-bound by elections or events, may be inaccurate.



election.

Created in 2003 to survey the American public on all topics, Rasmussen Reports is a [new entry](#) in the polling business. Rasmussen also conducts exit polls for each national

8. Mark Blumenthal, "Is Polling As We Know It Doomed?" *National Journal*, 10 August 2009.



Polls begin with a list of carefully written questions. The questions need to be free of framing, meaning they should not be worded to lead respondents to a particular answer. For example, take two questions about presidential approval. Question 1 might ask, “Given the high unemployment rate, do you approve of the job President Obama is doing?” Question 2 might ask, “Do you approve of the job President Obama is doing?” Both questions want to know how respondents perceive the president’s success, but the first question sets up a frame for the respondent to believe the economy is doing poorly before answering. This is likely to make the respondent’s answer more negative. Similarly, the way we refer to an issue or concept can affect the way listeners perceive it. The phrase “estate tax” did not rally voters to protest the inheritance tax, but the phrase “death tax” sparked debate about whether taxing estates imposed a double tax on income.⁹

Many polling companies try to avoid leading questions, which lead respondents to select a predetermined answer, because they want to know what people really think. Some polls, however, have a different goal. Their questions are written to guarantee a specific outcome, perhaps to help a candidate get press coverage or gain momentum. These are called **push polls**. In the 2016 presidential primary race, MoveOn tried to encourage Senator Elizabeth Warren (D-MA) to enter the race for the Democratic nomination. Its poll used leading questions for what it termed an “informed ballot,” and,

9. Frank Luntz. 2007. *Words That Work: It’s Not What You Say, It’s What People Hear*. New York: Hyperion.

to show that Warren would do better than Hillary Clinton, it included ten positive statements about Warren before asking whether the respondent would vote for Clinton or Warren.¹⁰

The poll results were blasted by some in the media for being fake.

Sometimes lack of knowledge affects the results of a poll. Respondents may not know that much about the polling topic but are unwilling to say, “I don’t know.” For this reason, surveys may contain a quiz with questions that determine whether the respondent knows enough about the situation to answer survey questions accurately. A poll to discover whether citizens support changes to the Affordable Care Act or Medicaid might first ask who these programs serve and how they are funded. Polls about territory seizure by the Islamic State (or ISIS) or Russia’s aid to rebels in Ukraine may include a set of questions to determine whether the respondent reads or hears any international news. Respondents who cannot answer correctly may be excluded from the poll, or their answers may be separated from the others.

People may also feel social pressure to answer questions in accordance with the norms of their area or peers.¹¹

If they are embarrassed to admit how they would vote, they may lie to the interviewer.

In 2010, Proposition 19, which would have legalized and taxed

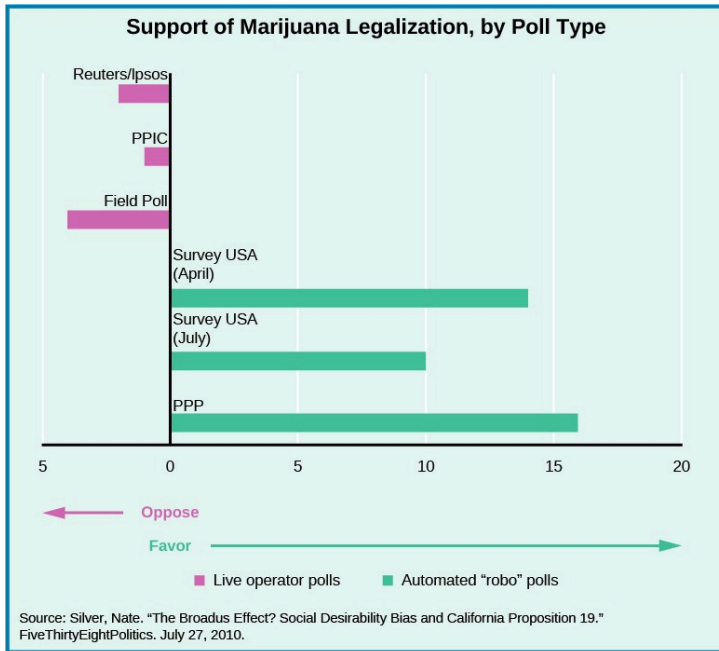
10. Aaron Blake, “This terrible polls shows Elizabeth Warren beating Hillary Clinton,” *Washington Post*, 11 February 2015.
11. Nate Silver. 2010. “The Broadus Effect? Social Desirability Bias and California Proposition 19.” *FiveThirtyEightPolitics*. July 27, 2010. <http://fivethirtyeight.com/features/broadus-effect-social-desirability-bias/> (February 18, 2016).

marijuana in California, met with a new version of the Bradley effect. Nate Silver, a political blogger, noticed that polls on the marijuana proposition were inconsistent, sometimes showing the proposition would pass and other times showing it would fail. Silver compared the polls and the way they were administered, because some polling companies used an interviewer and some used robo-calling. He then proposed that voters speaking with a live interviewer gave the socially acceptable answer that they would vote against Proposition 19, while voters interviewed by a computer felt free to be honest.¹²

While this theory has not been proven, it is consistent with other findings that interviewer demographics can affect respondents' answers. African Americans, for example, may give different responses to interviewers who are white than to interviewers who are black.¹³

12. Nate Silver. 2010. "The Broadus Effect? Social Desirability Bias and California Proposition 19." *FiveThirtyEightPolitics*. July 27, 2010. <http://fivethirtyeight.com/features/broadus-effect-social-desirability-bias/> (February 18, 2016).

13. D. Davis. 1997. "The Direction of Race of Interviewer Effects among African-Americans: Donning the Black Mask." *American Journal of Political Science* 41 (1): 309–322.



In 2010, polls about California's Proposition 19 were inconsistent, depending on how they were administered, with voters who spoke with a live interviewer declaring they would vote against Proposition 19 and voters who were interviewed via a computer declaring support for the legislation. The measure was defeated on Election Day.

Questions to Consider

1. Why do pollsters interview random people throughout the country when trying to project which candidate will win a presidential election?
2. How have changes in technology made polling

more difficult?

Terms to Remember

exit poll—an election poll taken by interviewing voters as they leave a polling place

leading question—a question worded to lead a respondent to give a desired answer

margin of error—a number that states how far the poll results may be from the actual preferences of the total population of citizens

push poll—politically biased campaign information presented as a poll in order to change minds

random sample—a limited number of people from the overall population selected in such a way that each has an equal chance of being chosen

representative sample—a group of respondents demographically similar to the population of interest

straw poll—an informal and unofficial election poll conducted with a non-random population

tracking poll—poll conducted repeatedly over a period of time; usually following an incumbent office holder (like the president) or a policy issue; making trends observable

57. Public Opinion: What is the connection to political institutions?

Learning Objectives

- Explain why Americans hold a variety of views about politics, policy issues, and political institutions
- Identify factors that change public opinion
- Compare levels of public support for the branches of government

Consider the Original

|| Federalist No. 71 ||

The Duration in Office of the Executive

From the New York Packet

Tuesday, March 18, 1788.

Author: **Alexander Hamilton**

To the People of the State of New York:

DURATION in office has been mentioned as the second requisite to the energy of the Executive authority. This has

relation to two objects: to the personal firmness of the executive magistrate, in the employment of his constitutional powers; and to the stability of the system of administration which may have been adopted under his auspices. With regard to the first, it must be evident, that the longer the duration in office, the greater will be the probability of obtaining so important an advantage. It is a general principle of human nature, that a man will be interested in whatever he possesses, in proportion to the firmness or precariousness of the tenure by which he holds it; will be less attached to what he holds by a momentary or uncertain title, than to what he enjoys by a durable or certain title; and, of course, will be willing to risk more for the sake of the one, than for the sake of the other. This remark is not less applicable to a political privilege, or honor, or trust, than to any article of ordinary property. The inference from it is, that a man acting in the capacity of chief magistrate, under a consciousness that in a very short time he MUST lay down his office, will be apt to feel himself too little interested in it to hazard any material censure or perplexity, from the independent exertion of his powers, or from encountering the ill-humors, however transient, which may happen to prevail, either in a considerable part of the society itself, or even in a predominant faction in the legislative body. If the case should only be, that he MIGHT lay it down, unless continued by a new choice, and if he should be desirous of being continued, his wishes, conspiring with his fears, would tend still more powerfully to corrupt his integrity, or debase his fortitude. In either case, feebleness and irresolution must be the characteristics of the station.

There are some who would be inclined to regard the

servile pliancy of the Executive to a prevailing current, either in the community or in the legislature, as its best recommendation. But such men entertain very crude notions, as well of the purposes for which government was instituted, as of the true means by which the public happiness may be promoted. **The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests.** It is a just observation, that the people commonly INTEND the PUBLIC GOOD. This often applies to their very errors. But their good sense would despise the adulator who should pretend that they always REASON RIGHT about the MEANS of promoting it. They know from experience that they sometimes err; and the wonder is that they so seldom err as they do, beset, as they continually are, by the wiles of parasites and sycophants, by the snares of the ambitious, the avaricious, the desperate, by the artifices of men who possess their confidence more than they deserve it, and of those who seek to possess rather than to deserve it. When occasions present themselves, in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection. Instances might be cited in which a conduct of this kind has saved the people from very fatal consequences of their own mistakes, and has procured lasting monuments of their gratitude to the men who had

courage and magnanimity enough to serve them at the peril of their displeasure [...].¹

PUBLIUS.

1. This was the case with respect to Mr. Fox's India bill, which was carried in the House of Commons, and rejected in the House of Lords, to the entire satisfaction, as it is said, of the people.

After reading Federalist 71, focus on the statement highlighted in red and give your opinion on whether politicians “flatter” our “prejudices” in order to “betray” our “interests”?

Public Opinion and Political Institutions

Public opinion about American institutions is measured in public approval ratings rather than in questions of choice between positions or candidates. The congressional and executive branches of government are the subject of much scrutiny and discussed daily in the media. Polling companies take daily approval polls of these two branches. The Supreme Court makes the news less frequently, and approval polls are more likely after the court has released major

1. The Federalist Papers: Federalist No. 71 by Alexander Hamilton/Publius at <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-71>

opinions. All three branches, however, are susceptible to swings in public approval in response to their actions and to national events. Approval ratings are generally not stable for any of the three. We next look at each in turn.

The president is the most visible member of the U.S. government and a lightning rod for disagreement. Presidents are often blamed for the decisions of their administrations and political parties, and are held accountable for economic and foreign policy downturns. For these reasons, they can expect their approval ratings to slowly decline over time, increasing or decreasing slightly with specific events. On average, presidents enjoy a 66 percent approval rating when starting office, but it drops to 53 percent by the end of the first term. Presidents serving a second term average a beginning approval rating of 55.5 percent, which falls to 47 percent by the end of office. President Obama's presidency has followed the same trend. He entered office with a public approval rating of 67 percent, which fell to 54 percent by the third quarter, dropped to 52 percent after his reelection, and, as of August 2015, sits at 46 percent.

Events during a president's term may spike his or her public approval ratings. George W. Bush's public approval rating jumped from 51 percent on September 10, 2001, to 86 percent by September 15 following the 9/11 attacks. His father, George H. W. Bush, had received a similar spike in approval ratings (from 58 to 89 percent) following the end of the first Persian Gulf War in 1991.²

These spikes rarely last more than a few weeks, so presidents try to quickly use the political capital they bring. For example, the 9/11 rally effect helped speed a congressional joint resolution

2. Gallup. 2015. "Presidential Approval Ratings – George W. Bush." *Gallup*. June 20, 2015. <http://www.gallup.com/poll/116500/Presidential-Approval-Ratings-George-Bush.aspx> (February 18, 2016).

authorizing the president to use troops, and the “global war on terror” became a reality.³

Some presidents have had higher or lower public approval than others, though ratings are difficult to compare, because national and world events that affect presidential ratings are outside a president’s control. Several chief executives presided over failing economies or wars, whereas others had the benefit of strong economies and peace. Gallup, however, gives an average approval rating for each president across the entire period served in office. George W. Bush’s average approval rating from 2001 to 2008 was 49.4 percent. Ronald Reagan’s from 1981 to 1988 was 52.8 percent, despite his winning all but thirteen electoral votes in his reelection bid. Bill Clinton’s average approval from 1993 to 2000 was 55.1 percent, including the months surrounding the Monica Lewinsky scandal and his subsequent impeachment. To compare other notable presidents, John F. Kennedy averaged 70.1 percent and Richard Nixon 49 percent.⁴

Kennedy’s average was unusually high because his time in office was short; he was assassinated before he could run for reelection,

3. 115 STAT. 2001. “224. Public Law 107-40. Joint Resolution.” 107th Congress. <http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf> (February 18, 2016).
4. Gallup. 2015. “Presidential Job Approval Center.” Gallup. June 20, 2015. http://www.gallup.com/poll/124922/Presidential-Job-Approval-Center.aspx?utm_source=PRESIDENTIAL_JOB_APPROVAL&utm_medium=topic&utm_campaign=tiles (February 18, 2016).

leaving less time for his ratings to decline. Nixon's unusually low approval ratings reflect several months of media and congressional investigations into his involvement in the Watergate affair, as well as his resignation in the face of likely impeachment.



Gallup polling has tracked approval ratings for all presidents since Harry Truman. The [Presidential Job Approval Center](#) allows you to compare weekly approval ratings for all tracked presidents, as well as their average approval ratings.

Public Mood and Watershed Moments

Polling is one area of U.S. politics in which political practitioners and political science scholars interact. Each election cycle, political scientists help media outlets interpret polling, statistical data, and election forecasts. One particular watershed moment in this regard occurred when Professor James Stimson, of the University of North Carolina at Chapel Hill, developed his aggregated measure of public mood. This measure takes a variety of issue positions and combines them to form a general ideology about the government.

According to Professor Stimson, the American electorate became more conservative in the 1970s and again in the 1990s, as demonstrated by Republican gains in Congress. With this public mood measure in mind, political scientists can explain why and when Americans allowed major policy shifts. For example, the Great Society's expansion of welfare and social benefits occurred during the height of liberalism in the mid-1960s, while the welfare cuts and reforms of the 1990s occurred during the nation's move toward conservatism. Tracking conservative and liberal shifts in the public's ideology allows policy analysts to predict whether voters are likely to accept or reject major policies.

What other means of measuring the public mood do you think might be effective and reliable? How would you implement them? Do you agree that watershed moments in history signal public mood changes? If so, give some examples. If not, why not?

Congress as an institution has historically received lower approval ratings than presidents, a striking result because individual senators and representatives are generally viewed favorably by their constituents. While congressional representatives almost always win reelection and are liked by their constituents back home, the institution itself is often vilified as representing everything that is wrong with politics and partisanship.

As of August 2015, public approval of Congress sat at around 20 percent.⁵

For most of the last forty years, congressional approval levels have bounced between 20 percent and 60 percent, but in the last fifteen years they have regularly fallen below 40 percent. Like President George W. Bush, Congress experienced a short-term jump in approval ratings immediately following 9/11, likely because of the rallying effect of the terrorist attacks. Congressional approval had dropped back below 50 percent by early 2003.



Congressional approval ratings over the past forty years have generally fallen between 20 and 50 percent; however, these ratings spiked to over 80 percent in the wake of the terrorist attacks on September 11, 2001.

While presidents are affected by foreign and domestic events, congressional approval is mainly affected by domestic events. When the economy rebounds or gas prices drop, public approval of Congress tends to go up. But when party politics within Congress becomes a domestic event, public approval falls. The passage of revenue bills has become an example of such an

event, because deficits require Congress to make policy decisions before changing the budget. Deficit and debt are not new to the United States. Congress and presidents have attempted various methods of controlling debt, sometimes successfully and sometimes not. In the past three decades alone, however, several prominent examples have shown how party politics make it difficult for

5. Gallup. 2015. "Congress and the Public." Gallup. June 21, 2015. <http://www.gallup.com/poll/1600/Congress-Public.aspx> (February 18, 2016).

Congress to agree on a budget without a fight, and how these fights affect public approval.

Most of the time, the people believe political parties need to work together to solve problems rather than play political games. During the 2011 ceiling debate, congressional approval fell from 18 to 13 percent, while in 2013, congressional approval fell to a new low of 9 percent in November.⁶

The Supreme Court generally enjoys less visibility than the other two branches of government, which leads to more stable but also less frequent polling results. Indeed, 22 percent of citizens surveyed in 2014 had never heard of Chief Justice John Roberts, the head of the Supreme Court.⁷

The court is protected by the justices' non-elected, non-political positions, which gives them the appearance of integrity and helps the Supreme Court earn higher public approval ratings than presidents and Congress. To compare, between 2000 and 2010, the court's approval rating bounced between 50 and 60 percent. During this same period, Congress had a 20 to 40 percent approval rating.

The Supreme Court's approval rating is also less susceptible to the influence of events. Support of and opinions about the court are affected when the justices rule on highly visible cases that are of

6. Gallup. 2015. "Congress and the Public." *Gallup*. June 21, 2015. <http://www.gallup.com/poll/1600/Congress-Public.aspx> (February 18, 2016).

7. Andrew Dugan. 2014. "Americans' Approval of Supreme Court New All-Time Low." *Gallup*. July 19, 2014. <http://www.gallup.com/poll/163586/americans-approval-supreme-court-near-time-low.aspx> (February 18, 2016).

public interest or other events occur that cause citizens to become aware of the court.⁸

Questions to Consider

1. Why might one branch's approval ratings be higher than another's?
2. When are social and economic issues more likely to cause polarization in public opinion?

8. James L. Gibson, and Gregory A. Caldeira. 2009. "Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court." *Journal of Politics* 71 (2): 429–441.

PART XIII

INTEREST GROUPS

58. Interest Groups: People Engage



William T. Hornaday Conservation Award winner and Eagle Scout delivers informative speech about the importance of nestboxes and promoting the interests of the Texas Bluebird Society at their 10th Annual Meeting and Convention in Glen Rose, Texas on August 20, 2011. TBS is an active interest group advocating on behalf of the protection of Eastern Bluebirds and their habitat.

People with a common interest often work together advocating on behalf of this shared interest. This is an **interest group**. Interest groups abound in the United States. Recently, many groups spoke out on behalf of both sides of the argument over government healthcare. The 2010 Patient Protection and Affordable Care Act (PPACA), also known as Obamacare, represented a substantial

overhaul of the U.S. healthcare system.¹ Given its potential impact, interest group representatives (lobbyists) from the insurance industry, hospitals, medical device manufacturers, and organizations representing doctors, patients, and employers all tried to influence what the law would look like and the way it would operate. Ordinary people took to the streets to voice their opinion. Some state governors sued to prevent a requirement in the law that their states expand Medicaid coverage. A number of interest groups challenged the law in court.

Interest groups like those for and against the PPACA play a fundamental role in representing individuals, corporate interests, and the public before the government. They help inform the public and lawmakers about issues, monitor government actions, and promote policies that benefit their interests, using all three branches of government at the federal, state, and local levels. The multi-layered federal structure in the US allows for more points of access or linkages to the government.

Interest Groups: Questions to Consider

1. What are interest groups?
2. Why and how do they form?
3. How do they provide avenues for political participation?
4. Why are some groups advantaged by the lobbying

1. Lawrence R. Jacobs and Theda Skocpol 2010. *Health Care Reform and American Politics: What Everyone Needs to Know* Oxford: Oxford University Press.

of government representatives, while others are disadvantaged?

5. How do interest groups try to achieve their objectives?
6. How are they regulated?

Term to Remember

interest group—people with a common interest often work together advocating on behalf of this shared interest

59. Interest Groups: Who or what are they?

Learning Objectives

- Explain how interest groups differ from political parties
- Evaluate the different types of interests and what they do
- Compare public and private interest groups

While the term *interest group* is not mentioned in the U.S. Constitution, the framers were aware that individuals would band together in an attempt to use government in their favor. In *Federalist* No. 10, James Madison warned of the dangers of “factions,” minorities who would organize around issues they felt strongly about, possibly to the detriment of the majority. But Madison believed limiting these factions was worse than facing the evils they might produce, because such limitations would violate individual freedoms. Instead, the natural way to control factions was to let them flourish and compete against each other. The sheer number of interests in the United States suggests that many have, indeed, flourished. They compete with similar groups for membership, and with opponents for access to decision-makers. Some people suggest there may be too many interests in the United States. Others argue that some have gained a disproportionate amount of influence over public policy, whereas many others are underrepresented.

Consider the Original

Excerpts from || Federalist No. 10 ||

The Same Subject Continued: The Union as a Safeguard Against Domestic Faction and Insurrection

From the New York Packet.

Friday, November 23, 1787.

Author: **James Madison**

To the People of the State of New York:

AMONG the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. [...] Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. [...]

By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different

circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. [...]

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.

The inference to which we are brought is, that the CAUSES of faction cannot be removed, and that relief is only to be sought in the means of controlling its EFFECTS.

[...] From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever

been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions. A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

[...] Hence, it clearly appears, that the same advantage which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic, – is enjoyed by the Union over the States composing it. Does the advantage consist in the substitution of representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and schemes of injustice? It will not be denied that the representation of the Union will be most likely to possess these requisite endowments. Does it consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber

and oppress the rest? In an equal degree does the increased variety of parties comprised within the Union, increase this security. Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here, again, the extent of the Union gives it the most palpable advantage.

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.

In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans, ought to be our zeal in cherishing the spirit and supporting the character of Federalists.¹

1. Library of Congress, *The Federalist Papers*, Federalist 10, James Madison Author, <https://www.congress.gov/>

Excerpt from the Library of Congress, The Federalist Papers, Federalist 10, James Madison at <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-10>

Madison's definition of factions can apply to both interest groups and political parties. But unlike political parties, interest groups do not necessarily function primarily to elect candidates under a certain party label or to directly control the operation of the government.

Political parties in the United States are generally much broader coalitions that represent a significant proportion of citizens. In the American two-party system, the Democratic and Republican Parties spread relatively wide nets to try to encompass large segments of the population. Interest groups may support or oppose political candidates, however, their goals are usually more issue-specific and narrowly focused on areas like taxes, the environment, and gun rights or gun control, or their membership is limited to specific professions. They may represent interests ranging from well-known organizations, such as the Sierra Club, IBM, or the American Lung Association, to obscure ones, such as the North Carolina Gamefowl Breeders Association.

Political parties and interest groups both work together and compete for influence.

*resources/display/content/
The+Federalist+Papers#TheFederalistPapers-10*

What Are Interest Groups and What Do They Want?

Definitions abound when it comes to interest groups, which are sometimes referred to as special interests, interest organizations, pressure groups, or just interests. Most definitions specify that **interest group** indicates any formal association of individuals or organizations that attempt to influence government decision-making and/or the making of public policy. This influence is **advocacy**. People translate opinion into advocacy. They may speak to a friend or co-worker and eventually form a group with this shared interest in influencing others. If advocacy attempts are successful, other individuals, groups, legislators, etc. may be **coopted** into the same opinion, shared interest, or common policy agenda. Often, this influence is exercised by a lobbyist or a lobbying firm.

Formally, a **lobbyist** is someone who represents the interest organization before government, is usually compensated for doing so, and is required to register with the government in which he or she lobbies, whether state or federal. The lobbyist's primary goal is usually to influence policy. Most interest organizations engage in lobbying activity to achieve their objectives. As you might expect, the interest hires a lobbyist, employs one internally, or has a member volunteer to lobby on its behalf. For present purposes, we might restrict our definition to the relatively broad one in the **Lobbying Disclosure Act**.² This act requires the registration of lobbyists representing any interest group and devoting more than

2. Anthony J. Nownes. 2013. *Interest Groups in American Politics*. Routledge: New York.

20 percent of their time to it.³ Clients and lobbying firms must also register with the federal government based on similar requirements. Moreover, campaign finance laws require disclosure of campaign contributions given to political candidates by organizations.



Visit this [site](#) to research donations and campaign contributions given to political candidates by organizations.

Lobbying is not limited to Washington, DC, and many interests lobby there as well as in one or more states. Each state has its own laws describing which individuals and entities must register, so the definitions of lobbyists and interests, and of what lobbying is and who must register to do it, also vary from state to state. Therefore, while a citizen contacting a lawmaker to discuss an issue is generally not viewed as lobbying, an organization that devotes a certain amount of time and resources to contacting lawmakers may be classified as lobbying, depending on local, state, or federal law.

Largely for this reason, there is no comprehensive list of all interest groups to tell us how many there are in the United States. Estimates of the number vary widely, suggesting that if we use a broad definition and include all interests at all levels of government, there may be more than 200,000.⁴ Following the passage of the

3. Nownes, *Interest Groups in American Politics*.

4. Nownes, *Interest Groups in American Politics*.

Lobbying Disclosure Act in 1995, we had a much better understanding of the number of interests registered in Washington, DC; however, it was not until several years later that we had a complete count and categorization of the interests registered in each of the fifty states.⁵ Political scientists have categorized interest groups in a number of ways.⁶



(a)



(b)

A Florida member of the NRA proudly displays his support of gun rights (a). In December 2012, CREDO, a San Francisco telecommunications company that supports progressive causes, called on the NRA to stop blocking Congress from passing gun control legislation (b). (credit a: modification of work by Daniel Oines; credit b: modification of work by Josh Lopez)

First, interest groups may take the form of membership

5. Jennifer Wolak, Adam J. Newmark, Todd McNoldy, David Lowery, and Virginia Gray, "Much of Politics is Still Local: Multistate Representation in State Interest Communities," *Legislative Studies Quarterly* 27 (2002): 527–555.
6. Anthony J. Nownes and Adam J. Newmark. 2013. "Interest Groups in the States." In *Politics in the American States*. Washington, DC: CQ Press, 105–131.

organizations, which individuals join voluntarily and to which they usually pay dues. Membership groups often consist of people who have common issues or concerns, or who want to be with others who share their views. The National Rifle Association (NRA) is a membership group consisting of members who promote gun rights. For those who advocate greater regulation of access to firearms, such as background checks prior to gun purchases, the Brady Campaign to Prevent Gun Violence is a membership organization that weighs in on the other side of the issue.⁷ includes Coca-Cola,

7. Interest groups may also form to represent companies, corporate organizations, and governments. These groups do not have individual members but rather are offshoots of corporate or governmental entities with a compelling interest to be represented in front of one or more branches of government. Verizon and Coca-Cola will register to lobby in order to influence policy in a way that benefits them. These corporations will either have one or more in-house lobbyists, who work for one interest group or firm and represent their organization in a lobbying capacity, and/or will hire a contract lobbyist, individuals who work for firms that represent a multitude of clients and are often hired because of their resources and their ability to contact and lobby lawmakers, to represent them before the legislature.

Governments such as municipalities and executive departments such as the Department of Education register to lobby in an effort to maximize their share of budgets or increase their level of autonomy. These

Red Bull North America, ROCKSTAR, and Kraft Foods. Despite the fact that these companies are competitors, they have common interests related to the manufacturing, bottling, and distribution of beverages, as well as the regulation of their business activities. The logic is that there is strength in numbers, and if members can lobby for tax breaks or eased regulations for an entire industry, they may all benefit. These common goals do not, however, prevent individual association members from employing in-house lobbyists or contract lobbying firms to represent their own business or organization as well. Indeed, many members of associations are competitors who also seek representation individually before the legislature.

government institutions are represented by a **legislative liaison**, whose job is to present issues to decision-makers. For example, a state university usually employs a lobbyist, legislative liaison, or government affairs person to represent its interests before the legislature. This includes lobbying for a given university's share of the budget or for its continued autonomy from lawmakers and other state-level officials who may attempt to play a greater oversight role.

Interest groups also include associations, which are typically groups of institutions that join with others, often within the same trade or industry (trade associations), and have similar concerns. The American Beverage Association⁸ <http://www.ameribev.org/> (March 1, 2016).

8.



Visit the website of an association like the [American Beverage Association](#) or the [American Bankers Association](#) and look over the key issues it addresses. Do any of the issues it cares about surprise you? What areas do you think members can agree about? Are there issues on which the membership might disagree? Why would competitors join together when they normally compete for business?

Finally, sometimes individuals volunteer to represent an organization. They are called amateur or volunteer lobbyists, and are typically not compensated for their lobbying efforts. In some cases, citizens may lobby for pet projects because they care about some issue or cause. They may or may not be members of an interest group, but if they register to lobby, they are sometimes nicknamed "hobbyists."

Lobbyists representing a variety of organizations employ different techniques to achieve their objectives. One method is inside lobbying or direct lobbying, which takes the interest group's message directly to a government official such as a lawmaker.⁹ Inside lobbying tactics include testifying in legislative hearings and helping to draft legislation. Numerous surveys of lobbyists have confirmed that the vast majority rely on these inside strategies. For example, nearly all report that they contact

9. Nownes and Newmark, "Interest Groups in the States."

lawmakers, testify before the legislature, help draft legislation, and contact executive agencies. Trying to influence government appointments or providing favors to members of government are somewhat less common insider tactics.

Many lobbyists also use outside lobbying or indirect lobbying tactics, whereby the interest attempts to get its message out to the public.¹⁰ These tactics include issuing press releases, placing stories and articles in the media, entering coalitions with other groups, and contacting interest group members, hoping that they will individually pressure lawmakers to support or oppose legislation. An environmental interest group like the Sierra Club, for example, might issue a press release or encourage its members to contact their representatives in Congress about legislation of concern to the group. It might also use outside tactics if there is a potential threat to the environment and the group wants to raise awareness among its members and the public. Members of Congress are likely to pay attention when many constituents contact them about an issue or proposed bill. Many interest groups, including the Sierra Club, will use a combination of inside and outside tactics in their lobbying efforts, choosing whatever strategy is most likely to help them achieve their goals.

10. Ken Kollman. 1998. *Outside Lobbying: Public Opinion and Interest Groups Strategies*. Princeton, NJ: Princeton University Press.

The primary goal of most interests, no matter their lobbying approach, is to influence decision-makers and public policies.



In February 2013, members of the Sierra Club joined a march on Los Angeles City Hall to demand action on climate change and protest the development of the Keystone pipeline. (credit: Charlie Kaijo)

Interest Group Functions

While influencing policy is the primary goal, interest groups also monitor government activity, serve as a means of political participation for members, and provide information to the public and to lawmakers. According to the National Conference of State Legislatures, by November 2015, thirty-six states had laws requiring that voters provide identification at the polls.¹¹

Interest groups facilitate political participation in a number of ways. Some members become active within a group, working on behalf of the organization to promote its agenda. Some interests work to increase membership, inform the public about issues the group deems important, or organize rallies and promote get-out-the-vote efforts. Sometimes groups will utilize events to mobilize existing members or encourage new members to join.

11. <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> (November 78, 2015).

Public vs. Private Interest Groups

Interest groups and organizations represent both private and public interests in the United States. **Private interests** usually seek particularized benefits from government that favor either a single interest or a narrow set of interests. For example, corporations and political institutions may lobby government for tax exemptions, fewer regulations, or favorable laws that benefit individual companies or an industry more generally. Their goal is to promote private goods. Private goods are items individuals can own, including corporate profits. An automobile is a private good; when you purchase it, you receive ownership. Wealthy individuals are more likely to accumulate private goods, and they can sometimes obtain private goods from governments, such as tax benefits, government subsidies, or government contracts.

On the other hand, **public interest** groups attempt to promote public, or collective, goods. Such collective goods are benefits—tangible or intangible—that help most or all citizens. These goods are often produced collectively, and because they may not be profitable and everyone may not agree on what public goods are best for society, they are often underfunded and thus will be underproduced unless there is government involvement. The Tennessee Valley Authority, a government corporation, provides electricity in some places where it is not profitable for private firms to do so. Other examples of collective goods are public safety, highway safety, public education, and environmental protection. With some exceptions, if an environmental interest promotes clean air or water, most or all citizens are able to enjoy the result. So if the Sierra Club encourages Congress to pass legislation that improves national air quality, citizens receive the benefit regardless of whether they are members of the organization or even support the legislation. Many environmental groups are public interest groups

that lobby for and raise awareness of issues that affect large segments of the population.¹²

Questions to Consider

1. What benefits do private and public interests bring to society?
2. What are some disadvantages of private and public interests?

Terms to Remember

advocacy--influence; individuals or interest groups speak out in an attempt to influence others

association--groups of companies or institutions that organize around a common set of concerns, often within a given industry or trade

contract lobbyist--lobbyist who works for a contract lobbying firm that represents clients before government

cooptation/co-opt--successful influence/advocacy for a policy position, agenda, opinion

12. Jeffrey M. Berry and Clyde Wilcox. 2009. *The Interest Group Society*. New York: Pearson.

in-house lobbyist--an employee or executive within an organization who works as a lobbyist on behalf of the organization

legislative liaison--a person employed by a governmental entity such as a local government, executive department, or university to represent the organization before the legislature

lobbyist--a person who represents an organization before government in an attempt to influence policy

private interest group--seek particularized benefits from government that favor either a single interest or a narrow set of interests

public interest group--an interest group that seeks a public good, which is something that accrues to all

60. Interest Groups: How are they formed?

Learning Objectives

- Explain the concept of collective action and its effect on interest group formation
- Describe free riding and the reasons it occurs
- Discuss ways to overcome collective action problems

In any group project in which you have participated, you may have noticed that a small number of students did the bulk of the work while others did very little. Yet everyone received the same grade. Why do some do all the work, while others do little or none? How is it possible to get people to work when there is a disincentive to do so? This situation is an example of a collective action problem, and it exists in government as well as in public and private organizations. Whether it is Congress trying to pass a budget or an interest group trying to motivate members to contact lawmakers, organizations must overcome collective action problems to be productive. This is especially true of interest groups, whose formation and survival depend on members doing the necessary work to keep the group funded and operating.

Collective Action and Free Riding

Collective action problems exist when people have a disincentive to take action.¹ People tend not to act when the perceived benefit is insufficient to justify the costs associated with engaging in the action. Many citizens may have concerns about the appropriate level of taxation, gun control, or environmental protection, but these concerns are not necessarily strong enough for them to become politically active. In fact, most people take no action on most issues, either because they do not feel strongly enough or because their action will likely have little bearing on whether a given policy is adopted. Thus, there is a disincentive to call your member of Congress, because rarely will a single phone call sway a politician on an issue.

Why do some students elect to do little on a group project? The answer is that they likely prefer to do something else and realize they can receive the same grade as the rest of the group without contributing to the effort. This result is often termed the **free rider problem**, because some individuals can receive benefits (get a free ride) without helping to bear the cost. When National Public Radio (NPR) engages in a fund-raising effort to help maintain the station, many listeners will not contribute. Since it is unlikely that any one listener's donation will be decisive in whether NPR has adequate funding to continue to operate, most listeners will not contribute

1. Mancur Olson, Jr. 1965. *The Logic of Collective Action*. Cambridge, MA: Harvard University Press; Frank R. Baumgartner and Beth L. Leech. *Basic Interests: The Importance of Groups in Political Science*. Princeton, NJ: Princeton University Press.

to the costs but instead will free ride and continue to receive the benefits of listening.

Groups with financial resources have an advantage in mobilizing in that they can offer incentives or hire a lobbyist. Smaller, well-organized groups also have an advantage. For one thing, opinions within smaller groups may be more similar, making it easier to reach consensus. It is also more difficult for members to free ride in a smaller group. In comparison, larger groups have a greater number of individuals and therefore more viewpoints to consider, making consensus more difficult. It may also be easier to free ride because it is less obvious in a large group when any single person does not contribute. However, if people do not lobby for their own interests, they may find that they are ignored, especially if smaller but more active groups with interests opposed to theirs lobby on behalf of themselves.

Sometimes collective action problems are overcome because there is little choice about whether to join an organization. For example, some organizations may require membership in order to participate in a profession. To practice law, individuals may be required to join the American Bar Association or a state bar association. In the past, union membership could be required of workers, particularly in urban areas controlled by political machines consisting of a combination of parties, elected representatives, and interest groups.

Questions to Consider

1. What are some ways to overcome collective action problems?
2. Why do some groups have an easier time overcoming collective action problems?

Term to Remember

free rider problem—the situation that occurs when some individuals receive benefits (get a free ride) without helping to bear the cost

6I. Interest Groups: Pathways to Participation and Influence

Learning Objectives

- Analyze how interest groups provide a means for political participation
- Discuss recent changes to interest groups and the way they operate in the United States
- Explain why lower socioeconomic status citizens are not well represented by interest groups
- Identify the barriers to interest group participation in the United States
- Describe how interest groups influence the government through elections
- Explain how interest groups influence the government through the governance processes

Interest groups offer individuals an important avenue for political participation. Tea Party protests, for instance, gave individuals all over the country the opportunity to voice their opposition to government actions and control. Likewise, the Occupy Wall Street movement also gave a voice to those individuals frustrated with economic inequality and the influence of large corporations on the public sector. Individually, the protestors would likely have received little notice, but by joining with others, they drew substantial attention in the media and from lawmakers. While the Tea Party movement might not meet the definition of interest groups

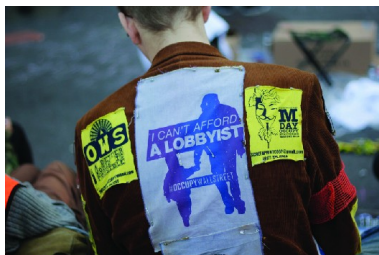
presented earlier, its aims have been promoted by established interest groups. Other opportunities for participation that interest groups offer or encourage include voting, campaigning, contacting lawmakers, and informing the public about causes.

Group Participation as Civic Engagement

Joining interest groups can help facilitate civic engagement, which allows people to feel more connected to the political and social community. Some interest groups develop as

grassroots movements, which often begin from the bottom up among a small number of people at the local level. Interest groups can amplify the voices of such individuals through proper organization and allow them to participate in ways that would be less effective or even impossible alone or in small numbers. The Tea Party is also a grassroots movement. Many ordinary citizens support the Tea Party because of its opposition to tax increases, it attracts a great deal of support from elite and wealthy sponsors, some of whom are active in lobbying. The FreedomWorks political action committee (PAC), for example, is a conservative advocacy group that has supported the Tea Party movement. FreedomWorks is an offshoot of the interest group Citizens for a Sound Economy, which was founded by billionaire industrialists David H. and Charles G. Koch in 1984.

According to political scientists Jeffrey Berry and Clyde Wilcox, interest groups provide a means of representing people and serve



*In 2011, an Occupy Wall Street protestor highlights that the concerns of individual citizens are not always heard by those in the seats of power.
(credit: Timothy Krause)*

as a link between them and government.¹ Interest groups also allow people to actively work on an issue in an effort to influence public policy. Another function of interest groups is to help educate the public. Someone concerned about the environment may not need to know what an acceptable level of sulfur dioxide is in the air, but by joining an environmental interest group, he or she can remain informed when air quality is poor or threatened by legislative action. A number of education-related interests have been very active following cuts to education spending in many states, including North Carolina, Mississippi, and Wisconsin, to name a few.

Interest groups also help frame issues, usually in a way that best benefits their cause. Abortion rights advocates often use the term “pro-choice” to frame abortion as an individual’s private choice to be made free of government interference, while an anti-abortion group might use the term “pro-life” to frame its position as protecting the life of the unborn. “Pro-life” groups often label their opponents as “pro-abortion,” rather than “pro-choice,” a distinction that can affect the way the public perceives the issue.

Interest groups also try to get issues on the government agenda and to monitor a variety of government programs. Following the passage of the PPACA, numerous interest groups have been monitoring the implementation of the law, hoping to use successes and failures to justify their positions for and against the legislation. Those opposed have utilized the court system to try to alter or eliminate the law, or have lobbied executive agencies or departments that have a role in the law’s implementation. Similarly, teachers’ unions, parent-teacher organizations, and other education-related interests have monitored implementation of the *No Child Left Behind* Act promoted and signed into law by President George W. Bush.

1. See in general Jeffrey M. Berry and Clyde Wilcox. 2008. *The Interest Group Society*. 5th ed. New York: Routledge.

Trends in Public Interest Group Formation and Activity

A number of changes in interest groups have taken place over the last three or four decades in the United States. The most significant change is the tremendous increase in both the number and type of groups.² Political scientists often examine the diversity of

2. Clive S. Thomas and Ronald J. Hrebenar. 1990. "Interest Groups in the States." In *Politics in the American States: A Comparative Analysis*, 5th ed., eds. Virginia Gray, Herbert Jacob, and Robert B. Albritton. Glenview, IL: Scott, Foresman, 123–158; Clive S. Thomas and Ronald J. Hrebenar. 1991. "Nationalization of Interest Groups and Lobbying in the States." In *Interest Group Politics*, 3d ed., eds. Allan J. Cigler and Burdett A. Loomis. Washington, DC: CQ Press, 63–80; Clive S. Thomas and Ronald J. Hrebenar. 1996. "Interest Groups in the States." In *Politics in the American States: A Comparative Analysis*, 6th ed., eds. Virginia Gray, and Herbert Jacob. Washington, DC: CQ Press, 122–158; Clive S. Thomas and Ronald J. Hrebenar. 1999. "Interest Groups in the States." In *Politics in the American States: A Comparative Analysis*, 7th ed., eds. Virginia Gray, Russell L. Hanson, and Herbert Jacob. Washington, DC: CQ Press, 113–143; Clive S. Thomas and Ronald J. Hrebenar. 2004. "Interest Groups in the States." In *Politics in the American States: A Comparative Analysis*,

registered groups, in part to determine how well they reflect the variety of interests in society. Some areas may be dominated by certain industries, while others may reflect a multitude of interests. Some interests appear to have increased at greater rates than others. For example, the number of institutions and corporate interests has increased both in Washington and in the states. Telecommunication companies like Verizon and AT&T will lobby Congress for laws beneficial to their businesses, but they also target the states because state legislatures make laws that can benefit or harm their activities. There has also been an increase in the number of public interest groups that represent the public as opposed to economic interests. U.S. PIRG is a public interest group that represents the public on issues including public health, the environment, and consumer protection.³

Public Interest Research Groups

Public interest research groups (PIRGs) have increased in recent years, and many now exist nationally and at the state level. PIRGs represent the public in a multitude of issue areas, ranging from consumer protection to the environment, and like other interests, they provide opportunities for people to make a difference in the political process. PIRGs try to promote

8th ed., eds. Virginia Gray and Russell L. Hanson. Washington, DC: CQ Press, 100–128.

3. <http://www.uspirg.org/> (November 1, 2015).

the common or public good, and most issues they favor affect many or even all citizens. Student PIRGs focus on issues that are important to students, including tuition costs, textbook costs, new voter registration, sustainable universities, and homelessness. Consider the cost of a college education. You may want to research how education costs have increased over time. Are cost increases similar across universities and colleges? Are they similar across states? What might explain similarities and differences in tuition costs? What solutions might help address the rising costs of higher education?

How can you get involved in the drive for affordable college education? Consider why students might become engaged in it and why they might not do so. A number of countries have made tuition free or nearly free.⁴ Is this feasible or desirable in the United States? Why or why not?

4. Rick Noack, “7 countries where Americans can study at universities, in English, for free (or almost free),” *Washington Post*, 29 October 2014, <https://www.washingtonpost.com/news/worldviews/wp/2014/10/29/7-countries-where-americans-can-study-at-universities-in-english-for-free-or-almost-free/>.



Take a look at the [website](#) for Student PIRGs. What issues does this interest group address? Are these issues important to you? How can you get involved? Visit this [section of their site](#) to learn more about their position on financing higher education.

What are the reasons for the increase in the number of interest groups? In some cases, it simply reflects new interests in society. Forty years ago, stem cell research was not an issue on the government agenda, but as science and technology advanced, its techniques and possibilities became known to the media and the public, and a number of interests began lobbying for and against this type of research. Medical research firms and medical associations will lobby in favor of greater spending and increased research on stem cell research, while some religious organizations and anti-abortion groups will oppose it. As societal attitudes change and new issues develop, and as the public becomes aware of them, we can expect to see the rise of interests addressing them.

The devolution of power also explains some of the increase in the number and type of interests, at least at the state level. As power and responsibility shifted to state governments in the 1980s, the states began to handle responsibilities that had been under the jurisdiction of the federal government. A number of federal welfare programs, for example, are generally administered at the state level. This means interests might be better served targeting their lobbying efforts in Albany, Raleigh, Austin, or Sacramento, rather than only in Washington, DC. As the states have become more active in more

policy areas, they have become prime targets for interests wanting to influence policy in their favor.⁵

We have also seen increased specialization by some interests and even fragmentation of existing interests. While the American Medical Association may take a stand on stem cell research, the issue is not critical to the everyday activities of many of its members. On the other hand, stem cell research is highly salient to members of the American Neurological Association, an interest organization that represents academic neurologists and neuroscientists. Accordingly, different interests represent the more specialized needs of different specialties within the medical community, but **fragmentation** can occur when a large interest like this has diverging needs. Such was also the case when several unions split from the AFL-CIO (American Federation of Labor-Congress of Industrial Organizations), the nation's largest federation of unions, in 2005.⁶ Improved technology and the development of social media have made it easier for smaller groups to form and to attract and communicate with members. The use of the Internet to raise money has also made it possible for even small groups to receive funding.

Over the last few decades, we have also witnessed an increase in professionalization in lobbying and in the sophistication of lobbying techniques. This was not always the case, because lobbying was not

5. Thomas and Hrebennar, "Nationalization of Interest Groups and Lobbying in the States," Nownes and Newmark, "Interest Groups in the States."
6. Thomas and Hrebennar, "Interest Groups in the States," 1991, 1996, 1999, 2004; Thomas and Hrebennar, "Nationalization of Interest Groups and Lobbying in the States."

considered a serious profession in the mid-twentieth century. Over the past three decades, there has been an increase in the number of contract lobbying firms. These firms are often effective because they bring significant resources to the table, their lobbyists are knowledgeable about the issues on which they lobby, and they may have existing relationships with lawmakers. In fact, relationships between lobbyists and legislators are often ongoing, and these are critical if lobbyists want access to lawmakers. However, not every interest can afford to hire high-priced contract lobbyists to represent it. A great deal of money is spent on lobbying activities.

We have also seen greater limits on inside lobbying activities. In the past, many lobbyists were described as “good ol’ boys” who often provided gifts or other favors in exchange for political access or other considerations. Today, restrictions limit the types of gifts and benefits lobbyists can bestow on lawmakers. There are certainly fewer “good ol’ boy” lobbyists, and many lobbyists are now full-time professionals. The regulation of lobbying is addressed in greater detail below.

How Representative Is the Interest Group System?

Participation in the United States has never been equal; wealth and education, components of socioeconomic status, are strong predictors of political engagement.⁷

We already discussed how wealth can help overcome collective

7. Sidney Verba, Kay Lehmann Schlozman, and Henry Brady. 1995. *Voice and Equality*. Cambridge, MA: Harvard University Press.

action problems, but lack of wealth also serves as a barrier to participation more generally. These types of barriers pose challenges, making it less likely for some groups than others to participate.⁸ Some institutions, including large corporations, are more likely to participate in the political process than others, simply because they have tremendous resources. And with these resources, they can write a check to a political campaign or hire a lobbyist to represent their organization. Writing a check and hiring a lobbyist are unlikely options for a disadvantaged group.

Individually, the poor may not have the same opportunities to join groups.⁹ They may work two jobs to make ends meet and lack the free time necessary to participate in politics. Further, there are often financial barriers to participation. For someone who punches a time-clock, spending time with political groups may be costly and paying dues may be a hardship. Certainly, the poor are unable to hire expensive lobbying firms to represent them. Structural barriers like voter identification laws may also disproportionately affect people with low socioeconomic status, although the effects of these laws may not be fully understood for some time.

Minorities may also participate less often than the majority population, although when we control for wealth and education levels, we see fewer differences in participation rates. Still, there is a bias in participation and representation, and this bias extends

8. Steven J. Rosenstone and John Mark Hansen. 2003. *Mobilization, Participation, and Democracy in America*. New York: Longman.
9. Verba et al., *Voice and Equality*; Mark J. Rozell, Clyde Wilcox, and Michael M. Franz. 2012. *Interest Groups in American Campaigns: The New Face of Electioneering*. Oxford University Press: New York.

to interest groups as well. For example, when fast food workers across the United States went on strike to demand an increase in their wages, they could do little more than take to the streets bearing signs, like the protestors shown in the image below. Their opponents, the owners of restaurant chains and others who pay their employees minimum wage, could hire groups such as the Employment Policies Institute, which paid for billboard ads in Times Square in New York City. The billboards implied that raising the minimum wage was an insult to people who worked hard and discouraged people from getting an education to better their lives.¹⁰



Finally, people do not often participate because they lack the political skill to do so or believe that it is impossible to influence government

Unlike their opponents, these minimum-wage workers in Minnesota have limited ways to make their interests known to government. However, they were able to increase their political efficacy by joining fast food workers in a nationwide strike on April 15, 2015, to call for a \$15 per hour minimum wage and improved working conditions. (credit: "Fibonacci Blue"/Flickr)

10. Aaron Smith, "Conservative Group's Times Square Billboard Attacks a \$15 Minimum Wage," 31 August 2015, <http://money.cnn.com/2015/08/31/news/economy/times-square-minimum-wage/>.

actions.¹¹ They might also lack interest or could be apathetic. Participation usually requires some knowledge of the political system, the candidates, or the issues. Younger people in particular are often cynical about government's response to the needs of non-elites.

People naturally join groups and that there will be a great deal of competition for access to decision-makers.¹²

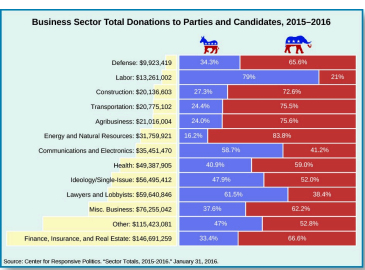
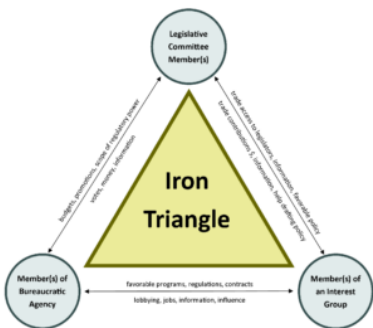
A study of almost eighteen hundred policy decisions made over a twenty-year period revealed that the interests of the wealthy have much greater influence on the government than those of average citizens. The approval or disapproval of proposed policy changes by average voters had relatively little effect on whether the changes took place. When wealthy voters disapproved of a particular policy, it almost never was enacted. When wealthy voters favored a particular policy, the odds of the policy proposal's passing increased to more than 50 percent.¹³

The graph below shows contributions by interests from a variety of different sectors. We can draw a few notable observations from the table. First, large sums of money are spent by different interests.

11. Robert Putnam. 2000. *Bowling Alone*. New York: Simon and Shuster; Rosenstone and Hansen, *Mobilization, Participation and Democracy in America*.
12. David B. Truman 1951. *The Governmental Process: Political Interests and Public Opinion*. New York: Knopf.
13. Kevin Drum, "Nobody Cares What You Think Unless You're Rich," *Mother Jones*, 8 April 2014, <http://www.motherjones.com/kevin-drum/2014/04/nobody-cares-what-you-think-unless-youre-rich>.

Second, many of these interests are business sectors, including the real estate sector, the insurance industry, businesses, and law firms.

Interest group politics are often characterized by whether the groups have access to decision-makers and can participate in the policy-making process. The **iron triangle** is a hypothetical arrangement among three elements (the corners of the triangle) that illustrates the often real relationships in government: an interest group, a congressional committee member or chair, and an agency within the bureaucracy.¹⁴



The chart above shows the dollar amounts contributed from PACs, soft money (including directly from corporate and union treasuries), and individual donors to Democratic (blue) and Republican (red) federal candidates and political parties during the 2015-2016 election cycle, as reported to the Federal Election Commission.

Each element has a symbiotic relationship with the other two, and it is difficult for those outside the triangle to break into it. The congressional committee members, including the chair, rely on the interest group for campaign contributions and policy information, while the interest

group needs the committee to consider laws favorable to its view.

14. Frank R. Baumgartner and Beth L. Leech. 1998. *Basic Interests: The Importance of Groups in Political Science*. Princeton, NJ: Princeton University Press.

The interest group and the committee need the agency to implement the law, while the agency needs the interest group for information and the committee for funding and autonomy in implementing the law.¹⁵

Influence depends on a number of factors in the political environment such as public opinion, political culture, competition for access, and the relevance of the issue. Even wealthy interests do not always win if their position is at odds with the wish of an attentive public. And if the public cares about the issue, politicians may be reluctant to defy their constituents. Thus, the conclusion that businesses, the wealthy, and elites win in every situation is overstated.¹⁶

Many people criticize the huge amounts of money spent in politics. Some argue that interest groups have too much influence on who wins elections, while others suggest influence is also problematic when interests try to sway politicians in office. There is little doubt that interest groups often try to achieve their objectives by influencing elections and politicians, but discovering whether they have succeeded in changing minds is actually challenging because they tend to support those who already agree with them.

15. Francis E. Rourke. 1984. *Bureaucracy, Politics, and Public Policy*, 3rd ed. NY: Harper Collins.
16. Mark A. Smith. 2000. *American Business and Political Power: Public Opinion, Elections, and Democracy*. Chicago: University of Chicago Press; F. R. Baumgartner, J. M. Berry, M. Hojnacki, D. C. Kimball, and B. L. Leech. 2009. *Lobbying and Policy Change*. Chicago: University of Chicago Press.

Influence in Elections

Interest groups support candidates who are sympathetic to their views in hopes of gaining access to them once they are in office.¹⁷ For example, an organization like the NRA will back candidates who support Second Amendment rights. Both the NRA and the Brady Campaign to Prevent Gun Violence (an interest group that favors background checks for firearm purchases) have grading systems that evaluate candidates and states based on their records of supporting these organizations.¹⁸

To garner the support of the NRA, candidates must receive an A+ rating for the group. In much the same way, Americans for Democratic Action, a liberal interest group, and the American Conservative Union, a conservative interest group, both rate politicians based on their voting records on issues these organizations view as important.¹⁹ These ratings, and those of many

17. John R. Wright. 1996. *Interest Groups and Congress: Lobbying, Contributions, and Influence*. Needham Heights, MA: Allyn and Bacon; Mark J. Rozell, Clyde Wilcox, and Michael M. Franz. 2012. *Interest Groups in American Campaigns: The New Face of Electioneering*. New York: Oxford University Press.

18. <https://www.nrapvf.org/grades/>;
<http://www.bradycampaign.org/2013-state-scorecard>
(March 1, 2016).

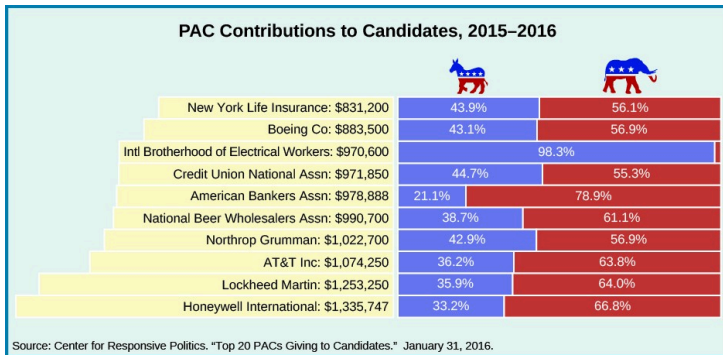
19. <http://www.adaction.org/pages/publications/voting->

other groups, are useful for interests and the public in deciding which candidates to support and which to oppose. Incumbents have electoral advantages in terms of name recognition, experience, and fundraising abilities, and they often receive support because interest groups want access to the candidate who is likely to win. Some interest groups will offer support to the challenger, particularly if the challenger better aligns with the interest's views or the incumbent is vulnerable. Sometimes, interest groups even hedge their bets and give to both major party candidates for a particular office in the hopes of having access regardless of who wins.

Some interests groups form **political action committees (PACs)**, groups that collect funds from donors and distribute them to candidates who support their issues. As the chart below makes apparent, many large corporations like Honeywell International, AT&T, and Lockheed Martin form PACs to distribute money to candidates.²⁰ Other PACs are either politically or ideologically oriented. For example, the MoveOn.org PAC is a progressive group that formed following the impeachment trial of President Bill Clinton, whereas GOPAC is a Republican PAC that promotes state and local candidates of that party. PACs are limited in the amount of money that they can contribute to individual candidates or to national party organizations; they can contribute no more than \$5,000 per candidate per election and no more than \$15,000 a year to a national political party. Individual contributions to PACs are also limited to \$5,000 a year.

[records.php](#); <http://acuratings.conservative.org/> (March 1, 2016).

20. <https://www.opensecrets.org/pacs/> (March 1, 2016).



Corporations and associations spend large amounts of money on elections via affiliated PACs. This chart reveals the amount donated to Democratic (blue) and Republican (red) candidates by the top ten PACs during the most recent election cycle.

PACs through which corporations and unions can spend virtually unlimited amounts of money on behalf of political candidates are called super PACs.²¹ As a result of a 2010 Supreme Court decision, *Citizens United v. Federal Election Commission*, there is no limit to how much money unions or corporations can donate to super PACs. Unlike PACs, however, super PACs cannot contribute money directly to individual candidates. If the 2014 elections were any indication, super PACs will continue to spend large sums of money in an attempt to influence future election results.

21. Conor M. Dowling and Michael G. Miller. 2014. *Super PAC! Money, Elections, and Voters after Citizens United*. New York: Routledge.

Influencing Governmental Policy

Interest groups support candidates in order to have access to lawmakers once they are in office. Lawmakers, for their part, lack the time and resources to pursue every issue; they are policy generalists. Therefore, they (and their staff members) rely on interest groups and lobbyists to provide them with information about the technical details of policy proposals, as well as about fellow lawmakers' stands and constituents' perceptions. These **voting cues** give lawmakers an indication of how to vote on issues, particularly those with which they are unfamiliar. But lawmakers also rely on lobbyists for information about ideas they can champion and that will benefit them when they run for reelection.²²

Interest groups likely cannot target all 535 lawmakers in both the House and the Senate, nor would they wish to do so. There is little reason for the Brady Campaign to Prevent Gun Violence to lobby members of Congress who vehemently oppose any restrictions on gun access. Instead, the organization will often contact lawmakers who are amenable to some restrictions on access to firearms. Thus, interest groups first target lawmakers they think will consider introducing or sponsoring legislation.

Second, they target members of relevant committees.²³ If a company that makes weapons systems wants to influence a defense

22. Wright, *Interest Groups and Congress: Lobbying, Contributions, and Influence*.

23. Richard L. Hall and Frank W. Wayman, "Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees," *American Political Science Review* 84.3 (1990): 797-820.

bill, it will lobby members of the Armed Services Committees in the House and the Senate or the House and Senate appropriations committees if the bill requires new funding. Many members of these committees represent congressional districts with military bases, so they often sponsor or champion bills that allow them to promote policies popular with their districts or state. Interest groups attempt to use this to their advantage. But they also conduct strategic targeting because legislatures function by respectfully considering fellow lawmakers' positions. Since lawmakers cannot possess expertise on every issue, they defer to their trusted colleagues on issues with which they are unfamiliar. So targeting committee members also allows the lobbyist to inform other lawmakers indirectly.

Third, interest groups target lawmakers when legislation is on the floor of the House and/or Senate, but again, they rely on the fact that many members will defer to their colleagues who are more familiar with a given issue. Finally, since legislation must pass both chambers in identical form, interest groups may target members of the conference committees whose job it is to iron out differences across the chambers. At this negotiation stage, a 1 percent difference in, say, the corporate income tax rate could mean millions of dollars in increased or decreased revenue or taxation for various interests.

Interest groups also target the budgetary process in order to maximize benefits to their group. In some cases, their aim is to influence the portion of the budget allocated to a given policy, program, or policy area. For example, interests for groups that represent the poor may lobby for additional appropriations for various welfare programs; those interests opposed to government assistance to the poor may lobby for reduced funding to certain programs. It is likely that the legislative liaison for your university or college spends time trying to advocate for budgetary allocations in your state.

Once legislation has been passed, interest groups may target the executive branch of government, whose job is to implement the

law. The U.S. Department of Veterans Affairs has some leeway in providing care for military veterans, and interests representing veterans' needs may pressure this department to address their concerns or issues. Other entities within the executive branch, like the Securities and Exchange Commission, which maintains and regulates financial markets, are not designed to be responsive to the interests they regulate, because to make such a response would be a conflict of interest. Interest groups may lobby the executive branch on executive, judicial, and other appointments that require Senate confirmation. As a result, interest group members may be appointed to positions in which they can influence proposed regulation of the industry of which they are a part.

In addition to lobbying the legislative and executive branches of government, many interest groups also lobby the judicial branch. Lobbying the judiciary takes two forms, the first of which was mentioned above. This is lobbying the executive branch about judicial appointments the president makes and lobbying the Senate to confirm these appointments. The second form of lobbying consists of filing amicus briefs, which are also known as "friend of the court" briefs. These documents present legal arguments stating why a given court should take a case and/or why a court should rule a certain way. In *Obergefell v. Hodges* (2015), the Supreme Court case that legalized same-sex marriage nationwide, numerous interest groups filed amicus briefs.²⁴

For example, the Human Rights Campaign filed a brief arguing that the Fourteenth Amendment's due process and equal protection clauses required that same-sex couples be afforded the same rights to marry as opposite-sex couples. In a 5-4 decision, the U.S. Supreme Court agreed.

24. *Obergefell v. Hodges*, 576 U.S. ____ (2015).



Members of the Human Rights Campaign, an interest that supports LGBT rights, march toward the Supreme Court on June 26, 2015, the day that the Obergefell v. Hodges decision is announced. (credit: modification of work by Matt Popovich)

Measuring the effect of interest groups' influence is somewhat difficult because lobbyists support lawmakers who would likely have supported them in the first place.



Examine websites for the [American Conservative Union](#) and [Americans for Democratic Action](#) that compile legislative ratings and voting records. On what issues do these organizations choose

to take positions? Where do your representatives and senators rank according to these groups? Are these rankings surprising?

Questions to Consider

1. What does group participation provide to citizens?
2. Why don't lower-income groups participate more in the interest group system?
3. What are some barriers to participation?
4. How do interest groups lobby the judicial branch?
5. How do interest groups and their lobbyists decide which lawmakers to lobby? And where do they do so?

Terms to Remember

fragmentation—the result when a large interest group develops diverging needs

grassroots movement—a political movement that often begins from the bottom up, inspired by average citizens concerned about a given issue

iron triangle—three-way relationship among

congressional committees, interests groups, and the bureaucracy

voting cues—sources—including fellow lawmakers, constituents, and interest groups—that lawmakers often use to help them decide how to vote, especially on unfamiliar issues

62. Interest Groups: How are they regulated?

Learning Objectives

- Identify the various court cases, policies, and laws that outline what interest groups can and cannot do
- Evaluate the arguments for and against whether contributions are a form of freedom of speech

As we noted earlier in the chapter, James Madison viewed factions as a necessary evil and thought preventing people from joining together would be worse than any ills groups might cause. The First Amendment guarantees, among other things, freedom of speech, petition, and assembly. However, people have different views on how far this freedom extends. For example, should freedom of speech as afforded to individuals in the U.S. Constitution also apply to corporations and unions? To what extent can and should government restrict the activities of lobbyists and lawmakers, limiting who may lobby and how they may do it?

Interest Groups and Free Speech

Most people would agree that interest groups have a right under the Constitution to promote a particular point of view. What people do not necessarily agree upon, however, is the extent to which certain

interest group and lobbying activities are protected under the First Amendment.

In addition to free speech rights, the First Amendment grants people the right to assemble. We saw above that pluralists even argued that assembling in groups is natural and that people will gravitate toward others with similar views. Most people acknowledge the right of others to assemble to voice unpopular positions, but this was not always the case. At various times, groups representing racial and religious minorities, communists, and members of the LGBT community have had their First Amendment rights to speech and assembly curtailed. And as noted above, organizations like the ACLU support free speech rights regardless of whether the speech is popular.

Today, the debate about interest groups often revolves around whether the First Amendment protects the rights of individuals and groups to give money, and whether government can regulate the use of this money. In 1971, the Federal Election Campaign Act was passed, setting limits on how much presidential and vice-presidential candidates and their families could donate to their own campaigns.¹ The law also allowed corporations and unions to form PACs and required public disclosure of campaign contributions and their sources. In 1974, the act was amended in an attempt to limit the amount of money spent on congressional campaigns. The amended law banned the transfer of union, corporate, and trade association money to parties for distribution to campaigns.

In *Buckley v. Valeo* (1976), the Supreme Court upheld Congress's right to regulate elections by restricting contributions to campaigns

1. Wright, *Interest Groups and Congress: Lobbying, Contributions, and Influence*; Rozell, Wilcox, and Franz, *Interest Groups in American Campaigns: The New Face of Electioneering*.

and candidates. However, at the same time, it overturned restrictions on expenditures by candidates and their families, as well as total expenditures by campaigns.² In 1979, an exemption was granted to get-out-the vote and grassroots voter registration drives, creating what has become known as the soft-money loophole; **soft money** was a way in which interests could spend money on behalf of candidates without being restricted by federal law. To close this loophole, Senators John McCain and Russell Feingold sponsored the Bipartisan Campaign Reform Act in 2002 to ban parties from collecting and distributing unregulated money.

Some continued to argue that campaign expenditures are a form of speech, a position with which two recent Supreme Court decisions are consistent. The *Citizens United v. Federal Election Commission*³ and the *McCutcheon v. Federal Election Commission*⁴ cases opened the door for a substantially greater flow of money into elections. *Citizens United* overturned the soft money ban of the Bipartisan Campaign Reform Act and allowed corporations and unions to spend unlimited amounts of money on elections. Essentially, the Supreme Court argued in a 5-4 decision that these entities had free speech rights, much like individuals, and that free speech included campaign spending. The *McCutcheon* decision further extended spending allowances based on the First Amendment by striking down aggregate contribution limits. These limits put caps on the total contributions allowed and some say

2. *Buckley v. Valeo*, 75-436, 424 U.S. 1 (1976).

3. *Citizens United v. Federal Election Commission*, 08-205, 558 U.S. 310 (2010).

4. *McCutcheon v. Federal Election Commission*, 12-536, 572 U.S. ____ (2014).

have contributed to a subsequent increase in groups and lobbying activities.



With his Harper's Weekly cartoon of William "Boss" Tweed with a moneybag for a head, Thomas Nast provided an enduring image of the corrupting power of money on politics. Some denounce "fat cat" lobbyists and the effects of large sums of money in lobbying, while others suggest that interests have every right to spend money to achieve their objectives.



Read about the [rights](#) that corporations share with people.

Should corporations have the same rights as people?

Regulating Lobbying and Interest Group Activity

While the Supreme Court has paved the way for increased spending in politics, lobbying is still regulated in many ways.⁵ The 1995 Lobbying Disclosure Act defined who can and cannot lobby, and requires lobbyists and interest groups to register with the federal government.⁶ The Honest Leadership and Open Government Act of 2007 further increased restrictions on lobbying. For example, the act prohibited contact between members of Congress and lobbyists who were the spouses of other Congress members. The laws broadened the definition of lobbyist and require detailed disclosure of spending on lobbying activity, including who is lobbied and what bills are of interest. In addition, President Obama's Executive Order 13490 prohibited appointees in the executive branch from accepting

5. Adam J. Newmark, "Measuring State Legislative Lobbying Regulation, 1990–2003." *State Politics and Policy Quarterly* 5 (2005): 182–191; Nownes and Newmark, "Interest Groups in the States."

6. Nownes, *Interest Groups in American Politics*.

gifts from lobbyists and banned them from participating in matters, including the drafting of any contracts or regulations, involving the appointee's former clients or employer for a period of two years. The states also have their own registration requirements, with some defining lobbying broadly and others more narrowly.

Second, the federal and state governments prohibit certain activities like providing gifts to lawmakers and compensating lobbyists with commissions for successful lobbying. Many activities are prohibited to prevent accusations of vote buying or currying favor with lawmakers. Some states, for example, have strict limits on how much money lobbyists can spend on lobbying lawmakers, or on the value of gifts lawmakers can accept from lobbyists. According to the Honest Leadership and Open Government Act, lobbyists must certify that they have not violated the law regarding gift giving, and the penalty for knowingly violating the law increased from a fine of \$50,000 to one of \$200,000. Also, **revolving door laws** also prevent lawmakers from lobbying government immediately after leaving public office. Members of the House of Representatives cannot register to lobby for a year after they leave office, while senators have a two-year "cooling off" period before they can officially lobby. Former cabinet secretaries must wait the same period of time after leaving their positions before lobbying the department of which they had been the head. These laws are designed to restrict former lawmakers from using their connections in government to give them an advantage when lobbying. Still, many former lawmakers do become lobbyists, including former Senate majority leader Trent Lott and former House minority leader Richard Gephardt.

Third, governments require varying levels of disclosure about the amount of money spent on lobbying efforts. The logic here is that lawmakers will think twice about accepting money from controversial donors. The other advantage to disclosure requirements is that they promote transparency. Many have argued that the public has a right to know where candidates get their money. Candidates may be reluctant to accept contributions from

donors affiliated with unpopular interests such as hate groups. This was one of the key purposes of the **Lobbying Disclosure Act** and comparable laws at the state level.

Finally, there are penalties for violating the law. Lobbyists and, in some cases, government officials can be fined, banned from lobbying, or even sentenced to prison. While state and federal laws spell out what activities are legal and illegal, the attorneys general and prosecutors responsible for enforcing lobbying regulations may be understaffed, have limited budgets, or face backlogs of work, making it difficult for them to investigate or prosecute alleged transgressions. While most lobbyists do comply with the law, exactly how the laws alter behavior is not completely understood. We know the laws prevent lobbyists from engaging in certain behaviors, such as by limiting campaign contributions or preventing the provision of certain gifts to lawmakers, but how they alter lobbyists' strategies and tactics remains unclear.

Questions to Consider

1. How might disclosure requirements affect lobbying?
2. How might we get more people engaged in the interest group system?
3. Are interest groups good or bad? Defend and explain your answer.
4. Why does it matter how we define interest group?
5. Is it possible to balance the pursuit of private goods with the need to promote the public good? Is this balance a desired goal? Why or why not?
6. How representative are interest groups in the United States? Do you agree that "all active and

legitimate groups have the potential to make themselves heard?” Or is this potential an illusion? Explain your answer.

7. Evaluate the *Citizens United* decision. Why might the Court have considered campaign contributions a form of speech? Would the Founders have agreed with this decision? Why or why not?
8. How do we regulate interest groups and lobbying activity? What are the goals of these regulations? Do you think these regulations achieve their objectives? Why or why not? If you could alter the way we regulate interest group activity and lobbying, how might you do so in a way consistent with the Constitution and recent Supreme Court decisions?

Terms to Remember

revolving door laws—laws that require a cooling-off period before government officials can register to lobby after leaving office

soft money—money that interests can spend on behalf of candidates without being restricted by federal law

PART XIV

POLITICAL PARTIES

63. Political Parties: What are they?



The families of the 2012 presidential candidates joined in the festivities at the Democratic National Convention in Charlotte, North Carolina, (left) and the Republican National Convention in Tampa, Florida (right). (credit right: modification of work by "PBS NewsHour"/Flickr)

In 2012, Barack Obama accepted his second nomination to lead the Democratic Party into the presidential election. During his first term, he had been attacked by pundits for his failure to convince congressional Republicans to work with him. Despite that, he was wildly popular in his own party, and voters reelected him by a comfortable margin. Just a few decades ago, then-president Dwight D. Eisenhower was criticized for failing to create a clear vision for his Republican Party, and Congress was lampooned for what was deemed a lack of real conflict over important issues. Political parties, it seems, can never get it right—they are either too polarizing or too noncommittal.

Political Parties: Questions to Consider

1. Could the modern political system exist without political parties?
2. What are political parties?
3. Why do they form, and why has the United States typically had only two?
4. Why have political parties become so highly structured?
5. Why does it seem that parties today are more polarized than they have been in the past?

64. Parties: How and why did they form?

Learning Objectives

- Describe political parties and what they do
- Explain how U.S. political parties formed

Collective action is common in societies, as groups and entire societies try to solve problems or distribute resources. There are many interest groups, all with opinions about what should be done and a desire to influence policy. Essentially, **political parties** are groups of people with similar interests who work together to create and implement policies, to further an agenda, and to gain control of government and the policy-making process. They gain control over the government by winning elections. Party platforms often guide members of Congress in drafting, supporting, and voting for legislation. Parties guide proposed laws through Congress and inform party members how they should vote on important issues. Political parties also nominate candidates to run for state government, Congress, and the presidency. Finally, they coordinate political campaigns and mobilize voters.

In *Federalist* No. 10, written in the late eighteenth century, James Madison noted that the formation of self-interested groups, which he called factions, was inevitable in any society, as individuals started to work together to protect themselves from the government. Interest groups and political parties are two of the most easily identified forms of factions in the United States. These groups are similar in that they are both mediating institutions responsible for communicating public preferences to the government. They are points of access/linkage institutions available to the public, though they are not themselves government institutions in a formal sense.

Neither is directly mentioned in the U.S. Constitution nor do they have any real, legal authority to influence policy. Where interest groups often work indirectly to influence our leaders, political parties are organizations that try to directly influence public policy through members who seek to win and hold public office. Parties accomplish this by identifying and aligning sets of issues that are important to voters in the hopes of gaining support during elections; their positions on these critical issues are often presented in documents known as a **party platform**, which is adopted at each party's presidential nominating convention every four years. If successful, a party can create a large enough electoral coalition to gain control of the government. Once in power, the party is then



The party platform adopted at the first national convention of the Progressive Party in 1912. Among other items, this platform called for disclosure requirements for campaign contributions, an eight-hour workday, a federal income tax, and women's suffrage.

able to deliver, to its voters and elites, the policy preferences they choose by electing its partisans to the government. In this respect, parties provide choices to the electorate, something they are doing that is in such sharp contrast to their opposition.



You can read the full platform of the [Republican Party](#) and the [Democratic Party](#) at their respective websites.

Winning elections and implementing policy would be hard enough in simple political systems, but in a country as complex as the United States, political parties must take on great responsibilities to win elections and coordinate behavior across the many local, state, and national governing bodies. Indeed, political differences between states and local areas can contribute much complexity. If a party stakes out issue positions on which few people agree and therefore builds too narrow a coalition of voter support, that party may find itself marginalized. But if the party takes too broad a position on issues, it might find itself in a situation where the members of the party disagree with one another, making it difficult to pass legislation, even if the party can secure victory.

It should come as no surprise that the story of U.S. political parties largely mirrors the story of the United States itself. The United States has seen sweeping changes to its size, its relative power, and its social and demographic composition. These changes have been mirrored by the political parties as they have sought to shift their coalitions to establish and maintain power across the nation and as party leadership has changed. The structure and behavior of modern parties largely parallel the social, demographic, and geographic divisions within the United States. To understand

how this has happened, we look at the origins of the U.S. party system.

How Political Parties Formed

National political parties as we understand them today did not really exist in the United States during the early years of the republic. Most politics during the time of the nation's founding were local in nature and based on elite politics, limited suffrage (or the ability to vote in elections), and property ownership. Residents of the various colonies, and later of the various states, were far more interested in events in their state legislatures than in those occurring at the national level or later in the nation's capital. To the extent that national issues did exist, they were largely limited to collective security efforts to deal with external rivals, such as the British or the French, and with perceived internal threats, such as conflicts with Native Americans.

Soon after the United States emerged from the Revolutionary War, however, a rift began to emerge between two groups that had very different views about the future direction of U.S. politics. Thus, from the very beginning of its history, the United States has had a system of government dominated by two different philosophies. **Federalists**, who were largely responsible for drafting and ratifying the U.S. Constitution, generally favored the idea of a stronger, more centralized republic that had greater control over regulating the

economy.¹ **Anti-Federalists** preferred a more confederate system built on state equality and autonomy.²

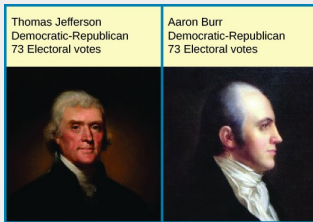
The Federalist faction, led by Alexander Hamilton, largely dominated the government in the years immediately after the Constitution was ratified. President George Washington, who was initially against the existence of parties in the United States, warned of the potential negative effects of parties in his farewell address to the nation, including their potentially divisive nature and the fact that they might not always focus on the common good but rather on partisan ends. However, members of each faction quickly realized that they had a vested interest not only in nominating and electing a president who shared their views, but also in winning other elections. Two loosely affiliated party coalitions, known as the Federalists and the Democratic-Republicans, soon emerged. The Federalists succeeded in electing their first leader, John Adams, to the presidency in 1796, only to see the Democratic-Republicans gain victory under Thomas Jefferson four years later in 1800.

1. Larry Sabato and Howard R. Ernst. 2007. *Encyclopedia of American Political Parties and Elections*. New York: Checkmark Books, 151.
2. Saul Cornell. 2016. *The Other Founders: Anti-Federalism and the Dissenting Tradition in America*. Chapel Hill, NC: UNC Press, 11.

The “Revolution of 1800”: Uniting the Executive Branch under One Party

When the U.S. Constitution was drafted, its authors were certainly aware that political parties existed in other countries (like Great Britain), but they hoped to avoid them in the United States. They felt the importance of states in the U.S. federal structure would make it difficult for national parties to form. They also hoped that having a college of electors vote for the executive branch, with the top two vote-getters becoming president and vice president, would discourage the formation of parties. Their system worked for the first two presidential elections, when essentially all the electors voted for George Washington to serve as president. But by 1796, the Federalist and Anti-Federalist camps had organized into electoral coalitions. The Anti-Federalists joined with many others active in the process to become known as the Democratic-Republicans. The Federalist John Adams won the Electoral College vote, but his authority was undermined when the vice presidency went to Democratic-Republican Thomas Jefferson, who finished second. Four years later, the Democratic-Republicans managed to avoid this outcome by coordinating the electors to vote for their top two candidates. But when the vote ended in a tie, it was ultimately left to Congress

to decide who would be the third president of the United States.



Thomas Jefferson almost lost the presidential election of 1800 to his own running mate when a flaw in the design of the Electoral College led to a tie that had to be resolved by Congress.

In an effort to prevent a similar outcome in the future, Congress and the states voted to ratify the Twelfth Amendment, which went into effect in 1804. This amendment changed the rules so that the president and vice president would be selected through separate elections within the

Electoral College, and it altered the method that Congress used to fill the offices in the event that no candidate won a majority. The amendment essentially endorsed the new party system and helped prevent future controversies. It also served as an early effort by the two parties to collude to make it harder for an outsider to win the presidency.

Does the process of selecting the executive branch need to be reformed so that the people elect the president and vice president directly, rather than through the Electoral College? Should the people vote separately on each office rather than voting for both at the same time? Explain your reasoning.

Growing regional tensions eroded the Federalist Party's ability to coordinate elites, and it eventually collapsed following its

opposition to the War of 1812.³ The Democratic-Republican Party, on the other hand, eventually divided over whether national resources should be focused on economic and mercantile development, such as tariffs on imported goods and government funding of internal improvements like roads and canals, or on promoting populist issues that would help the “common man,” such as reducing or eliminating state property requirements that had prevented many men from voting.⁴

In the election of 1824, numerous candidates contended for the presidency, all members of the Democratic-Republican Party. Andrew Jackson won more popular votes and more votes in the Electoral College than any other candidate. However, because he did not win the majority (more than half) of the available electoral votes, the election was decided by the House of Representatives, as required by the Twelfth Amendment. The Twelfth Amendment limited the House’s choice to the three candidates with the greatest number of electoral votes. Thus, Andrew Jackson, with 99 electoral votes, found himself in competition with only John Quincy Adams, the second place finisher with 84 electoral votes, and William H. Crawford, who had come in third with 41.⁵

3. James H. Ellis. 2009. *A Ruinous and Unhappy War: New England and the War of 1812*. New York: Algora Publishing, 80.
4. Alexander Keyssar. 2009. *The Right to Vote: The Contested History of Democracy in the United States*. New York: Basic Books.
5. R. R. Stenberg, “Jackson, Buchanan, and the “Corrupt Bargain” Calumny,” *The Pennsylvania Magazine of History and Biography* 58, no. 1 (1934): 61–85.

This marked the beginning of what historians call the Second Party System (the first parties had been the Federalists and the Jeffersonian Republicans), with the splitting of the Democratic-Republicans and the formation of two new political parties. One half, called simply the Democratic Party, was the party of Jackson. The branch of the Democratic-Republicans that believed that the national government should encourage economic (primarily industrial) development was briefly known as the National Republicans and later became the Whig Party.⁶



Each of the two main U.S. political parties today—the [Democrats](#) and the [Republicans](#)—maintains an extensive website with links to its affiliated statewide organizations, which in turn often maintain links to the party’s country organizations.

By comparison, here are websites for the [Green Party](#) and the [Libertarian Party](#) that are two other parties in the United States today.

The Democratic Party emphasized personal politics, which focused

6. 2009. “Democratic-Republican Party,” In *UXL Encyclopedia of U.S. History*, eds. Sonia Benson, Daniel E. Brannen, Jr., and Rebecca Valentine. Detroit: UXL, 435–436; “Jacksonian Democracy and Modern America,” <http://www.ushistory.org/us/23f.asp> (March 6, 2016).

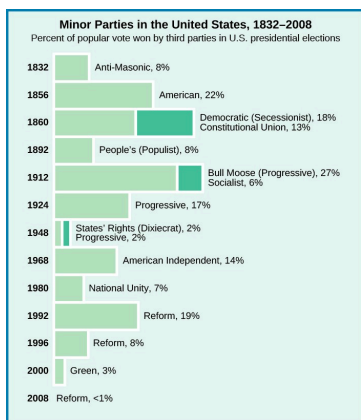
on building direct relationships with voters rather than on promoting specific issues. This party dominated national politics from Andrew Jackson's presidential victory in 1828 until the mid-1850s, when regional tensions began to threaten the nation's very existence. Tensions between the northern and southern states over slavery, led to the rise of the Republican Party and its leader Abraham Lincoln in the election of 1860, while the Democratic Party dominated in the South. Like the Democrats, the Republicans also began to utilize a mass approach to party design and organization. Their opposition to the expansion of slavery, and their role in helping to stabilize the Union during Reconstruction, made them the dominant player in national politics for the next several decades.⁷

The Democratic and Republican parties have remained the two dominant players in the U.S. party system since the Civil War (1861–1865). That does not mean, however, that the system has been stagnant. Every political actor and every citizen has the ability to determine for him/herself whether one of the two parties meets his/her needs and provides an appealing set of policy options, or whether another option is preferable.

At various points in the past 170 years, elites and voters have sought to create alternatives to the existing party system. Political parties that are formed as alternatives to the Republican and Democratic parties are known as **third parties**, or minor parties.⁸

7. Calvin Jillson. 1994. "Patterns and Periodicity." In *The Dynamics of American Politics: Approaches and Interpretations*, eds. Lawrence C. Dodd and Calvin C. Jillson. Boulder, CO: Westview Press, 38–41.

8. Norman Pollack. 1976. *The Populist Response to Industrial*



Various third parties, also known as minor parties, have appeared in the United States over the years. Some, like the Socialist Party, still exist in one form or another. Others, like the Anti-Masonic Party, which wanted to protect the United States from the influence of the Masonic fraternal order and garnered just under 8 percent of the popular vote in 1832, are gone.

the same reforms as the Populist Party, such as the direct election of U.S. senators and an income tax, although Populists tended to be farmers while the Progressives were from the middle class. In general, Progressives sought to make government more responsive to the will of the people and to end political corruption in government. They wished to break the power of party bosses and political machines, and called upon states to pass laws allowing voters to vote directly on proposed legislation, propose new laws, and recall from office incompetent or corrupt elected officials. The

In 1912, former Republican president Theodore Roosevelt attempted to form a third party, known as the Progressive Party, as an alternative to the more business-minded Republicans. The Progressives sought to correct the many problems that had arisen as the United States transformed itself from a rural, agricultural nation into an increasingly urbanized, industrialized country dominated by big business interests. Among the reforms that the Progressive Party called for in its 1912 platform were women's suffrage, an eight-hour workday, and workers' compensation. The party also favored some of the

America: Midwestern Populist Thought. Cambridge, MA: Harvard University Press, 11–12.

Progressive Party largely disappeared after 1916, and most members returned to the Republican Party.⁹ The party enjoyed a brief resurgence in 1924, when Robert “Fighting Bob” La Follette ran unsuccessfully for president under the Progressive banner.

In 1948, two new third parties appeared on the political scene. Henry A. Wallace, a vice president under Franklin Roosevelt, formed a new Progressive Party, which had little in common with the earlier Progressive Party. Wallace favored racial desegregation and believed that the United States should have closer ties to the Soviet Union. Wallace’s campaign was a failure, largely because most people believed his policies, including national healthcare, were too much like those of communism, and this party also vanished. The other third party, the States’ Rights Democrats, also known as the Dixiecrats, were white, southern Democrats who split from the Democratic Party when Harry Truman, who favored civil rights for African Americans, became the party’s nominee for president. The Dixiecrats opposed all attempts by the federal government to end segregation, extend voting rights, prohibit discrimination in employment, or otherwise promote social equality among races.¹⁰

They remained a significant party that threatened Democratic unity throughout the 1950s and 1960s. Other examples of third parties in the United States include the American Independent Party, the Libertarian Party, United We Stand America, the Reform Party, and the Green Party.

9. 1985. *Congressional Quarterly’s Guide to U.S. Elections*. Washington, DC: Congressional Quarterly Inc., 75–78, 387–388.

10. “Platform of the States Rights Democratic Party,” <http://www.presidency.ucsb.edu/ws/?pid=25851> (March 12, 2016).

None of these alternatives to the two major political parties had much success at the national level, and most are no longer viable parties. All faced the same fate. Formed by charismatic leaders, each championed a relatively narrow set of causes and failed to gain broad support among the electorate. Once their leaders had been defeated or discredited, the party structures that were built to contest elections collapsed. And within a few years, most of their supporters were eventually pulled back into one of the existing parties. To be sure, some of these parties had an electoral impact. For example, the Progressive Party pulled enough votes away from the Republicans to hand the 1912 election to the Democrats. Thus, the third-party rival's principal accomplishment was helping its least-preferred major party win, usually at the short-term expense of the very issue it championed. In the long run, however, many third parties have brought important issues to the attention of the major parties, which then incorporated these issues into their platforms. Understanding why this is the case is an important next step in learning about the issues and strategies of the modern Republican and Democratic parties. In the next section, we look at why the United States has historically been dominated by only two political parties.

Questions to Consider

1. Why were the early U.S. political parties formed?
2. What techniques led the Democratic Party to national prominence in the 1830s through 1850s?

Terms to Remember

party platform—the collection of a party's positions on issues it considers politically important

personal politics—a political style that focuses on building direct relationships with voters rather than on promoting specific issues

political machine—an organization that secures votes for a party's candidates or supports the party in other ways, usually in exchange for political favors such as a job in government

political parties—organizations made up of groups of people with similar interests that try to directly influence public policy through their members who seek and hold public office

third parties—political parties formed as an alternative to the Republican and Democratic parties, also known as minor parties

65. Political Parties: How does the two-party system work?

Learning Objectives

- Describe the effects of winner-take-all elections
- Compare plurality and proportional representation
- Describe the institutional, legal, and social forces that limit the number of parties
- Discuss the concepts of party alignment and realignment

One of the cornerstones of a vibrant representative republic is citizens' ability to influence government through voting. In order for that influence to be meaningful, citizens must send clear signals to their leaders about what they wish the government to do. It only makes sense, then, that voters have several clearly differentiated options available to them at the polls on Election Day. Having these options means voters can select a candidate who more closely represents their own preferences on the important issues of the day. It also gives individuals who are considering voting a reason to participate. After all, you are more likely to vote if you care about who wins and who loses. The existence of two major parties, especially in our present era of strong parties, leads to sharp distinctions between the candidates and between the party organizations.

The **two-party system** came into being because the structure of U.S. elections, with one seat tied to a geographic district, tends to lead to dominance by two major political parties. Even when there are other options on the ballot, most voters understand that minor parties have no real chance of winning even a single office. Hence, they vote for candidates of the two major parties in order to support a potential winner. Of the 535 members of the House and Senate, only a handful identify as something other than Republican or Democrat. Third parties have fared no better in presidential elections. No third-party candidate has ever won the presidency. Some historians or political scientists might consider Abraham Lincoln to have been such a candidate, but in 1860, the Republicans were a major party that had subsumed members of earlier parties, such as the Whig Party, and they were the only major party other than the Democratic Party.

Election Rules and the Two-Party System

A number of reasons have been suggested to explain why the structure of U.S. elections has resulted in a two-party system. Most of the blame has been placed on the process used to select its representatives. First, most elections at the state and national levels are winner-take-all: The candidate who receives the greatest overall number of votes wins. **Winner-take-all** elections with one representative elected for one geographic district allow voters to develop a personal relationship with “their” representative to the government. They know exactly whom to blame, or thank, for the actions of that government. But these elections also tend to limit the number of people who run for office. Otherwise-qualified candidates might not stand for election if they feel the incumbent or another candidate has an early advantage in the race. And since voters do not like to waste votes, third parties must convince voters they have a real chance of winning races before voters will take

them seriously. This is a tall order given the vast resources and mobilization tools available to the existing parties, especially if an incumbent is one of the competitors. In turn, the likelihood that third-party challengers will lose an election bid makes it more difficult to raise funds to support later attempts.¹

Winner-take-all systems of electing candidates to office, which exist in several countries other than the United States, require that the winner receive either the majority of votes or a plurality of the votes. U.S. elections are based on plurality voting. **Plurality voting**, commonly referred to as first-past-the-post, is based on the principle that the individual candidate with the most votes wins, whether or not he or she gains a majority (51 percent or greater) of the total votes cast. For instance, Abraham Lincoln won the presidency in 1860 even though he clearly lacked majority support given the number of candidates in the race. In 1860, four candidates competed for the presidency: Lincoln, a Republican; two Democrats, one from the northern wing of the party and one from the southern wing; and a member of the newly formed Constitutional Union Party, a southern party that wished to prevent the nation from dividing over the issue of slavery. Votes were split among all four parties, and Lincoln became president with only 40 percent of the vote, not a majority of votes cast but more than any of the other three candidates had received, and enough to give him a majority in the Electoral College, the body that ultimately decides presidential elections. Plurality voting has been justified as the simplest and most cost-effective method for identifying a victor in a democracy. A single election can be held on a single day, and the victor of the

1. Robert Richie and Steven Hill, "The Case for Proportional Representation," *Boston Review*, February–March 1998, <https://bostonreview.net/archives/BR23.1/richie.html> (March 15, 2016).

competition is easily selected. On the other hand, systems in which people vote for a single candidate in an individual district often cost more money because drawing district lines and registering voters according to district is often expensive and cumbersome.²

In a system in which individual candidates compete for individual seats representing unique geographic districts, a candidate must receive a fairly large number of votes in order to win. A political party that appeals to only a small percentage of voters will always lose to a party that is more popular.³

Because second-place (or lower) finishers will receive no reward for their efforts, those parties that do not attract enough supporters to finish first at least some of the time will eventually disappear because their supporters realize they have no hope of achieving success at the polls.⁴ The failure of third parties to win and the possibility that they will draw votes away from the party the voter had favored before—resulting in a win for the party the voter liked least—makes people hesitant to vote for the third party's candidates a second time. This has been the fate of all U.S. third parties—the

2. International Institute for Democracy and Electoral Assistance. 2005. *Electoral Design System: The New IDEA Handbook*. Stockholm: International IDEA, 153–156, http://www.idea.int/publications/esd/upload/esd_chapter5.pdf (March 15, 2016).
3. Duverger, Maurice. 1972 “Factors in a Two-Party and Multiparty System.” In *Party Politics and Pressure Groups*. New York: Thomas Y. Crowell, 23–32.
4. Jeffrey Sachs. 2011. *The Price of Civilization*. New York: Random House, 107.

Populist Party, the Progressives, the Dixiecrats, the Reform Party, and others.

In a proportional electoral system, however, parties advertise who is on their candidate list and voters pick a party. Then, legislative seats are doled out to the parties based on the proportion of support each party receives. While the Green Party in the United States might not win a single congressional seat in some years thanks to plurality voting, in a proportional system, it stands a chance to get a few seats in the legislature regardless. For example, assume the Green Party gets 7 percent of the vote. In the United States, 7 percent will never be enough to win a single seat, shutting the Green candidates out of Congress entirely, whereas in a proportional system, the Green Party will get 7 percent of the total number of legislative seats available. Hence, it could get a foothold for its issues and perhaps increase its support over time. But with plurality voting, it doesn't stand a chance.

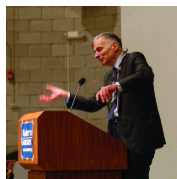
Third parties, often born of frustration with the current system, attract supporters from one or both of the existing parties during an election but fail to attract enough votes to win. After the election is over, supporters experience remorse when their least-favorite candidate wins instead. For example, in the 2000 election, Ralph Nader ran for president as the candidate of the Green Party. Nader, a longtime consumer activist concerned with environmental issues and social justice, attracted many votes from people who usually voted for Democratic candidates. This has caused some to claim that Democratic nominee Al Gore lost the 2000 election to Republican George W. Bush, because Nader won Democratic votes in Florida that might otherwise have gone to Gore.⁵

5. James Dao, "The 2000 Elections: The Green Party; Angry Democrats, Fearing Nader Cost Them Presidential Race,

Abandoning plurality voting, even if the winner-take-all election were kept, would almost certainly increase the number of parties from which voters could choose. The easiest switch would be to a majoritarian voting scheme, in which a candidate wins only if he or she enjoys the support of a majority of voters. If no candidate wins a majority in the first round of voting, a run-off election is held among the top contenders. Some states conduct their primary elections within the two major political parties in this way.

A second way to increase the number of parties in the U.S.

system is to abandon the winner-take-all approach. Rather than allowing voters to pick their representatives directly, many democracies have chosen to have voters pick their preferred party and allow the party to select the individuals who serve in government. The argument for this method is that it is ultimately the party and not the individual who will influence policy. Under this model of **proportional representation**, legislative seats are allocated to competing parties based on the total share of votes they receive in the election. As a result, any given election can have



(a)

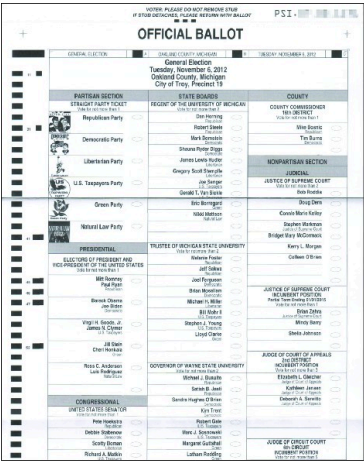


(b)

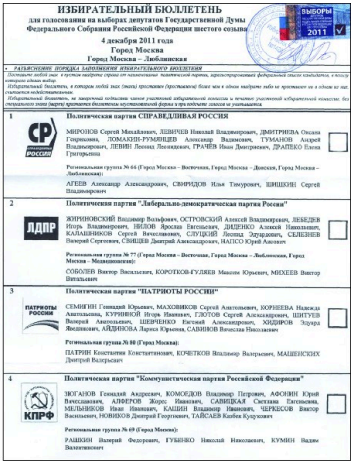
Ralph Nader, a longtime consumer advocate and crusader for social justice and the environment, campaigned as an independent in 2008 (a). However, in 2000, he ran for the presidency as the Green Party candidate. He received votes from many Democrats, and some analysts claim Nader's campaign cost Al Gore the presidency—an ironic twist for a politician who would come to be known primarily for his environmental activism, even winning the Nobel Peace Prize in 2007 (b) for his efforts to inform the public about climate change. (credit a: modification of work by “Mely-o”/Flickr”; credit b: modification of work by “kangotraveler”/Flickr)

Threaten to Retaliate,” *The New York Times*, 9 November 2000.

multiple winners, and voters who might prefer a smaller party over a major one have a chance to be represented in government.



(a)



(b)

While a U.S. ballot (a) for first-past-the-post elections features candidates' names, the ballots of proportional representation countries list the parties. On this Russian ballot (b), the voter is offered a choice of Social Democratic, Nationalist, Socialist, and Communist parties, among others.

One possible way to implement proportional representation in the United States is to allocate legislative seats based on the national level of support for each party's presidential candidate, rather than on the results of individual races. If this method had been used in the 1996 elections, 8 percent of the seats in Congress would have gone to Ross Perot's Reform Party because he won 8 percent of the votes cast. Even though Perot himself lost, his supporters would have been rewarded for their efforts with representatives who had a real voice in government. And Perot's party's chances of survival would have greatly increased.

Electoral rules are probably not the only reason the United States has a two-party system. We need only look at the number of parties in the British or Canadian systems, both of which are winner-take-all plurality systems like that in the United States, to see that it is

possible to have more than two parties while still directly electing representatives. The two-party system is also rooted in U.S. history. The first parties, the Federalists and the Jeffersonian Republicans, disagreed about how much power should be given to the federal government, and differences over other important issues further strengthened this divide. Over time, these parties evolved into others by inheriting, for the most part, the general ideological positions and constituents of their predecessors, but no more than two major parties ever formed. Instead of parties arising based on region or ethnicity, various regions and ethnic groups sought a place in one of the two major parties.

Scholars of voting behavior have also suggested at least three other characteristics of the U.S. system that are likely to influence party outcomes: the **Electoral College**, demobilized ethnicity, and campaign and election laws. First, the United States has a presidential system in which the winner is selected not directly by the popular vote but indirectly by a group of electors known collectively as the Electoral College. The winner-take-all system also applies in the Electoral College. In all but two states (Maine and Nebraska), the total of the state's electoral votes go to the candidate who wins the plurality of the popular vote in that state. Even if a new, third party is able to win the support of a lot of voters, it must be able to do so in several states in order to win enough electoral votes to have a chance of winning the presidency.⁶

Besides the existence of the Electoral College, political scientist Gary W. Cox has also suggested that the relative prosperity of the United States and the relative unity of its citizens have prevented the formation of "large dissenting groups" that might give support

6. Bruce Bartlett, "Why Third Parties Can't Compete," *Forbes*, 14 May 2010.

to third parties.⁷ This is similar to the argument that the United States does not have viable third parties, because none of its regions is dominated by mobilized ethnic minorities that have created political parties in order to defend and to address concerns solely of interest to that ethnic group. Such parties are common in other countries.

Finally, party success is strongly influenced by local election laws. Someone has to write the rules that govern elections, and those rules help to determine outcomes. In the United States, such rules have been written to make it easy for existing parties to secure a spot for their candidates in future elections. But some states create significant burdens for candidates who wish to run as independents or who choose to represent new parties. For example, one common practice is to require a candidate who does not have the support of a major party to ask registered voters to sign a petition. Sometimes, thousands of signatures are required before a candidate's name can be placed on the ballot, but a small third party that does have large numbers of supporters in some states may not be able to secure enough signatures for this to happen.⁸

7. George C. Edwards III. 2011. *Why the Electoral College is Bad for America*, 2nd. ed. New Haven and London: Yale University Press, 176–177.

8. Kevin Liptak, “Fatal Flaw: Why Third Parties Still Fail Despite Voter Anger,” <http://www.cnn.com/2012/05/21/politics/third-party-fail/index.html> (March 13, 2016).



Costa Constantinides (right), while campaigning in 2013 to represent the 22nd District on the New York City Council, said, “Few things are more important to a campaign than the petition process to get on the ballot. We were so pumped up to get started that we went out at 12:01 a.m. on June 4 to start collecting signatures right away!” Constantinides won the election later that year. (credit: modification of work by Costa Constantinides)



Visit [Fair Vote](#) for a discussion of ballot access laws across the country.

Given the obstacles to the formation of third parties, it is unlikely that serious challenges to the U.S. two-party system will emerge. But this does not mean that we should view it as entirely stable

either. The U.S. party system is technically a loose organization of fifty different state parties and has undergone several considerable changes since its initial consolidation after the Civil War. Third-party movements may have played a role in some of these changes, but all resulted in a shifting of party loyalties among the U.S. electorate.

Critical Elections and Realignment

Political parties exist for the purpose of winning elections in order to influence public policy. This requires them to build coalitions across a wide range of voters who share similar preferences. Since most U.S. voters identify as moderates,⁹ the historical tendency has been for the two parties to compete for “the middle” while also trying to mobilize their more loyal bases. If voters’ preferences remained stable for long periods of time, and if both parties did a good job of competing for their votes, we could expect Republicans and Democrats to be reasonably competitive in any given election. Election outcomes would probably be based on the way voters compared the parties on the most important events of the day rather than on electoral strategy.

There are many reasons we would be wrong in these expectations, however. First, the electorate is not entirely stable. Each generation of voters has been a bit different from the last. Over time, the United States has become more socially liberal, especially

9. Morris P. Fiorina, “America’s Missing Moderates: Hiding in Plain Sight,” 2 February 2013, <http://www.the-american-interest.com/2013/02/12/americas-missing-moderates-hiding-in-plain-sight/> (March 1, 2016).

on topics related to race and gender, and millennials—those aged 18–34—are more liberal than members of older generations.¹⁰ The electorate’s economic preferences have changed, and different social groups are likely to become more engaged in politics now than they did in the past. Surveys conducted in 2016, for example, revealed that candidates’ religion is less important to voters than it once was. Also, as young Latinos reach voting age, they seem more inclined to vote than do their parents, which may raise the traditionally low voting rates among this ethnic group.¹¹ Internal population shifts and displacements have also occurred, as various regions have taken their turn experiencing economic growth or stagnation, and as new waves of immigrants have come to U.S. shores.

Additionally, the major parties have not always been unified in their approach to contesting elections. While we think of both Congress and the presidency as national offices, the reality is that congressional elections are sometimes more like local elections. Voters may reflect on their preferences for national policy when deciding whom to send to the Senate or the House of

10. Jocelyn Kiley and Michael Dimock, “The GOP’s Millennial Problem Runs Deep,” 28 September 2014, <http://www.pewresearch.org/fact-tank/2014/09/25/the-gops-millennial-problem-runs-deep/> (March 15, 2016).
11. Gabrielle Levy, “‘Trump Effect’ Driving Push for Latino Voter Registration,” *U.S. News & World Report*, 27 January 2016, <http://www.usnews.com/news/articles/2016-01-27/trump-effect-driving-push-for-latino-voter-registration> (March 15, 2016).

Representatives, but they are very likely to view national policy in the context of its effects on their area, their family, or themselves, not based on what is happening to the country as a whole. For example, while many voters want to reduce the federal budget, those over sixty-five are particularly concerned that no cuts to the Medicare program be made.¹² One-third of those polled reported that “senior’s issues” were most important to them when voting for national officeholders.¹³ If they hope to keep their jobs, elected officials must thus be sensitive to preferences in their home constituencies as well as the preferences of their national party.

After the Civil War, Republicans, the party of Lincoln, were viewed as the party that had freed the slaves. Their efforts to provide blacks with greater legal rights earned them the support of African Americans in both the South, where they were newly enfranchised, and the Northeast. When the Democrats, the party of the Confederacy, lost control of the South after the Civil War, Republicans ruled the region. However, the Democrats regained control of the South after the removal of the Union army in 1877.

12. “Heading into 2016 Election Season, U.S. Voters Overwhelmingly Concerned About Issues Affecting Seniors, New National Poll Reveals,” 26 February 2016, <http://www.prnewswire.com/news-releases/heading-into-2016-election-season-us-voters-overwhelmingly-concerned-about-issues-affecting-seniors-new-national-poll-reveals-300226953.html> (March 15, 2016).

13. “Morning Consult,” 25 February 2016, <http://www.bringthevotehome.org/wp-content/uploads/2016/02/160209-BTVH-Memo.pdf> (March 15, 2016).

Democrats had largely supported slavery before the Civil War, and they opposed postwar efforts to integrate African Americans into society after they were liberated. In addition, Democrats in the North and Midwest drew their greatest support from labor union members and immigrants who viewed African Americans as competitors for jobs and government resources, and who thus tended to oppose the extension of rights to African Americans as much as their southern counterparts did.¹⁴

While the Democrats' opposition to civil rights may have provided regional advantages in southern or urban elections, it was largely disastrous for national politics. From 1868 to 1931, Democratic candidates won just four of sixteen presidential elections. Two of these victories can be explained as a result of the spoiler effect of the Progressive Party in 1912 and then Woodrow Wilson's reelection during World War I in 1916. This rather-dismal success rate suggested that a change in the governing coalition would be needed if the party were to have a chance at once again becoming a player on the national level.

That change began with the 1932 presidential campaign of Franklin Delano Roosevelt. FDR determined that his best path toward victory was to create a new coalition based not on region or ethnicity, but on the suffering of those hurt the most during the Great Depression. This alignment sought to bring African American voters in as a means of shoring up support in major urban areas and the Midwest, where many southern blacks had migrated in the decades after the Civil War in search of jobs and better education for their children, as well as to avoid many of the legal restrictions placed on them in the South. Roosevelt accomplished this realignment by promising assistance to those hurt most by the Depression.

14. Thomas Streissguth. 2003. *Hate Crimes*. New York: Facts on File, 8.

Questions to Consider

1. What impact, if any, do third parties typically have on U.S. elections?
2. In what ways do political parties collude with state and local government to prevent the rise of new parties?

Terms to Remember

critical election—an election that represents a sudden, clear, and long-term shift in voter allegiances

Electoral College—a presidential system in which the winner is selected not directly by the popular vote but indirectly by a group of electors

majoritarian voting—type of election in which the winning candidate must receive at least 50 percent of the votes, even if a run-off election is required

party realignment—a shifting of party alliances within the electorate

plurality voting—the election rule by which the candidate with the most votes wins, regardless of vote share

proportional representation—a party-based election rule in which the number of seats a party receives is a function of the share of votes it receives in an election

two-party system—a system in which two major parties win all or almost all elections

66. Political Parties: How are they organized?

Learning Objectives

- Discuss the importance of voting in a political party organization
- Describe party organization at the county, state, and national levels
- Compare the perspectives of the party in government and the party in the electorate

Party identification is not quite the same thing as party membership. People may call themselves Republicans or Democrats without being registered as a member of the party, and the Republican and Democratic parties do not require individuals to join their formal organization in the same way that parties in some other countries do. Many states require voters to declare a party affiliation before participating in primaries, but primary participation is irregular and infrequent, and a voter may change his or her identity long before changing party registration. For most voters, party identification is informal at best and often matters only in the weeks before an election. It does matter, however, because party identification guides some voters, who may know little about a particular issue or candidate, in casting their ballots. If, for example, someone thinks of him- or herself as a Republican and always votes Republican, he or she will not be confused when faced with a candidate, perhaps in a local or county election, whose name is

unfamiliar. If the candidate is a Republican, the voter will likely cast a ballot for him or her.

Party ties can manifest in other ways as well. The actual act of registering to vote and selecting a party reinforces party loyalty. Moreover, while pundits and scholars often deride voters who blindly vote their party, the selection of a party in the first place can be based on issue positions and ideology. In that regard, voting your party on Election Day is not a blind act—it is a shortcut based on issue positions.

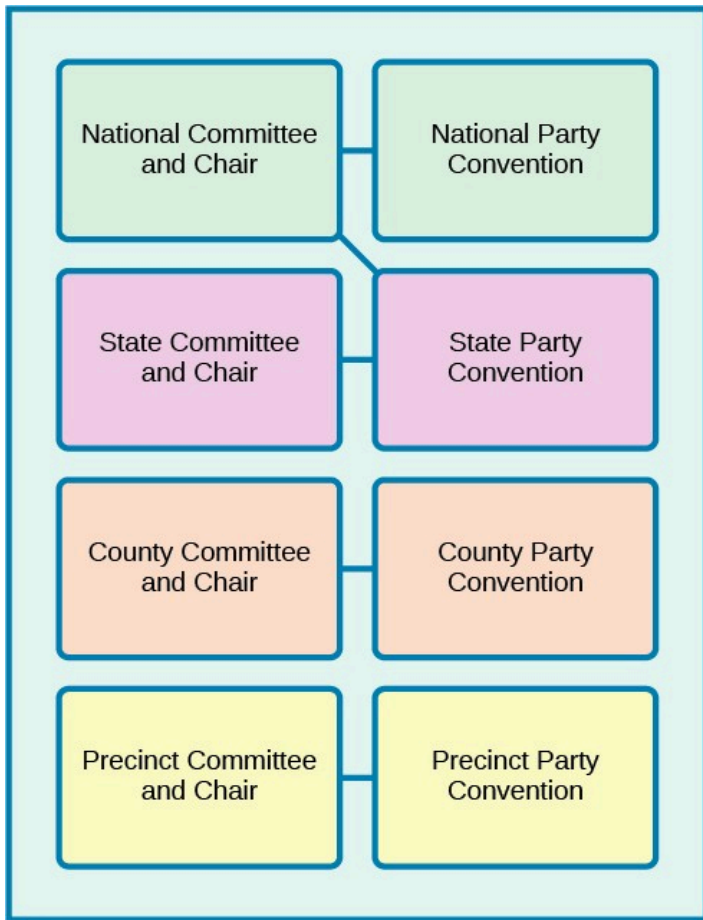
The Party Organization

A significant subset of American voters views their party identification as something far beyond simply a shortcut to voting. These individuals get more energized by the political process and have chosen to become more active in the life of political parties. They are part of what is known as the party organization. The **party organization** is the formal structure of the political party, and its active members are responsible for coordinating party behavior and supporting party candidates. It is a vital component of any successful party because it bears most of the responsibility for building and maintaining the party “brand.” It also plays a key role in helping select, and elect, candidates for public office.

Local Organizations

Since winning elections is the first goal of the political party, it makes sense that the formal party organization mirrors the local-state-federal structure of the U.S. political system. While the lowest level of party organization is technically the **precinct**, many of the operational responsibilities for local elections fall upon the county-

level organization. The county-level organization is in many ways the workhorse of the party system, especially around election time. This level of organization frequently takes on many of the most basic responsibilities of a democratic system, including identifying and mobilizing potential voters and donors, identifying and training potential candidates for public office, and recruiting new members for the party. County organizations are also often responsible for finding rank and file members to serve as volunteers on Election Day, either as officials responsible for operating the polls or as monitors responsible for ensuring that elections are conducted honestly and fairly. They may also hold regular meetings to provide members the opportunity to meet potential candidates and coordinate strategy. Of course, all this is voluntary and relies on dedicated party members being willing to pitch in to run the party.



Political parties are bottom-up structures, with lower levels often responsible for selecting delegates to higher-level offices or conventions.

State Organizations

Most of the county organizations' formal efforts are devoted to supporting party candidates running for county and city offices. But

a fair amount of political power is held by individuals in statewide office or in state-level legislative or judicial bodies. While the county-level offices may be active in these local competitions, most of the coordination for them will take place in the state-level organizations. Like their more local counterparts, state-level organizations are responsible for key party functions, such as statewide candidate recruitment and campaign mobilization. Most of their efforts focus on electing high-ranking officials such as the governor or occupants of other statewide offices (e.g., the state's treasurer or attorney general) as well as candidates to represent the state and its residents in the U.S. Senate and the U.S. House of Representatives. The greater value of state- and national-level offices requires state organizations to take on several key responsibilities in the life of the party.



Visit the following [Republican](#) and [Democratic](#) sites to see what party organizations look like on the local level. Although these sites are for different parties in different parts of the country, they both inform visitors of local party events, help people volunteer to work for the party, and provide a convenient means of contributing to the party.

First, state-level organizations usually accept greater fundraising responsibilities than do their local counterparts. Statewide races and races for national office have become increasingly expensive in recent years. The average cost of a successful House campaign

was \$1.2 million in 2014; for Senate races, it was \$8.6 million.¹ While individual candidates are responsible for funding and running their own races, it is typically up to the state-level organization to coordinate giving across multiple races and to develop the staffing expertise that these candidates will draw upon at election time.

State organizations are also responsible for creating a sense of unity among members of the state party. Building unity can be very important as the party transitions from sometimes-contentious nomination battles to the all-important general election. The state organization uses several key tools to get its members working together towards a common goal. First, it helps the party's candidates prepare for state primary elections or caucuses that allow voters to choose a nominee to run for public office at either the state or national level. Caucuses are a form of town hall meeting at which voters in a precinct get together to voice their preferences, rather than voting individually throughout the day.

Second, the state organization is also responsible for drafting a **state platform** that serves as a policy guide for partisans who are eventually selected to public office. These platforms are usually the result of a negotiation between the various coalitions within the party and are designed to



Caucus-goers gather at a Democratic precinct caucus on January 3, 2008, in Iowa City, Iowa. Caucuses are held every two years in more than 1650 Iowa precincts.

1. Russ Choma, "Money Won on Tuesday, But Rules of the Game Changed," 5 November 2014, <http://www.opensecrets.org/news/2014/11/money-won-on-tuesday-but-rules-of-the-game-changed/> (March 1, 2016).

ensure that everyone in the party will receive some benefits if their candidates win the election. Finally, state organizations hold a statewide convention at which delegates from the various county organizations come together to discuss the needs of their areas. The state conventions are also responsible for selecting delegates to the national convention.

National Party Organization

The local and state-level party organizations are the workhorses of the political process. They take on most of the responsibility for party activities and are easily the most active participants in the party formation and electoral processes. They are also largely invisible to most voters. The average citizen knows very little of the local party's behavior unless there is a phone call or a knock on the door in the days or weeks before an election. The same is largely true of the activities of the state-level party. Typically, the only people who notice are those who are already actively engaged in politics or are being targeted for donations.

But most people are aware of the presence and activity of the national party organizations for several reasons. First, many Americans, especially young people, are more interested in the topics discussed at the national level than at the state or local level. According to John Green of the Ray C. Bliss Institute of Applied Politics, "Local elections tend to be about things like sewers, and roads and police protection—which are not as dramatic an issue as same-sex marriage or global warming or international affairs."²

2. Elizabeth Lehman, "Trend Shows Generation Focuses Mostly on Social, National Issues," <http://www.thenewsoutlet.org/survey-local->

Presidential elections and the behavior of the U.S. Congress are also far more likely to make the news broadcasts than the activities of county commissioners, and the national-level party organization is mostly responsible for coordinating the activities of participants at this level. The national party is a fundraising army for presidential candidates and also serves a key role in trying to coordinate and direct the efforts of the House and Senate. For this reason, its leadership is far more likely to become visible to media consumers, whether they intend to vote or not.

A second reason for the prominence of the national organization is that it usually coordinates the grandest spectacles in the life of a political party. Most voters are never aware of the numerous county-level meetings or coordinating activities. Primary elections, one of the most important events to take place at the state level, have a much lower turnout than the nationwide general election. In 2012, for example, only one-third of the eligible voters in New Hampshire voted in the state's primary, one of the earliest and thus most important in the nation; however, 70 percent of eligible voters in the state voted in the general election in November 2012.³

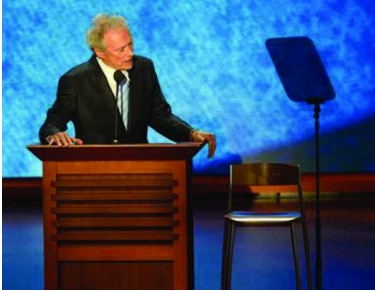
People may see or read an occasional story about the meetings of the state committees or convention but pay little attention. But the **national conventions**, organized and sponsored by the national-level party, can dominate the national discussion for several weeks in late summer, a time when the major media outlets are often searching for news. These conventions are the definition of a media circus at which high-ranking politicians, party elites, and sometimes celebrities, such as actor/director Clint Eastwood, along

millennials-more-interested-in-big-issues/ (March 15, 2016).

3. "Voter Turnout," <http://www.electproject.org/home/voter-turnout/voter-turnout-data> (March 14, 2016).

with individuals many consider to be the future leaders of the party are brought before the public so the party can make its best case for being the one to direct the future of the country.⁴

National party conventions culminate in the formal nomination of the party nominees for the offices of president and vice president, and they mark the official beginning of the presidential competition between the two parties.



In August 2012, Clint Eastwood—actor, director, and former mayor of Carmel-by-the-Sea, California—spoke at the Republican National Convention accompanied by an empty chair representing the Democratic incumbent president Barack Obama.

In the past, national conventions were often the sites of high drama and political intrigue. As late as 1968, the identities of the presidential and/or vice-presidential nominees were still unknown to the general public when the convention opened. It was also common for groups protesting key events and issues of the day to try to raise their profile by using the conventions to gain the media spotlight. National

media outlets would provide “gavel to gavel” coverage of the conventions, and the relatively limited number of national broadcast channels meant most viewers were essentially forced to choose between following the conventions or checking out of the media altogether. Much has changed since the 1960s, however, and between 1960 and 2004, viewership of both the Democratic National

4. Abdullah Halimah, “Eastwood, the Empty Chair, and the Speech Everyone’s Talking About,” 31 August 2012, <http://www.cnn.com/2012/08/31/politics/eastwood-speech/> (March 14, 2016).

Convention and the Republican National Convention had declined by half.⁵

National conventions are not the spectacles they once were, and this fact is almost certainly having an impact on the profile of the national party organization. Both parties have come to recognize the value of the convention as a medium through which they can communicate to the average viewer. To ensure that they are viewed in the best possible light, the parties have worked hard to turn the public face of the convention into a highly sanitized, highly orchestrated media event. Speakers are often required to have their speeches prescreened to ensure that they do not deviate from the party line or run the risk of embarrassing the eventual nominee—whose name has often been known by all for several months. And while protests still happen, party organizations have become increasingly adept at keeping protesters away from the convention sites, arguing that safety and security are more important than First Amendment rights to speech and peaceable assembly. For example, protestors were kept behind concrete barriers and fences at the Democratic National Convention in 2004.⁶

With the advent of cable TV news and the growth of internet blogging, the major news outlets have found it unnecessary to provide the same level of coverage they once did. Between 1976

5. “Influence of Democratic and Republican Conventions on Opinions of the Presidential Candidates,” <http://journalistsresource.org/studies/politics/elections/personal-individual-effects-presidential-conventions-candidate-evaluations> (March 14, 2016).

6. Timothy Zick, “Speech and Spatial Tactics,” *Texas Law Review* February (2006): 581.

and 1996, ABC and CBS cut their coverage of the nominating conventions from more than fifty hours to only five. NBC cut its coverage to fewer than five hours.⁷ One reason may be that the outcome of nominating conventions are also typically known in advance, meaning there is no drama. Today, the nominee's acceptance speech is expected to be no longer than an hour, so it will not take up more than one block of prime-time TV programming.

This is not to say the national conventions are no longer important, or that the national party organizations are becoming less relevant. The conventions, and the organizations that run them, still contribute heavily to a wide range of key decisions in the life of both parties. The national party platform is formally adopted at the convention, as are the key elements of the strategy for contesting the national campaign. And even though the media is paying less attention, key insiders and major donors often use the convention as a way of gauging the strength of the party and its ability to effectively organize and coordinate its members. They are also paying close attention to the rising stars who are given time at the convention's podium, to see which are able to connect with the party faithful. Most observers credit Barack Obama's speech at the 2004 Democratic National Convention with bringing him to national prominence.⁸

7. Thomas E. Patterson, "Is There a Future for On-the-Air Televised Conventions?" http://journalistsresource.org/wp-content/uploads/2012/08/vv_conv_paper1.pdf (March 14, 2016).

8. Todd Leopold, "The Day America Met Barack Obama," <http://www.cnn.com/2008/POLITICS/11/05/>

Conventions and Trial Balloons

While both political parties use conventions to help win the current elections, they also use them as a way of elevating local politicians to the national spotlight.

This has been particularly true for the Democratic Party. In 1988, the Democrats tapped Arkansas governor Bill Clinton to introduce their

nominee Michael Dukakis at the convention. Clinton's speech was lampooned for its length and lack of focus, but it served to get his name in front of Democratic voters. Four years later, Clinton was able to leverage this national exposure to help his own presidential campaign. The pattern was repeated when then-Illinois state senator Barack Obama gave the keynote address at the 2004 convention. Although he was only a candidate



Barack Obama gives his "Two Americas" speech at the Democratic National Convention in Boston in July 2004. At the time, he was an Illinois state senator running for the U.S. Senate.

obama.meeting/index.html?iref=werecommend (March 14, 2016).

for a U.S. Senate seat at the time, his address caught the attention of the Democratic establishment and ultimately led to his emergence as a viable presidential candidate just four years later.

Should the media devote more attention to national conventions? Would this help voters choose the candidate they want to vote for?



Bill Clinton's lengthy [nomination speech](#) in 1988 was much derided, but served the purpose of providing national exposure to a state governor. Barack Obama's [inspirational speech](#) at the 2004 national convention resulted in immediate speculation as to his wider political aspirations.

The Party-in-Government

One of the first challenges facing the party-in-government, or the party identifiers who have been elected or appointed to hold public office, is to achieve their policy goals. The means to do this is chosen in meetings of the two major parties; Republican meetings are called party conferences and Democrat meetings are called party caucuses. Members of each party meet in these closed sessions and

discuss what items to place on the legislative agenda and make decisions about which party members should serve on the committees that draft proposed laws. Party members also elect the leaders of their respective parties in the House and the Senate, and their party whips. Leaders serve as party managers and are the highest-ranking members of the party in each chamber of Congress. The party **whip** ensures that members are present when a piece of legislation is to be voted on and directs them how to vote. The whip is the second-highest ranking member of the party in each chamber. Thus, both the Republicans and the Democrats have a leader and a whip in the House, and a leader and a whip in the Senate. The leader and whip of the party that holds the majority of seats in each house are known as the majority leader and the majority whip. The leader and whip of the party with fewer seats are called the minority leader and the minority whip. The party that controls the majority of seats in the House of Representatives also elects someone to serve as Speaker of the House. People elected to Congress as independents (that is, not members of either the Republican or Democratic parties) must choose a party to conference or caucus with. For example, Vermont Senator Bernie Sanders, who ran for Senate as an independent candidate, caucuses with the Democrats in the Senate.



The political parties in government must represent their parties and the entire country at the same time. One way they do this is by creating separate governing and party structures in the legislature, even though these are run by the same people. Check out some of the more important

leadership organizations and their partisan counterparts in the [House of Representatives](#) and the [Senate](#) leadership.

Party Organization from the Inside

Interested in a cool summer job? Want to actually make a difference in your community? Consider an internship at the Democratic National Committee (DNC) or Republican National Committee (RNC). Both organizations offer internship programs for college students who want hands-on experience working in community outreach and grassroots organizing. While many internship opportunities are based at the national headquarters in Washington, DC, openings may exist within state party organizations.

Internship positions can be very competitive; most applicants are juniors or seniors with high grade-point averages and strong recommendations from their faculty. Successful applicants get an inside view of government, build a great professional network, and have the opportunity to make a real difference in the lives of their friends and families.

Visit the DNC or RNC website and find out what it takes to be an intern. While there, also check out the state

party organization. Is there a local leader you feel you could work for? Are any upcoming events scheduled in your state?

One problem facing the party-in-government relates to the design of the country's political system. The U.S. government is based on a complex principle of separation of powers, with power divided among the executive, legislative, and judiciary branches. The system is further complicated by federalism, which relegates some powers to the states, which also have separation of powers. This complexity creates a number of problems for maintaining party unity. The biggest is that each level and unit of government has different constituencies that the office holder must satisfy. The person elected to the White House is more beholden to the national party organization than are members of the House or Senate, because members of Congress must be reelected by voters in very different states, each with its own state-level and county-level parties.

Some of this complexity is eased for the party that holds the executive branch of government. Executive offices are typically more visible to the voters than the legislature, in no small part because a single person holds the office. Voters are more likely to show up at the polls and vote if they feel strongly about the candidate running for president or governor, but they are also more likely to hold that person accountable for the government's failures.⁹

Members of the legislature from the executive's party are under

9. Sidney R. Waldman. 2007. *America and the Limits of the Politics of Selfishness*. New York: Lexington Books, 27.

a great deal of pressure to make the executive look good, because a popular president or governor may be able to help other party members win office. Even so, partisans in the legislature cannot be expected to simply obey the executive's orders. First, legislators may serve a constituency that disagrees with the executive on key matters of policy. If the issue is important enough to voters, as in the case of gun control or abortion rights, an office holder may feel his or her job will be in jeopardy if he or she too closely follows the party line, even if that means disagreeing with the executive.

A second challenge is that each house of the legislature has its own leadership and committee structure, and those leaders may not be in total harmony with the president. Key benefits like committee appointments, leadership positions, and money for important projects in their home district may hinge on legislators following the lead of the party. These pressures are particularly acute for the **majority party**, so named because it controls more than half the seats in one of the two chambers. The Speaker of the House and the Senate majority leader, the majority party's congressional leaders, have significant tools at their disposal to punish party members who defect on a particular vote. Finally, a member of the **minority party** must occasionally work with the opposition on some issues in order to accomplish any of his or her constituency's goals. This is especially the case in the Senate, which is a super-majority institution. Sixty votes (of the 100 possible) are required to get anything accomplished, because Senate rules allow individual members to block legislation via holds and filibusters. The only way to block the blocking is to invoke *cloture*, a procedure calling for a vote on an issue, which takes 60 votes.

Questions to Consider

1. How do members of the party organization differ from party identifiers? What role does each play in the party as a whole?
2. Why is winning votes so important to political parties? How does the need to win elections affect party structures?

Terms to Remember

majority party—the legislative party with over half the seats in a legislative body, and thus significant power to control the agenda

minority party—the legislative party with less than half the seats in a legislative body

party identifiers—individuals who represent themselves in public as being part of a party

party-in-government—party identifiers who have been elected to office and are responsible for fulfilling the party's promises

party-in-the-electorate—members of the voting public who consider themselves part of a political party or who consistently prefer the candidates of one party over the other

party organization—the formal structure of the political party and the active members responsible for coordinating party behavior and supporting party candidates

precinct—the lowest level of party organization, usually organized around neighborhoods

67. Political Parties: What is divided government?

Learning Objectives

- Discuss the problems and benefits of divided government
- Define party polarization
- List the main explanations for partisan polarization
- Explain the implications of partisan polarization

In 1950, the American Political Science Association's Committee on Political Parties (APSA) published an article offering a criticism of the current party system. The parties, it argued, were too similar. Distinct, cohesive political parties were critical for any well-functioning democracy. First, distinct parties offer voters clear policy choices at election time. Second, cohesive parties could deliver on their agenda, even under conditions of lower bipartisanship. The party that lost the election was also important to democracy because it served as the "loyal opposition" that could keep a check on the excesses of the party in power. Finally, the paper suggested that voters could signal whether they preferred the vision of the current leadership or of the opposition. This signaling would keep both parties accountable to the people and lead to a more effective government, better capable of meeting the country's needs.

But, the APSA article continued, U.S. political parties of the day were lacking in this regard. Rarely did they offer clear and distinct

visions of the country's future, and, on the rare occasions they did, they were typically unable to enact major reforms once elected. Indeed, there was so much overlap between the parties when in office that it was difficult for voters to know whom they should hold accountable for bad results. The article concluded by advocating a set of reforms that, if implemented, would lead to more distinct parties and better government. While this description of the major parties as being too similar may have been accurate in the 1950s; that is no longer the case.¹

The Problem of Divided Government

The problem of majority versus minority politics is particularly acute under conditions of **divided government**. Divided government occurs when one or more houses of the legislature are controlled by the party in opposition to the executive. Unified government occurs when the same party controls the executive and the legislature entirely. Divided government can pose considerable difficulties for both the operations of the party and the government as a whole. It makes fulfilling campaign promises extremely difficult, for instance, since the cooperation (or at least the agreement) of both Congress and the president is typically needed to pass legislation. Furthermore, one party can hardly claim credit for success when the other side has been a credible partner, or when nothing can be accomplished. Party loyalty may be challenged too, because individual politicians might be forced to oppose their own party agenda if it will help their personal reelection bids.

Divided government can also be a threat to government

1. Nolan McCarty, Keith T. Poole and Howard Rosenthal. 2006. *Polarized America*. Cambridge, MA: MIT Press.

operations, although its full impact remains unclear.² For example, when the divide between the parties is too great, government may shut down. A 1976 dispute between Republican president Gerald Ford and a Democrat-controlled Congress over the issue of funding for certain cabinet departments led to a ten-day shutdown of the government (although the federal government did not cease to function entirely). But beginning in the 1980s, the interpretation that Republican president Ronald Reagan's attorney general gave to a nineteenth-century law required a complete shutdown of federal government operations until a funding issue was resolved.³

Clearly, the parties' willingness to work together and compromise can be a very good thing. However, the past several decades have brought an increased prevalence of divided government. Since 1969, the U.S. electorate has sent the president a Congress of his own party in only seven of twenty-three congressional elections, and during George W. Bush's first administration, the Republican majority was so narrow that a combination of resignations and defections gave the Democrats control before the next election could be held.

Over the short term, however, divided government can make for very contentious politics. A well-functioning government usually requires a certain level of responsiveness on the part of both the

2. David R. Mayhew. 1991. *Divided We Govern*. New Haven: Yale University Press; George C. Edwards, Andrew Barrett and Jeffrey S. Peake, "The Legislative Impact of Divided Government," *American Journal of Political Science* 41, no. 2 (1997): 545–563.
3. Dylan Matthews, "Here is Every Previous Government Shutdown, Why They Happened and How They Ended," *The Washington Post*, 25 September 2013.

executive and the legislative branches. This responsiveness is hard enough if government is unified under one party. During the presidency of Democrat Jimmy Carter (1977–1980), despite the fact that both houses of Congress were controlled by Democratic majorities, the government was shut down on five occasions because of conflict between the executive and legislative branches.⁴

Shutdowns are even more likely when the president and at least one house of Congress are of opposite parties. During the presidency of Ronald Reagan, for example, the federal government shut down eight times; on seven of those occasions, the shutdown was caused by disagreements between Reagan and the Republican-controlled Senate on the one hand and the Democrats in the House on the other, over such issues as spending cuts, abortion rights, and civil rights.⁵ More such disputes and government shutdowns took place during the administrations of George H. W. Bush, Bill Clinton, and Barack Obama, when different parties controlled Congress and the presidency.

For the first few decades of the current pattern of divided government, the threat it posed to the government appears to have been muted by a high degree of **bipartisanship**, or cooperation through compromise. Many pieces of legislation were passed in the 1960s and 1970s with reasonably high levels of support from both parties. Most members of Congress had relatively moderate voting records, with regional differences within parties that made bipartisanship on many issues more likely.

4. Matthews, “Here is Every Previous Government Shutdown, Why They Happened and How They Ended.”

5. Matthews, “Here is Every Previous Government Shutdown, Why They Happened and How They Ended.”

For example, until the 1980s, northern and midwestern Republicans were often fairly progressive, supporting racial equality, workers' rights, and farm subsidies. Southern Democrats were frequently quite socially and racially conservative and were strong supporters of states' rights. Cross-party cooperation on these issues was fairly frequent. But in the past few decades, the number of moderates in both



In the early 1980s, Republican president Ronald Reagan (left) and Democratic Speaker of the House Tip O'Neil (right) worked together to pass key pieces of legislation, even though they opposed each other on several issues. (credit: Ronald Reagan Presidential Library & Museum)

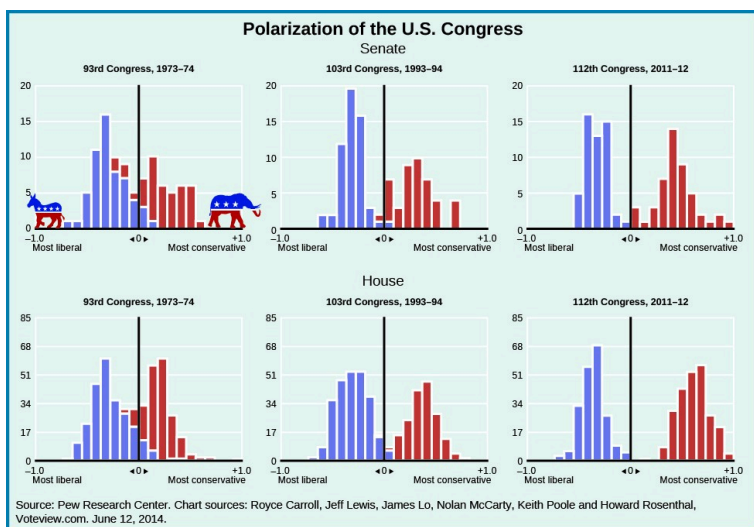
houses of Congress has declined. This has made it more difficult for party leadership to work together on a range of important issues, and for members of the minority party in Congress to find policy agreement with an opposing party president.

The Implications of Polarization

The past thirty years have brought a dramatic change in the relationship between the two parties as fewer conservative Democrats and liberal Republicans have been elected to office. As political **moderates**, or individuals with ideologies in the middle of the ideological spectrum, leave the political parties at all levels, the parties have grown farther apart ideologically, a result called **party polarization**. In other words, at least organizationally and in government, Republicans and Democrats have become increasingly dissimilar from one another. In the party-in-government, this means fewer members of Congress have mixed voting records;

instead they vote far more consistently on issues and are far more likely to side with their party leadership.⁶

It also means a growing number of moderate voters aren't participating in party politics. Either they are becoming independents, or they are participating only in the general election and are therefore not helping select party candidates in primaries.



The number of moderates has dropped since 1973 as both parties have moved toward ideological extremes.

6. Drew Desilver, “The Polarized Congress of Today Has Its Roots in the 1970s,” 12 June 2014, <http://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/> (March 16, 2016).

What is most interesting about this shift to increasingly polarized parties is that it does not appear to have happened as a result of the structural reforms recommended by APSA. Rather, it has happened because moderate politicians have simply found it harder and harder to win elections. There are many conflicting theories about the causes of polarization, some of which we discuss below. But whatever its origin, party polarization in the United States does not appear to have had the net positive effects that the APSA committee was hoping for. With the exception of providing voters with more distinct choices, positives of polarization are hard to find. The negative impacts are many. For one thing, rather than reducing interparty conflict, polarization appears to have only amplified it. For example, the Republican Party (or the GOP, standing for Grand Old Party) has historically been a coalition of two key and overlapping factions: pro-business rightists and social conservatives. The GOP has held the coalition of these two groups together by opposing programs designed to redistribute wealth (and advocating small government) while at the same time arguing for laws preferred by conservative Christians. But it was also willing to compromise with pro-business Democrats, often at the expense of social issues, if it meant protecting long-term business interests.

Recently, however, a new voice has emerged that has allied itself with the Republican Party. Born in part from an older third-party movement known as the Libertarian Party, the Tea Party is more hostile to government and views government intervention in all forms, and especially taxation and the regulation of business, as a threat to capitalism and democracy. Although an anti-tax faction within the Republican Party has existed for some time, some factions of the Tea Party movement are also active at the intersection of religious liberty and social issues, especially in opposing such initiatives as same-sex marriage and abortion

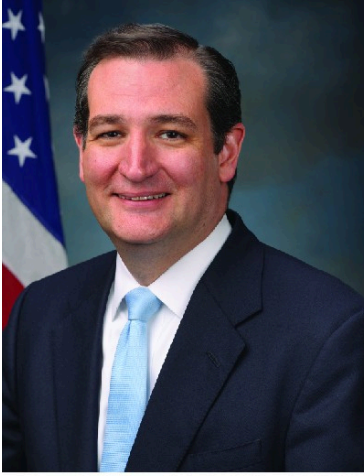
rights.⁷ The Tea Party has argued that government, both directly and by neglect, is threatening the ability of evangelicals to observe their moral obligations, including practices some perceive as endorsing social exclusion.

Although the Tea Party is a movement and not a political party, 86 percent of Tea Party members who voted in 2012 cast their votes for Republicans.⁸ Some members of the Republican Party are closely affiliated with the movement, and before the 2012 elections, Tea Party activist Grover Norquist exacted promises from many Republicans in Congress that they would oppose any bill that sought to raise taxes.⁹

7. “The Tea Party and Religion,” 23 February 2011, <http://www.pewforum.org/2011/02/23/tea-party-and-religion/> (March 16, 2016).

8. “The Tea Party and Religion.”

9. Paul Waldman, “Nearly All the GOP Candidates Bow Down to Grover Norquist,” *The Washington Post*, 13 August 2015, <https://www.washingtonpost.com/blogs/plum-line/wp/2015/08/13/nearly-all-the-gop-candidates-bow-down-to-grover-norquist/> (March 1, 2016).



(a)



(b)

Vying for the Republican nomination, 2016 presidential candidates Ted Cruz (a) and John Kasich (b), like many other Republicans, signed a pledge not to raise taxes if elected.

Movements on the left have also arisen. The Occupy Wall Street movement was born of the government's response to the Great Recession of 2008 and its assistance to endangered financial institutions, provided through the Troubled Asset Relief Program, TARP. The Occupy Movement believed government moved swiftly to protect the banking industry from the worst of the recession but largely failed to protect the average person, thereby worsening the growing economic inequality in the United States.



On September 30, 2011, Occupy Wall Street protesters marched to the headquarters of the New York Police Department to protest police brutality that occurred in response to the movement's occupation of Zuccotti Park in Lower Manhattan. (credit: modification of work by David Shankbone)

While the Occupy Movement itself has largely fizzled, the anti-business sentiment to which it gave voice continues within the Democratic Party, and many Democrats have proclaimed their support for the movement and its ideals, if not for its tactics.¹⁰ Bernie Sanders' presidential run made these topics and causes even more salient, especially among younger voters. To date, however, the Occupy

Movement has had fewer electoral effects than has the Tea Party. Yet, as manifested in Sanders' candidacy, it has the potential to affect races at lower levels in the 2016 national elections.

The Causes of Polarization

Scholars agree that some degree of **polarization** is occurring in the United States, even if some contend it is only at the elite level. But they are less certain about exactly why, or how, polarization has become such a mainstay of American politics. Several conflicting theories have been offered. The first and perhaps best argument is that polarization is a party-in-government phenomenon driven by a decades-long sorting of the voting public, or a change in party

10. Beth Fouhy, "Occupy Wall Street and Democrats Remain Wary of Each Other," *Huffington Post*, 17 November 2011.

allegiance in response to shifts in party position.¹¹ According to the sorting thesis, before the 1950s, voters were mostly concerned with state-level party positions rather than national party concerns. Since parties are bottom-up institutions, this meant local issues dominated elections; it also meant national-level politicians typically paid more attention to local problems than to national party politics.

But over the past several decades, voters have started identifying more with national-level party politics, and they began to demand their elected representatives become more attentive to national party positions. As a result, they have become more likely to pick parties that consistently represent national ideals, are more consistent in their candidate selection, and are more willing to elect office-holders likely to follow their party's national agenda. One example of the way social change led to party sorting revolves around race.

A second possible culprit in increased polarization is the impact of technology on the public square. Before the 1950s, most people got their news from regional newspapers and local radio stations. While some national programming did exist, most editorial control was in the hands of local publishers and editorial boards. These groups served as a filter of sorts as they tried to meet the demands of local markets.

Television was a powerful tool, with national news and editorial content that provided the same message across the country. All viewers saw the same images of the women's rights movement and the war in Vietnam. The expansion of news coverage to cable, and the consolidation of local news providers into big corporate conglomerates, amplified this nationalization. Average citizens were just as likely to learn what it meant to be a Republican from a

11. Morris Fiorina, "Americans Have Not Become More Politically Polarized," *The Washington Post*, 23 June 2014.

politician in another state as from one in their own, and national news coverage made it much more difficult for politicians to run away from their votes. The information explosion that followed the heyday of network TV by way of cable, the Internet, and blogs has furthered this nationalization trend.

A final possible cause for polarization is the increasing sophistication of **gerrymandering**, or the manipulation of legislative districts in an attempt to favor a particular candidate. According to the gerrymandering thesis, the more moderate or heterogeneous a voting district, the more moderate the politician's behavior once in office. Taking extreme or one-sided positions on a large number of issues would be hazardous for a member who needs to build a diverse electoral coalition. But if the district has been drawn to favor a particular group, it now is necessary for the elected official to serve only the portion of the constituency that dominates.



This cartoon, which inspired the term gerrymander, was printed in the Boston Gazette on March 26, 1812, after the Massachusetts legislature redistricted the state to favor the party of the sitting governor, Elbridge Gerry.

Gerrymandering is a centuries-old practice. There has always been an incentive for legislative bodies to draw districts in such a way that sitting legislators have the best chance of keeping their jobs. But changes in law and technology have transformed gerrymandering from a crude



art into a science. The first advance came with the introduction of the “one-person-one-vote” principle by the U.S. Supreme Court in 1962. Before then, it was common for many states to practice **redistricting**, or redrawing of their electoral maps, *only* if they gained or lost seats in the U.S. House of Representatives. This can happen once every ten years as a result of a constitutionally mandated **reapportionment** process, in which the number of House seats given to each state is adjusted to account for population changes.

But if there was no change in the number of seats, there was little incentive to shift district boundaries. After all, if a legislator had won election based on the current map, any change to the map could make losing seats more likely. Even when reapportionment led to new maps, most legislators were more concerned with protecting their own seats than with increasing the number of seats held by their party. As a result, some districts had gone decades without significant adjustment, even as the U.S. population changed from largely rural to largely urban. By the early 1960s, some electoral districts had populations several times greater than those of their more rural neighbors.

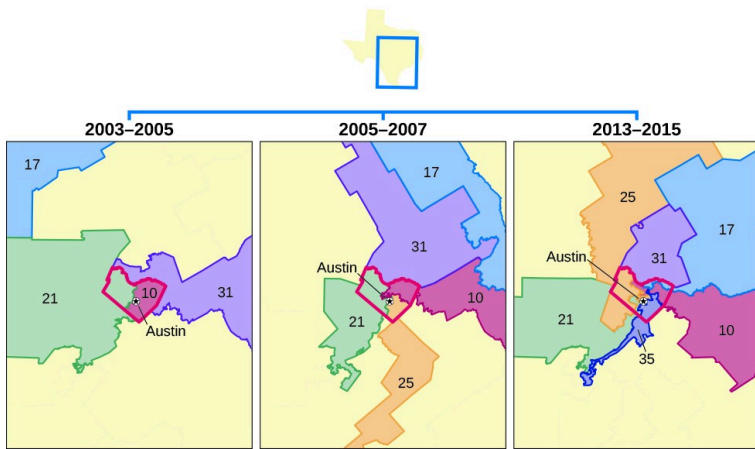
However, in its one-person-one-vote decision in *Reynolds v. Simms* (1964), the Supreme Court argued that everyone’s vote should count roughly the same regardless of where they

lived.¹² Districts had to be adjusted so they would have roughly equal populations. Several states therefore had to make dramatic changes to their electoral maps during the next two redistricting cycles (1970–1972 and 1980–1982). Map designers, no longer certain how to protect individual party members, changed tactics to try and create **safe seats** so members of their party could be assured of winning by a comfortable margin. The basic rule of thumb was that designers sought to draw districts in which their preferred party had a 55 percent or better chance of winning a given district, regardless of which candidate the party nominated.

Of course, many early efforts at post-*Reynolds* gerrymandering were crude since map designers had no good way of knowing exactly where partisans lived. At best, designers might have a rough idea of voting patterns between precincts, but they lacked the ability to know voting patterns in individual blocks or neighborhoods. They also had to contend with the inherent mobility of the U.S. population, which meant the most carefully drawn maps could be obsolete just a few years later. Designers were often forced to use crude proxies for party, such as race or the socio-economic status of a neighborhood. Some maps were so crude they were ruled unconstitutionally discriminatory by the courts.

12. *Reynolds v. Simms*, 379 U.S. 870 (1964).

Gerrymandering in Austin, TX, 2003–2015



Examples of gerrymandering in Texas, where the Republican-controlled legislature redrew House districts to reduce the number of Democratic seats by combining voters in Austin with those near the border, several hundred miles away. Today, Austin is represented by six different congressional representatives.

Proponents of the gerrymandering thesis point out that the decline in the number of moderate voters began during this period of increased redistricting. But it was not until later, they argue, that the real effects could be seen. A second advance in redistricting, via computer-aided map making, truly transformed gerrymandering into a science. Refined computing technology, the ability to collect data about potential voters, and the use of advanced algorithms have given map makers a good deal of certainty about where to place district boundaries to best predetermine the outcomes. These factors also provided better predictions about future population shifts, making the effects of gerrymandering more stable over time. Proponents argue that this increased efficiency in map drawing has led to the disappearance of moderates in Congress.

According to political scientist Nolan McCarty, there is little evidence to support the redistricting hypothesis alone. First, he

argues, the Senate has become polarized just as the House of Representatives has, but people vote for Senators on a statewide basis. There are no gerrymandered voting districts in elections for senators. Research showing that more partisan candidates first win election to the House before then running successfully for the Senate, however, helps us understand how the Senate can also become partisan.¹³ Furthermore, states like Wyoming and Vermont, which have only one Representative and thus elect House members on a statewide basis as well, have consistently elected people at the far ends of the ideological spectrum.¹⁴ Redistricting did contribute to polarization in the House of Representatives, but it took place largely in districts that had undergone significant change.¹⁵

Furthermore, polarization has been occurring throughout the country, but the use of increasingly polarized district design has not. While some states have seen an increase in these practices, many states were already largely dominated by a single party (such as in the Solid South) but still elected moderate representatives. Some parts of the country have remained closely divided between the two parties, making overt attempts at gerrymandering difficult. But when coupled with the sorting phenomenon discussed above,

13. Sean Theriault. 2013. *The Gingrich Senators: The Roots of Partisan Warfare in Congress*. New York: Oxford University Press.
14. Nolan McCarty, "Hate Our Polarized Politics? Why You Can't Blame Gerrymandering," *The Washington Post*, 26 October 2012.
15. Jamie L. Carson et al., "Redistricting and Party Polarization in the U.S. House of Representatives," *American Politics Research* 35, no. 6 (2007): 878–904.

redistricting probably is contributing to polarization, if only at the margins.

The Politics of Redistricting

Voters in a number of states have become so worried about the problem of gerrymandering that they have tried to deny their legislatures the ability to draw district boundaries. The hope is that by taking this power away from whichever party controls the state legislature, voters can ensure more competitive districts and fairer electoral outcomes.

In 2000, voters in Arizona approved a referendum that created an independent state commission responsible for drafting legislative districts. But the Arizona legislature fought back against the creation of the commission, filing a lawsuit that claimed only the legislature had the constitutional right to draw districts. Legislators asked the courts to overturn the popular referendum and end the operation of the redistricting commission. However, the U.S. Supreme Court upheld the authority of the independent commission in a 5–4

decision titled *Arizona State Legislature v. Arizona Independent Redistricting Commission* (2015).¹⁶

Currently, only five states use fully independent commissions—ones that do not include legislators or other elected officials—to draw the lines for both state legislative and congressional districts. These states are Arizona, California, Idaho, Montana, and Washington. In Florida, the League of Women Voters and Common Cause challenged a new voting districts map supported by state Republicans, because they did not believe it fulfilled the requirements of amendments made to the state constitution in 2010 requiring that voting districts not favor any political party or incumbent.¹⁷

Do you think redistricting is a partisan issue? Should commissions draw districts instead of legislators? If commissions are given this task, who should serve on them?

16. *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015).
17. “Editorial: Republicans Should Accept Redistricting Defeat and Drop Talk of Appeals,” 10 January 2016, <http://www.fairdistrictsnow.org/news/661/> (March 16, 2016).



Think you have what it takes to gerrymander a district? Play the [redistricting game](#) and see whether you can find new ways to help out old politicians.

Questions to Consider

1. What are the positives and negatives of partisan polarization?
2. What is the sorting thesis, and what does it suggest as the cause of party polarization?
3. Does gerrymandering lead to increased polarization?
4. How have the Tea Party and Occupy Wall Street Movement affected partisan politics?
5. Is it possible for a serious third party to emerge in the United States, positioned ideologically between the Democrats on the left and the Republicans on the right? Why or why not?
6. In what ways are political parties of the people and in what ways might they be more responsive to elites?
7. If you were required to become active in some aspect of a political party, what activity and level of party organization would you choose and why?

8. Is it preferable for the U.S. government to have unified party control or divided government? Why?
9. In general, do parties make the business of government easier or harder to accomplish?

Terms to Remember

bipartisanship—a process of cooperation through compromise

census—counting citizens for purposes of representation in the U. S. House and the Electoral College; data collected every 10 years to allow for reapportionment of House seats

divided government—a condition in which one or more houses of the legislature is controlled by the party in opposition to the executive

gerrymandering—the manipulation of legislative districts in an attempt to favor a particular candidate

moderate—an individual who falls in the middle of the ideological spectrum

party polarization—the shift of party positions from moderate towards ideological extremes

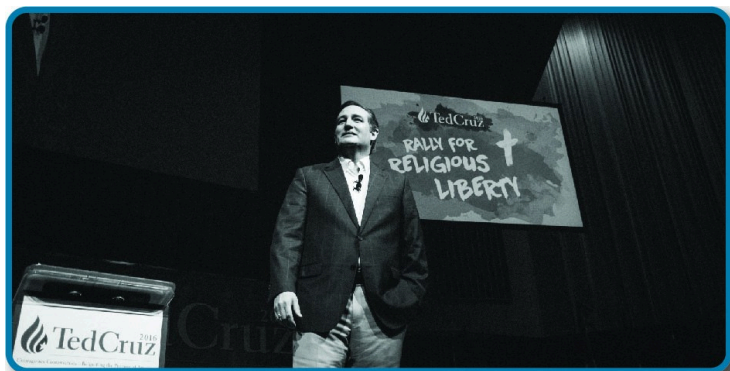
reapportionment—the reallocation of House seats between the states to account for population changes

redistricting—the redrawing of electoral maps

safe seat—district drawn so members of a party can be assured of winning by a comfortable margin

PART XV
ELECTIONS

68. Elections: The People Take Action



Senator Ted Cruz (R-TX) hosts a Rally for Religious Liberty at Bob Jones University in Greenville, South Carolina, on November 14, 2015. Cruz announced his campaign for president on March 23, 2015, at Liberty University in Lynchburg, Virginia. (credit: modification of work by Jamelle Bouie)

The first Republican candidate to throw a hat into the ring for 2016, Ted Cruz had been preparing for his presidential run since 2013 when he went hunting in Iowa and vacationed in New Hampshire, both key states in the nomination process.¹

1. Margaret Carlson, "In Iowa, Ted Cruz Shoots Ducks in a Barrel," *Bloomberg View*, 29 October 2013; Steve Peoples, "Sen. Ted Cruz of Texas Heading to New Hampshire," *San Jose Mercury News*, 13 July 2013.

He opposed the Affordable Care Act while showcasing his family side by reading *Green Eggs and Ham* aloud in a filibuster attack on the act.²

First, by officially declaring his candidacy at Liberty University, whose stated mission is to provide “a world-class education with a solid Christian foundation,” Cruz sought to demonstrate that his values were the same as those of the Christian students before him.³

Second, the speech reminded Christians to vote. As Cruz told the students, “imagine millions of young people coming together and standing together, saying ‘we will stand for liberty.’”⁴

Like candidates for office at all levels of U.S. government, Cruz understood that campaigns must reach out to the voters and compel them to vote or the candidate will fail miserably.

Elections: Questions to Consider

1. What brings voters to the polls?

2. “Cruz Filibusters with ‘Green Eggs and Ham,’ ‘Redneck Rules,’” 30 July 2015, <http://abcnews.go.com/GMA/video/tea-party-senator-ted-cruz-filibusters-attack-obamacare-20366644>.
3. Brandie Peterson, “Election 2016: Why Ted Cruz Picked Liberty University,” CNN, 23 March 2015.
4. “Transcript: Ted Cruz’s Speech at Liberty University,” *Washington Post*, 23 March 2015.

2. How are voting decisions made?
3. Who controls the election process?

69. Elections: Voter Registration

Learning Objectives

- Identify ways the U.S. government promotes voter rights and registration
- Summarize similarities and differences in state voter registration methods
- Analyze ways states increase voter registration and decrease fraud

Before most voters are allowed to cast a ballot, they must register to vote in their state. This process may be as simple as checking a box on a driver's license application (**Motor-Voter Act**) or as difficult as filling out a long form with complicated questions.¹

Congress enacted the [National Voter Registration Act of 1993](#) (also known as the “NVRA” and the “Motor Voter Act”), to enhance voting opportunities for every American. The Act has made it easier for all Americans to register to vote and to maintain their registration. In addition to whatever other methods of voter registration which States offer, the Act requires states to provide the opportunity to

1. USA.gov at <https://www.justice.gov/crt/about-national-voter-registration-act> “About the National Voter Registration Act”

apply to register to vote for federal elections by three means: [Section 5](#) of the Act requires states to provide individuals with the opportunity to register to vote at the same time that they apply for a driver's license or seek to renew a driver's license, and requires the State to forward the completed application to the appropriate state or local election official.²

[Section 7](#) of the Act requires states to offer voter registration opportunities at all offices that provide public assistance and all offices that provide state-funded programs primarily engaged in providing services to persons with disabilities. Each applicant for any of these services, renewal of services, or address changes must be provided with a voter registration form or a declination form as well as assistance in completing the form and forwarding the completed application to the appropriate state or local election official. [Section 6](#) of the Act provides that citizens can register to vote by mail using mail-in-forms developed by each state and the Election Assistance Commission.³

Registration allows governments to determine which citizens are eligible to vote and, in some cases, from which list of candidates they may select a party nominee. Ironically, while government wants to increase voter turnout, the registration process may prevent various groups of citizens from participating in the electoral process.

2. USA.gov at <https://www.justice.gov/crt/about-national-voter-registration-act> "About the National Voter Registration Act"
3. USA.gov at <https://www.justice.gov/crt/about-national-voter-registration-act> "About the National Voter Registration Act"

Voter Registration Across the United States

Elections are state-by-state contests. General elections for president and statewide offices (e.g., governor and U.S. senator) are often organized and paid for by the states. Because political cultures vary from state to state, the process of **voter registration** varies.

The varied registration and voting laws across the United States cause controversy. In the aftermath of the Civil War, some states enacted **literacy tests**, **grandfather clauses**, and other requirements intended to disenfranchise poor and black voters in Alabama, Georgia, and Mississippi. Literacy tests were long and detailed exams on local and national politics, history, and more. They were often administered arbitrarily with more blacks required to take them than whites.⁴

Poll taxes required voters to pay a fee to vote. Grandfather clauses exempted individuals from taking literacy tests or paying poll taxes if they or their fathers or grandfathers had been permitted to vote prior to a certain point in time. While the Supreme Court determined that grandfather clauses were unconstitutional in 1915, states continued to use poll taxes and literacy tests to deter potential voters from registering.⁵

Some states ignored instances of violence and intimidation against African Americans wanting to register or vote.⁶

4. Stephen Medvic. 2014. *Campaigns and Elections: Players and Processes*, 2nd ed. New York: Routledge.

5. *Guinn v. United States*, 238 U.S. 347 (1915).

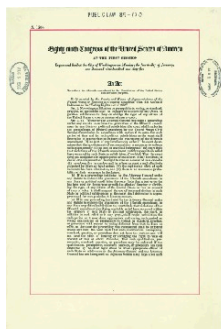
6. Medvic, *Campaigns and Elections*.



Black and white people voting together, Warren K. Leffler, photographer, 6 November 1962, U.S. News & World Report magazine photograph collection, Library of Congress, no known restrictions on publication at <https://www.loc.gov/item/2016646466/>.

The ratification of the **Twenty-Fourth Amendment** in 1964 ended poll taxes, but the passage of the **Voting Rights Act (VRA)** in 1965 had a more profound effect. The act protected minority voters by prohibiting state laws denying voting rights. The VRA gave the attorney general of the United States authority to order federal examiners to areas with a history of discrimination. These examiners had the power to oversee and monitor voter registration and elections. States violating or sometimes suspected of violating the VRA were required to get any changes in their election laws approved by the U.S. attorney general or by going through the

court system. In *Shelby County v. Holder* (2013), the Supreme Court, in a 5–4 decision, threw out the standards and process of the VRA.⁷



(a)



(b)

The Voting Rights Act (a) was signed into law by President Lyndon B. Johnson (b/left) on August 6, 1965, in the presence of major figures of the civil rights movement, including Rosa Parks and Martin Luther King Jr. (b/center).

The effects of the VRA were visible almost immediately. In Mississippi, only 6.7 percent of blacks were registered to vote in 1965; however, by the fall of 1967, nearly 60 percent were registered. Alabama experienced similar effects, with African American registration increasing from 19.3 percent to 51.6 percent. Voter turnout across these two states similarly increased. Mississippi went from 33.9 percent turnout to 53.2 percent, while Alabama increased from 35.9 percent to 52.7 percent between the 1964 and 1968 presidential elections.⁸

7. *Shelby County v. Holder*, 570 U.S. ____ (2013).

8. Bernard Grofman, Lisa Handley, and Richard G. Niemi. 1992. *Minority Representation and the Quest for Voting Equality*. New York: Cambridge University Press, 25.

Many states have sought other methods of increasing voter registration. In 2002, Arizona was the first state to offer online voter registration, which allowed citizens with a driver's license to register to vote without any paper application or signature. The system matches the information on the application to information stored at the Department of Motor Vehicles, to ensure each citizen is registering to vote in the right precinct. Citizens without a driver's license still need to file a paper application. More than eighteen states have moved to online registration. The National Conference of State Legislatures estimates, however, that adopting an online voter registration system can initially cost a state between \$250,000 and \$750,000.⁹

Other states have decided against online registration due to concerns about voter fraud and security. Legislators also argue that online registration makes it difficult to ensure that only citizens are registering and that they are registering in the correct precincts. A bill to move registration online in Florida stalled for over a year in the legislature, based on security concerns. In other states, such as Texas, both the government and citizens are concerned about identity fraud, so traditional paper registration is still preferred.

How Does Someone Register to Vote?

In all states except North Dakota, a citizen wishing to vote must complete an application. Whether the form is online or on paper, the prospective voter will list his/her name, residency address, and in many cases party identification (with Independent as an option)

9. "The Canvass," April 2014, Issue 48, <http://www.ncsl.org/research/elections-and-campaigns/states-and-election-reform-the-canvass-april-2014.aspx>.

and affirm that he or she is competent to vote. States may also have a **residency requirement**, which establishes how long a citizen must live in a state before becoming eligible to register, often 30 days. Beyond these requirements, there may be an oath administered or more questions asked, such as felony convictions. If the application is completely online and the citizen has government documents (e.g., driver's license or state identification card), the system will compare the application to other state records and accept an online signature or affidavit if everything matches. Citizens who do not have these state documents are often required to complete paper applications. States without online registration often allow a citizen to fill out an application on a website, but the citizen will receive a paper copy in the mail to sign and mail back to the state.

Another aspect of registering to vote is the timeline. States may require registration to take place as much as thirty days before voting, or they may allow same-day registration. Maine first implemented same-day registration in 1973. Fourteen states and the District of Columbia now allow voters to register the day of the election if they have proof of residency, such as a driver's license or utility bill. Many of the more populous states (e.g., Michigan and Texas), require registration forms to be mailed thirty days before an election. Moving means citizens must re-register or update addresses. College students, for example, may have to re-register or update addresses each year as they move. States that use same-day registration had a 4 percent higher voter turnout in the 2012 presidential election than states that did not.¹⁰

10. Ibid.

MAIL TO:
DMV CHANGE OF ADDRESS
 P.O. BOX 942899
 SACRAMENTO, CA 95829-0001

A Public Service Agency

**A SEPARATE FORM IS NEEDED
 FOR EACH DRIVER OR VEHICLE OWNER**

NOTICE OF CHANGE OF ADDRESS

Please Print Characters in Capital Letters Using Block or Sans Serif font only.

DMV USE ONLY
 (DL Address)
 updated by PO

24002

INSTRUCTIONS:

- Enter this information on sheets on this document, i.e. California driver license, ID card, or vehicle registration card, for which a change is being requested.
- Return unexpired DMV license and/or vehicle registration card to the office.
- Type or write your new address on a small piece of paper with your signature and date. Keep it with your other license or ID card.
- A commercial licensed driver must maintain a California residence address or the driver license will be downgraded to non-commercial status.

Personal Information

DRIVER LICENSE/ID CARD NO.

LAST NAME: _____

FIRST: _____ INITIAL: _____ BIRTH DATE: _____

Voter Change of Address

We will change your voting address if you have moved and still live in the same county. If you have moved to a new county or are not registered to vote, you must complete a new voter registration card. DMV provides the form or call 1-800-345-VOTE or logon to the Secretary of State's website at www.sos.ca.gov.

Use only with ☐ **DL Change of Address** Mark this box if you do not want to change your voting address.

STREET NUMBER ONLY _____ STREET NAME _____

APT. NO. _____

CITY - DO NOT ABBREVIATE - USE FIRST 22 CHARACTERS IN CITY NAME _____ STATE _____ ZIP CODE _____

Do Not Use P.O. Box in this space

New or Correct Mailing Address

STREET NUMBER ONLY _____ P.O. BOX OR STREET NAME OR STREET NAME AND PRIVATE MAIL BOX _____

APT. NO. _____

CITY - DO NOT ABBREVIATE - USE FIRST 22 CHARACTERS IN CITY NAME _____ STATE _____ ZIP CODE _____

If Different From Residence Address

Voter Change of Address

We will change your voting address if you have moved and still live in the same county. If you have moved to a new county or are not registered to vote, you must complete a new voter registration card. DMV provides the form or call 1-800-345-VOTE or logon to the Secretary of State's website at www.sos.ca.gov.

Use only with ☐ **DL Change of Address** Mark this box if you do not want to change your voting address.

Moving requires a voter to re-register or update his or her address in the system. Depending on the state, this notification can sometimes be completed through the Department of Motor Vehicles.

Some attempts have been made to streamline voter registration. As previously noted, Motor-Voter was enacted to expedite the registration process, allowing citizens to register to vote when they sign up for driver's licenses and Social Security benefits. On each government form, the citizen need only mark an additional box to also register to vote. Unfortunately, while increasing registrations by 7 percent between 1992 and 2012, Motor-Voter did not

dramatically increase voter turnout.¹¹ In fact, for two years following the passage of the act, voter turnout decreased slightly.¹²

It appears that the main users of the expedited system were those already intending to vote. One study, however, found that preregistration may have a different effect on youth than on the overall voter pool; in Florida, it increased turnout of young voters by 13 percent.¹³

In 2015, Oregon made news when it took the concept of Motor-Voter further. When citizens turn eighteen, the state now automatically registers most of them using driver's license and state identification information. When a citizen moves, the voter rolls are updated when the license is updated. While this policy has been controversial, with some arguing that private information may

11. Royce Crocker, "The National Voter Registration Act of 1993: History, Implementation, and Effects," *Congressional Research Service*, CRS Report R40609, September 18, 2013, <https://www.fas.org/sgp/crs/misc/R40609.pdf>.
12. "National General Election VEP Turnout Rates, 1789–Present," <http://www.electproject.org/national-1789-present> (November 4, 2015).
13. John B. Holbein, D. Sunshine Hillygus. 2015. "Making Young Voters: The Impact of Preregistration on Youth Turnout." *American Journal of Political Science* (March). doi:10.1111/ajps.12177.

become public or that Oregon is moving toward mandatory voting.¹⁴

Journalists discovered that many states, including Florida, had large numbers of phantom voters on their rolls, voters had moved or died but remained on the states' voter registration rolls.¹⁵

The Help America Vote Act of 2002 (HAVA) was passed in order to reform voting across the states and reduce these problems. As part of the Act, states were required to update voting equipment, make voting more accessible to those with assessability challenges, and maintain computerized voter rolls that could be updated regularly.¹⁶

Over a decade later, there has been some progress. In Louisiana, voters are placed on ineligible lists if a voting registrar is notified that they have moved or become ineligible to vote. If the voter remains on this list for two general elections, his or her registration

14. Russell Berman, "Should Voter Registration Be Automatic?" *Atlantic*, 20 March 2015; Maria L. La Ganga, "Under New Oregon Law, All Eligible Voters are Registered Unless They Opt Out," *Los Angeles Times*, 17 March 2015.

15. "'Unusable' Voter Rolls," *Wall Street Journal*, 7 November 2000.

16. "One Hundred Seventh Congress of the United States of America at the Second Session," 23 January 2002. http://www.eac.gov/assets/1/workflow_staging/Page/41.PDF.

is cancelled. In Oklahoma, the registrar receives a list of deceased residents from the Department of Health.¹⁷

Twenty-nine states now participate in the Interstate Voter Registration Crosscheck Program, which allows states to check for duplicate registrations.¹⁸



The National Association of Secretaries of State maintains a [website](#) that directs users to their state's information regarding voter registration, identification policies, and polling locations.

Who Is Allowed to Register?

In order to be eligible to vote in the United States, a person must

17. “Voter List Accuracy,”¹¹ February 2014.
<http://www.ncsl.org/research/elections-and-campaigns/voter-list-accuracy.aspx>

18. Brad Bryant and Kay Curtis, eds. December 2013.
“Interstate Crosscheck Program Grows,”
http://www.kssos.org/forms/communication/canvassing_kansas/dec13.pdf.

be a citizen, resident, and eighteen years old. But states often place additional requirements on the right to vote. The most common requirement is that voters must be mentally competent and not currently serving time in jail. Some states enforce more stringent or unusual requirements on citizens who have committed crimes. Florida and Kentucky permanently bar felons and ex-felons from voting unless they obtain a pardon from the governor, while Mississippi and Nevada allow former felons to apply to have their voting rights restored.¹⁹

On the other end of the spectrum, Vermont does not limit voting based on incarceration unless the crime was election fraud.²⁰ Maine citizens serving in Maine prisons also may vote in elections.

Beyond those jailed, some citizens have additional expectations placed on them when they register to vote. Wisconsin requires that voters “not wager on an election,” and Vermont citizens must recite the “Voter’s Oath” before they register, swearing to cast votes with a conscience and “without fear or favor of any person.”²¹

19. “Felon Voting Rights,” 15 July 2014. <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>.

20. Wilson Ring, “Vermont, Maine Only States to Let Inmates Vote,” *Associated Press*, 22 October 2008.

21. “Voter’s Qualifications and Oath,” <https://votesmart.org/elections/ballot-measure/1583/voters-qualifications-and-oath#.VjQOJH6rS00> (November 12, 2015).

Where to Register?

Across the United States, over twenty million college and university students begin classes each fall, many away from home. The simple act of moving away to college presents a voter registration problem. Elections are local. Each citizen lives in a district with state legislators, city council or other local elected representatives, a U.S. House of Representatives member, and more. State and national laws require voters to reside in their districts, but students are an unusual case. They often hold temporary residency while at school and return home for the summer. Therefore, they have to decide whether to register to vote near campus or vote back in their home district.

Maintaining voter registration back home is legal in most states, assuming a student holds only temporary residency at school. This may be the best plan, because students are likely more familiar with local politicians and issues. But it requires the student to either go home to vote or apply for an absentee ballot. With classes, clubs, work, and more, it may be difficult to remember this task. One study found that students living more than two hours from home were less likely to vote than

students living within thirty minutes of campus, which is not surprising.²²



(a)



(b)

On National Voter Registration Day in 2012, Roshaunda McLean (a, left), campus director of the Associated Students of the University of Missouri, and David Vaughn (a, right), a Missouri Student Association senator, register voters on campus. Cassie Dorman (b, left) and Samantha Peterson (b, right), both eighteen years old, were just two of the University of Missouri students registering to vote for the first time. (credit a, b: modification of work by “KOMUnews”/Flickr)

22. Richard Niemi and Michael Hanmer. 2010. “Voter Turnout Among College Students: New Data and a Rethinking of Traditional Theories,” *Social Science Quarterly* 91, No. 2: 301–323.

Questions to Consider

1. What effect did the National Voter Registration Act have on voter registration?
2. What challenges do college students face with regard to voter registration?
3. Have you registered to vote in your college area or back home?
4. What factors influence your decision about where to vote?

Terms to Remember

24th Amendment—eliminated poll taxes

grandfather clause—exempted individuals from taking literacy tests or paying poll taxes if they or their fathers or grandfathers had been permitted to vote prior to a certain point in time

literacy test—long and detailed exams on local and national politics, history, and more

Motor-Voter Act—legislation making voter registration easier; registration at time of obtaining or updating driver's license

poll tax—required voters to pay a fee to vote

residency requirement—the stipulation that citizen

must live in a state for a determined period of time before a citizen can register to vote as a resident of that state

voter registration—paperwork required for voting; proof of residency and age; state requirements met in order to cast ballot

Voting Rights Act—protected minority voters by prohibiting state laws denying voting rights

70. Elections: Voter Turnout

Learning Objectives

- Identify factors that motivate registered voters to vote
- Discuss circumstances that prevent citizens from voting
- Analyze reasons for low voter turnout in the United States

Counting Voters

Low **voter turnout** has long caused concern and frustration. A healthy society is expected to be filled with civically engaged citizens who vote regularly and participate in the electoral process.



(a)



(b)

Rock the Vote works with musicians and other celebrities across the country to encourage and register young people to vote (a). Sheryl Crow was one of Rock the Vote's strongest supporters in the 2008 election, subsequently performing at the Midwest Inaugural Ball in January 2009 (b). (credit a: modification of work by Jeff Kramer; credit b: modification of work by "cliff1066"/Flickr)



Interested in mobilizing voters?
Explore [Rock the Vote](#) and [The Voter Participation Center](#) for more information.

Calculating voter turnout begins by counting how many ballots were cast in a particular election. These votes must be cast on time, either by mail or in person. The next step is to count how many people *could* have voted in the same election. The voting-age population (VAP) consists of persons who are eighteen and older.

Some of these persons may not be eligible to vote in their state, but they are included because they are of age to do so.¹



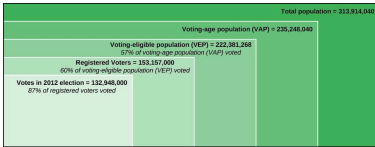
Mrs. J. Hardy Stubbs, Miss Ida Craft, Miss Rosalie Jones Summary Photo shows 3 suffragettes with bag "Votes for Women pilgrim leaflets." Published [between ca. 1910 and ca. 1915] ; George Grantham Bain Collection (Library of Congress). – General information about the Bain Collection is available at <http://hdl.loc.gov/loc.pnp/pp.ggbain>; <http://hdl.loc.gov/loc.pnp/pp.print> Digital Id ggbain 11100 //hdl.loc.gov/loc.pnp/ggbain.11100 Control Number ggb2005011205 Reproduction Number LC-DIG-ggbain-11100 (digital file from original negative) Rights Advisory No known restrictions on publication.

1. Michael P. McDonald and Samuel Popkin. 2001. "Myth of the Vanishing Voter," *American Political Science Review* 95, No. 4: 963–974; See also, "What is the Voting-Age Population (VAP) and the Voting-Eligible Population (VEP)?" <http://www.electproject.org/home/voter-turnout/faq/denominator> (November 12, 2015).

An even smaller group is the voting-eligible population (VEP), citizens eighteen and older who, whether they have registered or not, are eligible to vote because they are citizens, mentally competent, and not imprisoned. If a state has more stringent requirements, such as not having a felony conviction, citizens counted in the VEP must meet those criteria as well. This population is much harder to measure, but statisticians who use the VEP will generally take the VAP and subtract the state's prison population and any other known group that cannot vote. This results in a number that is somewhat theoretical; however, in a way, it is more accurate when determining voter turnout.²

The last and smallest population is registered voters, who, as the name implies, are citizens currently registered to vote. Now we can appreciate how reports of voter turnout can vary. Although 87 percent of registered voters voted in the 2012 presidential election, this represents only 42 percent of the total U.S. population. While 42 percent is indeed low and might cause alarm, some people included in it are under eighteen, not citizens, or unable to vote due to competency or prison status. The next number shows that just over 57 percent of the voting-age population voted, and 60 percent of the voting-eligible population. The best turnout ratio is calculated using the smallest population: 87 percent of registered voters voted. Those who argue that a healthy democracy needs high voter turnout will look at the voting-age population or voting-eligible population as proof that the United States has a problem. Those who believe only informed and active citizens should vote point to the registered voter turnout numbers instead.

2. McDonald and Popkin, "Myth of the Vanishing Voter," 963–974.



There are many ways to measure voter turnout depending on whether we calculate it using the total population, the voting-age population (VAP), the voting-eligible population (VEP), or the total number of registered voters.

What Factors Drive Voter Turnout?

Those who are registered and did vote in the last election are likely to have a strong interest in politics and elections and will vote again, provided they are not angry with the political

system or politicians.

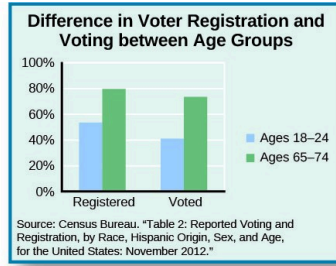
Younger people are often still in college, perhaps working part-time and earning low wages. They are unlikely to be receiving government benefits beyond Pell Grants or government-subsidized tuition and loans. They are also unlikely to be paying taxes at a high rate. Government is a distant concept rather than a daily concern, which may drive down turnout.

In 2012, for example, the Census Bureau reported that only 53.6 percent of eligible voters between the ages of eighteen and twenty-four registered and 41.2 percent voted, while 79.7 percent of sixty-five to seventy-four-year-olds registered and 73.5 percent voted.³

3. “Table 2. Reported Voting and Registration, by Race, Hispanic Origin, Sex, and Age, for the United States: November 2012,” <https://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html> (November 6, 2015).



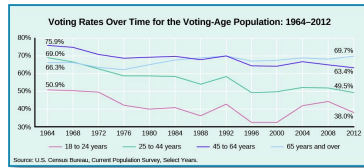
(a)



(b)

On January 7, 2008, John McCain campaigned in New Hampshire among voters holding AARP signs (a). AARP, formerly the American Association of Retired Persons, is one of the most influential interest groups because senior citizens are known to vote at nearly double the rate of young people (b), thanks in part to their increased reliance on government programs as they age. (credit a: modification of work by Ryan Glenn)

A citizen's socioeconomic status—the combination of education, income, and social status—may also predict whether he or she will vote. Among those who have completed college, the 2012 voter turnout rate jumps to 75 percent of eligible voters, compared to about 52.6 percent for those who have completed only high school.⁴



Jose Antonio Vargas, "Vote or Die? Well, They Did Vote," *Washington Post*, 9 November 2004; Melissa Dahl, 5 November 2008. "Youth Vote May Have Been Key in Obama's Win," http://www.nbcnews.com/id/27525497/ns/politics-decision_08/t/youth-vote-may-have-been-key-obamas-win/.

4. "Table 5. Reported Voting and Registration, by Age, Sex, and Educational Attainment: November 2012," <https://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html> (November 6, 2015).

This is due in part to the powerful effect of education, one of the strongest predictors of voting turnout. Income also has a strong effect on the likelihood of voting. Citizens earning \$100,000 to \$149,999 a year are very likely to vote and 76.9 percent of them do, while only 50.4 percent of those who earn \$15,000 to \$19,999 vote.⁵

Once high income and college education are combined, the resulting high socioeconomic status strongly predicts the likelihood that a citizen will vote.

Race is also a factor. Caucasians turn out to vote in the highest numbers, with 63 percent of white citizens voting in 2012. In comparison, 62 percent of African Americans, 31.3 percent of Asian Americans, and 31.8 percent of Hispanic citizens voted in 2012. Voting turnout can increase or decrease based upon the political culture of a state. Hispanics, for example, often vote in higher numbers in states where there has historically been higher Hispanic involvement and representation, such as New Mexico, where 49 percent of Hispanic voters turned out in 2012.⁶

5. "Table 7. Reported Voting and Registration of Family Members, by Age and Family Income: November 2012," <https://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html> (November 5, 2015).
6. "Table 4b. Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States: November 2012," <https://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html> (November 2, 2015).



Suffragettes voting; between 1920 and 1921 provided by the National Photo Company on the negative or negative sleeve; Repository Library of Congress Prints and Photographs Division Washington, D.C. 20540 USA Digital Id npcc 29566 //hdl.loc.gov/loc.pnp/npcc.29566 Control Number npc2008010067; No known restrictions on publication.

While less of a factor today, gender has historically been a factor in voter turnout. After 1920, when the Nineteenth Amendment gave women the right to vote, women began slowly turning out to vote, and now they do so in high numbers. Today, more women vote than men. In 2012, 59.7 percent of men and 63.7 percent of women reported voting.⁷

7. “Table 1. Reported Voting and Registration, by Sex and Single Years of Age: November 2012,”



Check out this [website](#) to find out who is voting and who isn't.

What Factors Decrease Voter Turnout?

Just as political scientists and campaign managers worry about who does vote, they also look at why people choose to stay home on Election Day. Over the years, studies have explored why a citizen might not vote. The reasons range from the obvious excuse of being too busy (19 percent) to more complex answers, such as transportation problems (3.3 percent) and restrictive registration laws (5.5 percent).⁸ With only 57 percent of our voting-age population (VAP) voting in the presidential election of 2012,⁹ however, we should examine why the rest do not participate.

<https://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html> (November 2, 2015).

8. "Table 10. Reported Voting and Registration, by Sex and Single Years of Age: November 2012," <https://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html> (November 2, 2015).
9. Table 1. Reported Voting and Registration, by Sex and

One prominent reason for low national turnout is that participation is not mandated. Some countries, such as Belgium and Turkey, have compulsory voting laws, which require citizens to vote in elections or pay a fine. This helps the two countries attain VAP turnouts of 87 percent and 86 percent, respectively, compared to the U.S. turnout of 54 percent. Sweden and Germany automatically register their voters, and 83 percent and 66 percent vote, respectively. Chile's decision to move from compulsory voting to voluntary voting caused a drop in participation from 87 percent to 46 percent.¹⁰



Do you wonder what voter turnout looks like in other developed countries? Visit the [Pew Research Center report on international voting turnout](#) to find out.

Voter turnout may be affected by voter identification laws. The American Civil Liberties Union and other groups argue an unfair

Single Years of Age: November 2012. Calculated using total number of people voted divided by total population.

10. Drew Desilver. 6 May 2015. "U.S. Voter Turnout trails Most Developed Countries," <http://www.pewresearch.org/fact-tank/2015/05/06/u-s-voter-turnout-trails-most-developed-countries>.

burden on people who are poor, older, or have limited finances, while states argue it would prevent fraud. In *Crawford v. Marion County Election Board* (2008), the Supreme Court decided that Indiana's voter identification requirement was constitutional.¹¹

In 2011, Texas passed a photo identification law for voters, allowing concealed-handgun permits as identification. The Texas law was blocked by the Obama administration before it could be implemented, because Texas was on the Voting Rights Act's preclearance list. Other states, such as Alabama, Alaska, Arizona, Georgia, and Virginia similarly had laws and districting changes blocked.¹²

As a result, Shelby County, Alabama, and several other states sued the U.S. attorney general, arguing the Voting Rights Act's preclearance list was unconstitutional and that the formula that determined whether states had violated the VRA was outdated. In *Shelby County v. Holder* (2013), the Supreme Court agreed. In a 5–4 decision, the justices in the majority said the formula for placing states on the VRA preclearance list was outdated and reached into the states' authority to oversee elections.¹³ States and counties on the preclearance list were released, and Congress was told to design new guidelines for placing states on the list.

11. David Stout, "Supreme Court Upholds Voter Identification Law in Indiana," *New York Times*, 29 April 2008; *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

12. "Jurisdictions Previously Covered by Section 5," <http://www.justice.gov/crt/jurisdictions-previously-covered-section-5> (November 1, 2015).

13. *Shelby County v. Holder*, 570 U.S. ____ (2013).

Another reason for not voting is that polling places may be open only on Election Day. This makes it difficult for voters juggling school, work, and child care during polling hours. Many states have tried to address this problem with **early voting**, which opens polling places as much as two weeks early. Texas opened polling places on weekdays and weekends in 1988 and initially saw an increase in voting in gubernatorial and presidential elections, although the impact tapered off over time.¹⁴ Other states with early voting, however, showed a decline in turnout, possibly because there is less social pressure to vote when voting is spread over several days.¹⁵

14. Stefan D. Haag, “Early Voting in Texas: What are the Effects?” *Austin Community College CPPPS Report*, <http://www.austincc.edu/cppps/earlyvotingfull/report5.pdf> (November 1, 2015).
15. Rich Morin. 23 September 2013. “Early Voting Associated with Lower Turnout,” <http://www.pewresearch.org/fact-tank/2013/09/23/study-early-voting-associated-with-lower-turnout>.

In a similar effort, Oregon, Colorado, and Washington have moved to a mail-only voting system in which there are no polling locations, only mailed ballots. These states have seen a rise in turnout, with Colorado's numbers increasing from 1.8 million votes in the 2010 congressional elections to 2 million votes in the 2014 congressional elections.¹⁶

Apathy may also play a role. Some people avoid voting because their vote is unlikely to make a difference or the election is not competitive. If one party has a clear majority in a state or district, for instance,

members of the minority party may see no reason to vote. Democrats in Utah and Republicans in California are so outnumbered that they are unlikely to affect the outcome of an election, and they may opt to stay home. Because the presidential candidate with the highest number of popular votes receives all of Utah's and California's electoral votes, there is little incentive for some citizens to vote: they will never change the outcome of the state-level election. These citizens, as well as those who vote for third parties like the Green Party or the Libertarian Party, are sometimes referred to as the chronic minority. While third-party



On February 5, 2008, dubbed “Super Duper Tuesday” by the press, twenty-four states held caucuses or primary elections—the largest simultaneous number of state presidential primary elections in U.S. history. As a result, over half the Democratic delegates were allocated unusually early in the election season. This polling station, on the Stanford University campus in Palo Alto, California, had long lines, commonly seen only on Election Day, and nearly ran out of Democratic ballots. (credit: Josh Thompson)

16. The Denver Post Editorial Board, “A Vote of Confidence for Mail Elections in Colorado,” *Denver Post*, 10 November 2014.

candidates sometimes win local or state office or even dramatize an issue for national discussion, such as when Ross Perot discussed the national debt during his campaign as an independent presidential candidate in 1992, they never win national elections.

Finally, some voters may view non-voting as a means of social protest or may see volunteering as a better way to spend their time. Younger voters are more likely to volunteer their time rather than vote, believing that serving others is more important than voting.¹⁷

Possibly related to this choice is **voter fatigue**. In many states, due to our federal structure with elections at many levels of government, voters may vote many times per year on ballots filled with candidates and issues to research. The less time there is between elections, the lower the turnout.¹⁸

Questions to Consider

1. What recommendations would you make to increase voter turnout in the United States?
2. Why does age affect whether a citizen will vote?

17. Harvard IOP, "Trump, Carson Lead Republican Primary; Sanders Edging Clinton Among Democrats, Harvard IOP Poll Finds," news release, December 10, 2015, <http://www.iop.harvard.edu/harvard-iop-fall-2015-poll>.
18. C. Rallings, M. Thrasher, and G. Borisyyuk. 2003. "Seasonal Factors, Voter Fatigue and the Costs of Voting," *Electoral Studies* 22, No. 1: 65–79.

3. If you were going to predict whether your classmates would vote in the next election, what questions would you ask them?

Terms to Remember

early voting—an accommodation that allows voting up to two weeks before Election Day

voter fatigue—the result when voters grow tired of voting and stay home from the polls

voter turnout—number of citizens voting in a given election

7I. Elections: Why run for office?

Learning Objectives

- Describe the stages in the election process
- Compare the primary and caucus systems
- Summarize how primary election returns lead to the nomination of the party candidates

Elections offer American voters the opportunity to participate in their government with little investment of time or personal effort.

Deciding to Run

Running for office can be as easy as collecting one hundred signatures on a city election form or paying a registration fee of several thousand dollars to run for governor of a state. However, a potential candidate needs to meet state-specific requirements covering length of residency, voting status, and age. Potential candidates must also consider competitors, family obligations, and the likelihood of drawing financial backing. His or her spouse, children, work history, health, financial history, and business dealings also become part of the media's focus, along with many other personal details about the past. Candidates for office are slightly more diverse than the representatives serving in legislative

and executive bodies, but the realities of elections drive many eligible and desirable candidates away from running.¹

Despite these problems, most elections will have at least one candidate per party on the ballot. In states or districts where one party holds a supermajority, such as Georgia, candidates from the other party may be discouraged from running because they do not think they have a chance to win.²

Candidates are likely to be moving up from prior elected office or are professionals, like lawyers, who can take time away from work to campaign and serve in office.³

When candidates run for office, they are most likely to choose local or state office first. For women, studies have shown that family obligations rather than desire or ambition account for this choice.

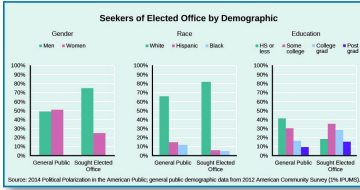
1. Jennifer L. Lawless. 2012. *Becoming a Candidate: Political Ambition and the Decision to Run for Office*. Cambridge: Cambridge University Press.
2. "Partisan Composition of State Houses," http://ballotpedia.org/Partisan_composition_of_state_houses (November 4, 2015); Zach Holden. 20 November 2014. "No Contest: 36 Percent of 2014 State Legislative Races Offered No Choice," <https://www.followthemoney.org/research/blog/no-contest-36-percent-of-2014-state-legislative-races-offer-no-choice-blog/>.
3. "Legislators' Occupations in All States," <http://www.ncsl.org/research/about-state-legislatures/legislator-occupations-national-data.aspx> (November 3, 2015).

Further, women are more likely than men to wait until their children are older before entering politics.⁴

Because higher office is often attained only after service in lower office, there are repercussions to women waiting so long. If they do decide to run for the U.S. House of Representatives or Senate, they are often older, and fewer in number, than their male colleagues. Only 24.4 percent of state legislators and 20 percent of U.S. Congress members are women.⁵

The number of women in executive office is often lower as well. 80 percent of members of Congress are male, 90 percent have at least a bachelor's degree, and their average age is sixty.⁶

4. Jennifer L. Lawless and Richard L. Fox. 2010. *It Still Takes a Candidate: Why Women Don't Run for Office*. Revised Edition. Cambridge: Cambridge University Press.
5. "Women in State Legislatures for 2015," 4 September 2015. <http://www.ncsl.org/legislators-staff/legislators/womens-legislative-network/women-in-state-legislatures-for-2015.aspx>.
6. Philip Bump, "The New Congress is 80 Percent White, 80 Percent Male and 92 Percent Christian," *Washington Post*, 5 January 2015.



Those who seek elected office do not generally reflect the demographics of the general public: They are often disproportionately male, white, and more educated than the overall U.S. population.

Another factor for potential candidates is whether the seat they are considering is competitive or open. A **competitive seat** describes a race where a challenger runs against the **incumbent**—the current office holder. An **open seat** is one whose incumbent is not running for reelection. Incumbents who run for

reelection are very likely to win for a number of reasons. In fact, in the U.S. Congress, 95 percent of representatives and 82 percent of senators were reelected in 2014.⁷ But when an incumbent retires, the seat is open and more candidates will run for that seat.

Many potential candidates will also decline to run if their opponent has a lot of money in a campaign war chest. War chests are campaign accounts registered with the Federal Election Commission, and candidates are allowed to keep earlier donations if they intend to run for office again. Incumbents and candidates trying to move from one office to another very often have money in their war chests. Those with early money are hard to beat because they have an easier time showing they are a viable candidate (one likely to win). They can woo potential donors, which brings in more donations and strengthens the campaign. A challenger who does not have money, name recognition, or another way to appear viable will have fewer campaign donations and will be less competitive against the incumbent.

7. “Reelection Rates Over the Years,” <https://www.opensecrets.org/bigpicture/reelect.php> (November 12, 2015).

Campaign Finance Laws

In the 2012 presidential election cycle, candidates for all parties raised a total of over \$1.3 billion dollars for campaigns.⁸ Congressional candidates running in the 2014 Senate elections raised \$634 million, while candidates running for the House of Representatives raised \$1.03 billion.⁹

This, however, pales in comparison to the amounts raised by **political action committees (PACs)**, which are organizations created to raise and spend money to influence politics and contribute to candidates' campaigns. In the 2014 congressional elections, PACs raised over \$1.7 billion to help candidates and political parties.¹⁰ How does the government monitor the vast amounts of money that are now a part of the election process?

The history of campaign finance monitoring has its roots in a federal law written in 1867, which prohibited government employees

8. "2012 Presidential Campaign Finance," <http://www.fec.gov/disclosurep/national.do?sessionId=293EB5D0106C1C18892DC99478B01A46.worker3> (November 10, 2015).

9. "2014 House and Senate Campaign Finance," <http://www.fec.gov/disclosurehs/national.do?sessionId=E14EDC00736EF23F31DC86C1C0320049.worker4> (November 12, 2015).

10. "Political Action Committees," <http://www.opensecrets.org/pacs/> (November 12, 2015).

from asking Naval Yard employees for donations.¹¹ In 1896, the Republican Party spent about \$16 million overall, which includes William McKinley's \$6–7 million campaign expenses.¹²

This raised enough eyebrows that several key politicians, including Theodore Roosevelt, took note. After becoming president in 1901, Roosevelt pushed Congress to look for political corruption and influence in government and elections.¹³

Shortly after, the Tillman Act (1907) was passed by Congress, which prohibited corporations from contributing money to candidates running in federal elections. Other congressional acts followed, limiting how much money individuals could contribute to candidates, how candidates could spend contributions, and what information would be disclosed to the public.¹⁴

While these laws intended to create transparency in campaign funding, government did not have the power to stop the high levels of money entering elections, and little was done to enforce the laws. In 1971, Congress again tried to fix the situation by passing the Federal Election Campaign Act (FECA), which outlined how

11. Greg Scott and Gary Mullen, "Thirty Year Report," *Federal Election Commission*, September 2005, <http://www.fec.gov/info/publications/30year.pdf>.

12. Jonathan Bernstein, "They Spent What on Presidential Campaigns?," *Washington Post*, 20 February, 2012.

13. Jaime Fuller, "From George Washington to Shaun McCutcheon: A Brief-ish History of Campaign Finance Reform," *Washington Post*, 3 April 2014.

14. Federal Corrupt Practices Act of 1925; Hatch Act of 1939; Taft-Hartley Act of 1947

candidates would report all contributions and expenditures related to their campaigns. The FECA also created rules governing the way organizations and companies could contribute to federal campaigns, which allowed for the creation of political action committees.¹⁵

Finally, a 1974 amendment to the act created the Federal Election Commission (FEC), which operates independently of government and enforces the elections laws. While some portions of the FECA were ruled unconstitutional by the courts in **Buckley v. Valeo** (1976), such as limits on personal spending on campaigns by candidates not using federal money, the FEC began enforcing campaign finance laws in 1976.¹⁶

Even with the new laws and the FEC, money continued to flow into elections. By using loopholes in the laws, political parties and political action committees donated large sums of money to candidates, and new reforms were soon needed. Senators John McCain (R-AZ) and Russ Feingold (former D-WI) cosponsored the Bipartisan Campaign Reform Act of 2002 (BCRA), also referred to as the **McCain-Feingold Act**. McCain-Feingold restricts the amount of money given to political parties, which had become a way for companies and PACs to exert influence. It placed limits on total contributions to political parties, prohibited coordination between candidates and PAC campaigns, and required candidates to include personal endorsements on their political ads. It also limited advertisements run by unions and corporations thirty days before a primary election and sixty days before a general election.¹⁷

15. Scott and Mullen, “Thirty Year Report.”

16. *Buckley v. Valeo*, 424 U.S. 1 (1976).

17. “Bipartisan Campaign Reform Act of 2002,”
http://www.fec.gov/pages/bcra/bcra_update.shtml

Soon after the passage of the McCain–Feingold Act, the FEC’s enforcement of the law spurred court cases challenging it. The first, *McConnell v. Federal Election Commission* (2003), resulted in the Supreme Court’s upholding the act’s restrictions on how candidates and parties could spend campaign contributions. But later court challenges led to the removal of limits on personal spending and ended the ban on ads run by interest groups in the days leading up to an election.¹⁸

In 2010, the Supreme Court’s ruling on *Citizens United v. Federal Election Commission* led to the removal of spending limits on corporations. Justices in the majority argued that the BCRA violated a corporation’s free speech rights.¹⁹

The court ruling also allowed corporations to place unlimited money into **super PACs**, or Independent Expenditure-Only Committees. These organizations cannot contribute directly to a candidate, nor can they strategize with a candidate’s campaign. They can, however, raise and spend as much money as they please to support or attack a candidate, including running advertisements and hosting events.²⁰

(November 11, 2015); Scott and Mullen, “Thirty Year Report.”

18. “Court Case Abstracts,” http://www.fec.gov/law/litigation_CCA_W.shtml (November 12, 2015); *Davis v. Federal Election Commission*, 554 U.S. 724 (2008).

19. *Citizens United v. FEC*, 558 U.S. 310 (2010).

20. “Citizens United v. Federal Election Commission,” http://www.opensecrets.org/news/reports/citizens_united.php (November 11, 2015); “Independent

Several limits on campaign contributions have been upheld by the courts and remain in place. Individuals may contribute up to \$2,700 per candidate per election. This means a teacher living in Nebraska may contribute \$2,700 to Bernie Sanders for his campaign to become the Democratic presidential nominee, and if Sanders becomes the nominee, the teacher may contribute another \$2,700 to his general election campaign. Individuals may also give \$5,000 to political action committees and \$33,400 to a national party committee. PACs that contribute to more than one candidate are permitted to contribute \$5,000 per candidate per election, and up to \$15,000 to a national party. PACs created to give money to only one candidate are limited to only \$2,700 per candidate, however.²¹

The amounts are adjusted every two years, based on inflation. These limits are intended to create a more equal playing field for the candidates, so that candidates must raise their campaign funds from a broad pool of contributors.

Expenditure-Only Committees,” http://www.fec.gov/press/press2011/ieoc_alpha.shtml (November 11, 2015).

21. “Contribution Limits for the 2015–2016 Federal Elections,” <http://www.fec.gov/info/contriblimitschart1516.pdf>. (November 11, 2015).

Contribution Limits for 2015–2016 Federal Elections					
DONORS	RECIPIENTS				
	Candidate Committee	PAC ¹ (SSF and Nonconnected)	State/ District/ Local Party Committee	National Party Committee	Additional National Party Committee Accounts
Individual	\$2,700* per election	\$5,000 per year	\$10,000 per year (combined)	\$33,400*	\$100,000 per account per year
Candidate Committee	\$2,000 per election	\$5,000 per year	Unlimited Transfers	Unlimited Transfers	
PAC-Multicandidate	\$5,000 per election	\$5,000 per year	\$5,000 per year (combined)	\$15,000 per year	\$45,000 per account per year
PAC-Nonmulticandidate	\$2,700 per election	\$5,000 per year	\$10,000 per year (combined)	\$33,400*	\$100,000 per account per year
State/District/Local Party Committee	\$5,000 per election	\$5,000 per year	Unlimited Transfers		
National Party Committee	\$5,000 per election ³	\$5,000 per year			
<p>* Indexed for inflation in odd-numbered years.</p> <p>1 “PAC” here refers to a committee that makes contributions to other federal political committees. Independent-expenditure-only political committees (sometimes called “super PACs”) may accept unlimited contributions, including from corporations and labor organizations.</p> <p>2 The limits in this column apply to a national party committee’s accounts for: (i) the presidential nominating convention; (ii) election recounts and contests and other legal proceedings; and (iii) national party headquarters buildings. A party’s national committee, Senate campaign committee and House campaign committee are each considered separate national party committees with separate limits. Only a national party committee, not the parties’ national congressional campaign committees, may have an account for the presidential nominating convention.</p> <p>3 Additionally, a national party committee and its Senatorial campaign committee may contribute up to \$46,800 combined per campaign to each Senate candidate.</p> <p>Source: Federal Election Commission. “Contribution Limits for 2015–2016 Federal Elections.” June 25, 2015.</p>					

Nomination Stage

Although the *Constitution* explains how candidates for national office are elected, it is silent on how those candidates are nominated. Political parties have taken on the role of promoting nominees for offices, such as the presidency and seats in the Senate and the House of Representatives. Because there are no national guidelines, there is much variation in the nomination process. States pass election laws and regulations, choose the selection method for party nominees, and schedule the election, but the process also greatly depends on the candidates and the political parties.

States, through their legislatures, often influence the nomination method by paying for an election to help parties identify the nominee the voters prefer. Many states fund elections because they can hold several nomination races at once. In 2012, many voters had to choose a presidential nominee, U.S. Senate nominee, House of Representatives nominee, and state-level legislature nominee for their parties.

The most common method of picking a party nominee for state, local, and presidential contests is the primary. Party members use a ballot to indicate which candidate they desire for the party nominee. Despite the ease of voting using a ballot, primary elections have a number of rules and variations that can still cause confusion for citizens. In a **closed primary**, only members of the political party selecting nominees may vote. A registered Green Party member, for example, is not allowed to vote in the Republican or Democratic primary. Parties prefer this method, because it ensures the nominee is picked by voters who legitimately support the party. An **open primary** allows all voters to vote. In this system, a Green Party member is allowed to pick either a Democratic or Republican ballot when voting.

For state-level office nominations, or the nomination of a U.S. Senator or House member, some states use the top-two primary method. A **top-two primary**, sometimes called a jungle primary, pits

all candidates against each other, regardless of party affiliation. The two candidates with the most votes become the final candidates for the general election. Thus, two candidates from the same party could run against each other in the general election. In one California congressional district, for example, four Democrats and two Republicans all ran against one another in the June 2012 primary. The two Republicans received the most votes, so they ran against one another in the general election in November.²² More often, however, the top-two system is used in state-level elections for non-partisan elections, in which none of the candidates are allowed to declare a political party.

In general, parties do not like nominating methods that allow non-party members to participate in the selection of party nominees. In 2000, the Supreme Court heard a case brought by the California Democratic Party, the California Republican Party, and the California Libertarian Party.²³ The parties argued that they had a right to determine who associated with the party and who participated in choosing the party nominee. The Supreme Court agreed, limiting the states' choices for nomination methods to closed and open primaries.

Despite the common use of the primary system, at least five states (Alaska, Hawaii, Idaho, Colorado, and Iowa) regularly use caucuses for presidential, state, and local-level nominations. A **caucus** is a meeting of party members in which nominees are selected informally. Caucuses are less expensive than primaries because they rely on voting methods such as dropping marbles in a jar, placing names in a hat, standing under a sign bearing the candidate's name, or taking a voice vote. Volunteers record the votes and no poll

22. Harold Meyerson, "Op-Ed: California's Jungle Primary: Tried it. Dump It," *Los Angeles Times*, 21 June 2014.

23. *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

workers need to be trained or compensated. The party members at the caucus also help select **delegates**, who represent their choice at the party's state- or national-level nominating convention.

The Iowa Democratic Caucus is well-known for its spirited nature. The party's voters are asked to align themselves into preference groups, which often means standing in a room or part of a room that has been designated for the candidate of choice. The voters then get to argue and discuss the candidates, sometimes in a very animated and forceful manner. After a set time, party members are allowed to realign before the final count is taken. The caucus leader then determines how many members support each candidate, which determines how many delegates each candidate will receive.

The caucus has its proponents and opponents. Many argue that it is more interesting than the primary and brings out more sophisticated voters, who then benefit from the chance to debate the strengths and weaknesses of the candidates. The caucus system is also more transparent than ballots. The local party members get to see the election outcome and pick the delegates who will represent them at the national convention. Opponents point out that caucuses take two to three hours and are intimidating to less experienced voters. Voter turnout for a caucus is generally 20 percent lower than for a primary.²⁴

Regardless of which nominating system the states and parties choose, states must also determine which day they wish to hold their nomination. When the nominations are for state-level office, such as governor, the state legislatures receive little to no input from the national political parties. In presidential election years, however, the national political parties pressure most states to hold their primaries or caucuses in March or later. Only Iowa, New

24. "Voter Turnout," <http://www.electproject.org/home/voter-turnout/voter-turnout-data>. (November 3, 2015).

Hampshire, and South Carolina are given express permission by the national parties to hold presidential primaries or caucuses in January or February. Both political parties protect the three states' status as the first states to host caucuses and primaries, due to tradition and the relative ease of campaigning in these smaller states.



(a)



(b)

Presidential candidates often spend a significant amount of time campaigning in states with early caucuses or primaries. In September 2015, Senator Bernie Sanders (a), a candidate for the Democratic nomination, speaks at the Amherst Democrats BBQ in Amherst, New Hampshire. In July 2015, John Ellis "Jeb" Bush (b), former Republican governor of Florida, greets the public at the Fourth of July parade in Merrimack, New Hampshire. (credit a, b: modification of work by Marc Nozell)

Other states, especially large states like California, Florida, Michigan, and Wisconsin, often are frustrated that they must wait to hold their presidential primary elections later in the season. Their frustration is reasonable: candidates who do poorly in the first few primaries often drop out entirely, leaving fewer candidates to run in caucuses and primaries held in February and later. In 2008, California, New York, and several other states disregarded the national party's guidelines and scheduled their primaries the first week of February. In response, Florida and Michigan moved their primaries to January and many other states moved forward to March. This was not the first time states participated in frontloading and scheduled the majority of the primaries and caucuses at the beginning of the primary season. It was, however, one of the worst occurrences. States have been **frontloading** since the 1976

presidential election, with the problem becoming more severe in the 1992 election and later.²⁵

Political parties allot delegates to their national nominating conventions based on the number of registered party voters in each state. California, the state with the most Democrats, will send 548 delegates to the 2016 Democratic National Convention, while Wyoming, with far fewer Democrats, will send only 18 delegates. When the national political parties want to prevent states from frontloading, or doing anything else they deem detrimental, they can change the state's delegate count, which in essence increases or reduces the state's say in who becomes the presidential nominee. In 1996, the Republicans offered bonus delegates to states that held their primaries and caucuses later in the nominating season.²⁶

In 2008, the national parties ruled that only Iowa, South Carolina, and New Hampshire could hold primaries or caucuses in January. Both parties also reduced the number of delegates from Michigan and Florida as punishment for those states' holding early primaries.²⁷ Despite these efforts, candidates in 2008 had a very

25. Josh Putnam, "Presidential Primaries and Caucuses by Month (1976)," *Frontloading HQ* (blog), February 3, 2009, <http://frontloading.blogspot.com/2009/02/1976-presidential-primary-calendar.html>.
26. William G. Mayer and Andrew Busch. 2004. *The Frontloading Problem in Presidential Nominations*. Washington D.C.: Brookings Institution.
27. Joanna Klonsky, "The Role of Delegates in the U.S. Presidential Nominating Process," *Washington Post*, 6 February 2008.

difficult time campaigning during the tight window caused by frontloading.



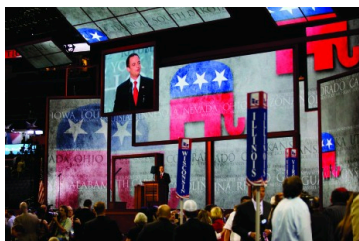
Take a look at [Campaigns & Elections](#) to see what hopeful candidates are reading.

Convention Season

Once it is clear who the parties' nominees will be, presidential and gubernatorial campaigns enter a quiet period. Candidates run fewer ads and concentrate on raising funds for the fall. This is a crucial time because lack of money can harm their chances. The media spends much of the summer keeping track of the fundraising totals while the political parties plan their conventions. State parties host state-level conventions during gubernatorial elections, while national parties host national conventions during presidential election years.

Party conventions are typically held between June and September, with state-level conventions earlier in the summer and national conventions later. Conventions normally last four to five days, with days devoted to platform discussion and planning and nights reserved for speeches. Local media covers the speeches given at state-level conventions, showing speeches given by the party nominees for governor and lieutenant governor, and perhaps important guests or the state's U.S. senators. The national media covers the Democratic and Republican conventions during presidential election years, mainly showing the speeches. Some

cable networks broadcast delegate voting and voting on party platforms. Members of the candidate's family and important party members will generally speak during the first few days of a national convention, with the vice presidential nominee speaking on the next-to-last night and the presidential candidate on the final night. The two chosen candidates will then hit the campaign trail for the general election. The party with the incumbent president will hold the later convention, so in 2016, the Democrats will hold their convention after the Republicans.



(a)



(b)

Reince Priebus, chairman of the Republican National Committee, opens the Republican National Convention in Tampa, Florida, on August 28, 2012 (a). Pageantry and symbolism, such as the flag motifs and political buttons shown on this Wisconsin attendee's hat (b), reign supreme during national conventions. (credit a, b: modification of work by Mallory Benedict/PBS NewsHour)

There are rarely surprises at the modern convention. Thanks to party rules, the nominee for each party is generally already clear. In 2008, John McCain had locked up the Republican nomination in March by having enough delegates, while in 2012, President Obama was an unchallenged incumbent and hence people knew he would be the nominee. The naming of the vice president is generally not a surprise either. Even if a presidential nominee tries to keep it a secret, the news often leaks out before the party convention or official announcement. In 2004, the media announced John Edwards was John Kerry's running mate. The Kerry campaign had not made a formal announcement, but an amateur photographer had taken a

picture of Edwards' name being added to the candidate's plane and posted it to an aviation message board.

Despite the lack of surprises, there are several reasons to host traditional conventions. First, the parties require that the delegates officially cast their ballots. Delegates from each state come to the national party convention to publicly state who their state's voters selected as the nominee.

Second, delegates will bring state-level concerns and issues to the national convention for discussion, while local-level delegates bring concerns and issues to state-level conventions. This list of issues that concern local party members, like limiting abortions in a state or removing restrictions on gun ownership, are called *planks*, and they will be discussed and voted upon by the delegates and party leadership at the convention. Just as wood planks make a platform, issues important to the party and party delegates make up the party **platform**. The parties take the cohesive list of issues and concerns and frame the election around the platform. Candidates will try to keep to the platform when campaigning, and outside groups that support them, such as super PACs, may also try to keep to these issues.

Third, conventions are covered by most news networks and cable programs. This helps the party nominee get positive attention while surrounded by loyal delegates, family members, friends, and colleagues. For presidential candidates, this positivity often leads to a bump in popularity, so the candidate gets a small increase in favorability. If a candidate does not get the bump, however, the campaign manager has to evaluate whether the candidate is connecting well with the voters or is out of step with the party faithful. In 2004, John Kerry spent the Democratic convention talking about getting U.S. troops out of the war in Iraq and increasing spending at home. Yet after his patriotic and positive convention, Gallup recorded no convention bump and the voters did not appear more likely to vote for him.

General Elections and Election Day

The **general election** campaign period occurs between mid-August and early November. These elections are simpler than primaries and conventions, because there are only two major party candidates and a few minor party candidates. About 50 percent of voters will make their decisions based on party membership, so the candidates will focus on winning over independent voters and visiting states where the election is close.²⁸

Debates are an important element of the general election season, allowing voters to see candidates answer questions on policy and prior decisions. While most voters think only of presidential debates, the general election season sees many debates. In a number of states, candidates for governor are expected to participate in televised debates, as are candidates running for the U.S. Senate. Debates not only give voters a chance to hear answers, but also to see how candidates hold up under stress. Because television and the Internet make it possible to stream footage to a wide audience, modern campaign managers understand the importance of a debate.

28. “Party Affiliation and Election Polls,” *Pew Research Center*, August 3, 2012.

In 1960, the first televised presidential debate showed that answering questions well is not the only way to impress voters. Senator John F. Kennedy, the Democratic nominee, and Vice President

Richard Nixon, the Republican nominee, prepared in slightly different ways for their first of four debates. Although both studied answers to possible questions, Kennedy also worked on the delivery of his answers, including accent, tone, facial displays, and body movements, as well as overall appearance. Nixon, however, was ill in the days before the debate and appeared sweaty and gaunt. He also chose not to wear makeup, a decision that left his pale, unshaven face vulnerable.²⁹ Interestingly, while people who watched the debate thought Kennedy won, those listening on radio saw the debate as more of a draw.

While debates are not just about a candidate's looks, most debate rules contain language that prevents candidates from artificially enhancing their physical qualities. For example, prior rules have prohibited shoes that increase a candidate's height, banned prosthetic devices that change a candidate's physical appearance, and limited camera angles to prevent unflattering side and back shots. Candidates and their campaign managers are aware that visuals matter.

Debates are generally over by the end of October, just in time for Election Day. Beginning with the election of 1792, presidential



Sailors on the USS McCampbell, based out of Yokosuka, Japan, watch the first presidential debate between President Barack Obama and former Massachusetts governor Mitt Romney on October 4, 2012.

29. Shanto Iyengar. 2016. *Media Politics: A Citizen's Guide*, 3rd ed. New York: W.W. Norton.

elections were to be held in the thirty-four days prior to the “first Wednesday in December.”³⁰

In 1845, Congress passed legislation that moved the presidential Election Day to the first Tuesday after the first Monday in November, and in 1872, elections for the House of Representatives were also moved to that same Tuesday.³¹

The United States was then an agricultural country, and because a number of states restricted voting to property-owning males over twenty-one, farmers made up nearly 74 percent of voters.³²

30. 2nd Congress, Session I, “An Act relative to the Election of a President and Vice President of the United States, and Declaring the Office Who Shall Act as President in Case of Vacancies in the Offices both of President and Vice President,” Chapter 8, section 1, image 239. <http://memory.loc.gov/ammem/index.html> (November 1, 2015).

31. 28th Congress, Session II. 23 January 1845. “An Act to Establish a Uniform Time for Holding Elections for Electors of President and Vice President in all the States of the Union,” Statute II, chapter 1, image 721. <http://memory.loc.gov/ammem/index.html>; 42nd Congress, Session II, “An Act for the Apportionment of Representatives to Congress among the Several States According to the Ninth Census.” Chapter 11, section 3, <http://memory.loc.gov/ammem/index.html> (November 1, 2015).

32. Donald Ratcliffe. 2013. “The Right to Vote and the Rise

The tradition of Election Day to fall in November allowed time for the lucrative fall harvest to be brought in and the farming season to end. And, while not all members of government were of the same religion, many wanted to ensure that voters were not kept from the polls by a weekend religious observance. Finally, business and mercantile concerns often closed their books on the first of the month. Rather than let accounting get in the way of voting, the bill's language forces Election Day to fall between the second and eighth of the month.

The Electoral College

Once the voters have cast ballots in November and all the election season madness comes to a close, races for governors and local representatives may be over, but the constitutional process of electing a president has only begun. The electors of the **Electoral College** travel to their respective state capitols and cast their votes in mid-December, often by signing a certificate recording their vote. In most cases, electors cast their ballots for the candidate who won the majority of votes in their state. The states then forward the certificates to the U.S. Senate.

of Democracy, 1787–1828,” *Journal of the Early Republic* 33: 219–254; Stanley Lebergott. 1966. “Labor Force and Employment, 1800–1960,” In *Output, Employment, and Productivity in the United States after 1800*, ed. Dorothy S. Brady. Ann Arbor, Michigan: National Bureau of Economic Research, <http://www.nber.org/books/brad66-1>.



Counting electoral vote 1921, National Photo Company Collection, Library of Congress, no known restrictions on publication, at <https://www.loc.gov/item/npc2007003393/>

The number of [Electoral College](#) votes granted to each state equals the total number of representatives and senators that state has in the U.S. Congress or, in the case of Washington, DC, as many electors as it would have if it were a state. The number of representatives may fluctuate based on state population, which is determined every ten years by the U.S. Census, mandated by Article I, Section 2, of the Constitution. For the 2016 and 2020 presidential elections, there are a total of 538 electors in the Electoral College, and a majority of 270 electoral votes is required to win the presidency.

Once the electoral votes have been read by the president of the Senate (i.e., the vice president of the United States) during a special joint session of Congress in January, the presidential candidate who

received the majority of electoral votes is officially named president. Should a tie occur, the sitting House of Representatives elects the president, with each state receiving one vote. While this rarely occurs, both the 1800 and the 1824 elections were decided by the House of Representatives.

Electors cannot be elected officials nor can they work for the federal government. Since the Republican and Democratic parties choose faithful party members who have worked hard for their candidates, the modern system decreases the chance they will vote differently from the state's voters.

There is no guarantee of this, however. Occasionally there are examples of **faithless electors**. In 2000, the majority of the District of Columbia's voters cast ballots for Al Gore, and all three electoral votes should have been cast for him. Yet one of the electors cast a blank ballot, denying Gore a precious electoral vote, reportedly to contest the unequal representation of the District in the Electoral College. In 2004, one of the Minnesota electors voted for John Edwards, the vice presidential nominee, to be president and misspelled the candidate's last name in the process. Some believe this was a result of confusion rather than a political statement. The electors' names and votes are publicly available on the electoral certificates, which are scanned and documented by the National Archives and easily available for viewing online.

**PRESIDENTIAL ELECTOR
CERTIFICATE OF VOTE**

We, the undersigned, duly elected and qualified as electors for the President and Vice-President of the United States of America for the respective terms beginning on the twentieth day of January, 2005 and for the State of Minnesota, do appear by the annexed certificates marked and delivered as by the Governor of this State, its chief executive officer, having met and convened separately in the presence of the law, in the executive chamber of the State Capitol at Saint Paul, Minnesota on the first Monday after the second Wednesday in December 2004, being the thirtieth day of this month.

We hereby certify, that being so assembled and duly organized, we proceeded to vote by ballot, and balloted for President and Vice-President by distant ballot.

And we further certify that the following are two distinct lists, one of the votes for President and the other of the votes for Vice-President, so cast as aforesaid:

PERSONS VOTED FOR PRESIDENT	NUMBER OF VOTES
John Kerry	9
John Edwards	1
PERSONS VOTED FOR VICE-PRESIDENT	NUMBER OF VOTES
John Edwards	10

In Testimony whereof, and as required by the Twelfth Amendment to the Constitution of the United States, we have hereunto set our hands on the first Monday after the second Wednesday in December 2004, being the thirtieth day of this month.

PERSONS VOTED FOR PRESIDENT	PERSONS VOTED FOR VICE-PRESIDENT
Sonja Berg	Lil Ortendahl
Vi Grooms-Alban	Everett Pettiford
Matthew Little	Joan Schiebel
Michael Meyers	Frank Simon
Tim O'Brien	Chandler Harrison Stevens

(a)



(b)

In 2004, Minnesota had an error or faithless voter when one elector cast a vote for John Edwards for president (a). On July 8, 2004, presidential candidate John Kerry and his running mate John Edwards arrive for a campaign rally in Fort Lauderdale, Florida (b). (credit b: modification of work by Richard Block)

In forty-eight states and the District of Columbia, the candidate who wins the most votes in November receives all the state's electoral votes, and only the electors from that party will vote. This is often called the **winner-take-all system**. In two states, Nebraska and Maine, the electoral votes are divided. The candidate who wins the state gets two electoral votes, but the winner of each congressional district also receives an electoral vote. In 2008, for example, Republican John McCain won two congressional districts and the majority of the voters across the state of Nebraska, earning him four electoral votes from Nebraska. Obama won in one congressional district and earned one electoral vote from

Nebraska.³³ This Electoral College voting method is referred to as the **district system**.

Midterm Elections

Presidential elections garner the most attention from the media and political elites. Yet they are not the only important elections. The even-numbered years between presidential years, like 2014 and 2018, are reserved for congressional elections—sometimes referred to as **midterm elections** because they are in the middle of the president's term. Midterm elections are held because all members of the House of Representatives and one-third of the senators come up for reelection every two years.

During a presidential election year, members of Congress often experience the **coattail effect**, which gives members of a popular presidential candidate's party an increase in popularity and raises their odds of retaining office. During a midterm election year, however, the president's party often is blamed for the president's actions or inaction. Representatives and senators from the sitting president's party are more likely to lose their seats during a midterm election year. Many recent congressional realignments, in which the House or Senate changed from Democratic to Republican control, occurred because of this reverse-coattail effect during midterm elections. The most recent example is the 2010 election, in which control of the House returned to the Republican Party after two years of a Democratic presidency.

33. "Presidential Popular Vote Summary for All Candidates Listed on at Least One State Ballot," <http://www.fec.gov/pubrec/fe2008/tables2008.pdf> (November 7, 2015).

Questions to Consider

1. What problems will candidates experience with frontloading?
2. Why have fewer moderates won primaries than they used to?
3. How do political parties influence the state's primary system?
4. Why do parties prefer closed primaries to open primaries?

Terms to Remember

caucus—a form of candidate nomination that occurs in a town-hall style format rather than a day-long election; usually reserved for presidential elections

closed primary—an election in which only voters registered with a party may vote for that party's candidates

coattail effect—the result when a popular presidential candidate helps candidates from his or her party win their own elections

delegates—party members who are chosen to represent a particular candidate at the party's state- or national-level nominating convention

district system—the means by which electoral votes are

divided between candidates based on who wins districts and/or the state

Electoral College—the constitutionally created group of individuals, chosen by the states, with the responsibility of formally selecting the next U.S. president

incumbent—the current holder of a political office

midterm elections—the congressional elections that occur in the even-numbered years between presidential election years, in the middle of the president's term

open primary—an election in which any registered voter may vote in any party's primary or caucus

platform—the set of issues important to the political party and the party delegates

political action committees (PACs)—organizations created to raise money for political campaigns and spend money to influence policy and politics

super PACs—officially known as Independent Expenditure-Only Committees; organizations that can fundraise and spend as they please to support or attack a candidate but not contribute directly to a candidate or strategize with a candidate's campaign

top-two primary—a primary election in which the two candidates with the most votes, regardless of party, become the nominees for the general election

winner-take-all system—all electoral votes for a state are given to the candidate who wins the most votes in that state

72. Elections: Campaigns and Voting

Learning Objectives

- Compare campaign methods for elections
- Identify strategies campaign managers use to reach voters
- Analyze the factors that typically affect a voter's decision

Campaign managers know that to win an election, they must do two things: reach voters with their candidate's information and get voters to show up at the polls. To accomplish these goals, candidates and their campaigns will often try to target those most likely to vote. Unfortunately, these voters change from election to election and sometimes from year to year. Primary and caucus voters are different from voters who vote only during presidential general elections. Some years see an increase in younger voters turning out to vote. Elections are unpredictable, and campaigns must adapt to be effective.

Fundraising

Even with a carefully planned and orchestrated presidential run, early fundraising is vital for candidates. Money helps them win, and

the ability to raise money identifies those who are viable. In fact, the more money a candidate raises, the more he or she will continue to raise. EMILY's List, a political action group, was founded on this principle; its name is an acronym for "Early Money Is Like Yeast" (it makes the dough rise). This group helps progressive women candidates gain early campaign contributions, which in turn helps them get further donations.



(a)



(b)

EMILY's List candidates include members of Congress, such as Tammy Duckworth (D-IL) (a), and governors, such as Maggie Hassan (b) of New Hampshire, who is currently running for U.S. Senate. (credit b: modification of work by Roger H. Goun)

Early in the 2016 election season, several candidates had fundraised well ahead of their opponents. Hillary Clinton, Jeb Bush, and Ted Cruz were the top fundraisers by July 2015. Clinton reported \$47 million, Cruz with \$14 million, and Bush with \$11 million in contributions. In comparison, Bobby Jindal and George Pataki (who both dropped out relatively early) each reported less than \$1 million in

contributions during the same period. Bush later reported over \$100 million in contributions, while the other Republican candidates continued to report lower contributions. Media stories about Bush's fundraising discussed his powerful financial networking, while coverage of the other candidates focused on their lack of money. Donald Trump, the eventual Republican nominee, showed a comparatively low fundraising amount because he was self-funded.

Comparing Primary and General Campaigns

Although candidates have the same goal for primary and general elections, which is to win, these elections are very different from

each other and require a very different set of strategies. Primary elections are more difficult for the voter. There are more candidates vying to become their party's nominee, and party identification is not a useful cue because each party has many candidates rather than just one. In the 2016 presidential election, Republican voters in the early primaries were presented with a number of options, including Mike Huckabee, Donald Trump, Jeb Bush, Ted Cruz, Marco Rubio, John Kasich, Chris Christie, Carly Fiorina, Ben Carson, and more. (Huckabee, Christie, and Fiorina dropped out relatively early.) Democrats had to decide between Hillary Clinton, Bernie Sanders, and Martin O'Malley (who soon dropped out). Voters must find more information about each candidate to decide which is closest to their preferred issue positions. Due to time limitations, voters may not research all the candidates. Nor will all the candidates get enough media or debate time to reach the voters. These issues make campaigning in a primary election difficult, so campaign managers tailor their strategy.

First, name recognition is extremely important. Voters are unlikely to cast a vote for an unknown. Some candidates, like Hillary Clinton and Jeb Bush, have held or are related to someone who held national office, but most candidates will be governors, senators, or local politicians who are less well-known nationally. Barack Obama was a junior senator from Illinois and Bill Clinton was a governor from Arkansas prior to running for president. Voters across the country had little information about them, and both candidates needed media time to become known. While well-known candidates have longer records that can be attacked by the opposition, they also have an easier time raising campaign funds because their odds of winning are better. Newer candidates face the challenge of proving themselves during the short primary season and are more likely to lose.

Second, visibility is crucial when a candidate is one in a long parade of faces. Given that voters will want to find quick, useful information about each, candidates will try to get the media's attention and pick up momentum. Media attention is especially

important for newer candidates. Most voters assume a candidate's website and other campaign material will be skewed, showing only the most positive information. The media, on the other hand, are generally considered more reliable and unbiased than a candidate's campaign materials, so voters turn to news networks and journalists to pick up information about the candidates' histories and issue positions. Candidates are aware of voters' preference for quick information and news and try to get interviews or news coverage for themselves. Candidates also benefit from news coverage that is longer and cheaper than campaign ads.

For all these reasons, campaign ads in primary elections rarely mention political parties and instead focus on issue positions or name recognition. Many of the best primary ads help the voters identify issue positions they have in common with the candidate. In 2008, for example, Hillary Clinton ran a holiday ad in which she was seen wrapping presents. Each present had a card with an issue position listed, such as "bring back the troops" or "universal pre-kindergarten." In a similar, more humorous vein, Mike Huckabee gained name recognition and issue placement with his 2008 primary ad. The "HuckChuck" spot had Chuck Norris repeat Huckabee's name several times while listing the candidate's issue positions. Norris's line, "Mike Huckabee wants to put the IRS out of business," was one of many statements that repeatedly used Huckabee's name, increasing voters' recognition of it. While neither of these candidates won the nomination, the ads were viewed by millions and were successful as primary ads.

By the general election, each party has only one candidate, and campaign ads must accomplish a different goal with different voters. Because most party-affiliated voters will cast a ballot for their party's candidate, the campaigns must try to reach the independent and undecided, as well as try to convince their party members to get out and vote. Some ads will focus on issue and policy



In February 2008, Chuck Norris speaks at a rally for Mike Huckabee in College Station, Texas. (credit: modification of work by "ensign_beedrill"/Flickr)

positions, comparing the two main party candidates. Other ads will remind party loyalists why it is important to vote. President Lyndon B. Johnson used the infamous "Daisy Girl" ad, which cut from a little girl counting daisy petals to an atomic bomb being dropped, to explain why voters needed to turn out and vote for him. If the voters stayed home, Johnson implied, his opponent, Republican Barry Goldwater, might start an atomic war. The ad aired once as a paid ad on NBC before it was pulled, but the footage appeared on other news stations as newscasters discussed the controversy over it.¹

Another source of negative ads is from groups outside the campaigns. Sometimes, shadow campaigns, run by political action committees and other organizations without the coordination or guidance of candidates, also use negative ads to reach voters. Even

1. Drew Babb, "LBJ's 1964 Attack Ad 'Daisy' Leaves a Legacy for Modern Campaigns," *Washington Post*, 5 September 2014; "1964 Johnson vs. Goldwater," <http://www.livingroomcandidate.org/commercials/1964> (November 9, 2015).

before the *Citizens United* decision allowed corporations and interest groups to run ads supporting candidates, shadow campaigns existed. In 2004, the Swift Boat Veterans for Truth organization ran ads attacking John Kerry's military service record, and MoveOn attacked George W. Bush's decision to commit to the wars in Afghanistan and Iraq. In 2014, super PACs poured more than \$300 million into supporting candidates.²



Want to know how much money federal candidates and PACs are raising? Visit the Campaign Finance Disclosure Portal at the [Federal Election Commission](https://www.fec.gov/disclosure/) website.

General campaigns also try to get voters to the polls in closely contested states. In 2004, realizing that it would be difficult to convince Ohio Democrats to vote Republican, George W. Bush's campaign focused on getting the state's Republican voters to the polls. The volunteers walked through precincts and knocked on Republican doors to raise interest in Bush and the election. Volunteers also called Republican and former Republican households to remind them when and where to vote.³ The strategy

2. "Super PACs," <https://www.opensecrets.org/pacs/superpacs.php?cycle=2014> (November 11, 2015).

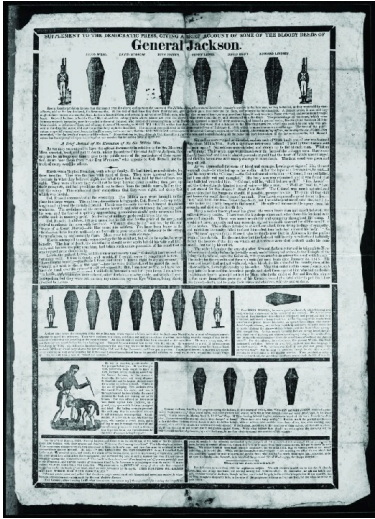
3. ...*So Goes the Nation*. 2006. Directed by Adam Del Deo

worked, and it reminded future campaigns that an organized effort to get out the vote is still a viable way to win an election.

Technology

Campaigns have always been expensive. Also, they have sometimes been negative and nasty. The 1828 “Coffin Handbill” that John Quincy Adams ran, for instance, listed the names and circumstances of the executions his opponent Andrew Jackson had ordered. This was in addition to gossip and verbal attacks against Jackson’s wife, who had accidentally committed bigamy when she married him without a proper divorce. Campaigns and candidates have not become more amicable in the years since then.

and James D. Stern. Beverly Hills: Endgame Entertainment.



The infamous “Coffin Handbill” used by John Quincy Adams against Andrew Jackson in the 1828 presidential election.

Once television became a fixture in homes, campaign advertising moved to the airwaves. Television allowed candidates to connect with the voters through video, allowing them to appeal directly to and connect emotionally with voters. While Adlai Stevenson and Dwight D. Eisenhower were the first to use television in their 1952 and 1956 campaigns, the ads were more like jingles with images. Stevenson’s “Let’s Not Forget the Farmer” ad had a catchy tune, but its animated images were not serious and contributed little to the

message. The “Eisenhower Answers America” spots allowed Eisenhower to answer policy questions, but his answers were glib rather than helpful.

John Kennedy’s campaign was the first to use images to show voters that the candidate was the choice for everyone. His ad, “Kennedy,” combined the jingle “Kennedy for me” and photographs of a diverse population dealing with life in the United States.



The [Museum of the Moving Image](#) has collected presidential campaign ads from 1952 through today, including the “Kennedy for Me” spot mentioned above. Take a look and see how

candidates have created ads to get the voters' attention and votes over time.

Over time, however, ads became more negative and manipulative. In reaction, the Bipartisan Campaign Reform Act of 2002, or McCain-Feingold, included a requirement that candidates stand by their ad and include a recorded statement within the ad stating that they approved the message. Although ads, especially those run by super PACs, continue to be negative, candidates can no longer dodge responsibility for them.

Candidates are also frequently using interviews on late night television to get messages out. Soft news, or infotainment, is a new type of news that combines entertainment and information. Shows like *The Daily Show* and *Last Week Tonight* make the news humorous or satirical while helping viewers become more educated about the events around the nation and the world.⁴

In 2008, Huckabee, Obama, and McCain visited popular programs like *The Daily Show*, *The Colbert Report*, and *Late Night with Conan O'Brien* to target informed voters in the under-45 age bracket. The candidates were able to show their funny sides and appear like average Americans, while talking a bit about their policy preferences. By fall of 2015, *The Late Show with Stephen Colbert* had already interviewed most of the potential presidential candidates,

4. "Public Knowledge of Current Affairs Little Changed by News and Information Revolutions," *Pew Research Center*, April 15, 2007.

including Hillary Clinton, Bernie Sanders, Jeb Bush, Ted Cruz, and Donald Trump.

The Internet has given candidates a new platform and a new way to target voters. In the 2000 election, campaigns moved online and created websites to distribute information. They also began using search engine results to target voters with ads. In 2004, Democratic candidate Howard Dean used the Internet to reach out to potential donors. Rather than host expensive dinners to raise funds, his campaign posted footage on his website of the candidate eating a turkey sandwich. The gimmick brought over \$200,000 in campaign donations and reiterated Dean's commitment to be a down-to-earth candidate. Candidates also use social media, such as Facebook, Twitter, and YouTube, to interact with supporters and get the attention of younger voters.

Voter Decision Making

The election environment is complex and most voters do not have time to research everything about the candidates and issues. Yet they will need to make a fully rational assessment of the choices for an elected office. To meet this goal, they tend to take shortcuts.

One popular shortcut is simply to vote using party affiliation. Many political scientists consider party-line voting to be rational behavior because citizens register for parties based upon either position preference or socialization. Similarly, candidates align with parties based upon their issue positions. A Democrat who votes for a Democrat is very likely selecting the candidate closest to his or her personal ideology. While party identification is a voting cue, it also makes for a logical decision.

Citizens also use party identification to make decisions via **straight-ticket voting**—choosing every Republican or Democratic Party member on the ballot. In some states, such as Texas or Michigan, selecting one box at the top of the ballot gives a single

ballot for the presidential seat, yet only 54 percent voted yes or no on retaining Nathan B. Coats for the state supreme court.⁵ Voters make decisions based upon candidates' physical characteristics, such as attractiveness or facial features.⁶

They may also vote based on gender or race, because they assume the elected official will make policy decisions based on a demographic shared with the voters. Candidates are very aware of voters' focus on these non-political traits. In 2008, a sizable portion of the electorate wanted to vote for either Hillary Clinton or Barack Obama because they offered new demographics—either the first woman or the first black president. Demographics hurt John McCain that year, because many people believed that at 71 he was too old to be president.⁷

Aside from party identification and demographics, voters will also look at issues or the economy when making a decision. For some

5. "Presidential Electors," <http://www.sos.state.co.us/pubs/elections/Results/Abstract/2012/general/president.html> (July 15, 2015); "Judicial Retention—Supreme Court," <http://www.sos.state.co.us/pubs/elections/Results/Abstract/2012/general/retention/supremeCourt.html> (July 15, 2015).

6. Lasse Laustsen. 2014. "Decomposing the Relationship Between Candidates' Facial Appearance and Electoral Success," *Political Behavior* 36, No. 4: 777–791.

7. Alan Silverleib. 15 June 2008. "Analysis: Age an Issue in the 2008 Campaign?" <http://www.cnn.com/2008/POLITICS/06/15/mccain.age/index.html?iref=newssearch>.

single-issue voters, a candidate's stance on abortion rights will be a major factor, while other voters may look at the candidates' beliefs on the Second Amendment and gun control. Single-issue voting may not require much more effort by the voter than simply using party identification; however, many voters are likely to seek out a candidate's position on a multitude of issues before making a decision. They will use the information they find in several ways.

Retrospective voting occurs when the voter looks at the candidate's past actions and the past economic climate and makes a decision only using these factors. This behavior may occur during economic downturns or after political scandals, when voters hold politicians accountable and do not wish to give the representative a second chance. Pocketbook voting occurs when the voter looks at his or her personal finances and circumstances to decide how to vote. Someone having a harder time finding employment or seeing investments suffer during a particular candidate or party's control of government will vote for a different candidate or party than the incumbent. Prospective voting occurs when the voter applies information about a candidate's past behavior to decide how the candidate will act in the future. For example, will the candidate's voting record or actions help the economy and better prepare him or her to be president during an economic downturn? The challenge of this voting method is that the voters must use a lot of information, which might be conflicting or unrelated, to make an educated guess about how the candidate will perform in the future. Voters do appear to rely on prospective and retrospective voting more often than on pocketbook voting.

In some cases, a voter may cast a ballot strategically. In these cases, a person may vote for a second- or third-choice candidate, either because his or her preferred candidate cannot win or in the hope of preventing another candidate from winning. This type of

voting is likely to happen when there are multiple candidates for one position or multiple parties running for one seat.⁸

In Florida and Oregon, for example, Green Party voters (who tend to be liberal) may choose to vote for a Democrat if the Democrat might otherwise lose to a Republican. Similarly, in Georgia, while a Libertarian may be the preferred candidate, the voter would rather have the Republican candidate win over the Democrat and will vote accordingly.⁹

One other way voters make decisions is through incumbency. In essence, this is retrospective voting, but it requires little of the voter. In congressional and local elections, incumbents win reelection up to 90 percent of the time, a result called the **incumbency advantage**. What contributes to this advantage and often persuades competent challengers not to run? First, incumbents have name recognition and voting records. The media is more likely to interview them because they have advertised their name over several elections and have voted on legislation affecting the state or district. Incumbents also have won election before, which increases the odds that political action committees and interest groups will give them money; most interest groups will not give money to a candidate destined to lose.

Incumbents also have franking privileges, which allows them a limited amount of free mail to communicate with the voters in their district. While these mailings may not be sent in the days leading

8. R. Michael Alvarez and Jonathan Nagler. 2000. "A New Approach for Modelling Strategic Voting in Multiparty Elections," *British Journal of Political Science* 30, No. 1: 57-75.

9. Nathan Thornburgh, "Could Third-Party Candidates Be Spoilers?" *Time*, 3 November 2008.

up to an election—sixty days for a senator and ninety days for a House member—congressional representatives are able to build a free relationship with voters through them.¹⁰ Moreover, incumbents have exiting campaign organizations, while challengers must build new organizations from the ground up. Lastly, incumbents have more money in their war chests than most challengers.

Another incumbent advantage is gerrymandering, the drawing of district lines to guarantee a desired electoral outcome. Every ten years, following the U.S. Census, the number of House of Representatives members allotted to each state is determined based on a state's population. If a state gains or loses seats in the House, the state must redraw districts to ensure each district has an equal number of citizens. States may also choose to redraw these districts at other times and for other reasons.¹¹ If the district is drawn to ensure that it includes a majority of Democratic or Republican Party members within its boundaries, for instance, then candidates from those parties will have an advantage.

Gerrymandering helps local legislative candidates and members of the House of Representatives, who win reelection over 90 percent of the time. Senators and presidents do not benefit from gerrymandering because they are not running in a district. Presidents and senators win states, so they benefit only from war chests and name recognition. This is one reason why senators

10. Matthew E. Glassman, "Congressional Franking Privilege: Background and Current Legislation," *Congressional Research Service*, CRS Report RS22771, December 11, 2007, <http://fas.org/sgp/crs/misc/RS22771.pdf>.

11. *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).

running in 2014, for example, won reelection only 82 percent of the time.¹²



Since 1960, the [American National Election Studies](https://www.anes.org/) has been asking a random sample of voters a battery of questions about how they voted. The data are available at the Inter-university Consortium for Political and Social Research at the University of Michigan.

Questions to Consider

1. In what ways is voting your party identification an informed choice? In what ways is it lazy?
2. Do physical characteristics matter when voters assess candidates? If so, how?

12. “Reelection Rates of the Years,” <https://www.opensecrets.org/bigpicture/reelect.php> (November 2, 2015).

Learning Objectives

ballot fatigue—the result when a voter stops voting for offices and initiatives at the bottom of a long ballot

incumbency advantage—the advantage held by officeholders that allows them to often win reelection

shadow campaign—a campaign run by political action committees and other organizations without the coordination of the candidate

straight-ticket voting —the practice of voting only for candidates from the same party

73. Elections and Other Methods of Participation: People Actively Engage

Learning Objectives

- Identify the different forms of and reasons for direct civic engagement by the people
- Summarize the steps needed to place initiatives on a ballot
- Explain why some policies are made by elected representatives and others by voters

The majority of elections in the United States are held to facilitate indirect engagement with the election process. Elections allow the people to pick representatives to serve in government and make decisions on the citizens' behalf. Representatives pass laws, implement taxes, and carry out decisions. Although direct democracy had been used in some of the colonies, the framers of the *Constitution* granted voters no legislative or executive powers, because they feared the masses would make poor decisions and be susceptible to whims. States that formed and joined the United States after the Civil War often assigned their citizens some methods of directly implementing laws or removing corrupt politicians. Citizens now use these powers at the ballot to change laws and direct public policy in their states.

Democratic ideals may be realized when policy questions go

directly to the voters for a decision. These decisions include funding, budgets, candidate removal, candidate approval, policy changes, and constitutional amendments. Not all states allow direct democracy, nor does the United States government.

Active engagement by the people may occur locally or statewide, allowing citizens to propose and pass laws that affect local towns or counties. Towns in Massachusetts, for example, may choose to use town meetings, which is a meeting comprised of the town's eligible voters, to make decisions on budgets, salaries, and local laws.¹

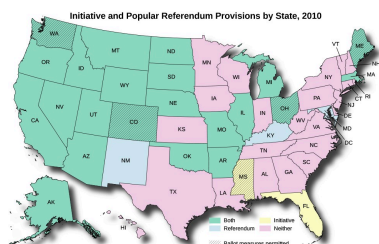


To learn more about what type of direct democracy is practiced in your state, visit the University of Southern California's [Initiative & Referendum Institute](#). This site also allows you to look up initiatives and measures that have appeared on state ballots.

Statewide methods of engagement similar to direct democracy practices allow citizens to propose and pass laws that affect state constitutions, state budgets, and more. Most states in the western half of the country allow citizens all forms of direct democracy, while most states on the eastern and southern regions allow few or none of these forms. States that joined the United States after the

1. "Citizen's Guide to Town Meetings," http://www.sec.state.ma.us/cis/cispdf/Guide_to_Town_Meetings.pdf (November 7, 2015).

Civil War are more likely to have direct democracy, possibly due to the influence of Progressives during the late 1800s and early 1900s. Progressives believed citizens should be more active in government and democracy, a hallmark of direct democracy.



This map shows which states allow citizens to place laws and amendments on the ballot for voter approval or repeal.

A **referendum** asks citizens to confirm or repeal a decision made by the government. A legislative referendum occurs when a legislature passes a law or a series of constitutional amendments and presents them to the voters to ratify with a yes or no vote. A judicial appointment to a state supreme court may require voters to

confirm whether the judge should remain on the bench. Popular referendums occur when citizens petition to place a referendum on a ballot to repeal legislation enacted by their state government. This form of direct democracy gives citizens a limited amount of power, but it does not allow them to overhaul policy or circumvent the government.

Initiative or proposition is normally a law or constitutional amendment proposed and passed by the citizens of a state. Initiatives completely bypass the legislatures and governor, but they are subject to review by the state courts if they are not consistent with the state or national constitution. The process to pass an initiative is not easy and varies from state to state. Most states require that a petitioner or the organizers supporting an initiative file paperwork with the state and include the proposed text of the initiative. This allows the state or local office to determine whether the measure is legal, as well as estimate the cost of implementing it. This approval may come at the beginning of the process or after organizers have collected signatures. The initiative may be reviewed by the state attorney general, as in Oregon's procedures, or by

another state official or office. In Utah, the lieutenant governor reviews measures to ensure they are constitutional.

Next, organizers gather registered voters' signatures on a petition. The number of signatures required is often a percentage of the number of votes from a past election. In California, for example, the required numbers are 5 percent (law) and 8 percent (amendment) of the votes in the last gubernatorial election. This means through 2018, it will take 365,880 signatures to place a law on the ballot and 585,407 to place a constitutional amendment on the ballot.²

Once the petition has enough signatures from registered voters, it is approved by a state agency or the secretary of state for placement on the ballot. Signatures are verified by the state or a county elections office to ensure the signatures are valid. If the petition is approved, the initiative is then placed on the next ballot, and the organization campaigns to voters.

While the process is relatively clear, each step can take a lot of time and effort. First, most states place a time limit on the signature collection period. Organizations may have only 150 days to collect signatures, as in California, or as long as two years, as in Arizona. For larger states, the time limit may pose a dilemma if the organization is trying to collect more than 500,000 signatures from registered voters. Second, the state may limit who may circulate the petition and collect signatures. Some states, like Colorado, restrict what a signature collector may earn, while Oregon bans payments to signature-collecting groups. And the minimum number of signatures required affects the number of ballot measures. Arizona had more than sixty ballot measures on the 2000 general election ballot, because the state requires so few signatures to get an

2. "How to Qualify an Initiative," <http://www.sos.ca.gov/elections/ballot-measures/how-qualify-initiative/> (November 13, 2015).

initiative on the ballot. Oklahomans see far fewer ballot measures because the number of required signatures is higher.

Another consideration is that, as we've seen, voters in primaries are more ideological and more likely to research the issues. Measures that are complex or require a lot of research, such as a lend-lease bond or changes in the state's eminent-domain language, may do better on a primary ballot. Measures that deal with social policy, such as laws preventing animal cruelty, may do better on a general election ballot, when more of the general population comes out to vote. Proponents for the amendments or laws will take this into consideration as they plan.

Finally, the **recall** allows voters to decide whether to remove a government official from office. All states have ways to remove officials, but removal by voters is less common. The recall of California Governor Gray Davis in 2003 and his replacement by Arnold Schwarzenegger is perhaps one of the more famous such recalls. The recent attempt by voters in Wisconsin to recall Governor Scott Walker show how contentious a recall can be. Walker survived recall.³

Politicians are often unwilling to wade into highly political waters if they fear it will harm their chances for reelection. When a legislature refuses to act or change current policy, initiatives allow citizens to take part in the policy process and end the impasse. In Colorado, Amendment 64 allowed the recreational use of marijuana by adults, despite concerns that state law would then conflict with national law. Colorado and Washington's legalization of recreational marijuana use started a trend, leading to more states adopting similar laws.

3. David A. Fahrenthold and Rachel Weiner, "Gov. Walker Survives Recall in Wisconsin," *Washington Post*, 5 June 2012.

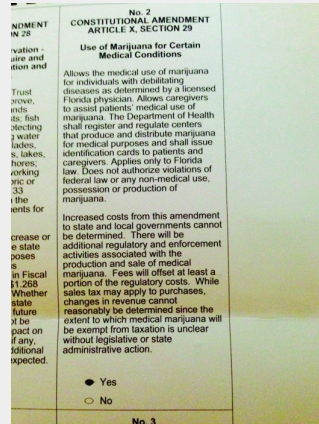
Too Much Direct Engagement?

How much direct engagement is too much? When citizens want one policy direction and government prefers another, who should prevail?

Consider recent laws and decisions about marijuana. California was the first state to allow the use of medical marijuana, after the passage of Proposition 215 in 1996. Just a few years later, however, in *Gonzales v. Raich* (2005), the Supreme Court ruled that the U.S.

government had the authority to criminalize the use of marijuana. In 2009, then-Attorney General Eric Holder said the federal government would not seek to prosecute patients using marijuana medically, citing limited resources and other priorities. Perhaps emboldened by the national government's stance, Colorado voters approved recreational marijuana use in 2012. Since then, other states have followed. Twenty-three states and the District of Columbia now have laws in place that legalize the use of marijuana to varying degrees. In a number of these cases, the decision was made by voters through initiatives and direct democracy.

So where is the problem? First, while citizens of these states believe smoking or consuming marijuana should be legal, the U.S. government does not. The Controlled Substances Act (CSA), passed by Congress in 1970, declares marijuana a dangerous drug and makes its sale a prosecutable act. And despite Holder's statement, a



In 2014, Florida voters considered a proposed amendment to the Florida constitution that would allow doctors to recommend the use of marijuana for patient use. The ballot initiative received 58 percent of the vote, just short of the 60 percent required to pass in Florida.

2013 memo by James Cole, the deputy attorney general, reminded states that marijuana use is still illegal.⁴

But the federal government cannot enforce the CSA on its own; it relies on the states' help. And while Congress has decided not to prosecute patients using marijuana for medical reasons, it has not waived the Justice Department's right to prosecute recreational use.⁵

The states and its citizens are in an interesting position. States have a legal obligation to enforce state laws and the state constitution, yet they also must follow the laws of the United States. Citizens who use marijuana legally in their state are not using it legally in their country. This leads many to question whether initiative, as a form of direct democracy, gives citizens too much power.

Any group can create an organization to spearhead an initiative or

4. James M. Cole, "Memorandum for All United States Attorneys," *U.S. Department of Justice*, August 29, 2013, <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.
5. "State Medical Marijuana Laws," <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx#2> (July 20, 2015).

referendum. And because the cost of collecting signatures can be high in many states, signature collection may be backed by interest groups or wealthy individuals wishing to use the initiative to pass pet projects. The 2003 recall of California governor Gray Davis faced difficulties during the signature collection phase, but \$2 million in donations by Representative Darrell Issa (R-CA) helped the organization attain nearly one million signatures.⁶

Many commentators argued that this example showed direct civic engagement is not always a process by the people, but rather a process used by the wealthy and business.

Questions to Consider

1. What problems would a voter face when trying to pass an initiative or recall?
2. Why do some argue that direct engagement is simply a way for the wealthy and businesses to get their own policies passed?
3. What factors determine whether people turn out to vote in U.S. elections?
4. What can be done to increase voter turnout in the United States?
5. In what ways do primary elections contribute to the rise of partisanship in U.S. politics?

6. Mark Barabak, “10 memorable moments from the recall of Gov. Gray Davis, 10 years later,” *Los Angeles Times*, <http://www.latimes.com/nation/la-me-recall-pictures-20131001-photogallery.html> (August 1, 2015).

6. How does social media affect elections and campaigns? Is this a positive trend? Why or why not?
7. Should states continue to allow ballot initiatives and other forms of direct democracy? Why or why not?
8. Is it a good idea to give citizens the power to pass laws? Or should this power be subjected to checks and balances, as legislative bills are?

Terms to Remember

initiative—law or constitutional amendment proposed and passed by the voters and subject to review by the state courts; also called a proposition

recall—the removal of a politician or government official by the voters

referendum—a yes or no vote by citizens on a law or candidate proposed by the state government

PART XVI
MEDIA

74. Media: Influence and Impact



On August 8, 2015, activists for Black Lives Matter in Seattle commandeered presidential candidate Bernie Sanders' campaign rally in an effort to get their message out. (credit: modification of work by Tiffany Von Arnim)

Democratic primary candidate Bernie Sanders arrived in Seattle on August 8, 2015, to give a speech at a rally to promote his presidential campaign. Instead, the rally was interrupted—and eventually co-opted—by activists for Black Lives Matter.¹

Why did the group risk alienating Democratic voters by preventing Sanders from speaking?

While some questioned its tactics, the organization's move

1. Dan Merica, “Black Lives Matter Protesters Shut Down Sanders Event in Seattle,” CNN, 10 August 2015.

underscores how important the media are to gaining recognition, and the lengths to which organizations are willing to go to get media attention.²

Media: Questions to Consider

1. What does it mean to have a free news media?
2. What regulations limit what media can do?
3. How do the media contribute to informing citizens and monitoring politicians and the government, and how do we measure their impact?

2. Conor Friedersdorf, “A Conversation about Black Lives Matter and Bernie Sanders,” *The Atlantic*, 21 August 2015.

75. Media: What is their function?

Learning Objectives

- Explain what the media are and how they are organized
- Describe the main functions of the media in a free society
- Compare different media formats and their respective audiences

What started as **print** (media) journalism was subsequently supplemented by radio coverage, then network television, followed by cable television. Now, with the addition of the Internet, blogs and social media—a set of applications or web platforms that allow users to immediately communicate with one another—give citizens a wide variety of sources for instant news of all kinds. The Internet also allows citizens to initiate public discussion by uploading images and video for viewing, such as videos documenting interactions between citizens and the police, for example. Provided we are connected digitally, we have a bewildering amount of choices for finding information about the world. In fact, some might say that compared to the tranquil days of the 1970s, when we might read the morning newspaper over breakfast and take in the network news at night, there are now too many choices in today's increasingly complex world of information. This reality may make the news media all the more important to structuring and shaping narratives about

U.S. politics. The proliferation of competing information sources like blogs and social media may actually weaken the power of the news media relative to the days when news media monopolized our attention.

The term media defines a number of different communication formats from television media, which share information through broadcast airwaves, to print media, which rely on printed documents. The collection of all forms of media that communicate information to the general public is called **mass media**, including television, print, radio, and Internet. One of the primary reasons citizens turn to the media is for news. We expect the media to cover important political and social events and information in a concise and neutral manner.

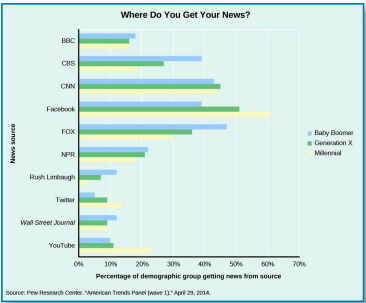
To accomplish its work, the media employs a number of people in varied positions. Journalists and reporters are responsible for uncovering news stories by keeping an eye on areas of public interest, like politics, business, and sports. Once a journalist has a lead or a possible idea for a story, he or she researches background information and interviews people to create a complete and balanced account. Editors work in the background of the newsroom, assigning stories, approving articles or packages, and editing content for accuracy and clarity. Publishers are people or companies that own and produce print or digital media. They oversee both the content and finances of the publication, ensuring the organization turns a profit and creates a high-quality product to distribute to consumers. Producers oversee the production and finances of visual media, like television, radio, and film.

The work of the news media *should* differ from **public relations**, which is communication carried out to improve the image of companies, organizations, or candidates for office. *Public relations is not a neutral information form, and accusations abound against media outlets acting as partisan promoters rather than ethically neutral journalists.* While journalists write stories to inform the public, a public relations spokesperson helps an individual or organization get positive press. Public relations materials normally

appear as press releases or paid advertisements in newspapers and other media outlets. Some less reputable publications, however, publish paid articles under the news banner, blurring the line between journalism and public relations.

Media Types

Each form of media has its own complexities and is used by different demographics.



Age greatly influences the choice of news sources. Baby boomers are more likely to get news and information from television, while members of generation X and millennials are more likely to use social media.

Television alone offers viewers a variety of formats. Programming may be scripted, like dramas or comedies or unscripted, like game shows or reality programs, or informative, such as news programming. Most local stations are affiliated with a national network corporation, and they broadcast national network programming to their local viewers.

Before the existence of cable and fiber optics, networks needed to own local affiliates to have access to the local station's transmission towers. Towers have a limited radius, so each network needed an affiliate in each major city to reach viewers. While cable technology has lessened networks' dependence on aerial signals, some viewers still use antennas and receivers to view programming broadcast from local towers.

Affiliates, by agreement with the networks, give priority to network news and other programming chosen by the affiliate's national media corporation. Local affiliate stations are told when to

air programs or commercials, and they diverge only to inform the public about a local or national emergency.

Most affiliate stations will show local news before and after network programming to inform local viewers of events and issues. Network news has a national focus on politics, international events, the economy, and more. Local news, on the other hand, is likely to focus on matters close to home, such as regional business, crime, sports, and weather.¹

Cable programming offers national networks a second method to directly reach local viewers. As the name implies, cable stations transmit programming directly to a local cable company hub, which then sends the signals to homes through coaxial or fiber optic cables. Because cable does not broadcast programming through the airwaves, cable networks can operate across the nation directly without local affiliates. Instead they purchase broadcasting rights for the cable stations they believe their viewers want. For this reason, cable networks often specialize in different types of programming.

The on-demand nature of the Internet has created many opportunities for news outlets. Unfortunately, the proliferation of online news has also increased the amount of poorly written material with little editorial oversight, and readers must be cautious when reading Internet news sources. Even large news outlets, like the Associated Press, have published articles with errors in their haste to get a story out.

The Internet also facilitates the flow of information through social media, which allows users to instantly communicate with one another and share with audiences that can grow exponentially. Social media changes more rapidly than the other media formats.

1. Jeremy Lipschultz and Michael Hilt. 2003. "Race and Local Television News Crime Coverage," *Studies in Media & Information Literacy Education* 3, No. 4: 1-10.

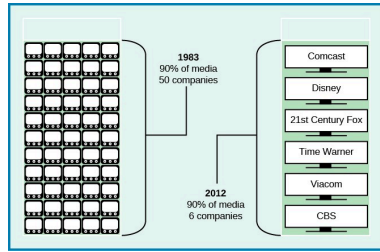
A growing number of these sites also allow users to comment anonymously, leading to increases in threats and abuse. The site 4chan, for example, was linked to the 2015 shooting at an Oregon community college.²

Regardless of where we get our information, the various media avenues available today, versus years ago, make it much easier for everyone to be engaged. The question is: Who controls the media we rely on? Most media are controlled by a limited number of conglomerates. A conglomerate is a corporation made up of a number of companies, organizations, and media networks. In the 1980s, more than fifty companies owned the majority of television and radio stations and networks. Now, only six conglomerates control most of the broadcast media in the United States: CBS Corporation, Comcast, Time Warner, 21st Century Fox (formerly News Corporation), Viacom, and The Walt Disney Company.³

The Walt Disney Company, for example, owns the ABC Television Network, ESPN, A&E, and Lifetime, in addition to the Disney Channel. Viacom owns BET, Comedy Central, MTV, Nickelodeon, and Vh2. Time Warner owns Cartoon Network, CNN, HBO, and TNT, among others. While each of these networks has its own programming, in the end, the conglomerate can make a policy that affects all stations and programming under its control.

2. Daniel Marans, "Did the Oregon Shooter Warn of His Plans on 4chan?" *Huffington Post*, 1 October 2015.
3. Vanna Le, "Global 2000: The World's Largest Media Companies of 2014," *Forbes*, 7 May 2014.

Conglomerates can create a monopoly on information by controlling a sector of a market. When a media conglomerate has policies or restrictions, they will apply to all stations or outlets under its ownership, potentially limiting the information citizens receive. Conglomerate ownership also creates circumstances in which censorship may occur.



In 1983, fifty companies owned 90 percent of U.S. media. By 2012, just six conglomerates controlled the same percentage of U.S. media outlets.

Newspapers too have experienced the pattern of concentrated ownership. Gannett Company, while also owning television media, holds a large number of newspapers and news magazines in its control. Many of these were acquired quietly, without public notice or discussion. Gannett's 2013 acquisition of publishing giant A.H. Belo Corporation caused some concern and news coverage, however. The sale would have allowed Gannett to own both an NBC and a CBS affiliate in St. Louis, Missouri, giving it control over programming and advertising rates for two competing stations. The U.S. Department of Justice required Gannett to sell the station owned by Belo to ensure market competition and multi-ownership in St. Louis.⁴

4. Meg James, "DOJ Clears Gannett-Belo Deal but Demands Sale of St. Louis TV Station," *Los Angeles Times*, 16 December 2013.



communication.

If you are concerned about the lack of variety in the media and the market dominance of media conglomerates, the non-profit organization, [Free Press](#), tracks and promotes open

These changes in the format and ownership of media raise the question whether the media still operate as an independent source of information. Is it possible that corporations and CEOs now control the information flow, making profit more important than the impartial delivery of information? The reality is that media outlets, whether newspaper, television, radio, or Internet, are businesses. They have expenses and must raise revenues. At the same time, we expect the media to entertain, inform, and alert us without bias. The media may also serve as a point of access for the public. The media must provide some public services, while following laws and regulations. Reconciling these goals may not always be possible.

Functions of the Media

The media exist to fill a number of functions. Whether the medium is a newspaper, a radio, or a television newscast, a corporation behind the scenes must bring in revenue and pay for the cost of the product. Revenue comes from advertising and sponsors. Corporations will not pay for advertising if there are no viewers or readers.

The media should also function as watchdogs of society and of

public officials. Some refer to the media as the fourth estate, with the branches of government being the first three estates and the media equally participating as the fourth. This role helps maintain the republic and keeps the government accountable for its actions, even if a branch of the government is reluctant to open itself to public scrutiny. As much as social scientists would like citizens to be informed and involved in politics and events, the reality is that we are not. So the media, especially journalists, keep an eye on what is happening and sounds an alarm when the public needs to pay attention.⁵

The media also engages in **agenda setting**, which is the act of choosing which issues or topics deserve public discussion. For example, in the early 1980s, famine in Ethiopia drew worldwide attention, which resulted in increased charitable giving to the country. Yet the famine had been going on for a long time before it was discovered by western media. Even after the discovery, it took video footage to gain the attention of the British and U.S. populations and start the aid flowing.⁶

Today, numerous examples of agenda setting show how important the media are when trying to prevent further emergencies or humanitarian crises. In the spring of 2015, when the Dominican Republic was preparing to exile Haitians and undocumented (or under documented) residents, major U.S. news outlets remained silent. However, once the story had been covered several times by Al

5. John Zaller. 2003. "A New Standard of News Quality: Burglar Alarms for the Monitorial Citizen," *Political Communication* 20, No. 2: 109–130.
6. Suzanne Ranks, "Ethiopian Famine: How Landmark BBC Report Influenced Modern Coverage," *Guardian*, 22 October 2014.

Jazeera, a state-funded broadcast company based in Qatar, ABC, the *New York Times*, and other network outlets followed.⁷ With major network coverage came public pressure for the U.S. government to act on behalf of the Haitians.⁸

Before the Internet, traditional media determined whether citizen photographs or video footage would become “news.” In 1991, a private citizen’s camcorder footage showed four police officers beating an African American motorist named Rodney King in Los Angeles. After appearing on local independent television station, KTLA-TV, and then the national news, the event began a national discussion on police brutality and ignited riots in Los Angeles.⁹

The agenda-setting power of traditional media is often appropriated by social media and smartphones. Tumblr, Facebook, YouTube, and other Internet sites allow witnesses to instantly upload images and accounts of events and forward the link to friends. Some uploads go viral and attract the attention of the mainstream media, but large network newscasts and major

7. Hisham Aidi, “Haitians in the Dominican Republic in Legal Limbo,” *Al Jazeera*, 10 April 2015.
8. “Pressure the Government of the Dominican Republic to Stop its Planned ‘Cleaning’ of 250,000 Black Dominicans,” <https://petitions.whitehouse.gov/petition/pressure-government-dominican-republic-stop-its-planned-cleaning-250000-black-dominicans> (November 26, 2015); Led Black, “Prevent Humanitarian Tragedy in Dominican Republic,” CNN, 23 June 2015.
9. Erik Ortiz, “George Holliday, Who Taped Rodney King Beating, Urges Others to Share Videos,” NBC, 9 June 2015.

newspapers are still more powerful at initiating or changing a discussion.

While journalists reporting the news try to present information in an unbiased fashion, sometimes they put forth opinions and analysis of complicated issues.

Questions to Consider

1. How can conglomerates censor information?
2. In what ways is media responsible for promoting the public good?
3. Why is social media an effective way to spread news and information?
4. Social media allow citizens and businesses to quickly forward information and news to large groups of friends and followers.

Terms to Remember

agenda setting—the media's ability to choose which issues or topics get attention

mass media—the collection of all media forms that communicate information to the general public

print media—newspapers, news magazines, news you may hold in your hand

public relations—biased communication intended to

improve the image of people, companies, or organizations

76. Media: How have they evolved?

Learning Objectives

- Discuss the history of major media formats
- Compare important changes in media types over time
- Explain how citizens learn political information from the media

The evolution of the media has been fraught with concerns and problems. Accusations of mind control, bias, and poor quality have been thrown at the media on a regular basis. Yet the growth of communications technology allows people today to find more information more easily than any previous generation. Mass media can be print, radio, television, or Internet news. They can be local, national, or international. They can be broad or limited in their focus. The choices are tremendous.

Print Media

Early news was presented to local populations through the print press. While several colonies had printers and occasional newspapers, high literacy rates combined with the desire for self-government made Boston a perfect location for the creation of

a newspaper, and the first continuous press was started there in 1704.¹

Newspapers spread information about local events and activities. The Stamp Tax of 1765 raised costs for publishers, however, leading several newspapers to fold under the increased cost of paper. The repeal of the Stamp Tax in 1766 quieted concerns for a short while, but editors and writers soon began questioning the right of the British to rule over the colonies. Newspapers took part in the effort to inform citizens of British misdeeds and incite attempts to revolt. Readership across the colonies increased to nearly forty thousand homes (among a total population of two million), and daily papers sprang up in large cities.²

Although newspapers united for a common cause during the Revolutionary War, the divisions that occurred during the Constitutional Convention and the United States' early history created a change. The publication of the *Federalist Papers*, as well as the *Anti-Federalist Papers*, in the 1780s, moved the nation into the party press era, in which partisanship and political party loyalty dominated the choice of editorial content. One reason was cost. Subscriptions and advertisements did not fully cover printing costs, and political parties stepped in to support presses that aided the parties and their policies. Papers began printing party propaganda and messages, even publicly attacking political leaders like George Washington. Despite the antagonism of the press, Washington and several other founders felt that freedom of the press was important

1. Fellow. *American Media History*.

2. "Population in the Colonial and Continental Periods," <http://www2.census.gov/prod2/decennial/documents/00165897ch01.pdf> (November 18, 2015); Fellow. *American Media History*.

for creating an informed electorate. Indeed, freedom of the press is enshrined in the Bill of Rights in the first amendment.

Between 1830 and 1860, machines and manufacturing made the production of newspapers faster and less expensive. Benjamin Day's paper, the *New York Sun*, used technology like the linotype machine to mass-produce papers. Roads and waterways were expanded, decreasing the costs of distributing printed materials to subscribers. New newspapers popped up. The popular penny press papers and magazines contained more gossip than news, but they were affordable at a penny per issue. Over time, papers expanded their coverage to include racing, weather, and educational materials. By 1841, some news reporters considered themselves responsible for upholding high journalistic standards, and under the editor (and politician) Horace Greeley, the *New-York Tribune* became a nationally respected newspaper. By the end of the Civil War, more journalists and newspapers were aiming to meet professional standards of accuracy and impartiality.³



(a)



(b)

Benjamin Day (a) founded the first U.S. penny press, *The Sun*, in 1833. *The Sun*, whose front page from November 26, 1834, is shown above (b), was a morning newspaper published in New York from 1833 to 1950.

Yet readers still wanted to be entertained. Joseph Pulitzer and the *New York World* gave them what they wanted. The tabloid-style paper included editorial pages, cartoons, and pictures, while the front-page news was sensational and scandalous. This style of coverage became known as **yellow journalism**. Ads sold quickly thanks to the paper's popularity, and the Sunday

edition became a regular feature of the newspaper. As the *New York*

3. Fellow. American Media History.

World's circulation increased, other papers copied Pulitzer's style in an effort to sell papers. Competition between newspapers led to increasingly sensationalized covers and crude issues.

In 1896, Adolph Ochs purchased the *New York Times* with the goal of creating a dignified newspaper that would provide readers with important news about the economy, politics, and the world rather than gossip and comics. The *New York Times* brought back the informational model, which exhibits impartiality and accuracy and promotes transparency in government and politics. With the arrival of the Progressive Era, the media began **muckraking**: the writing and publishing of news coverage that exposed corrupt business and government practices. Investigative work like Upton Sinclair's serialized novel *The Jungle* led to changes in the way industrial workers were treated and local political machines were run. The Pure Food and Drug Act and other laws were passed to protect consumers and employees from unsafe food processing practices. Local and state government officials who participated in bribery and corruption became the centerpieces of exposés.

Some muckraking journalism still appears today, and the quicker movement of information through the system would seem to suggest an environment for yet more investigative work and the punch of exposés than in the past. However, at the same time there are fewer journalists being hired than there used to be. The scarcity of journalists and the lack of time to dig for details in a 24-hour, profit-oriented news model make investigative stories rare.⁴

There are two potential concerns about the decline of investigative journalism in the digital age. First, one potential shortcoming is that the quality of news content will become uneven in depth and quality, which could lead to a less informed citizenry.

4. Lars Willnat and David H. Weaver. 2014. *The American Journalist in the Digital Age: Key Findings*. Bloomington, IN: School of Journalism, Indiana University.

Second, if investigative journalism in its systematic form declines, then the cases of wrongdoing that are the objects of such investigations would have a greater chance of going on undetected. In the twenty-first century, newspapers have struggled to stay financially stable. Print media earned \$44.9 billion from ads in 2003, but only \$16.4 billion from ads in 2014.⁵

Given the countless alternate forms of news, many of which are free, newspaper subscriptions have fallen. Advertising and especially classified ad revenue dipped. Many newspapers now maintain both a print and an Internet presence in order to compete for readers. The rise of free news blogs, such as the *Huffington Post*, have made it difficult for newspapers to force readers to purchase online subscriptions to access material they place behind a digital paywall. Some local newspapers, in an effort to stay visible and profitable, have turned to social media, like Facebook and Twitter. Stories can be posted and retweeted, allowing readers to comment and forward material.⁶

Yet, overall, newspapers have adapted, becoming leaner—though less thorough and investigative—versions of their earlier selves.

Radio

Radio news made its appearance in the 1920s. The National

5. Michael Barthel. 29 April 2015. “Newspapers: Factsheet,” <http://www.journalism.org/2015/04/29/newspapers-fact-sheet/>.

6. “Facebook and Twitter—New but Limited Parts of the Local News System,” *Pew Research Center*, 5 March 2015.

Broadcasting Company (NBC) and the Columbia Broadcasting System (CBS) began running sponsored news programs and radio dramas. Comedy programs, such as *Amos 'n' Andy*, *The Adventures of Gracie*, and *Easy Aces*, also became popular during the 1930s, as listeners were trying to find humor during the Depression. Talk shows, religious shows, and educational programs followed, and by the late 1930s, game shows and quiz shows were added to the airwaves. Almost 83 percent of households had a radio by 1940, and most tuned in regularly.⁷

Not just something to be enjoyed by those in the city, the proliferation of the radio brought communications to rural America as well. News and entertainment programs were also targeted to rural communities. WLS in Chicago provided the *National Farm and Home Hour* and the *WLS Barn Dance*. WSM in Nashville began to broadcast the live music show called the *Grand Ole Opry*, which is still broadcast every week and is the longest live broadcast radio show in U.S. history.⁸



(a)



(b)

The “golden age of radio” included comedy shows like *Easy Aces*, starring Goodman and Jane Ace (a), and *Amos 'n' Andy*, starring Freeman Gosden and Charles Correll, shown here celebrating their program’s tenth anniversary in 1938 (b). These programs helped amuse families during the dark years of the Depression.

7. “1940 Census,” <http://www.census.gov/1940census> (September 6, 2015).
8. Steve Craig. 2009. *Out of the Dark: A History of Radio and Rural America*. Tuscaloosa, AL: University of Alabama Press.

As radio listenership grew, politicians realized that the medium offered a way to reach the public in a personal manner. Warren Harding was the first president to regularly give speeches over the radio. President Herbert Hoover used radio as well, mainly to announce government programs on aid and unemployment relief.⁹

Yet it was Franklin D. Roosevelt who became famous for harnessing the political power of radio. On entering office in March 1933, President Roosevelt needed to quiet public fears about the economy and prevent people from removing their money from the banks. He delivered his first radio speech eight days after assuming the presidency:

“My friends: I want to talk for a few minutes with the people of the United States about banking—to talk with the comparatively few who understand the mechanics of banking, but more particularly with the overwhelming majority of you who use banks for the making of deposits and the drawing of checks. I want to tell you what has been done in the last few days, and why it was done, and what the next steps are going to be.”¹⁰

Roosevelt spoke directly to the people and addressed them as equals. One listener described the chats as soothing, with the president acting like a father, sitting in the room with the family,

9. “Herbert Hoover: Radio Address to the Nation on Unemployment Relief,” *The American Presidency Project*, 18 October 1931, <http://www.presidency.ucsb.edu/ws/?pid=22855>.

10. “Franklin Delano Roosevelt: First Fireside Chat,” <http://www.americanrhetoric.com/speeches/fdrfirstfiresidechat.html> (August 20, 2015).

cutting through the political nonsense and describing what help he needed from each family member.¹¹

Roosevelt would sit down and explain his ideas and actions directly to the people on a regular basis, confident that he could convince voters of their value.¹²

His speeches became known as “fireside chats” and formed an important way for him to promote his New Deal agenda. Roosevelt’s combination of persuasive rhetoric and the media allowed him to expand both the government and the presidency beyond their traditional roles.¹³

11. “The Fireside Chats,” <https://www.history.com/topics/fireside-chats> (November 20, 2015); Fellow. *American Media History*, 256.
12. “FDR: A Voice of Hope,” <http://www.history.com/topics/fireside-chats> (September 10, 2015).
13. Mary E. Stuckey. 2012. “FDR, the Rhetoric of Vision, and the Creation of a National Synoptic State.” *Quarterly Journal of Speech* 98, No. 3: 297–319.



(a)



(b)

As radio listenership became widespread in the 1930s (a), President Franklin D. Roosevelt took advantage of this new medium to broadcast his “fireside chats” and bring ordinary Americans into the president’s world (b). (credit a: modification of work by George W. Ackerman; credit b: modification of work by the Library of Congress)

During this time, print news still controlled much of the information flowing to the public. Radio news programs were limited in scope and number. But in the 1940s the German annexation of Austria, conflict in Europe, and World War II changed radio news forever. The need and desire for frequent news updates about the constantly evolving war made newspapers, with their

once-a-day printing, too slow. People wanted to know what was happening, and they wanted to know immediately. Although initially reluctant to be on the air, reporter Edward R. Murrow of CBS began reporting live about Germany’s actions from his posts in Europe. His reporting contained news and some commentary, and even live coverage during Germany’s aerial bombing of London. To protect covert military operations during the war, the White House had placed guidelines on the reporting of classified information, making a legal exception to the First Amendment’s protection against government involvement in the press. Newscasters voluntarily agreed to suppress information, such as about the development of the atomic bomb and movements of the military, until after the events had occurred.¹⁴

The number of professional and amateur radio stations grew quickly. Initially, the government exerted little legislative control over the industry. Stations chose their own broadcasting locations, signal strengths, and frequencies, which sometimes overlapped with one another or with the military, leading to tuning problems

14. Fellow. American Media History.

for listeners. The Radio Act (1927) created the Federal Radio Commission (FRC), which made the first effort to set standards, frequencies, and license stations. The Commission was under heavy pressure from Congress, however, and had little authority. The Communications Act of 1934 ended the FRC and created the **Federal Communications Commission (FCC)**, which continued to work with radio stations to assign frequencies and set national standards, as well as oversee other forms of broadcasting and telephones. The FCC regulates interstate communications to this day. For example, it prohibits the use of certain profane words during certain hours on public airwaves.

Prior to WWII, radio frequencies were broadcast using amplitude modulation (AM). After WWII, frequency modulation (FM) broadcasting, with its wider signal bandwidth, provided clear sound with less static and became popular with stations wanting to broadcast speeches or music with high-quality sound. While radio's importance for distributing news waned with the increase in television usage, it remained popular for listening to music, educational talk shows, and sports broadcasting. Talk stations began to gain ground in the 1980s on both AM and FM frequencies, restoring radio's importance in politics. By the 1990s, talk shows had gone national, showcasing broadcasters like Rush Limbaugh and Don Imus.

In 1990, Sirius Satellite Radio began a campaign for FCC approval of satellite radio. The idea was to broadcast digital programming from satellites in orbit, eliminating the need for local towers. By 2001, two satellite stations had been approved for broadcasting. Satellite radio has greatly increased programming with many specialized offerings, such as channels dedicated to particular artists. It is generally subscription-based and offers a larger area of coverage, even to remote areas such as deserts and oceans. Satellite programming is also exempt from many of the FCC regulations that govern regular radio stations. Howard Stern, for example, was fined more than \$2 million while on public airwaves, mainly for

his sexually explicit discussions.¹⁵ Stern moved to Sirius Satellite in 2006 and has since been free of oversight and fines.

Television

Television combined the best attributes of radio and pictures and changed media forever. The first official broadcast in the United States was President Franklin Roosevelt's speech at the opening of the 1939 World's Fair in New York. The public did not immediately begin buying televisions, but coverage of World War II changed their minds. CBS reported on war events and included pictures and maps that enhanced the news for viewers. By the 1950s, the price of television sets had dropped, more television stations were being created, and advertisers were buying up spots.

As on the radio, quiz shows and games dominated the television airwaves. But when Edward R. Murrow made the move to television in 1951 with his news show *See It Now*, television journalism gained its foothold. As television programming expanded, more channels were added. Networks such as ABC, CBS, and NBC began nightly newscasts, and local stations and affiliates followed suit.

15. Sheila Marikar, "Howard Stern's Five Most Outrageous Offenses," *ABC News*, 14 May 2012.

Even more than radio, television allows politicians to reach out and connect with citizens and voters in deeper ways. Before television, few voters were able to see a president or candidate speak or answer questions in an interview. Now everyone can decode body language and tone to decide whether candidates or politicians are sincere. Presidents can directly convey their anger, sorrow, or optimism during addresses.



*Edward R. Murrow's move to television increased the visibility of network news. In *The Challenge of Ideas* (1961) pictured above, Murrow discussed the Cold War between the Soviet Union and the United States alongside films stars such as John Wayne.*

The first television advertisements, run by presidential candidates Dwight D. Eisenhower and Adlai Stevenson in the early 1950s, were mainly radio jingles with animation or short question-and-answer sessions. In 1960, John F. Kennedy's campaign used a Hollywood-style approach to promote his image as young and vibrant. The Kennedy campaign ran interesting and engaging ads, featuring Kennedy, his wife Jacqueline, and everyday citizens who supported him.

Television was also useful to combat scandals and accusations of impropriety. Republican vice presidential candidate Richard Nixon used a televised speech in 1952 to address accusations that he had taken money from a political campaign fund illegally. Nixon laid out his finances, investments, and debts and ended by saying that the only election gift the family had received was a cocker spaniel the children named Checkers.¹⁶

16. Lee Huebner, "The Checkers Speech after 60 Years," *The Atlantic*, 22 September 2012.

The “Checkers speech” was remembered more for humanizing Nixon than for proving he had not taken money from the campaign account. Yet it was enough to quiet accusations. Democratic vice presidential nominee Geraldine Ferraro similarly used television to answer accusations in 1984, holding a televised press conference to answer questions for over two hours about her husband’s business dealings and tax returns.¹⁷

In addition to television ads, the 1960 election also featured the first televised presidential debate. By that time most households had a television. Kennedy’s careful grooming and practiced body language allowed viewers to focus on his presidential demeanor. His opponent, Richard Nixon, was still recovering from a severe case of the flu. While Nixon’s substantive answers and debate skills made a favorable impression on radio listeners, viewers’ reaction to his sweaty appearance and obvious discomfort demonstrated that live television had the potential to make or break a candidate.¹⁸

In 1964, Lyndon B. Johnson was ahead in the polls, and he let Barry Goldwater’s campaign know he did not want to debate.¹⁹ Nixon, who ran for president again in 1968 and 1972, declined to debate. Then in 1976, President Gerald Ford, who was behind in the polls,

17. Joel K. Goldstein, “Mondale–Ferraro: Changing History,” *Huffington Post*, 27 March 2011.

18. Shanto Iyengar. 2016. *Media Politics: A Citizen’s Guide*, 3rd ed. New York: W.W. Norton.

19. Bob Greene, “When Candidates said ‘No’ to Debates,” CNN, 1 October 2012.

invited Jimmy Carter to debate, and televised debates became a regular part of future presidential campaigns.²⁰



Visit [American Rhetoric](#) for free access to speeches, video, and audio of famous presidential and political speeches.

Between the 1960s and the 1990s, presidents often used television to reach citizens and gain support for policies. When they made speeches, the networks and their local affiliates carried them. With few independent local stations available, a viewer had little alternative but to watch. During this “Golden Age of Presidential Television,” presidents had a strong command of the media.²¹

Some of the best examples of this power occurred when presidents used television to inspire and comfort the population during a national emergency. These speeches aided in the “rally

20. “The Ford/Carter Debates,” <http://www.pbs.org/newshour/spc/debatingourdestiny/doc1976.html> (November 21, 2015); Kayla Webley, “How the Nixon-Kennedy Debate Changed the World,” *Time*, 23 September 2010.
21. Matthew A. Baum and Samuel Kernell. 1999. “Has Cable Ended the Golden Age of Presidential Television?” *The American Political Science Review* 93, No. 1: 99–114.

'round the flag" phenomenon, which occurs when a population feels threatened and unites around the president.²² During these periods, presidents may receive heightened approval ratings, in part due to the media's decision about what to cover.²³

In 1995, President Bill Clinton comforted and encouraged the families of the employees and children killed at the bombing of the Oklahoma City Federal Building. Clinton reminded the nation that children learn through action, and so we must speak up against violence and face evil acts with good acts.²⁴

Following the terrorist attacks in New York and Washington on September 11, 2001, President George W. Bush's bullhorn speech from the rubble of Ground Zero in New York similarly became a rally. Bush spoke to the workers and first responders and encouraged them, but his short speech became a viral clip demonstrating the resilience of New Yorkers and the anger of a

22. Alan J. Lambert¹, J. P. Schott¹, and Laura Scherer. 2011. "Threat, Politics, and Attitudes toward a Greater Understanding of Rally-'Round-the-Flag Effects," *Current Directions in Psychological Science* 20, No. 6: 343-348.
23. Tim Groeling and Matthew A. Baum. 2008. "Crossing the Water's Edge: Elite Rhetoric, Media Coverage, and the Rally-Round-the-Flag Phenomenon," *Journal of Politics* 70, No. 4: 1065-1085.
24. "William Jefferson Clinton: Oklahoma Bombing Memorial Prayer Service Address," 23 April 1995, <http://www.americanrhetoric.com/speeches/wjcoklahomabombingspeech.htm>.

nation.²⁵ He told New Yorkers, the country, and the world that Americans could hear the frustration and anguish of New York, and that the terrorists would soon hear the United States.



(a)



(b)

Presidents Clinton and Bush were both called upon to calm the people after mass killings. In April 1996, President Bill Clinton and First Lady Hillary Rodham Clinton lay flowers at the site of the former Alfred P. Murrah federal building just before the one-year anniversary of the Oklahoma City bombing (a). Three days after the terrorist attacks of 9/11 brought down the World Trade Center in New York City, George W. Bush declares to the crowd, “I can hear you! The rest of the world hears you! And the people . . . and the people who knocked these buildings down will hear all of us soon!” (b)

Following their speeches, both presidents also received a bump in popularity. Clinton’s approval rating rose from 46 to 51 percent, and Bush’s from 51 to 90 percent.²⁶

25. Ian Christopher McCaleb, “Bush tours ground zero in lower Manhattan,” CNN, 14 September 2001.

26. “Presidential Job Approval Center,” <http://www.gallup.com/poll/124922/presidential-job-approval-center.aspx> (August 28, 2015).

New Media Trends

The invention of cable in the 1980s and the expansion of the Internet in the 2000s opened up more options for media consumers than ever before. Viewers can watch nearly anything at the click of a button, bypass commercials, and record programs of interest. The resulting saturation, or inundation of information, may lead viewers to abandon the news entirely or become more suspicious and fatigued about politics.²⁷

This effect, in turn, also changes the president's ability to reach out to citizens. For example, viewership of the president's annual State of the Union address has decreased over the years, from sixty-seven million viewers in 1993 to thirty-two million in 2015.²⁸

Citizens who want to watch reality television and movies can easily avoid the news, leaving presidents with no sure way to communicate with the public.²⁹ Other voices, such as those of talk show hosts and political pundits, now fill the gap.

Electoral candidates have also lost some media ground. In *horse-race coverage*, modern journalists analyze campaigns and blunders

27. Alison Dagnes. 2010. *Politics on Demand: The Effects of 24-hour News on American Politics*. Santa Barbara, CA: Praeger.

28. "Number of Viewers of the State of the Union Addresses from 1993 to 2015 (in millions)," <http://www.statista.com/statistics/252425/state-of-the-union-address-viewer-numbers> (August 28, 2015).

29. Baum and Kernell, "Has Cable Ended the Golden Age of Presidential Television?"

or the overall race, rather than interviewing the candidates or discussing their issue positions. Some argue that this shallow coverage is a result of candidates' trying to control the journalists by limiting interviews and quotes. In an effort to regain control of the story, journalists begin analyzing campaigns without input from the candidates.³⁰

The First Social Media Candidate

When president-elect Barack Obama admitted an addiction to his Blackberry, the signs were clear: A new generation was assuming the presidency.³¹ Obama's use of technology was a part of life, not a campaign pretense. Perhaps for this reason, he was the first candidate to fully embrace social media.

While John McCain, the 2008 Republican presidential candidate, focused on traditional media to run his

30. Shanto Iyengar. 2011. "The Media Game: New Moves, Old Strategies," *The Forum: Press Politics and Political Science* 9, No. 1, <http://pcl.stanford.edu/research/2011/iyengar-mediagame.pdf>.
31. Jeff Zeleny, "Lose the BlackBerry? Yes He Can, Maybe," *New York Times*, 15 November 2008.

campaign, Obama did not. One of Obama's campaign advisors was Chris Hughes, a cofounder of Facebook. The campaign allowed Hughes to create a powerful online presence for Obama, with sites on YouTube, Facebook, MySpace, and more. Podcasts and videos were available for anyone looking for information about the candidate. These efforts made it possible for information to be forwarded easily between friends and colleagues. It also allowed Obama to connect with a younger generation that was often left out of politics.

By Election Day, Obama's skill with the web was clear: he had over two million Facebook supporters, while McCain had 600,000. Obama had 112,000 followers on Twitter, and McCain had only 4,600. Matthew Fraser and Soumitra Dutta, "Obama's win means future elections must be fought online," *Guardian*, 7 November 2008.

Are there any disadvantages to a presidential candidate's use of social media and the Internet for campaign purposes? Why or why not?

The availability of the Internet and social media has moved some control of the message back into the presidents' and candidates' hands. Politicians can now connect to the people directly, bypassing journalists. When Barack Obama's minister, the Reverend Jeremiah Wright, was seen to give inflammatory racial sermons, Obama used YouTube to respond to charges that he shared Wright's beliefs.

The video drew more than seven million views.³² To reach out to supporters and voters, the White House maintains a YouTube channel and a Facebook site, as did the former Speaker of the House of Representatives, John Boehner.

Social media, like Facebook, also placed journalism in the hands of citizens: **citizen journalism** occurs when citizens use their personal recording devices and cell phones to capture events and post them on the Internet. In 2012, citizen journalists caught both presidential candidates by surprise. Mitt Romney was taped by a bartender's personal camera saying that 47 percent of Americans would vote for President Obama because they were dependent on the government.³³

Obama was recorded by a *Huffington Post* volunteer saying that some Midwesterners “cling to guns or religion or antipathy to people who aren't like them” due to their frustration with the economy.³⁴ These statements became nightmares for the campaigns. As journalism continues to scale back and hire fewer professional writers in an effort to control costs, citizen journalism may become the new normal.³⁵ Another shift in the new media is a change in viewers' preferred programming. Younger viewers,

32. Iyengar, “The Media Game.”

33. David Corn. 29 July 2013. “Mitt Romney's Incredible 47-Percent Denial,” <http://www.motherjones.com/mojo/2013/07/mitt-romney-47-percent-denial>.

34. Ed Pilkington, “Obama Angers Midwest Voters with Guns and Religion Remark,” *Guardian*, 14 April 2008.

35. Amy Mitchell, “State of the News Media 2015,” *Pew Research Center*, 29 April 2015.

especially members of generation X and millennials, like their newscasts to be humorous. The popularity of *The Daily Show* and *The Colbert Report* demonstrate that news, even political news, can win young viewers if delivered well.³⁶

Such **soft news** presents news in an entertaining and approachable manner, painlessly introducing a variety of topics. While the depth or quality of reporting may be less than ideal, these shows can sound an alarm as needed to raise citizen awareness.³⁷

Viewers who watch or listen to programs like John Oliver's *Last Week Tonight* are more likely to be aware and observant of political events and foreign policy crises than they would otherwise be.³⁸ They may view opposing party candidates more favorably because the low-partisan, friendly interview styles allow politicians to relax and be conversational rather than defensive.³⁹

Because viewers of political comedy shows watch the news frequently, they may, in fact, be more politically knowledgeable than

36. Tom Huddleston, Jr., "Jon Stewart Just Punched a \$250 Million Hole in Viacom's Value," *Fortune*, 11 February 2015.
37. John Zaller. 2003. "A New Standard of News Quality: Burglar Alarms for the Monitorial Citizen," *Political Communication* 20, No. 2: 109–130.
38. Matthew A. Baum. 2002. "Sex, Lies and War: How Soft News Brings Foreign Policy to the Inattentive Public," *American Political Science Review* 96, no. 1: 91–109.
39. Matthew Baum. 2003. "Soft News and Political Knowledge: Evidence of Absence or Absence of Evidence?" *Political Communication* 20, No. 2: 173–190.

citizens viewing national news. In two studies researchers interviewed respondents and asked knowledge questions about current events and situations. Viewers of *The Daily Show* scored more correct answers than viewers of news programming and news stations.⁴⁰ That being said, it is not clear whether the number of viewers is large enough to make a big impact on politics, nor do we know whether the learning is long term or short term.⁴¹

Becoming a Citizen Journalist

Local government and politics need visibility. College students need a voice. Why not become a citizen journalist? City and county governments hold meetings on a regular basis and students rarely attend. Yet issues

40. "Public Knowledge of Current Affairs Little Changed by News and Information Revolutions," *Pew Research Center*, 15 April 2007; "What You Know Depends on What You Watch: Current Events Knowledge across Popular News Sources," *Fairleigh Dickinson University*, 3 May 2012, <http://publicmind.fdu.edu/2012/confirmed/>.
41. Markus Prior. 2003. "Any Good News in Soft News? The Impact of Soft News Preference on Political Knowledge," *Political Communication* 20, No. 2: 149–171.

relevant to students are often discussed at these meetings, like increases in street parking fines, zoning for off-campus housing, and tax incentives for new businesses that employ part-time student labor. Attend some meetings, ask questions, and write about the experience on your Facebook page. Create a blog to organize your reports or use Storify to curate a social media debate. If you prefer videography, create a YouTube channel to document your reports on current events, or Tweet your live video using Periscope or Meerkat.

Not interested in government? Other areas of governance that affect students are the university or college's Board of Regents meetings. These cover topics like tuition increases, class cuts, and changes to student conduct policies. If your state requires state institutions to open their meetings to the public, consider attending. You might be the one to notify your peers of changes that affect them.

What local meetings could you cover? What issues are important to you and your peers?

Questions to Consider

1. Why did Franklin D. Roosevelt's fireside chats help the president enact his policies?
2. How have modern presidents used television to

reach out to citizens?

3. Why is soft news good at reaching out and educating viewers?

Terms to Remember

citizen journalism—video and print news posted to the Internet or social media by citizens rather than the news media

muckraking—news coverage focusing on exposing corrupt business and government practices

soft news—news presented in an entertaining style

yellow journalism—sensationalized coverage of scandals and human interest stories

77. Media: How are they regulated?

Learning Objectives

- Identify circumstances in which the freedom of the press is not absolute
- Compare the ways in which the government oversees and influences media programming

The *Constitution* gives Congress responsibility for promoting the general welfare. While it is difficult to define what this broad dictate means, Congress has used it to protect citizens from media content it deems inappropriate. Although the media are independent participants in the U.S. political system, their liberties are not absolute and there are rules they must follow.

Media and the First Amendment

The U.S. *Constitution* was written in secrecy. Journalists were neither invited to watch the drafting, nor did the framers talk to the press about their disagreements and decisions. Once it was finished, however, the *Constitution* was released to the public and almost all newspapers printed it. Newspaper editors also published commentary and opinion about the new document and the form of government it proposed. Early support for the *Constitution* was

strong, and Anti-Federalists (who opposed it) argued that their concerns were not properly covered by the press. The eventual printing of *The Federalist Papers*, and the lesser-known *Anti-Federalist Papers*, fueled the argument that the press was vital to American democracy. It was also clear the press had the ability to affect public opinion and therefore public policy.¹

The approval of the **First Amendment**, as a part of the Bill of Rights, demonstrated the framers' belief that a free and vital press was important enough to protect. It said:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

This amendment serves as the basis for the political freedoms of the United States, and freedom of the press plays a strong role in keeping democracy healthy. Without it, the press would not be free to alert citizens to government abuses and corruption. In fact, one of New York's first newspapers, the *New York Weekly Journal*, began under John Peter Zenger in 1733 with the goal of routing corruption in the colonial government. After the colonial governor, William Cosby, had Zenger arrested and charged with seditious libel in 1735, his lawyers successfully defended his case and Zenger was found not guilty, affirming the importance of a free press in the colonies.

1. Fellow. *American Media History*.

The media act as informants and messengers, providing the means for citizens to become informed and serving as a venue for citizens to announce plans to assemble and protest actions by their government. Yet the government must ensure the media are acting in good faith and not abusing their power. Like the other First Amendment liberties, freedom of the press is not absolute. The media have limitations on their freedom to publish and broadcast.



In defending John Peter Zenger against charges of libel against colonial governor William Cosby, Andrew Hamilton argued that a statement is not libelous if it can be proved. (credit: modification of work by the Library of Congress)

Slander and Libel

First, the media do not have the right to commit **slander**, speak false information with an intent to harm a person or entity, or **libel**, print false information with an intent to harm a person or entity. These acts constitute defamation of character that can cause a loss of reputation and income. The media do not have the right to free speech in cases of libel and slander because the information is known to be false. Yet on a weekly basis, newspapers and magazines print stories that are negative and harmful. How can they do this and not be sued?

First, libel and slander occur only in cases where false information is presented as fact. When editors or columnists write opinions, they are protected from many of the libel and slander provisions because they are not claiming their statements are facts. Second, it is up to the defamed individual or company to bring a lawsuit against the media outlet, and the courts have different standards depending on whether the claimant is a private or public figure. A

public figure must show that the publisher or broadcaster acted in “reckless disregard” when submitting information as truth or that the author’s intent was malicious. This test goes back to the **New York Times v. Sullivan** (1964) case, in which a police commissioner in Alabama sued over inaccurate statements in a newspaper advertisement.² Because the commissioner was a public figure, the U.S. Supreme Court applied a stringent test of malice to determine whether the advertisement was libel; the court deemed it was not.

A private individual must make one of the above arguments or argue that the author was negligent in not making sure the information was accurate before publishing it. For this reason, newspapers and magazines are less likely to stray from hard facts when covering private individuals, yet they can be willing to stretch the facts when writing about politicians, celebrities, or public figures. But even stretching the truth can be costly for a publisher. In 2010, *Star* magazine published a headline, “Addiction Nightmare: Katie Drug Shocker,” leading readers to believe actress Katie Holmes was taking drugs. While the article in the magazine focuses on the addictive quality of Scientology sessions rather than drugs, the implication and the headline were different. Because drugs cause people to act erratically, directors might be less inclined to hire Holmes if she were addicted to drugs. Thus Holmes could argue that she had lost opportunity and income from the headline. While the publisher initially declined to correct the story, Holmes filed a \$50 million lawsuit, and *Star*’s parent company American Media, Inc. eventually settled. *Star* printed an apology and made a donation to a charity on Holmes’ behalf.³

2. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

3. Jill Serjeant, “Katie Holmes Settles Libel Suit on Drugs Claim,” *Reuters*, 28 April 2011, <http://www.reuters.com/>

Classified Material

The media have only a limited right to publish material the government says is classified. If a newspaper or media outlet obtains classified material, or if a journalist is witness to information that is classified, the government may request certain material be redacted or removed from the article. In many instances, government officials and former employees give journalists classified paperwork in an effort to bring public awareness to a problem. If the journalist calls the White House or Pentagon for quotations on a classified topic, the president may order the newspaper to stop publication in the interest of national security. The courts are then asked to rule on what is censored and what can be printed.

The line between the people's right to know and national security is not always clear. In 1971, the Supreme Court heard the Pentagon Papers case, in which the U.S. government sued the *New York Times* and the *Washington Post* to stop the release of information from a classified study of the Vietnam War. The Supreme Court ruled that while the government can impose **prior restraint** on the media, meaning the government can prevent the publication of information, that right is very limited. The court gave the newspapers the right to publish much of the study, but revelation of troop movements and the names of undercover operatives are some of the few approved reasons for which the government can stop publication or reporting.

During the second Persian Gulf War, FOX News reporter Geraldo Rivera convinced the military to embed him with a U.S. Army unit in Iraq to provide live coverage of its day-to-day activities. During one of the reports he filed while traveling with the 101st Airborne

[article/2011/04/28/us-katieholmes-idUSTRE73Q7K620110428](https://www.foxnews.com/article/2011/04/28/us-katieholmes-idUSTRE73Q7K620110428).

Division, Rivera had his camera operator record him drawing a map in the sand, showing where his unit was and using Baghdad as a reference point. Rivera then discussed where the unit would go next. Rivera was immediately removed from the unit and escorted from Iraq.⁴

The military exercised its right to maintain secrecy over troop movements, stating that Rivera's reporting had given away troop locations and compromised the safety of the unit. Rivera's future transmissions and reporting were censored until he was away from the unit.

Media and FCC Regulations

The liberties enjoyed by newspapers are overseen by the U.S. court system, while television and radio broadcasters are monitored by both the courts and a government regulatory commission.

The Radio Act of 1927 was the first attempt by Congress to regulate broadcast materials. The act was written to organize the rapidly expanding number of radio stations and the overuse of frequencies. But politicians feared that broadcast material would be obscene or biased. The Radio Act thus contained language that gave the government control over the quality of programming sent over public airwaves, and the power to ensure that stations maintained the public's best interest.⁵

4. Chris Plante, "Military Kicks Geraldo Out of Iraq," CNN, 31 March 2003. <http://www.cnn.com/2003/WORLD/meast/03/31/sprj.irq.gerald/>

5. Chapter 4—Radio Act of 1927, <http://uscode.house.gov/>

The Communications Act of 1934 replaced the Radio Act and created a more powerful entity to monitor the airwaves—a seven-member Federal Communications Commission (FCC) to oversee both radio and telephone communication. The FCC, which now has only five members, requires radio stations to apply for licenses, granted only if stations follow rules about limiting advertising, providing a public forum for discussion, and serving local and minority communities. With the advent of television, the FCC was given the same authority to license and monitor television stations. The FCC now also enforces ownership limits to avoid monopolies and censors materials deemed inappropriate. It has no jurisdiction over print media, mainly because print media are purchased and not broadcast.



In November 2013, the leadership of the FCC included (from left to right) Ajit Pai, Mignon Clyburn, Chairman Tom Wheeler, Jessica Rosenworcel, and Michael O'Rielly. (credit: Federal Communications Commission)

[view.xhtml?path=/prelim@title47/chapter4&edition=prelim](#) (May 19, 2016).



Concerned about something you heard or viewed? Would you like to file a complaint about an obscene radio program or place your phone number on the Do Not Call list? The [FCC](#) oversees each of these.

To maintain a license, stations are required to meet a number of criteria. The equal-time rule, for instance, states that registered candidates running for office must be given equal opportunities for airtime and advertisements at non-cable television and radio stations beginning forty-five days before a primary election and sixty days before a general election. Should WBNS in Columbus, Ohio, agree to sell Senator Marco Rubio thirty seconds of airtime for a presidential campaign commercial, the station must also sell all other candidates in that race thirty seconds of airtime at the same price. This rate cannot be more than the station charges favored commercial advertisers that run ads of the same class and during the same time period.⁶

More importantly, should Fox5 in Atlanta give Bernie Sanders five minutes of free airtime for an infomercial, the station must honor

6. “Statutes and Rules on Candidate Appearances & Advertising,” <https://transition.fcc.gov/mb/policy/political/candrule.htm>. Section 73.1942 [47 CFR §73.1942] Candidate rates. (November 21, 2015).

requests from all other candidates in the race for five minutes of **free equal air time** or a complaint may be filed with the FCC.⁷

In 2015, Donald Trump, when he was a candidate running for the presidential Republican nomination, appeared on *Saturday Night Live*. Other Republican candidates made equal time requests, and NBC agreed to give each candidate twelve minutes and five seconds of air time on a Friday and Saturday night, as well as during a later episode of *Saturday Night Live*.⁸

The FCC does waive the **equal-time rule** if the coverage is purely news. If a newscaster is covering a political rally and is able to secure a short interview with a candidate, equal time does not apply. Likewise, if a news programs creates a short documentary on the problem of immigration reform and chooses to include clips from only one or two candidates, the rule does not apply.⁹

But the rule may include shows that are not news. For this reason, some stations will not show a movie or television program if a candidate appears in it. In 2003, Arnold Schwarzenegger and Gary Coleman, both actors, became candidates in California's gubernatorial recall election. Television stations did not run Coleman's sitcom *Diff'rent Strokes* or Schwarzenegger's movies, because they would have been subject to the equal time provision.

7. "Statutes and Rules," Section 73.1941 [47 CFR §73.1941] Equal Opportunities.
8. Eric Deggans, "It's Not Hosting SNL, But NBC Will Give 'Equal Time' To 4 GOP Candidates," *National Public Radio*, 24 November 2015.
9. "47 U.S. Code § 315 – Candidates for public office," *Legal Information Institute*, <https://www.law.cornell.edu/uscode/text/47/315>.

With 135 candidates on the official ballot, stations would have been hard-pressed to offer thirty-minute and two-hour time slots to all.¹⁰

Even the broadcasting of the president's State of the Union speech can trigger the equal-time provisions. Opposing parties in Congress now use their time immediately following the State of the Union to offer an official rebuttal to the president's proposals.¹¹

While the idea behind the equal-time rule is fairness, it may not apply beyond candidates to supporters of that candidate or of a cause. Hence, there potentially may be a loophole in which broadcasters can give free time to just one candidate's supporters. In the 2012 Wisconsin gubernatorial recall election, Scott Walker's supporters were allegedly given free air time to raise funds and ask for volunteers while opponent Tom Barrett's supporters were not.¹²

According to someone involved in the case, the FCC declined to intervene after a complaint was filed on the matter, saying the equal-time rule applied only to the actual candidates, and that the case was an instance of the now-dead fairness doctrine.¹³

10. Joel Roberts, "Arnold's Movies Face TV Blackout," *CBS News*, 13 August 2003; Gary Susman, "Arnold's Movies Go off the Air until Election," *Entertainment Weekly*, 13 August 2003.
11. David Schultz and John R. Vile. 2015. *The Encyclopedia of Civil Liberties in America*.
12. Sue Wilson, "FCC: No More Equal Time Requirements for Political Campaign Supporters over Our Public Airwaves," *Huffington Post*, 15 May 2014.
13. William Lake, Letter from the FCC Regarding Capstar

The **fairness doctrine** was instituted in 1949 and required licensed stations to cover controversial issues in a balanced manner by providing listeners with information about all perspectives on any controversial issue. If one candidate, cause, or supporter was given an opportunity to reach the viewers or listeners, the other side was to be given a chance to present its side as well. The fairness doctrine ended in the 1980s, after a succession of court cases led to its repeal by the FCC in 1987, with stations and critics arguing the doctrine limited debate of controversial topics and placed the government in the role of editor.¹⁴

The FCC also maintains indecency regulations over television, radio, and other broadcasters, which limit indecent material and keep the public airwaves free of obscene material.¹⁵ While the Supreme Court has declined to define obscenity, it is identified using a test outlined in **Miller v. California** (1973).¹⁶ Under the Miller test, obscenity is something that appeals to deviants, breaks local or state laws, and lacks value.¹⁷

Texas LLX, 8 May 2014, http://bradblog.com/Docs/FCC_ZappleDoctrineRuling_050814.pdf.

14. *Syracuse Peace Council vs. FCC*, 867 F.2d 654 (1989); Katy Steinmetz, “The Death of the Fairness Doctrine,” *Time*, 23 August 2011.

15. “Obscenity, Indecency, and Profanity,” FCC, <https://www.fcc.gov/encyclopedia/obscenity-indecency-and-profanity> (September 10, 2015).

16. *Miller v. California*, 413 U.S. 15 (1973).

17. “Obscenity,” *Legal Information Institute at Cornell*

The Supreme Court determined that the presence of children in the audience trumped the right of broadcasters to air obscene and profane programming. However, broadcasters can show indecent programming or air profane language between the hours of 10 p.m. and 6 a.m.¹⁸

The Supreme Court has also affirmed that the FCC has the authority to regulate content. When a George Carlin skit was aired on the radio with a warning that material might be offensive, the FCC still censored it. The station appealed the decision and lost.¹⁹ Fines can range from tens of thousands to millions of dollars, and many are levied for sexual jokes on radio talk shows and nudity on television. In 2004, Janet Jackson's wardrobe malfunction during the Super Bowl's half-time show cost the CBS network \$550,000.

While some FCC violations are witnessed directly by commission members, like Jackson's exposure at the Super Bowl, the FCC mainly relies on citizens and consumers to file complaints about violations of equal time and indecency rules. Approximately 2 percent of complaints to the FCC are about radio programming and 10 percent about television programming, compared to 71 percent about telephone complaints and 15 percent about Internet complaints.²⁰

University, <https://www.law.cornell.edu/wex/obscenity> (November 29, 2015).

18. "Consumer Help Center: Obscene, Indecent, and Profane Broadcasts," FCC, <https://consumercomplaints.fcc.gov/hc/en-us/articles/202731600-Obscene-Indecent-and-Profane-Broadcasts> (September 10, 2015).

19. *FCC vs. Pacifica Foundation*, 438 U.S. 726 (1978).

20. "Obscenity, Indecency and Profanity," *Federal*

Yet what constitutes a violation is not always clear for citizens wishing to complain, nor is it clear what will lead to a fine or license revocation. In October 2014, parent advocacy groups and consumers filed complaints and called for the FCC to fine ABC for running a sexually charged opening scene in the drama *Scandal* immediately after *It's the Great Pumpkin, Charlie Brown*—without an ad or the cartoon's credits to act as a buffer between the very different types of programming.²¹ The FCC did not fine ABC.

The Telecommunications Act of 1996 brought significant changes to the radio and television industries. It dropped the limit on the number of radio stations (forty) and television stations (twelve) a single company could own. It also allowed networks to purchase large numbers of cable stations. In essence, it reduced competition and increased the number of conglomerates. Some critics, such as Common Cause, argue that the act also raised cable prices and made it easier for companies to neglect their public interest obligations.²² The act also changed the role of the FCC from

Communications Commission,
<https://consumercomplaints.fcc.gov/hc/en-us/articles/204009760-Consumer-Complaint-Charts-and-Data-Overview>.

21. Jason Molinet, “TV Watchdog Slams ABC for Sex-filled ‘Scandal’ Opening Immediately After ‘Charlie Brown’ Special,” *Daily News*, 4 November 2104.

22. “The Fallout from the Telecommunications Act of 1996: Unintended Consequences and Lessons Learned,” *Common Cause*, 9 May 2005; Mark Baumgartner, “Average Cable Rates on the Rise,” *ABC News*, February 15,

regulator to monitor. The Commission oversees the purchase of stations to avoid media monopolies and adjudicates consumer complaints against radio, television, and telephone companies.

Media and Transparency

The press has had some assistance in performing its muckraking duty. Laws that mandate federal and many state government proceedings and meeting documents be made available to the public are called **sunshine laws**. Proponents believe that open disagreements allow democracy to flourish and darkness allows corruption to occur. Opponents argue that some documents and policies are sensitive, and that the sunshine laws can inhibit policymaking.

While some documents may be classified due to national or state security, governments are encouraged to limit the over-classification of documents. The primary legal example for sunshine laws is the **Freedom of Information Act (FOIA)**, passed in 1966 and signed by President Lyndon B. Johnson. The act requires the executive branch of the U.S. government to provide information requested by citizens and was intended to increase openness in the executive branch, which had been criticized for hiding information. Citizens wishing to obtain information may request documents from the appropriate agencies, and agencies may charge fees if the collection and copying of the requested documentation requires time and labor.²³

[http://abcnews.go.com/Business/
story?id=88614&page=1](http://abcnews.go.com/Business/story?id=88614&page=1).

23. "The Freedom of Information Act, 5 U.S.C.", *The United*

FOIA also identifies data that does not need to be disclosed, such as human resource and medical records, national defense records, and material provided by confidential sources, to name a few.²⁴ Not all presidents have embraced this openness, however. President Ronald Reagan, in 1981, exempted the CIA and FBI from FOIA requests.²⁵

Information requests have increased significantly in recent years, with U.S. agencies receiving over 700,000 requests in 2014, many directed to the Departments of State and Defense, thus creating a backlog.²⁶



Want to request a government document but unsure where to start? If the agency is a part of the U.S. government, the [Freedom of Information Act](#) portal will help you out.

States Department of Justice, <http://www.justice.gov/oip/blog/foia-update-freedom-information-act-5-usc-sect-552-amended-public-law-no-104-231-110-stat> (September 7, 2015).

24. Ibid.

25. Fellow. *American Media History*.

26. “What is FOIA?” The Department of Justice, <http://www.foia.gov/index.html> (September 8, 2015).



Few people file requests for information because most assume the media will find and report on important problems. And many people, including the press, assume the government, including the White House, sufficiently answers questions and provides information about government actions and policies. This expectation is not new. During the Civil War, journalists expected to have access to those representing the government, including the military. But William Tecumseh Sherman, a Union general, maintained distance between the press and his military. Following the publication of material Sherman believed to be protected by government censorship, a journalist was arrested and nearly put to death. The event spurred the creation of accreditation for journalists, which meant a journalist must be approved to cover the White House and the military before entering a controlled area. All accredited journalists also need approval by military field commanders before coming near a military zone.²⁷

To cover war up close, more journalists are asking to travel with troops during armed conflict. In 2003, George W. Bush's administration decided to allow more journalists in the field, hoping the concession would reduce friction between the military and the press. The U.S. Department of Defense placed fifty-eight journalists in a media boot camp to prepare them to be embedded with military regiments in Iraq. Although the increase in embedded journalists resulted in substantial in-depth coverage, many journalists felt their

27. Fellow. *American Media History*.

colleagues performed poorly, acting as celebrities rather than reporters.²⁸

The line between journalists' expectation of openness and the government's willingness to be open has continued to be a point of contention. Some administrations use the media to increase public support during times of war, as Woodrow Wilson did in World War I. Other presidents limit the media in order to limit dissent. In 1990, during the first Persian Gulf War, journalists received all publication material from the military in a prepackaged and staged manner. Access to Dover, the air force base that receives coffins of U.S. soldiers who die overseas, was closed. Journalists accused George H. W. Bush's administration of limiting access and forcing them to produce bad pieces. The White House believed it controlled the message.²⁹ The ban was later lifted.

In his 2008 presidential run, Barack Obama promised to run a transparent White House.³⁰ Yet once in office, he found that transparency makes it difficult to get work done, and so he limited access and questions. In his first year in office, George W. Bush, who was criticized by Obama as having a closed government, gave 147 question-and-answer sessions with journalists, while Obama gave only 46. Even Helen Thomas, a long-time liberal White House press correspondent, said the Obama administration tried to control both information and journalists.³¹

28. Ibid.

29. Ibid.

30. Christopher Beam, "The TMI President," *Slate*, 12 November 2008.

31. Fellow. *American Media History*, 388.



President Barack Obama and White House correspondent Helen Thomas set aside their differences over transparency to enjoy cupcakes in honor of their shared birthday on August 4, 2009.

Because White House limitations on the press are not unusual, many journalists rely on confidential sources. In 1972, under the cloak of anonymity, the associate director of the Federal Bureau of Investigation, Mark Felt, became a news source for Bob Woodward and Carl Bernstein, political reporters at the *Washington Post*. Felt provided information about a number of potential

stories and was Woodward's main source for information about President Richard Nixon's involvement in a series of illegal activities, including the break-in at Democratic Party headquarters in Washington's Watergate office complex. The information eventually led to Nixon's resignation and the indictment of sixty-nine people in his administration. Felt was nicknamed "Deep Throat," and the journalists kept his identity secret until 2005.³²

The practice of granting anonymity to sources is sometimes referred to as reporter's privilege. Fueled by the First Amendment's protection of the press, journalists have long offered to keep sources confidential to protect them from government prosecution. To illustrate, as part of the investigation into the outing of Valerie Plame as a CIA officer, *New York Times* reporter Judith Miller was jailed for refusing to reveal "Scooter" Libby, Vice President Dick Cheney's chief of staff, as her confidential government source.³³

32. Bob Woodward, "How Mark Felt Became 'Deep Throat,'" *The Washington Post*, 20 June 2005.

33. Don Van Natta Jr., Adam Liptak, and Clifford J. Levy, "The

Reporter's privilege has increased the number of instances in which whistleblowers and government employees have given journalists tips or documents to prompt investigation into questionable government practices. Edward Snowden's 2013 leak to the press regarding the U.S. government's massive internal surveillance and tapping program was one such case.

In 1972, however, the Supreme Court determined that journalists are not exempt from subpoenas and that courts could force testimony to name a confidential source. Journalists who conceal a source and thereby protect him or her from being properly tried for a crime may spend time in jail for contempt of court. In the case of **Branzburg v. Hayes** (1972), three journalists were placed in contempt of court for refusing to divulge sources.³⁴

The journalists appealed to the Supreme Court. In a 5–4 decision, the justices determined that freedom of the press did not extend to the confidentiality of sources. A concurring opinion did state that the case should be seen as a limited ruling, however. If the government needed to know a source due to a criminal trial, it could pursue the name of that source.³⁵

More recently, the Supreme Court refused to hear an appeal from *New York Times* journalist James Risen, who was subpoenaed and ordered to name a confidential source who had provided details about a U.S. government mission designed to harm Iran's nuclear arms program. Risen was finally released from the subpoena, but

Miller Case: A Notebook, a Cause, a Jail Cell and a Deal,”
The New York Times, 16 October 2005.

34. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

35. Adam Liptak, “A Justice’s Scribbles on Journalists Rights,”
New York Times, 7 October 2007.

the battle took seven years and the government eventually collected enough other evidence to make his testimony less crucial to the case.³⁶ Overall, the transparency of the government is affected more by the executive currently holding office than by the First Amendment.

Questions to Consider

1. Why is it a potential problem that the equal-time rule does not apply to candidates' supporters
2. Under what circumstances might a journalist be compelled to give up a source?

Terms to Remember

equal-time rule—an FCC policy that all candidates running for office must be given the same radio and television airtime opportunities

fairness doctrine—a 1949 Federal Communications Commission (FCC) policy, now defunct, that required holders of broadcast licenses to cover controversial issues in a balanced manner

36. Matt Apuzzo, “Times Reporter Will Not Be Called to Testify in Leak,” *New York Times*, 12 January 2015.

Freedom of Information Act (FOIA)—a federal statute that requires public agencies to provide certain types of information requested by citizens

indecent regulations—laws that limit indecent and obscene material on public airwaves

libel—printed information about a person or organization that is not true and harms the reputation of the person or organization

prior restraint—a government action that stops someone from doing something before they are able to do it (e.g., forbidding someone to publish a book he or she plans to release)

reporter's privilege—the right of a journalist to keep a source confidential

slander—spoken information about a person or organization that is not true and harms the reputation of the person or organization

sunshine laws—laws that require government documents and proceedings to be made public

78. Media: What is their impact?

Learning Objectives

- Identify forms of bias that exist in news coverage and ways the media can present biased coverage
- Explain how the media cover politics and issues
- Evaluate the impact of the media on politics and policymaking

In what ways can the media affect society and government? The media's primary duty is to present us with information and alert us when important events occur. This information may affect what we think and the actions we take. The media can also place pressure on government to act by signaling a need for intervention or showing that citizens want change. For these reasons, the quality of the media's coverage matters.

Media Effects and Bias

Concerns about the effects of media on consumers and the existence and extent of media bias go back to the 1920s. Reporter and commentator Walter Lippmann noted that citizens have limited personal experience with government and the world and posited that the media, through their stories, place ideas in citizens' minds.

These ideas become part of the citizens' frame of reference and affect their decisions. Lippmann's statements led to the hypodermic theory, which argues that information is "shot" into the receiver's mind and readily accepted.¹

Yet studies in the 1930s and 1940s found that information was transmitted in two steps, with one person reading the news and then sharing the information with friends. People listened to their friends, but not to those with whom they disagreed. The newspaper's effect was thus diminished through conversation. This discovery led to the minimal effects theory, which argues the media have little effect on citizens and voters.²

By the 1970s, a new idea, the cultivation theory, hypothesized that media develop a person's view of the world by presenting a perceived reality.³ What we see on a regular basis is our reality. Media can then set norms for readers and viewers by choosing what is covered or discussed.

In the end, the consensus among observers is that media have some effect, even if the effect is subtle. This raises the question of how the media, even general newscasts, can affect citizens. One of the ways is through **framing**: the creation of a narrative, or context,

1. Walter Lippmann. 1922. *Public Opinion*. <http://xroads.virginia.edu/~hyper/Lippman/contents.html> (August 29, 2015).
2. Bernard Berelson, Paul Lazarsfeld, and William McPhee. 1954. *Voting*. Chicago: University of Chicago Press.
3. George Gerbner, Larry Gross, Michael Morgan, Nancy Signorielli, and Marilyn Jackson-Beeck. 1979. "The Demonstration of Power: Violence Profile," *Journal of Communication* 29, No.10: 177–196.

for a news story. The news often uses frames to place a story in a context so the reader understands its importance or relevance. Yet, at the same time, framing affects the way the reader or viewer processes the story.

Episodic framing occurs when a story focuses on isolated details or specifics rather than looking broadly at a whole issue. Thematic framing takes a broad look at an issue and skips numbers or details. It looks at how the issue has changed over a long period of time and what has led to it. For example, a large, urban city is dealing with the problem of an increasing homeless population, and the city has suggested ways to improve the situation. If journalists focus on the immediate statistics, report the current percentage of homeless people, interview a few, and look at the city's current investment in a homeless shelter, the coverage is episodic. If they look at homelessness as a problem increasing everywhere, examine the reasons people become homeless, and discuss the trends in cities' attempts to solve the problem, the coverage is thematic. Episodic frames may create more sympathy, while a thematic frame may leave the reader or viewer emotionally disconnected and less sympathetic.



Civil war in Syria has led many to flee the country, including this woman living in a Syrian refugee camp in Jordan in September 2015. Episodic framing of the stories of Syrian refugees, and their deaths, turned government inaction into action. (credit: Enes Reyhan)



For a closer look at framing and how it influences voters, read [“How the Media Frames Political Issues”](#), a review essay by Scott London.

Framing can also affect the way we see race, socioeconomics, or other generalizations. For this reason, it is linked to **priming**: when media coverage predisposes the viewer or reader to a particular perspective on a subject or issue. If a newspaper article focuses on unemployment, struggling industries, and jobs moving overseas, the

reader will have a negative opinion about the economy. If then asked whether he or she approves of the president's job performance, the reader is primed to say no. Readers and viewers are able to fight priming effects if they are aware of them or have prior information about the subject.

Coverage Effects on Governance and Campaigns

When it is spotty, the media's coverage of campaigns and government can sometimes affect the way government operates and the success of candidates. In 1972, for instance, the McGovern-Fraser reforms created a voter-controlled primary system, so party leaders no longer pick the presidential candidates. Now the media are seen as kingmakers and play a strong role in influencing who will become the Democratic and Republican nominees in presidential elections. They can discuss the candidates' messages, vet their credentials, carry sound bites of their speeches, and conduct interviews. The candidates with the most media coverage build momentum and do well in the first few primaries and caucuses. This, in turn, leads to more media coverage, more momentum, and eventually a winning candidate. Thus, candidates need the media.

In the 1980s, campaigns learned that tight control on candidate information created more favorable media coverage. In the presidential election of 1984, candidates Ronald Reagan and George H. W. Bush began using an issue-of-the-day strategy, providing quotes and material on only one topic each day. This strategy limited what journalists could cover because they had only limited quotes and sound bites to use in their reports. In 1992, both Bush's and Bill Clinton's campaigns maintained their carefully drawn candidate images by also limiting photographers and television journalists to photo opportunities at rallies and campaign venues. The constant control of the media became known as the "bubble," and journalists were less effective when they were in the campaign's

bubble. Reporters complained this coverage was campaign advertising rather than journalism, and a new model emerged with the 1996 election.⁴

Campaign coverage now focuses on the spectacle of the season, rather than providing information about the candidates. Colorful personalities, strange comments, lapse of memories, and embarrassing revelations are more likely to get air time than the candidates' issue positions. Candidate Donald Trump may be the best example of shallower press coverage of a presidential election. Some argue that newspapers and news programs are limiting the space they allot to discussion of the campaigns.⁵ Others argue that citizens want to see updates on the race and electoral drama, not boring issue positions or substantive reporting.⁶ It may also be that journalists have tired of the information games played by politicians and have taken back control of the news cycles.⁷

4. Elizabeth A. Skewes. 2007. *Message Control: How News Is Made on the Presidential Campaign Trail*. Maryland: Rowman & Littlefield, 79.
5. Stephen Farnsworth and S. Robert Lichter. 2012. "Authors' Response: Improving News Coverage in the 2012 Presidential Campaign and Beyond," *Politics & Policy* 40, No. 4: 547–556.
6. "Early Media Coverage Focuses on Horse Race," *PBS News Hour*, 12 June 2007.
7. Stephen Ansolabehere, Roy Behr, and Shanto Iyengar. 1992. *The Media Game: American Politics in the Television Age*. New York: Macmillan.

All these factors have likely led to the shallow press coverage we see today, sometimes dubbed **pack journalism** because journalists follow one another rather than digging for their own stories. Television news discusses the strategies and blunders of the election, with colorful examples. Newspapers focus on polls. In an analysis of the 2012 election, Pew Research found that 64 percent of stories and coverage focused on campaign strategy. Only 9 percent covered domestic issue positions; 6 percent covered the candidates' public records; and, 1 percent covered their foreign policy positions.⁸

For better or worse, coverage of the candidates' statements get less air time on radio and television, and sound bites, or clips, of their speeches have become even shorter. In 1968, the average sound bite from Richard Nixon was 42.3 seconds, while a recent study of television coverage found that sound bites had decreased to only eight seconds in the 2004 election.⁹

The clips chosen to air were attacks on opponents 40 percent of the time. Only 30 percent contained information about the candidate's issues or events. The study also found the news showed images of the candidates, but for an average of only twenty-five seconds while the newscaster discussed the stories.¹⁰ This study

8. "Frames of Campaign Coverage," *Pew Research Center*, 23 April 2012, <http://www.journalism.org/2012/04/23/frames-campaign-coverage>.

9. Kiku Adatto. May 28, 1990. "The Incredible Shrinking Sound Bite," *New Republic* 202, No. 22: 20–23.

10. Erik Bucy and Maria Elizabeth Grabe. 2007. "Taking Television Seriously: A Sound and Image Bite Analysis of

supports the argument that shrinking sound bites are a way for journalists to control the story and add their own analysis rather than just report on it.¹¹

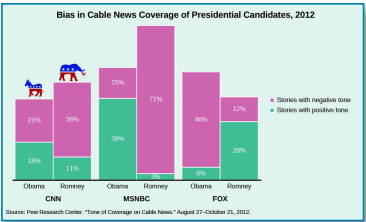
Candidates are given a few minutes to try to argue their side of an issue, but some say television focuses on the argument rather than on information. In 2004, Jon Stewart of Comedy Central's *The Daily Show* began attacking the CNN program *Crossfire* for being theater, saying the hosts engaged in reactionary and partisan arguing rather than true debating.¹² Some of Stewart's criticisms resonated, even with host Paul Begala, and *Crossfire* was later pulled from the air.¹³

The media's discussion of campaigns has also grown negative. Although biased campaign coverage dates back to the period of the partisan press, the increase in the number of cable news stations has made the problem more visible. Stations like FOX News and MSNBC are overt in their use of bias in framing stories. During the 2012 campaign, seventy-one of seventy-four MSNBC stories

Presidential Campaign Coverage, 1992–2004,” *Journal of Communication* 57, No. 4: 652–675.

11. Craig Fehrman, “The Incredible Shrinking Sound Bite,” *Boston Globe*, 2 January 2011, http://www.boston.com/bostonglobe/ideas/articles/2011/01/02/the_incredible_shrinking_sound_bite/.
12. “Crossfire: Jon Stewart’s America,” CNN, 15 October 2004, <http://www.cnn.com/TRANSCRIPTS/0410/15/cf.01.html>.
13. Paul Begala, “Begala: The day Jon Stewart blew up my show,” CNN, 12 February 2015.

about Mitt Romney were highly negative, while FOX News’ coverage of Obama had forty-six out of fifty-two stories with negative information. The major networks—ABC, CBS, and NBC—were somewhat more balanced, yet the overall coverage of both candidates tended to be negative.¹⁴



Media coverage of campaigns is increasingly negative, with cable news stations demonstrating more bias in their framing of stories during the 2012 campaign.

Due in part to the lack of substantive media coverage, campaigns increasingly use social media to relay their message. Candidates can create their own sites and pages and try to spread news through supporters to the undecided. In 2012, both Romney and Obama maintained Facebook, Twitter, and YouTube accounts to

provide information to voters. Yet, on social media, candidates still need to combat negativity, from both the opposition and supporters. Stories about Romney that appeared in the mainstream media were negative 38 percent of the time, while his coverage in Facebook news was negative 62 percent of the time and 58 percent of the time on Twitter.¹⁵

Once candidates are in office, the chore of governing begins, with the added weight of media attention. Historically, if presidents were unhappy with their press coverage, they used personal and

- 14. Pew Research Center: Journalism & Media Staff, “Coverage of the Candidates by Media Sector and Cable Outlet,” 1 November 2012.
- 15. “Winning the Media Campaign 2012,” Pew Research Center, 2 November 2012.

professional means to change its tone. Franklin D. Roosevelt, for example, was able to keep journalists from printing stories through gentleman's agreements, loyalty, and the provision of additional information, sometimes off the record. The journalists then wrote positive stories, hoping to keep the president as a source. John F. Kennedy hosted press conferences twice a month and opened the floor for questions from journalists, in an effort to keep press coverage positive.¹⁶

Cabinet secretaries and other appointees also talk with the press, sometimes making for conflicting messages. The creation of the position of press secretary and the White House Office of Communications both stemmed from the need to send a cohesive message from the executive branch. Currently, the White House controls the information coming from the executive branch through the Office of Communications and decides who will meet with the press and what information will be given.

But stories about the president often examine personality, or the president's ability to lead the country, deal with Congress, or respond to national and international events. They are less likely to cover the president's policies or agendas without a lot of effort on the president's behalf.¹⁷

When Obama first entered office in 2009, journalists focused on his battles with Congress, critiquing his leadership style and inability to work with Representative Nancy Pelosi, then Speaker

16. Fred Greenstein. 2009. *The Presidential Difference*. Princeton, NJ: Princeton University Press.

17. Matthew Eshbaugh-Soha and Jeffrey Peake. 2011. *Breaking Through the Noise: Presidential Leadership, Public Opinion, and the News Media*. Stanford, CA: Stanford University Press.

of the House. To gain attention for his policies, specifically the American Recovery and Reinvestment Act (ARRA), Obama began traveling the United States to draw the media away from Congress and encourage discussion of his economic stimulus package. Once the ARRA had been passed, Obama began travelling again, speaking locally about why the country needed the Affordable Care Act and guiding media coverage to promote support for the act.¹⁸

Congressional representatives have a harder time attracting media attention for their policies. House and Senate members who use the media well, either to help their party or to show expertise in an area, may increase their power within Congress, which helps them bargain for fellow legislators' votes. Senators and high-ranking House members may also be invited to appear on cable news programs as guests, where they may gain some media support for their policies. Yet, overall, because there are so many members of Congress, and therefore so many agendas, it is harder for individual representatives to draw media coverage.¹⁹

It is less clear, however, whether media coverage of an issue leads Congress to make policy, or whether congressional policymaking leads the media to cover policy. In the 1970s, Congress investigated ways to stem the number of drug-induced deaths and crimes. As congressional meetings dramatically increased, the press was slow to cover the topic. The number of hearings was at its highest from 1970 to 1982, yet media coverage did not rise to the same level until

18. Ibid.

19. Gary Lee Malecha and Daniel J. Reagan. 2011. *The Public Congress: Congressional Deliberation in a New Media Age*. New York: Routledge.

1984.²⁰ Subsequent hearings and coverage led to national policies like DARE and First Lady Nancy Reagan's "Just Say No" campaign.

Later studies of the media's effect on both the president and Congress report that the media has a stronger agenda-setting effect on the president than on Congress. What the media choose to cover affects what the president thinks is important to voters, and these issues were often of national importance. The media's effect on Congress was limited, however, and mostly extended to local issues like education or child and elder abuse.²¹ If the media are discussing a topic, chances are a



(a)



(b)

First Lady Nancy Reagan speaks at a "Just Say No" rally in Los Angeles on May 13, 1987 (a). The Drug Abuse Resistance Education (D.A.R.E.) is an anti-drug, anti-gang program founded in 1983 by a joint initiative of the Los Angeles Police Department and the Los Angeles Unified School District.

20. Frank R. Baumgartner, Bryan D. Jones, and Beth L. Leech. 1997. "Media Attention and Congressional Agendas," In *Do The Media Govern? Politicians, Voters, and Reporters in America*, eds. Shanto Iyengar and Richard Reeves. Thousand Oaks, CA: Sage.
21. George Edwards and Dan Wood. 1999. "Who Influences Whom? The President, Congress, and the Media," *American Political Science Review* 93, No 2: 327-344; Yue Tan and David Weaver. 2007. "Agenda-Setting Effects Among the Media, the Public, and Congress, 1946-2004," *Journalism & Mass Communication Quarterly* 84, No. 4: 729-745.

member of Congress has already submitted a relevant bill, and it is waiting in committee.

Coverage Effects on Society

The media choose what they want to discuss. This agenda setting creates a reality for voters and politicians that affects the way people think, act, and vote. Even if the crime rate is going down, for instance, citizens accustomed to reading stories about assault and other offenses still perceive crime to be an issue.²²

Studies have also found that the media's portrayal of race is flawed, especially in coverage of crime and poverty. One study revealed that local news shows were more likely to show pictures of criminals when they were African American, so they overrepresented blacks as perpetrators and whites as victims.²³ A second study found a similar pattern in which Latinos were underrepresented as victims of crime and as police officers, while whites were overrepresented as both.²⁴ Voters were thus more

22. Ally Fogg, "Crime Is Falling. Now Let's Reduce Fear of Crime," *Guardian*, 24 April 24 2013.

23. Travis L. Dixon. 2008. "Crime News and Racialized Beliefs: Understanding the Relationship between Local News Viewing and Perceptions of African Americans and Crime," *Journal of Communication* 58, No. 1: 106–125.

24. Travis Dixon. 2015. "Good Guys Are Still Always in White? Positive Change and Continued Misrepresentation of

likely to assume that most criminals are black and most victims and police officers are white, even though the numbers do not support those assumptions.

Network news similarly misrepresents the victims of poverty by using more images of blacks than whites in its segments. Viewers in a study were left believing African Americans were the majority of the unemployed and poor, rather than seeing the problem as one faced by many races.²⁵

The misrepresentation of race is not limited to news coverage, however. A study of images printed in national magazines, like *Time* and *Newsweek*, found they also misrepresented race and poverty. The magazines were more likely to show images of young African Americans when discussing poverty and excluded the elderly and the young, as well as whites and Latinos, which is the true picture of poverty.²⁶

Racial framing, even if unintentional, affects perceptions and policies. If viewers are continually presented with images of African Americans as criminals, there is an increased chance they will

Race and Crime on Local Television News,”
Communication Research, doi:10.1177/0093650215579223.

25. Travis L. Dixon. 2008. “Network News and Racial Beliefs: Exploring the Connection between National Television News Exposure and Stereotypical Perceptions of African Americans,” *Journal of Communication* 58, No. 2: 321–337.
26. Martin Gilens. 1996. “Race and Poverty in America: Public Misperceptions and the American News Media,” *Public Opinion Quarterly* 60, No. 4: 515–541.

perceive members of this group as violent or aggressive.²⁷ The perception that most recipients of welfare are working-age African Americans may have led some citizens to vote for candidates who promised to reduce welfare benefits.²⁸ When survey respondents were shown a story of a white unemployed individual, 71 percent listed unemployment as one of the top three problems facing the United States, while only 53 percent did so if the story was about an unemployed African American.²⁹

Word choice may also have a priming effect. News organizations like the *Los Angeles Times* and the Associated Press no longer use the phrase “illegal immigrant” to describe undocumented residents. This may be due to the desire to create a “sympathetic” frame for the immigration situation rather than a “threat” frame.³⁰

Media coverage of women is similarly biased. Most journalists in the early 1900s were male, and women’s issues were not part of the newsroom discussion. As journalist Kay Mills put it, the women’s movement of the 1960s and 1970s was about raising awareness of the problems of equality, but writing about rallies “was like trying to nail Jell-O to the wall.”³¹ Most politicians, business leaders, and

27. Dixon. “Crime News and Racialized Beliefs.”

28. Gilens. “Race and Poverty in America.”

29. Shanto Iyengar and Donald R. Kinder. 1987. *News That Matters*. Chicago: University of Chicago Press.

30. Daniel C. Hallin. 2015. “The Dynamics of Immigration Coverage in Comparative Perspective,” *American Behavioral Scientist* 59, No. 7: 876–885.

31. Kay Mills. 1996. “What Difference Do Women Journalists

other authority figures were male, and editors' reactions to the stories were lukewarm. The lack of women in the newsroom, politics, and corporate leadership encouraged silence.³²

In 1976, journalist Barbara Walters became the first female coanchor on a network news show, *The ABC Evening News*. She was met with great hostility from her coanchor Harry Reasoner and received critical coverage from the press.³³ On newspaper staffs, women reported having to fight for assignments to well-published **beats**, or to be assigned areas or topics, such as the economy or politics, that were normally reserved for male journalists. Once female journalists held these assignments, they feared writing about women's issues. Would it make them appear weak? Would they be taken from their coveted beats?³⁴

This apprehension allowed poor coverage of women and the women's movement to continue until women were better represented as journalists and as editors. Strength of numbers

Make?" In *Women, the Media and Politics*, ed. Pippa Norris. Oxford, UK: Oxford University Press, 43.

32. Kim Fridkin Kahn and Edie N. Goldenberg. 1997. "The Media: Obstacle or Ally of Feminists?" In *Do the Media Govern?* eds. Shanto Iyengar and Richard Reeves. Thousand Oaks, CA: Sage.

33. Barbara Walters, "Ms. Walters Reflects," *Vanity Fair*, 31 May 2008. http://www.vanityfair.com/culture/2008/06/walters_excerpt200806

34. Mills. "What Difference Do Women Journalists Make?"

allowed them to be confident when covering issues like health care, childcare, and education.³⁵



The [Center for American Women in Politics](#) researches the treatment women receive from both government and the media, and they share the data with the public.

The media's historically uneven coverage of women continues in its treatment of female candidates. Early coverage was sparse. The stories that did appear often discussed the candidate's viability, or ability to win, rather than her stand on the issues.³⁶

Women were seen as a novelty rather than as serious contenders who needed to be vetted and discussed. Modern media coverage has changed slightly. One study found that female candidates receive more favorable coverage than in prior generations, especially if they are incumbents.³⁷ Yet a different study found that while there was

35. Mills. "What Difference Do Women Journalists Make?"

36. Kahn and Goldenberg, "The Media: Obstacle or Ally of Feminists?"

37. Kim Fridkin Kahn. 1994. "Does Gender Make a Difference? An Experimental Examination of Sex Stereotypes and

increased coverage for female candidates, it was often negative.³⁸ And it did not include Latina candidates.³⁹ Without coverage, they are less likely to win.

The historically negative media coverage of female candidates has had another concrete effect: Women are less likely than men to run for office. One common reason is the effect negative media coverage has on families.⁴⁰ Many women do not wish to expose their children or spouses to criticism.⁴¹

Press Patterns in Statewide Campaigns,” *American Journal of Political Science* 38, No. 1: 162–195.

38. John David Rausch, Mark Rozell, and Harry L. Wilson. 1999. “When Women Lose: A Study of Media Coverage of Two Gubernatorial Campaigns,” *Women & Politics* 20, No. 4: 1–22.
39. Sarah Allen Gershon. 2013. “Media Coverage of Minority Congresswomen and Voter Evaluations: Evidence from an Online Experimental Study,” *Political Research Quarterly* 66, No. 3: 702–714.
40. Jennifer Lawless and Richard Logan Fox. 2005. *It Takes a Candidate: Why Women Don’t Run for Office*. Cambridge: Cambridge University Press.
41. Brittany L. Stalsburg, “Running with Strollers: The Impact of Family Life on Political Ambition,” *Eagleton Institute of Politics*, Spring 2012, Unpublished Paper, <http://www.eagleton.rutgers.edu/research/>

In 2008, the nomination of Sarah Palin as Republican candidate John McCain's running mate validated this concern. Some articles focused on her qualifications to be a potential future president or her record on the issues. But others questioned whether she had the right to run for office, given she had young children, one of whom has developmental disabilities.⁴² Her daughter, Bristol, was criticized for becoming pregnant while unmarried.⁴³ Her husband was called cheap for failing to buy her a high-priced wedding ring.⁴⁴ Even when candidates ask that children and families be off-limits, the press rarely honors the requests. So women with young children may wait until their children are grown before running for office, if they choose to run at all.

[documents/Stalsburg-FamilyLife-Political-Ambition.pdf](#)
(August 28, 2015).

- 42. Christina Walker, "Is Sarah Palin Being Held to an Unfair Standard?" CNN, 8 September 2008.
- 43. Dana Bash, "Palin's Teen Daughter is Pregnant," CNN, 1 September 2008.
- 44. Jimmy Orr, "Palin Wardrobe Controversy Heightens – Todd is a Cheapo!" *Christian Science Monitor*, 26 October 2008.



When Sarah Palin found herself on the national stage at the Republican Convention in September 2008, media coverage about her selection as John McCain's running mate included numerous questions about her ability to serve based on personal family history. Attacks on candidates' families lead many women to postpone or avoid running for office. (credit: Carol Highsmith)

Questions to Consider

1. How might framing or priming affect the way a reader or viewer thinks about an issue?
2. Why would inaccurate coverage of race and gender affect policy or elections?
3. If we are presented with a reality, it affects the way we vote and the policies we support.
4. In what ways can the media change the way a citizen thinks about government?

5. In what ways do the media protect people from a tyrannical government?
6. Should all activities of the government be open to media coverage? Why or why not? In what circumstances do you think it would be appropriate for the government to operate without transparency?
7. Have changes in media formats created a more accurate, less biased media? Why or why not?
8. How does citizen journalism use social media to increase coverage of world events?

Terms to Remember

beat—the coverage area assigned to journalists for news or stories

framing—the process of giving a news story a specific context or background

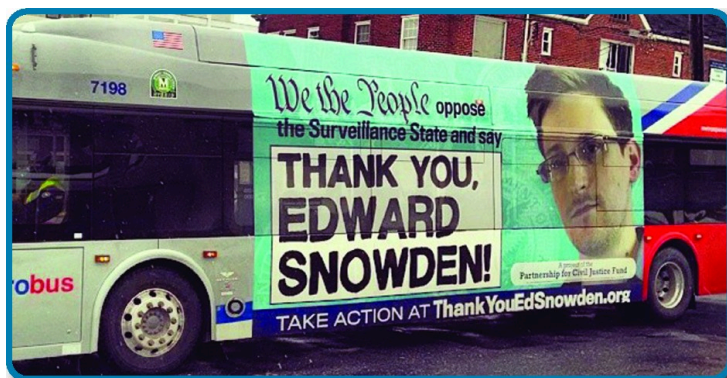
pack journalism—journalists follow one another rather than digging for their own stories

priming—the process of predisposing readers or viewers to think a particular way

PART XVII

CIVIL LIBERTIES

79. Civil Liberties: Protecting Freedoms



Edward Snowden, a former contractor for the U.S. government, leaked thousands of classified documents to journalists in June 2013. These documents revealed the existence of multiple global surveillance programs run by the National Security Agency. (credit: modification of work by Bruno Sanchez-Andrade Nuño)

Edward Snowden revealed that U.S. government agencies are conducting widespread surveillance, capturing not only the conversations of foreign leaders and suspected terrorists but also the private communications of U.S. citizens, even those not suspected of criminal activity (without probable cause or a specific warrant targeting an individual action).

The framers of the *Constitution* wanted a government that would not repeat the very abuses of individual **liberties** (basic freedoms possessed by all human beings) and **rights** (how much freedom ruling authority protects or denies individuals and whether that authority is exercised equitably) that caused them to declare independence from Britain. However, laws and other “parchment

barriers” (or written documents) alone have not protected freedoms over the years; instead, citizens have learned the truth of the old saying “Eternal vigilance is the price of liberty”(often attributed to Thomas Jefferson but actually said by Irish politician John Philpot Curran). Ordinary citizens’ actions are at the core of a vigilant effort to protect constitutional liberties.

If citizens of the United States acknowledge only the laws of the state, people in power can easily curtail civil rights and individual freedoms/civil liberties. Laws of the state, those formed through legislative action or agreement between parties, are positive laws.¹ Generally the term “positive law” connotes statutes, i.e., law enacted by a duly authorized legislature. [2] As used in this sense, **positive law** is distinguishable from **natural law**. The term “natural law”, especially as used in legal philosophy, refers to a set of universal principles and rules properly governing moral human conduct. Unlike a statute, natural law is not created by human beings. Rather, natural law is thought to be the preexisting law of nature, which human beings can *discover* through their capacity for rational analysis.²

1. See multiple discussions of natural and positive law withing the National Archives selection of original documents including but not limited to a letter from Thomas Jefferson to Henry Lee, 8 May 1827 at <http://founders.archives.gov/documents/Jefferson/98-01-02-5212>
2. Office of the Law Revision Counsel, United States Code, THE TERM “POSITIVE LAW” at http://uscode.house.gov/codification/term_positive_law.htm

Natural law or **unalienable rights** are acknowledged to exist outside the laws of the state. If an individual retains rights to maintain their own life and obtain property by attaching their labor to the acquisition, do individuals receive or obtain such rights from the state? If individuals recognize the state as the grantor of rights, may the state not remove rights at the will of those in power?

If citizens acknowledge the government gives them rights, they must also acknowledge the government has the power to remove these rights. If citizens believe they consent to some restrictions on their unalienable/inseparable rights (possessed by them because they are human beings), they consent only to government restrictions on their rights in order to obtain a benefit. Usually a portion of these rights are surrendered to the positive laws enforced by government toward safety and security for the remaining rights. Rights to self-determine driving destinations, times, speeds and methods are surrendered to positive laws established to protect the health and safety of all drivers and pedestrians.

Consider the Original

October 16, 2014

Obey the Law: Don't Pass Stopped School Buses



Stop for School Bus Loading or Unloading at

<http://www.txdot.gov/driver/kids-teens/school.html>.

AUSTIN – In conjunction with National School Bus Safety Week (Oct. 20-24), the Texas Department of Public Safety (DPS) is reminding drivers that it is illegal to pass any school bus that is stopped and operating a visual signal –

either flashing red lights or a stop sign. During this time, DPS Highway Patrol troopers will be on the lookout for drivers who disregard the law.

“Children are particularly vulnerable when entering or exiting a school bus, and drivers who refuse to yield to a stopped school bus put our children in harm’s way,” said DPS Director Steven McCraw. “DPS will not tolerate those who ignore the law, and we urge drivers to make safety a priority when they encounter school buses.”

During National School Bus Safety Week, troopers in many areas will be riding on or following school buses to catch motorists who disregard the law. Troopers will also be patrolling areas where school buses pick up and drop off students, watching for motorists violating the school bus law. Drivers who violate the law could face fines as much as \$1,250.

In 2013, Texas Highway Patrol troopers issued 566 tickets for passing a stopped school bus. According to the Texas

Education Agency, more than 40,000 school buses transport 1.5 million Texas children every school day.

According to Texas statute, a driver – traveling in either direction – must stop when approaching a school bus that is stopped and operating a visual signal. The driver may not proceed until one of the following occurs: the school bus resumes motion; the operator is signaled by the bus driver to proceed; or the visual signal is no longer activated.

If a road is divided only by a left-turning lane, drivers on both sides of the roadway must stop for school buses with alternating red flashing lights activated. However, if the lanes are separated by an intervening space or physical barrier, only motorists going in the same direction as the bus are required to stop.

(As a reminder, school buses, by law, must stop at all railroad crossings.)

Here are several safety measures drivers can take to help keep children safer:

- When driving in school zones, watch out for student pedestrians.
- Slow down and watch for children congregating near bus stops.
- Look for children who might dart into the street without looking for traffic.
- Know and obey the laws concerning traffic and school buses in Texas.³

Civil Liberties: Questions to Consider

1. What freedoms require vigilant protection?
2. How should we balance the societal interests with personal interests?
3. How do we balance the protection of liberties while ensuring appropriate levels of safety and security?

Terms to Remember

civil liberties—basic freedoms possessed by all human beings; right to life, liberty, and property (pursuit of happiness); unalienable rights

civil rights—how much freedom ruling authority protects

3. Texas Department of Public Safety News Release at http://www.dps.texas.gov/director_staff/media_and_communications/2014/pr101614.htm

or denies individuals and whether that authority is exercised equitably

natural law—a set of universal principles and rules that properly govern moral human conduct; the preexisting law of nature, which human beings can *discover* through their capacity for rational analysis

positive law—human made rules and regulations; human agreed upon contracts and constitutions

unalienable rights—basic freedoms possessed by all human beings; right to life, liberty, and property (pursuit of happiness); inseparable

80. Civil Liberties: What does the contract protect?

Learning Objectives

- Define civil liberties
- Describe the origin of civil liberties in the U.S. context
- Identify the key positions on civil liberties taken at the Constitutional Convention
- Explain the concern that states should respect civil liberties

The *Constitution*—in particular, the first ten amendments forming the Bill of Rights—protect the liberties and rights of individuals. It does not limit this protection to citizens or adults; in most cases the *Constitution* simply refers to “persons” which over time has grown to mean that even children, visitors from other countries, and immigrants—permanent or temporary, legal or undocumented—enjoy the same freedoms as adult citizens within the United States or its territories . Neither Japanese tourists visiting Disney World or visitors exceeding the limit of days allowed on their visas sacrifice those liberties. In everyday conversation, we often treat freedoms, liberties, and rights as effectively the same thing—similar to how separation of powers and checks and balances are often used interchangeably, when in fact they are distinct concepts.

Consider the Original

The Bill of Rights: A Transcription

The Preamble to The Bill of Rights

Congress of the United States begun and held at the City of New-York, on Wednesday the fourth of March, one thousand seven hundred and eighty nine.

THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution. RESOLVED by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all, or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz.

ARTICLES in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution. Note: The following text is a transcription of the first ten amendments to the Constitution in their original form. These amendments were ratified December 15, 1791, and form what is known as the “Bill of Rights.”

Amendment I Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X 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.¹

1. Note: The capitalization and punctuation in this version is from the enrolled original of the Joint Resolution of Congress proposing the Bill of Rights, which is on permanent display in the Rotunda of the National Archives Building, Washington, D.C. Page URL:

Defining Civil Liberties

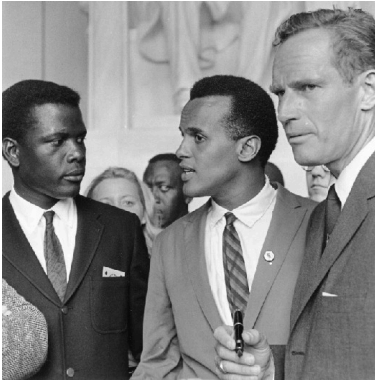
For language precision, political scientists and legal experts distinguish between civil liberties and civil rights, even though the *Constitution* has been interpreted to protect both. We often envision **civil liberties** as limitations on government power, intended to protect freedoms from illegal government intrusion. For example, the First Amendment denies the government the power to prohibit “the free exercise” of religion; the states and the national government cannot forbid people to follow a religion of their choice, even if politicians and judges think the religion is misguided, blasphemous, or otherwise inappropriate. You are free to create your own religion and recruit followers to it (subject to the U.S. Supreme Court deeming it a religion), even if both society and government disapprove of its tenets. That said, the way you practice your religion may be regulated if it impinges on the rights of others. Similarly, the Eighth Amendment says the government cannot impose “cruel and unusual punishments” on individuals for their criminal acts. Although the definitions of *cruel* and *unusual* have expanded over the years, the courts have generally and consistently interpreted this provision as making it unconstitutional for government officials to torture suspects.

http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html U.S. National Archives & Records Administration 8601 Adelphi Road, College Park, MD, 20740-6001, • 1-86-NARA-NARA • 1-866-272-6272 USA.gov, National Archives, America’s Founding Documents> The Bill of Rights: A Transcription at <https://www.archives.gov/founding-docs/bill-of-rights-transcript>

Civil rights are guarantees that government officials will treat people equally and base decisions on the law rather than race, gender, or other personal characteristics. The Constitution's civil rights guarantee makes it unlawful for a school or university run by a state government to treat students differently based on their race, ethnicity, age, sex, or national origin. In the 1960s and 1970s many states had separate schools where only students of a certain race or gender were able to study. The courts determined that these policies violated the civil rights of students refused admission because of those rules.²

The idea that Americans—indeed, people in general—have fundamental rights and liberties was a core argument for independence. In writing the [Declaration of Independence](#) in 1776, Thomas Jefferson drew on the ideas of John Locke to express the colonists' belief in certain inalienable or natural rights that no ruler had the power or authority to deny them. It was a scathing legal indictment of King George III for violating the colonists' liberties. Although the Declaration of Independence does not guarantee specific freedoms, its language fundamentally inspired many states to adopt protections for civil liberties and rights in their own constitutions. It also expressed principles of the founding era that have resonated in the United States since its independence. In particular, Jefferson's words "all men are created equal" became the centerpiece of struggles for the rights of women and minorities.

2. *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968); *Allen v. Wright*, 468 U.S. 737 (1984).



Actors and civil rights activists Sidney Poitier (left), Harry Belafonte (center), and Charlton Heston (right) on the steps of the Lincoln Memorial on August 28, 1963, during the March on Washington.

Civil Liberties and the Constitution

The Constitution as written in 1787 did not include a **Bill of Rights**. The idea of including one was proposed and after brief discussion was dismissed in the final week of the Constitutional Convention. The framers believed they faced more pressing concerns than the protection of civil rights and liberties, most notably keeping the fragile

union together in the light of internal unrest and external threats.

Moreover, the framers thought they had adequately covered rights issues in the document's main body. Federalists did include some protections against legislative acts that might restrict citizen's liberties, based on the history of real and perceived abuses by both British kings, parliaments and royal governors. Article I, Section 9, limits the congressional power in three ways: prohibiting the passage of bills of attainder, prohibiting ex post facto laws, and limiting the congressional ability to suspend the writ of habeas corpus.

A **bill of attainder** is a law that convicts or punishes someone for a crime without a trial, a tactic used often in England against the king's enemies. Prohibition of such laws means that the U.S. Congress cannot simply punish people who are unpopular or *seem* to be guilty of crimes. An **ex post facto law** has a retroactive effect: it can be used to punish crimes that were not crimes at the time they were committed, or it can be used to increase the severity of punishment after the fact.

Finally, the writ of **habeas corpus** in our common-law legal

system demands that a neutral judge decide whether someone has been lawfully detained. Particularly in times of war, or in response to threats against national security, the government has held suspected enemy agents without access to civilian courts. This is frequently without access to lawyers or a defense, seeking instead to try them before military tribunals or detain them indefinitely without trial. For example, during the Civil War, President Abraham Lincoln detained suspected Confederate saboteurs and sympathizers in Union-controlled states and attempted to have them tried in military courts, leading the Supreme Court to rule in *Ex parte Milligan* that the government could not bypass the civilian court system in states where it was operating.³

During World War II, the Roosevelt administration interned Japanese Americans and had other suspected enemy agents—including U.S. citizens—tried by military courts rather than by the civilian justice system, a choice the Supreme Court upheld in *Ex parte Quirin*.⁴

More recently, in the wake of the 9/11 attacks on the World Trade Center and the Pentagon, the Bush and Obama administrations detained suspected terrorists captured both within and outside the United States and sought to avoid trials in civilian courts. Hence, there have been times in our history when national security issues trumped individual liberties.

3. *Ex parte Milligan*, 71 U.S. 2 (1866).

4. *Ex parte Quirin*, 317 U.S. 1 (1942); See William H. Rehnquist. 1998. *All the Laws but One: Civil Liberties in Wartime*. New York: William Morrow.

Debate continues over these issues. The Federalists reasoned that the limited set of enumerated powers of Congress, along with the limitations on those powers in Article I, Section 9, would suffice, and no separate bill of rights was needed. Alexander Hamilton, writing as Publius in *Federalist* No. 84, argued that the Constitution was “merely intended to regulate the general political interests of the nation,” rather than to concern itself with “the regulation of every species of personal and private concerns.” Hamilton

went on to argue that listing specific rights might actually be dangerous as a pretext for people to claim that rights not included in such a list were therefore not protected. Later, in his speech introducing the proposed amendments that would become the Bill of Rights, James Madison acknowledged another Federalist argument: “It has been said, that a bill of rights is not necessary, because the establishment of this government has not repealed those declarations of rights which are added to the several state constitutions.”⁵



Richard Quirin and seven other trained German saboteurs had once lived in the United States and had secretly returned in June 1942. Upon their capture, a military commission (shown here) convicted the men—six of them received death sentences. Ex parte Quirin set a precedent for the trial by military commission of any unlawful combatant against the United States. (credit: Library of Congress)

5. American History from Revolution to Reconstruction and Beyond, “Madison Speech Proposing the Bill of Rights June 8 1789,” <http://www.let.rug.nl/usa/documents/>

For that matter, the Articles of Confederation had not included a specific listing of rights either.

However, the Anti-Federalists argued that the Federalists' position was incorrect and perhaps even insincere. They believed provisions such as the elastic clause in Article I, Section 8 would allow Congress to legislate on matters well beyond the limited ones foreseen by the *Constitution's* authors; thus, they held that a bill of rights *was* necessary. One of the Anti-Federalists, Brutus, whom most scholars believe to be Robert Yates, wrote: "The powers, rights, and authority, granted to the general government by this *Constitution*, are as complete, with respect to every object to which they extend, as that of any state government—It reaches to every thing which concerns human happiness—Life, liberty, and property, are under its controul [sic]. There is the same reason, therefore, that the exercise of power, in this case, should be restrained within proper limits, as in that of the state governments."⁶

Two centuries of experience suggests the Anti-Federalists may have been correct; while the states retain a significant importance, the scope and powers of the national government are much broader today than in 1787—likely beyond even the imaginings of the Federalists themselves.

James Madison ultimately delivered on this promise by proposing a package of amendments in the First Congress. These derived from the Declaration of Rights in the Virginia state constitution, ratification convention suggestions and other sources, which were

1786-1800/madison-speech-proposing-the-bill-of-rights-june-8-1789.php (March 4, 2016).

6. Constitution Society, "To the Citizens of the State of New-York," <http://www.constitution.org/afp/brutus02.htm> (March 4, 2016).

extensively debated in both houses of Congress and ultimately proposed as twelve separate amendments for ratification. Ten of the amendments were successfully ratified by the requisite 75 percent of the states and became known as the Bill of Rights.

Extending the Bill of Rights to the States

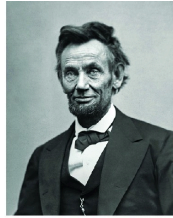
In the decades following the *Constitution's* ratification, the Supreme Court declined to expand the Bill of Rights to curb the power of the states, most notably in the 1833 case of *Barron v. Baltimore*.⁷

In this case, which dealt with Fifth Amendment property rights, the Supreme Court unanimously decided that the Bill of Rights applied only to federal government actions. Explaining the court's ruling, Chief Justice John Marshall wrote that it was incorrect to argue that "the Constitution was intended to secure the people of the several states against the undue exercise of power by their respective state governments; as well as against that which might be attempted by their [Federal] government."

7. *Barron v. Baltimore*, 32 U.S. 243 (1833).



(a)



(b)

Representative John Bingham (R-OH) (a) is considered the author of the Fourteenth Amendment, adopted on July 9, 1868. Influenced by his mentor, Salmon P. Chase, Bingham was a strong supporter of the antislavery cause; after Chase lost the Republican presidential nomination to Abraham Lincoln (b), Bingham became one of the president's most ardent supporters.

The prevailing view on the limited application of the Bill of Rights to the states changed in the wake of the Civil War. Soon after the Thirteenth Amendment abolished slavery, state

governments—particularly those in the former Confederacy—began to pass “black codes” restricting the rights of former slaves and effectively relegating them to second-class citizenship under their state laws and

constitutions. Angered by these actions, members of the Radical Republican faction in Congress demanded the laws be overturned. In the short term, they advocated suspending civilian government in most of the southern states and replacing politicians who had enacted the black codes. Long-term they proposed two constitutional amendments to guarantee the rights of freed slaves on an equal standing with whites; these rights became the Fourteenth Amendment, dealing with civil liberties and rights in general, and the Fifteenth Amendment protecting the right to vote in particular. But, the right to vote did not yet apply to women or to Native Americans.

Civil liberties were significantly clarified by the Fourteenth Amendment in 1868. First, it states that “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” – a provision echoing the privileges and immunities clause in Article IV, Section 2 of the original Constitution ensuring that states treat citizens of other states the same as their own. (To use an example from today, the punishment for speeding by an out-of-state driver cannot be more severe than the punishment for an in-state driver). Legal scholars and the courts

have extensively debated the meaning of this privileges or immunities clause over the years; some have argued it was supposed to extend the entire Bill of Rights (or at least the first eight amendments) to the states while others have argued that only some rights are extended. In 1999, Justice John Paul Stevens, writing for a majority of the Supreme Court, argued in *Saenz v. Roe* that the clause protects the right to travel from one state to another.⁸

More recently, Justice Clarence Thomas argued in the 2010 *McDonald v. Chicago* ruling that this clause applied the individual right to bear arms to the states.⁹

The due process clause is the second provision of the Fourteenth Amendment applying the Bill of Rights to the states. It says, “nor shall any State deprive any person of life, liberty, or property, without due process of law.” As in the Fifth Amendment this provision refers to “due process,” a term that generally means people must be treated fairly and impartially by government officials (or with what is commonly referred to as substantive due process). Although the provision’s text does not mention rights specifically, the courts have held in a series of cases that it indicates certain fundamental liberties that cannot be denied by the states. For example, in *Sherbert v. Verner* (1963), the Supreme Court ruled that states could not deny unemployment benefits to an individual who turned down a job because it required working on the Sabbath.¹⁰

Beginning in 1897, the Supreme Court established that various Bill of Rights protections of fundamental liberties must be upheld by the states, even if their state constitutions and laws do not protect them as fully as the Bill of Rights does—or at all. This means there

8. *Saenz v. Roe*, 526 U.S. 489 (1999).

9. *McDonald v. Chicago*, 561 U.S. 742 (2010).

10. *Sherbert v. Verner*, 374 U.S. 398 (1963).

has been a process of selective incorporation of the Bill of Rights into state practices; in other words, the *Constitution* effectively inserts parts of the Bill of Rights into state laws and constitutions, even though it does not do so explicitly. When cases arise to clarify particular issues and procedures, the United States Supreme Court decides whether state laws violate the Bill of Rights and are therefore unconstitutional.

For example, under the Fifth Amendment a person can be tried in federal court for a felony—a serious crime—only after a grand jury issues an indictment confirming it is reasonable to try the person for that crime. (A grand jury is a group of citizens charged with deciding if there is enough evidence of a crime to prosecute someone.) The Supreme Court has ruled however that states are not required to use grand juries as long as they ensure people accused of crimes are indicted using an equally fair process.

Selective incorporation is an ongoing process. When the Supreme Court initially decided in 2008 that the Second Amendment protects an individual's right to keep and bear arms, it did not then decide it was a fundamental liberty the states must also uphold. It was only in the *McDonald v. Chicago* case two years later that the Supreme Court incorporated the Second Amendment into state law. The Supreme Court also gradually moved to extend the Bill of Rights to the states regarding censorship and the Fourteenth Amendment. In *Near v. Minnesota* (1931), the Court disagreed with state courts regarding censorship and ruled it unconstitutional except in rare cases.¹¹

The Bill of Rights is designed to protect the freedoms of individuals from interference by government officials. Originally these protections were applied only to actions by the national government; different sets of rights and liberties were protected by state constitutions and laws, and even when the rights themselves

11. *Near v. Minnesota*, 283 U.S. 697 (1931).

were the same, the level of protection for them often differed by definition across the states. Most of the Bill of Rights' protections of civil liberties have been expanded to cover actions by state governments since the Civil War, through the Fourteenth Amendment, a series of Supreme Court decisions and a process of selective incorporation. Nonetheless there is still vigorous debate about what these rights entail and how they should be balanced against the interests of others and of society as a whole.

Questions to Consider

1. Briefly explain the difference between civil liberties and civil rights.
2. Briefly explain the concept of selective incorporation, and why it became necessary.

Terms to Remember

bill of attainder—trial by legislature rather than court system

civil liberties—limitations on the power of government, designed to ensure personal freedoms

civil rights—guarantees of equal treatment by government authorities

due process clause—provisions of the Fifth and

Fourteenth Amendments that limit government power to deny people “life, liberty, or property” on an unfair basis

ex post facto law—after the fact; laws enacting retroactive punishment

habeas corpus—present the body; government may not suspend due process protections; government may not hold an individual indefinitely without acknowledging charges against the individual

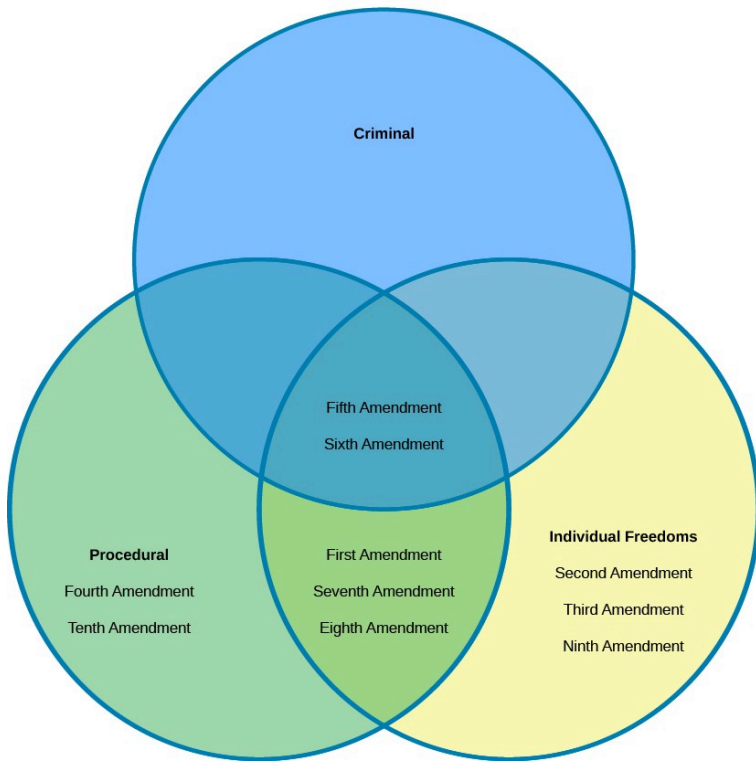
8I. Civil Liberties: How are basic freedoms secured?

Learning Objectives

- Identify the liberties and rights guaranteed by the first four amendments to the Constitution
- Explain why these rights and liberties are limited in actual practice
- Explain why interpreting some amendments has been controversial

The Bill of Rights provisions can broadly be divided into three categories. The First, Second, Third, and Fourth Amendments protect basic individual freedoms; the Fourth (partly), Fifth, Sixth, Seventh, and Eighth protect people suspected or accused of criminal activity; the Ninth and Tenth are consistent with the framers' view that the Bill of Rights is not necessarily an exhaustive list of all the rights people have and guarantees a role for state as well as federal government.

Categories of Rights and Protections



Individual Freedoms

The First Amendment protects the right to freedom of religious conscience and practice and the right to free expression, particularly of political and social beliefs. The Second Amendment protects the right to bear arms, as well as the collective right to protect the community as part of the militia. The Third Amendment prohibits the government from commandeering people's homes to house soldiers, particularly in peacetime. Finally, the Fourth Amendment prevents the government from searching our persons

or property or taking evidence without a warrant issued by a judge, with certain exceptions.

The First Amendment

The First Amendment is perhaps the most famous provision of the Bill of Rights; it is arguably the most extensive, because it guarantees both religious freedoms and the right to express your views in public. Specifically, the First Amendment says:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Given the broad scope of this amendment, it is helpful to break it into its two major parts.

The first part protects two related aspects of religious freedom: first, it prevents the government from imposing a specific religion on the people, and secondly it prevents the government from restricting the people from recognition and exercise of their own specific religion.

The Establishment Clause

The **establishment clause** is the first of these. Congress cannot create or promote a state-sponsored religion (this also includes the states now). When the United States was founded, most countries' governments had an established church or religion, an officially sponsored set of religious beliefs and values. Direct alliances between a state and a religion frequently led to religiously

aligned wars and state sponsored tyranny against anyone with religious beliefs outside of the *official* church.

Many settlers in the United States were refugees from these wars and state sponsored religious intolerance; they sought the freedom to follow their own religion with like-minded people in relative peace. As a practical matter, even if the early United States had tried to establish a single national religion, the existing diversity of religious beliefs would have hindered it.

The **establishment clause** today is interpreted more broadly; it forbids the creation of a “Church of the United States” or “Church of Ohio” and forbids the government from favoring one set of religious beliefs over others or favoring religion (of any variety) over non-religion.

The key question facing the courts is whether the establishment clause should be understood as imposing, in Thomas Jefferson’s words, “a wall of separation between church and state.” In a 1971 case known as *Lemon v. Kurtzman*, the Supreme Court established the Lemon test for deciding whether a law or other government action that might promote a particular religious practice should be allowed to stand.¹

The Lemon test has three criteria that must be satisfied for such a law or action to be found constitutional and remain in effect:

1. The action or law must not lead to *excessive government entanglement* with religion; in other words, policing the boundary between government and religion should be relatively straightforward and not require extensive effort by the government.
2. The action or law cannot either *inhibit* or *advance* religious practice; it should be neutral in its effects on religion.
3. The action or law must have some *secular purpose*; there must

1. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

be some non-religious justification for the law.

A school cannot prohibit students from voluntary, non-disruptive prayer because that would impair the free exercise of religion. The general statement that “prayer in schools is illegal” or unconstitutional is incorrect. However, the establishment clause *does* limit official endorsement of any religion, including prayers organized or otherwise facilitated by school authorities, even as part of off-campus or extracurricular activities.²

Some laws appearing to establish certain religious practices are allowed. The courts have permitted religiously inspired blue laws, for example, limiting working hours or even shuttering businesses on Sunday, the Christian day of rest, because by allowing people to practice their (Christian) faith, such rules may help ensure the “health, safety, recreation, and general well-being” of citizens. They have allowed restrictions on the sale of alcohol and sometimes other goods on Sunday for similar reasons.

Why has the **establishment clause** been so controversial? Government officials acknowledge that we live in a society with vigorous religious practice where most people believe in God—even if we disagree on the nature of God or how to worship. Disputes often arise over how much the government can acknowledge this widespread religious belief. The courts have allowed for a certain tolerance of what is described as ceremonial deism, an acknowledgement of God or a creator that lacking any specific and substantive religious detail. For example, the national motto “In God We Trust,” appearing on our

2. See, in particular, *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), which found that the school district’s including a student-led prayer at high school football games was illegal.

coins and paper money, is seen as more of an acknowledgment that most citizens believe in God than of any effort by government officials to promote religious belief and practice. This reasoning applies to the inclusion of the phrase “under God” in the Pledge of Allegiance—a change originating during the early years of the Cold War.

The courts have also allowed some religiously motivated actions by government agencies, such as clergy delivering prayers to open city council meetings and legislative sessions, on the presumption that—unlike school children—adult participants can distinguish between the government’s allowing someone to speak and endorsing that person’s speech. Yet, while some displays of religious codes (e.g., Ten Commandments) are permitted in the context of showing the evolution of law over the centuries, in other cases, these displays have been removed after state supreme court rulings. In Oklahoma, the courts ordered the removal of a Ten Commandments sculpture at the state capitol when other groups, including Satanists and the Church of the Flying Spaghetti Monster, attempted to get their own sculptures allowed there on an equal footing.



(a)



(b)

The motto “In God We Trust” has appeared intermittently on U.S. coins since the 1860s (a), yet it was not mandated on paper currency until 1957. The Ten Commandments are prominently displayed on the grounds of the Texas State Capitol in Austin (b), though a similar sculpture was ordered to be removed in Oklahoma. (credit a: modification of work by Kevin Dooley)

The Free Exercise Clause

The **free exercise clause** limits the government's ability to control or restrict specific group or individual religious practices. It does not regulate the government's promotion of religion, but rather government *suppression* of religious beliefs and practices. Controversy surrounding the free exercise clause reflects the way laws or rules that apply to everyone might apply to people with particular religious beliefs. For example, can a Jewish police officer whose religious belief requires her to observe Shabbat be compelled to work on a Friday night or during the day on Saturday? Or must the government accommodate this religious practice even if the general law or rule in question is not applied equally to everyone?

In the 1930s and 1940s, Jehovah's Witness cases demonstrated the difficulty of striking the right balance. Their church teaches that they should not participate in military combat. Its members also refuse to participate in displays of patriotism, including saluting the flag and reciting the Pledge of Allegiance. They also regularly recruit converts through door-to-door evangelism. These activities have led to frequent conflict with local authorities. Jehovah's Witness children were punished in public schools for failing to salute the flag or recite the Pledge of Allegiance, and members attempting to evangelize were arrested for violating laws prohibiting door-to-door solicitation. In early legal challenges brought by Jehovah's Witnesses, the Supreme Court was reluctant to overturn state and local laws that burdened their religious beliefs.³

However, in later cases, the court upheld the rights of Jehovah's

3. *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

Witnesses to proselytize and refuse to salute the flag or recite the Pledge.⁴

The rights of conscientious objectors—individuals who refuse to perform military service on the grounds of freedom of thought, conscience, or religion—have also been controversial, although many conscientious objectors have contributed service as non-combatant medics during wartime. To avoid serving in the Vietnam War, many people claimed conscientious objection to military service in a war they considered unwise or unjust. The Supreme Court, however, ruled in *Gillette v. United States* that to claim to be a conscientious objector, a person must be opposed to serving in *any* war, not just some wars.⁵

4. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Watchtower Society v. Village of Stratton*, 536 U.S. 150 (2002).

5. *Gillette v. United States*, 401 U.S. 437 (1971).



Amish farm scene in Pennsylvania, Carol M. Highsmith, Photographer, between 1980–2006; at <https://www.loc.gov/item/2011630183>

The Supreme Court has been challenged to establish a general framework for deciding if a religious belief can override general laws and policies. In the 1960s and 1970s, the court decided two establishing a general test for deciding similar future cases. In both *Sherbert v. Verner*, dealing with unemployment compensation, and *Wisconsin v. Yoder*, dealing with the right of Amish parents to homeschool their children, the court said that for a law to be allowed to

limit or burden a religious practice, the government must meet two criteria.⁶

It must demonstrate both a “**compelling governmental interest**” in limiting that practice and that restriction must be “narrowly tailored.” In other words, it must show a very good reason for that law and demonstrate that the law was the only feasible way of achieving that goal. This standard became known as the Sherbert test. Since the burden of proof in these cases was on the government, the Supreme Court made it very difficult for the federal and state governments to enforce laws against individuals that would infringe upon their religious beliefs.

In 1990, the Supreme Court made a controversial decision

6. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

substantially narrowing the Sherbert test in *Employment Division v. Smith*, more popularly known as “the peyote case.”⁷

This case involved two men who were members of the Native American Church, a religious organization that uses the hallucinogenic peyote plant as part of its sacraments. After being arrested for possession of peyote, the two men were fired from their jobs as counselors at a private drug rehabilitation clinic. When they applied for unemployment benefits, the state refused to pay on the basis that they had been dismissed for work-related reasons. The men appealed the denial of benefits and were



Veiled Muslim Women, 1898-1914, Matson Photograph Collection, Library of Congress at <https://www.loc.gov/item/mpc2004006830/PP>

initially successful, since the state courts applied the Sherbert test and found that the denial of unemployment benefits burdened their religious beliefs. However, the Supreme Court ruled in a 6–3 decision that the “compelling governmental interest” standard should not apply; instead, so long as the law was not designed to target a person’s religious beliefs in particular, it was not up to the courts to decide that those beliefs were more important than the law in question.

On the surface, a case involving the Native American Church seems unlikely to arouse much controversy. It replaced the Sherbert test with one allowing more government regulation of religious

7. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

practices and followers of other religions grew concerned that state and local laws, even ones neutral on their face, might be used to curtail their own religious practices. Congress responded to this decision in 1993 with a law known as the **Religious Freedom Restoration Act (RFRA)**, followed in 2000 by the **Religious Land Use and Institutionalized Persons Act** after part of the RFRA was struck down by the Supreme Court. According to the Department of Justice, RFRA mandates strict scrutiny before government may violate religious freedoms/free exercise of religious beliefs. RLUIPA designates the government may not impose a “substantial burden” on individual exercise of beliefs or religious freedoms and government must use “the least restrictive means” of carrying out policy while furthering “a compelling interest” on the part of the government.⁸ Land zoning issues, eminent domain, and the rights of prisoners exercising their religious beliefs drove the perceived need for this legislation. In addition, twenty-one states have passed state RFRAs since 1990 that include the Sherbert test in state law, and state court decisions in eleven states have enshrined the Sherbert

8. <https://www.gpo.gov/fdsys/pkg/STATUTE-107/pdf/STATUTE-107-Pg1488.pdf> RELIGIOUS FREEDOM RESTORATION ACT OF 1993 (P.L. 103-141) at <https://www.justice.gov/jmd/religious-freedom-restoration-act-1993-pl-103-141> and CHAPTER 21C-PROTECTION OF RELIGIOUS EXERCISE IN LAND USE AND BY INSTITUTIONALIZED PERSONS at <https://www.justice.gov/crt/title-42-public-health-and-welfare>

test's compelling governmental interest interpretation of the free exercise clause into state law.⁹

However, the RFRA itself has its critics. While relatively uncontroversial as applied to the rights of individuals, debate has emerged whether businesses and other groups have religious liberty. In explicitly religious organizations, such as a fundamentalist congregations or the Roman Catholic Church, members have a meaningful, shared religious belief. The application of the RFRA has become more problematic in businesses and non-profit organizations whose owners or organizers may share a religious belief while the organization has some secular, non-religious purpose.

Such a conflict emerged in the 2014 Supreme Court case known as *Burwell v. Hobby Lobby*.¹⁰

The Hobby Lobby chain sells arts and crafts merchandise at hundreds of stores; its founder David Green is a devout Christian whose beliefs include opposition to abortion. Consistent with these beliefs, he objected to a provision of the Patient Protection and Affordable Care Act (ACA or Obamacare) requiring employer-backed insurance plans to include no-charge access to the morning-after pill, a form of emergency contraception, arguing that this requirement infringed on his protected First Amendment right to exercise his religious beliefs. Based in part on the federal RFRA, the

9. Juliet Eilperin, "31 states have heightened religious freedom protections," *Washington Post*, 1 March 2014. <http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/>. Three more states passed state RFRAs in the past year.

10. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. __ (2014).

Supreme Court agreed 5–4 with Green and Hobby Lobby’s position and said that Hobby Lobby and other closely held businesses did not have to provide employees free access to emergency contraception or other birth control if doing so would violate the religious beliefs of the business’ owners, because there were other less restrictive ways the government could ensure access to these services for Hobby Lobby’s employees (e.g., paying for them directly).

In 2015, state RFRA became controversial when individuals and businesses providing wedding services (e.g., catering and photography) were compelled to provide services for same-sex weddings in states where the practice had been newly legalized. Proponents of state RFRA laws argued that people and businesses should not be compelled to endorse practices their counter to their religious beliefs and feared clergy might be compelled to officiate same-sex marriages against their religion’s specific teachings. Opponents of RFRA laws argued that individuals and businesses should be required, per *Obergefell v. Hodges*, to serve same-sex marriages on an equal basis as a matter of ensuring the rights of gays and lesbians.¹¹

Despite ongoing controversy the courts have consistently found some public interests sufficiently compelling to override the free exercise clause. For example, since the late nineteenth century the courts have consistently held that people’s religious beliefs do not exempt them from the general laws against polygamy. Other potential acts in the name of religion that are also out of the question are drug use and human sacrifice.

11. *Obergefell v. Hodges*, 576 U.S. ____ (2015).

Freedom of Expression

Although the remainder of the First Amendment protects four distinct rights—free speech, press, assembly, and petition—today we view them as encompassing a right to freedom of expression, particularly as technological advances blur the lines between oral and written communication (i.e., speech and press).

Controversies over freedom of expression were rare until the 1900s, even amidst common government censorship. During the Civil War the Union post office refused to deliver newspapers opposing the war or sympathizing with the Confederacy, while allowing distribution of pro-war newspapers. The emergence of photography and movies, in particular, led to new public concerns about morality, causing both state and federal politicians to censor lewd and otherwise improper content. At the same time, writers became emboldened and included explicit references to sex and obscene language, leading to government censorship of books and magazines.

Censorship reached its height during World War I. The United States was swept up in two waves of hysteria. Germany's actions leading up to United States involvement, including the sinking of the RMS *Lusitania* and the Zimmerman Telegram (an effort to ally with Mexico against the United States) provoked significant anti-German feelings. Further, the Bolshevik revolution of 1917 overthrowing the Russian government called for communist revolutionaries to overthrow the capitalist, democratic governments in western Europe and North America.

Americans vocally supporting the communist cause or opposing the war often found themselves in jail. In *Schenck v. United States*, the Supreme Court ruled that people encouraging young men to dodge the draft could be imprisoned, arguing that recommending people disobey the law was tantamount to “falsely

shouting fire in a theatre and causing a panic” and thus presented a “clear and present danger” to public order.¹²

Similarly, communists and other revolutionary anarchists and socialists during the post-war Red Scare were prosecuted under various state and federal laws for supporting the forceful or violent overthrow of government. This restriction to political speech continued for the next fifty years.

However, in the 1960s the Supreme Court’s rulings on free expression became more liberal, in response to the Vietnam War and the growing antiwar movement. In a 1969 case involving the Ku Klux Klan, *Brandenburg v. Ohio*, the Supreme Court ruled that only speech or writing that constituted a direct call or plan to imminent lawless action, an illegal act in the immediate future, could be suppressed; the mere advocacy of a hypothetical revolution was not enough.¹³

12. *Schenck v. United States*, 249 U.S. 47 (1919).

13. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).



A group of women carrying signs against America's support of the English against the Irish, burning a flag on the sidewalk, June 3, 1920; collection, Library of Congress at <https://www.loc.gov/item/npc2007001720/>

The Supreme Court also ruled that various forms of **symbolic speech**—wearing clothing like an armband that carried a political symbol or raising a fist in the air, for example—were subject to the same protections as written and spoken communication.

Burning the U.S. Flag

Perhaps no act of symbolic speech has been as controversial in U.S. history as the burning of the flag. Citizens tend to revere the flag as a unifying symbol of the country in much the same way most people in Britain would treat the reigning queen (or king). States and the federal government have long had laws protecting the

flag from desecration—defacing, damaging, or otherwise treating it with disrespect. Perhaps in part because of these laws, people wanting to publicize opposition to U.S. government policies have used desecrating the flag a useful way to gain public and press attention to their cause.

Note the case of Gregory Lee Johnson, a member of various pro-communist and antiwar groups. As part of a protest near the Republican National Convention in Dallas, Texas in 1984 Johnson set fire to a U.S. flag that another protestor had torn from a flagpole. He was arrested, charged with “desecration of a venerated



On the eve of the 2008 election, a U.S. flag was burned in protest in New Hampshire. (credit: modification of work by Jennifer Parr)

object” (among other offenses), and eventually convicted. However, in 1989 the Supreme Court decided in *Texas v. Johnson* that burning the flag was a form of symbolic speech protected by the First Amendment and found the law, as applied to flag desecration, to be unconstitutional.¹⁴

This court decision was strongly criticized, and Congress responded with a new federal law, the Flag Protection Act, intended to overrule it; this Act was also struck down as unconstitutional in 1990.¹⁵

Since then, Congress has attempted several times to propose constitutional amendments allowing the states and federal government to re-criminalize flag desecration—to no avail.

Should we amend the Constitution to allow Congress or the states to pass laws protecting the U.S. flag from desecration? Should we protect other symbols as well? Why or why not?

Commercial speech does not retain the same protections as individual free speech and expression. Commercial speech or advertising is subject to more scrutiny by the government because

14. *Texas v. Johnson*, 491 U.S. 397 (1989).

15. *United States v. Eichman*, 496 U.S. 310 (1990).

it involves companies or individuals seeking to make a profit.¹⁶ The government protects consumers from business or individuals who would lie to customers in order to make a profit.

Keeping Drug Advertising Honest and Balanced

DTC Advertising Art (350wide)

Each year, drug companies spend about \$25 billion in the United States promoting their prescription medications. Most goes to promoting drugs to health care professionals, but a growing amount—about one-fifth—is spent on direct-to-consumer (DTC) advertising.

Thomas Abrams is the director of the [Office of Prescription Drug Promotion \(OPDP\)](#) at the Food and Drug Administration (FDA). He addresses how the FDA protects consumers from false or misleading ads for

16. Food and Drug Administration, “Keeping Drug Advertising Honest and Balanced” at <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm355270.htm>

prescription drugs that appear on TV, radio, online, and in print publications.

Q: The United States and New Zealand are the only countries where prescription drug advertising is directed at consumers. Why is it allowed?

A: The First Amendment provides for freedom of speech, including commercial speech by companies. Direct-to-consumer advertising is considered commercial speech. FDA is charged by law to make sure advertising and other promotional materials are accurate and balanced, and provide helpful information to consumers about medical conditions and drugs to treat them.¹⁷

Freedom of the press is another important component of the right to free expression. In *Near v. Minnesota*, a 1931 case regarding press freedoms, the Supreme Court ruled that the government generally could not engage in **prior restraint**; that is, states and the federal government could not prohibit someone from publishing something in advance without a very compelling reason.¹⁸

This standard was reinforced in the Pentagon Papers case of 1971,

17. USA.gov, Food and Drug Administration, “Keeping Drug Advertising Honest and Balanced” at <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm355270.htm>

18. *Near v. Minnesota*, 283 U.S. 697 (1931).

when the Supreme Court ruled that the government could not prohibit the *New York Times* and *Washington Post* newspapers from publishing the Pentagon Papers.¹⁹

These papers included materials from a secret history of the Vietnam War compiled by the military. These papers were compiled at the request of Secretary of Defense Robert McNamara and provided a study of U.S. political and military involvement in Vietnam from 1945 to 1967. Daniel Ellsberg famously released passages of the Papers to the press to show that the United States had secretly enlarged the scope of the war by bombing Cambodia and Laos while lying to the American public.

Although people who leak secret information to the media can still be prosecuted and punished, this does not generally extend to reporters and news outlets that pass that information on to the public. The Edward Snowden case is a good example. Snowden himself, rather than those involved in promoting the information that he shared, became the object of criminal prosecution.

The courts have further recognized that government officials and other public figures might try to silence press criticism and avoid unfavorable news coverage by threatening a lawsuit for defamation of character. In the 1964 *New York Times v. Sullivan* case, the Supreme Court decided that public figures must demonstrate not only the falsehood of a negative press statement about them, but also that the statement was conveyed with either malicious intent or “reckless disregard” for the truth.²⁰

This ruling made it much harder for politicians to silence potential critics or to bankrupt their political opponents through the courts.

The right to freedom of expression is not absolute; several key

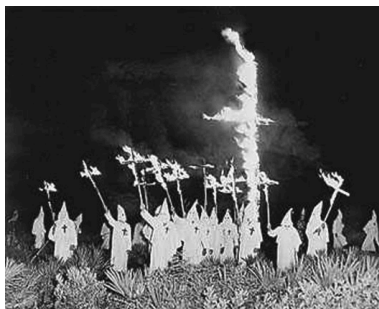
19. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

20. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

restrictions limit our ability to speak or publish opinions under certain circumstances. We have seen that the *Constitution* protects most forms of offensive and unpopular expression, particularly political speech; however, *incitement* of a criminal act, “fighting words,” and genuine threats are not protected. So, for example, you cannot point at someone in front of an angry crowd and shout, “Let’s beat up that guy!” And the Supreme Court has allowed laws that ban threatening symbolic speech, such as burning a cross on the lawn of an African American family’s home.²¹

Finally, defamation of character—whether in written form (**libel**) or spoken form (**slander**)—is not protected by the First Amendment. People subject to *false* accusations can sue to recover damages although criminal prosecutions of libel and slander are rare.

Obscenity is another exception to the right to freedom of expression. These are acts or statements considered extremely offensive under the current societal standards. The courts are understandably challenged to define obscenity; Supreme Court Justice Potter Stewart famously said of obscenity, having watched pornography in the Supreme Court building, “I know it when I see it.” Into the early twentieth century written



The Supreme Court has allowed laws that ban threatening symbolic speech, such as burning crosses on the lawns of African American families, an intimidation tactic used by the Ku Klux Klan, pictured here at a meeting in Gainesville, Florida, on December 31, 1922.

works were frequently banned as obscene, including those by noted authors such as James Joyce and Henry Miller. Today it is rare for

21. See, for example, *Virginia v. Black*, 538 U.S. 343 (2003).

the courts to uphold obscenity charges for written material alone. In 1973, the Supreme Court established the Miller test for deciding whether something is obscene: “(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”²²

Applying this standard has often been problematic. The concept of “contemporary community standards” asserts that obscenity can vary geographically; many people in New York or San Francisco might be unconcerned with something that offends people in Memphis or Salt Lake City. The one form of obscenity that has been banned almost without challenge is child pornography, although the courts have found exceptions even here.

The courts have allowed censorship of less-than-obscene content when broadcast over the airwaves, particularly when available for anyone to receive. Generally these restrictions on indecency—a quality of acts or statements that offend societal norms or may be harmful to minors—apply only to radio and television programming broadcast when children might be in the audience. Most cable and satellite channels follow similar standards for commercial reasons.

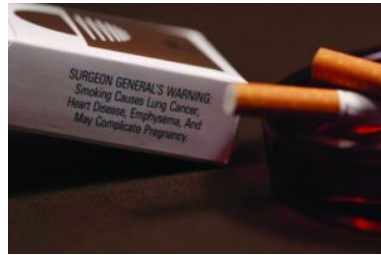
In the 1990s Congress compelled television broadcasters to implement a television ratings system enforced by a “V-Chip” in televisions and cable boxes, so parents could better control the television programming their children might watch. However, similar efforts to protect children from pornography on the internet have largely been struck down as unconstitutional. This demonstrates that technology has created new avenues for disseminate obscene material. The Children’s Internet Protection

22. *Miller v. California*, 413 U.S. 15 (1973).

Act, however, requires K-12 schools and public libraries receiving Internet access using special E-rate discounts to filter or block access to material deemed harmful to minors.

The courts have also allowed laws forbidding or compelling certain forms of expression by businesses. Examples are laws requiring nutritional information disclosure on food and beverage containers and warning labels on tobacco products. The federal government requires that prices advertised for airline tickets include all taxes and fees. Many states regulate advertising by lawyers. False or misleading statements made in connection with a commercial transaction can be illegal if they constitute fraud.

The courts have also ruled that, although public school officials are government actors, the First Amendment freedom of expression rights of children attending public schools are somewhat limited. In particular, in *Tinker v. Des Moines* (1969) and *Hazelwood v. Kuhlmeier* (1988), the Supreme Court has upheld restrictions on speech that create “substantial interference with school discipline or the rights of



The surgeon general's warning label on a box of cigarettes is mandated by the Food and Drug Administration. The United States was the first nation to require a health warning on cigarette packages. (credit: Debora Cartagena, Centers for Disease Control and Prevention)

others”²³ or is “reasonably related to legitimate pedagogical concerns.”²⁴

For example, the content of school-sponsored activities like school newspapers and speeches delivered by students can be controlled, either for student instruction in proper adult behavior or to deter student conflict.

Free expression includes the right to assemble peaceably and the right to petition government officials. This right even extends to members of groups whose views most people find abhorrent. Examples are American Nazis and the activist Westboro Baptist Church, whose members are known for protesting at the funerals of U.S. soldiers who have died fighting in the war on terror.²⁵

The Supreme Court in *National Association for the Advancement of Colored People (NAACP) v. Alabama* (1958) considered the rights of organizations of freely assembled persons to keep membership records confidential. As noted in the David M. Rubenstein Gallery of the National Archives, “Throughout the South, officials sought to discredit the National Association for the Advancement of Colored People (NAACP) since it threatened white supremacy.

In 1956, Alabama ordered the review of the organization’s documents, including membership lists. The NAACP refused to disclose its members. In a unanimous decision, the Supreme Court sided with the NAACP and formally recognized a constitutional

23. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

24. *Hazelwood School District et al. v. Kuhlmeier et al.*, 484 U.S. 260 (1988).

25. *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977); *Snyder v. Phelps*, 562 U.S. 443 (2011).

right to freedom of association. The forced disclosure of membership lists violated NAACP members' right 'to pursue their lawful private interests privately and to associate freely with others.' By recognizing the importance of confidential membership data, especially among unpopular groups, the *NAACP v. Alabama* decision furthered informational privacy rights."²⁶

26. ASSOCIATIONAL PRIVACY

1958 National Archives, David M. Rubenstein Gallery, Records of Rights at <https://search.archives.gov/search?utf8=%E2%9C%93&affiliate=national-archives&query=NAACP+v+Alabama> and <http://recordsofrights.org/events/28/associational-privacy>



Two eagle scouts at the BSA National Headquarters and museum in Irving, Texas.

Relying on precedent, the court considered arguments in 2006 involving the Boy Scouts of America. In *Boy Scouts of America et al. v. Dale* (2000), the court examined competing rights—the rights of an openly gay leader in the BSA, James Dale, who was removed from his position as a scoutmaster (discrimination based on sexual orientation in public accommodation) and the rights of the BSA (1st Amendment protected freedom of assembly), where the Court held: Applying New Jersey's public accommodations law to require the Boy Scouts to

readmit Dale violates the Boy Scouts' First Amendment right of expressive association. Government actions that unconstitutionally burden that right may take many forms, one of which is intrusion into a group's internal affairs by forcing it to accept a member it does not desire.²⁷

27. *Boy Scouts of America et al. v. Dale* certiorari to the supreme court of new jersey No. 99–699. Argued April 26, 2000—Decided June 28, 2000 Petitioners are the Boy Scouts of America and its Monmouth Council (collectively, Boy Scouts). The Boy Scouts is a private, not-for-profit organization engaged in instilling its system of values in young people. It asserts that homosexual

Free expression—although a broad right—is subject to certain constraints to balance it against the interests of public order. In particular, the nature, place, and timing of protests—but not their substantive content—are subject to reasonable limits. The courts have ruled that while people may peaceably assemble in a place that is a public forum, not all public property is a public forum. For example, the inside of a government office building or a college classroom—particularly while someone is teaching—is not generally considered a public forum.

Rallies and protests on land that has other dedicated uses such as roads and highways can be limited to groups that have secured a permit in advance, and those organizing large gatherings may be required to give sufficient notice so government authorities can ensure there is enough security available. However, any such regulation must be viewpoint-neutral; the government may not treat one group differently than another because of its opinions or beliefs. For example, the government can't permit a rally by a group that favors a government policy but forbid opponents from staging a similar rally. Finally, there have been controversial situations in which government agencies have established free-speech zones for protesters during political conventions, presidential visits, and international meetings in areas that are arguably selected to minimize their public audience or to ensure that the subjects of the protests do not have to encounter the protesters.

conduct is inconsistent with those values. Respondent Dale is an adult whose position as assistant scoutmaster of a New Jersey troop was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist. <https://www.supremecourt.gov/opinions/boundvolumes/530bv.pdf>



Since 2011, as part of the White House website, the Obama administration has included a dedicated system, [“We the People: Your Voice in our Government.”](#) for people to make petitions that will be reviewed by administration officials.

The Second Amendment

For such a highly charged political issue, the text of the Second Amendment is among the shortest:

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

The text’s relative simplicity has not spared it from controversy; arguably, the Second Amendment has become controversial *because* of its text. Does it merely protect the right of the states to organize and arm a “well regulated militia” for civil defense, or is it a protection of a “right of the people” as a whole to individually bear arms?

Before the Civil War, this would have been a nearly meaningless distinction. In most states white males of military age were considered part of the militia, liable to be called for service to put down rebellions or invasions, and the right “to keep and bear Arms” was considered a **common-law right** inherited from English law predating the federal and state constitutions.

The beginning of selective incorporation after the Civil War fueled

debates over the Second Amendment. In the meantime several southern states adopted laws that restricted the carrying and ownership of weapons by former slaves as part of their black codes. Despite acknowledging a common-law individual right to keep and bear arms, in 1876 the Supreme Court declined, in *United States v. Cruickshank*, to intervene to ensure the states would respect it.²⁸

States gradually began to introduce laws to regulate gun ownership. Federal gun control laws were introduced in the 1930s in response to organized crime, and stricter laws regulating most gun commerce stemming from the street protests of the 1960s. Laws requiring background checks for prospective gun buyers were passed in the early 1980s following an assassination attempt on President Ronald Reagan. During this period, the Supreme Court's decisions regarding the meaning of the Second Amendment were ambiguous at best. In *United States v. Miller*, the Supreme Court upheld the 1934 National Firearms Act's prohibition of sawed-off shotguns, largely because such weapons did not support the goal of promoting a "well regulated militia."²⁹

This ruling was interpreted to support the view that the Second Amendment protected the right of the states to organize a militia, rather than an individual right. Consequently the lower courts ruled most firearm regulations—including some city and state laws virtually outlawing private ownership of firearms—to be constitutional.

In 2008, in a narrow 5–4 decision on *District of Columbia v. Heller*, the Supreme Court ruled that at least some gun control laws *did* violate the Second Amendment and that this amendment *does* protect an individual's right to keep and bear arms, at least in some

28. *United States v. Cruickshank*, 92 U.S. 542 (1876).

29. *United States v. Miller*, 307 U.S. 174 (1939).

circumstances—in particular, “for traditionally lawful purposes, such as self-defense within the home.”³⁰

Because the District of Columbia is not a state, this decision immediately confirmed the right only to the federal government and territorial governments. Two years later, in *McDonald v. Chicago*, the Supreme Court overturned the *Cruikshank* decision (5–4) and again ruled that the right to bear arms was a fundamental right incorporated against the states, meaning that state regulation of firearms might, in some circumstances, be unconstitutional. In 2015, however, the Supreme Court allowed several of San Francisco’s strict gun control laws to remain in place. This suggested that—as in the case of rights protected by the First Amendment—the courts will not treat gun rights as absolute.³¹

30. *District of Columbia et al. v. Heller*, 554 US 570 (2008), p. 3.

31. Richard Gonzales, “Supreme Court Rejects NRA Challenge to San Francisco Gun Rules,” *National Public Radio*, 8 June 2015. <http://www.npr.org/sections/thetwo-way/2015/06/08/412917394/supreme-court-rejects-nra-challenge-to-s-f-gun-rules> (March 4, 2016).



A “No Firearms” sign is posted at Binghamton Park in Memphis, Tennessee, demonstrating that the right to possess a gun is not absolute. (credit: modification of work by Thomas R Machnitzki)

The Third Amendment

The Third Amendment says in full:

“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”

Many consider this *Constitutional* provision obsolete and unimportant. However, it is worthwhile to note its relevance in the context of the time: colonial citizens were routinely required to quarter British soldiers during training maneuvers, redeployments and occupations, even in peacetime and irrespective of their circumstances. They viewed the British laws requiring them to house these soldiers as particularly offensive and disrespectful. So much so that it had been among the grievances listed in the Declaration of Independence.

Today it seems unlikely the federal government would need to house military forces in civilian lodgings against the will of property

owners or tenants; however, perhaps in the same way we consider the Second and Fourth amendments, we can think of the Third Amendment as reflecting a broader idea that our homes lie within a “zone of privacy” that government officials should not violate unless absolutely necessary.

The Fourth Amendment

The Fourth Amendment sits at the boundary between general individual freedoms and the rights of those suspected of crimes. It may reflect James Madison’s broader concern to establish an expectation of privacy from government intrusion at home. The Fourth Amendment protects us from overzealous law enforcement by ensuring investigating authorities have good reason to intrude on people’s privacy and property.

The text of the Fourth Amendment is as follows:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The amendment places limits on both *searches* and *seizures*: Searches are efforts to locate evidence and contraband. Seizures are the taking of these items by the government for investigations and as evidence in a criminal prosecution (or, in the case of a person, the detention or taking of the person into custody).

It confirms that officials must apply for and receive a **search warrant** prior to a search or seizure; this warrant is a legal document, signed by a judge, allowing police to search and/or seize persons or property. Since the 1960s, however, the Supreme Court has issued a series of rulings limiting the warrant requirement in

situations where a person lacks a “reasonable expectation of privacy” outside the home. Police can also search and/or seize people or property without a warrant if the owner or renter consents to the search, if there is a reasonable expectation that evidence may be destroyed or tampered with before a warrant can be issued (i.e., exigent circumstances), or if the items in question are in plain view of government officials.

Furthermore, the courts have found that police do not generally need a warrant to search the passenger compartment of a car, or to search people entering the United States from another country.³²

When a warrant is needed, law enforcement officers do not need enough evidence to secure a conviction, but they must demonstrate to a judge that there is probable cause to believe a crime has been committed or evidence will be found. **Probable cause** is the legal standard for determining whether a search or seizure is constitutional or a crime has been committed; it is a lower threshold than the standard of proof required for a criminal conviction.

32. See, for example, *Arizona v. Gant*, 556 U.S. 332 (2009).



A state police officer conducting a traffic stop near Walla Walla, Washington.
(credit: modification of work by Richard Bauer)

What happens when police conduct an illegal search or seizure without a warrant and still find evidence of a crime? In the 1961 Supreme Court case *Mapp v. Ohio*, the court ruled that evidence obtained without a warrant and not under one of the above exceptions could not be used as evidence in a state criminal trial, leading to the broad application of the **exclusionary rule** established in 1914 on a federal level in *Weeks v. United States*.³³

The exclusionary rule does not just apply to evidence found or to items or people seized without a warrant (or falling under an exception noted above); it also applies to any evidence developed or discovered as a result of the illegal search or seizure.

For example, if police search your home without a warrant, find bank statements showing large cash deposits on a regular basis, and

33. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

discover evidence of some other unexpected crime (e.g., blackmail, drugs, or prostitution), they cannot use the bank statements as evidence of criminal activity—nor can they prosecute you for other evidence discovered during that illegal search. This extension of the exclusionary rule is sometimes called the “fruit of the poisonous tree,” because just as the metaphorical tree (i.e., the original search or seizure) is poisoned, so is anything that grows out of it.³⁴

However, like the requirement for a search warrant, the exclusionary rule does have exceptions. The courts have allowed evidence obtained without the necessary legal procedures in circumstances where police executed warrants they believed were correctly granted but in fact were not (“good faith” exception), and when the evidence would have been found anyway had they followed the law (“inevitable discovery”).

The requirement of probable cause also applies to arrest warrants. A person cannot generally be detained by police or taken into custody without a warrant. However most states allow arrests of a suspected felon without a warrant when probable cause exists, and police can arrest people for minor crimes or misdemeanors they have witnessed themselves.

The first four amendments of the Bill of Rights protect citizens’ key freedoms from governmental intrusion. The First Amendment restricts the government from imposing a specific religion on the people, or limiting the practice of one’s own religion. The First Amendment also protects freedom of expression by the public, the media, and organized groups via rallies, protests, and the petition of grievances. The Second Amendment today protects an individual’s right to keep and bear arms, while the Third Amendment prevents the military occupation of civilians’ homes except under extraordinary circumstances. Finally, the Fourth

34. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

Amendment protects our persons and property from unreasonable searches and seizures, and protects people from unlawful arrests. However, all these provisions are subject to limitations, often to protect the interests of public order and the good of society as a whole.

Questions to Consider

1. Explain the difference between the *establishment clause* and the *free exercise clause*, and explain how these two clauses work together to guarantee religious freedoms.
2. Explain the difference between the *collective rights* and *individual rights* views of the Second Amendment. Which of these views did the Supreme Court's decision in *District of Columbia v. Heller* reflect?

Terms to Remember

commercial speech—does not receive the same level of free speech protection because companies or individuals are seeking to make a profit; in order to accomplish this goal, they may not mislead the public or make untrue claims about their product(s)

common-law right—a right of the people rooted in legal

tradition and past court rulings, rather than the *Constitution*

compelling interest—before a right may be curtailed by law the government must provide a compelling interest or very good reason for doing so

establishment clause—the provision of the First Amendment that prohibits the government from endorsing a state-sponsored religion; interpreted as preventing government from favoring some religious beliefs over others or religion over non-religion

exclusionary rule—a requirement, from Supreme Court case *Mapp v. Ohio*, that evidence obtained as a result of an illegal search or seizure cannot be used to try someone for a crime

free exercise clause—the provision of the First Amendment that prohibits the government from regulating religious beliefs and practices

libel—written defamation of character; written false information with intent to harm another person

prior restraint—a government action that stops someone from doing something before they are able to do it (e.g., forbidding someone to publish a book he or she plans to release)

probable cause—legal standard for determining whether a search or seizure is constitutional or a crime has been committed; a lower threshold than the standard of proof needed at a criminal trial

search warrant—a legal document, signed by a judge, allowing police to search and/or seize persons or property

slander—spoken defamation of character; spoken false information with an intention to harm another individual

symbolic speech—a form of expression that does not use writing or speech but nonetheless communicates an idea (e.g., wearing an article of clothing to show solidarity with a group)

82. Civil Liberties: How are rights of the accused protected?

Learning Objectives

- Identify the rights of those suspected or accused of criminal activity
- Explain how Supreme Court decisions transformed the rights of the accused
- Explain why the Eighth Amendment is controversial regarding capital punishment

In addition to protecting the personal freedoms of individuals, the Bill of Rights protects those suspected or accused of crimes from unfair or unjust treatment. The prominence of these protections in the Bill of Rights may seem surprising. The impetus to ensure fair, just, and impartial treatment to everyone accused of a crime—no matter how unpopular—is understandable given the colonists' experience of British rule and the use of their legal system to punish rebels and their sympathizers for political offenses. . It is also important to note that the revolutionaries and the eventual framers of the *Constitution* wanted to keep the best features of English law as well.

In addition to the protections outlined in the Fourth Amendment (pertaining to investigations prior to criminal charges), the next four amendments pertain to those suspected, accused, or convicted of

crimes, and people engaged in other legal disputes. At every stage of the legal process, the Bill of Rights incorporates protections for these people.

The Fifth Amendment

The Fifth Amendment includes many of the provisions dealing with the rights of the accused; accordingly, it is one of the longest in the Bill of Rights. The Fifth Amendment states in full:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

The first clause requires that serious crimes be prosecuted only after a grand jury issues an indictment. The courts require this only for felonies; less serious crimes can be tried without a grand jury. This provision does *not* apply to the states because it has not been incorporated; many states alternatively require a preliminary hearing where a judge decides if there is enough evidence to hold a full trial. Active armed forces members accused of crimes are not entitled to a grand jury.

The Fifth Amendment also protects individuals against **double jeopardy**, which is prosecuting a person twice for the same criminal charges. No one who has been acquitted (found not guilty) of a crime can be prosecuted again for that same crime. The prohibition against double jeopardy has its own exceptions. It prohibits a

second prosecution only at the same level of government (federal or state) as the first; the federal government can try you for violating federal law, even if a state or local court finds you not guilty of the same charges. For example, in the early 1990s, several Los Angeles police officers accused of assaulting motorist Rodney King during his arrest were acquitted of charges in a state court, but some were later convicted in a federal court of violating King's civil rights.

The double jeopardy rule does not prevent someone from recovering damages in a civil case—a legal dispute between individuals over a contract or compensation for an injury—that results from a criminal act, even if the person accused of that act is acquitted of criminal charges. One famous case from the 1990s involved former football star and television personality O. J. Simpson. Simpson was acquitted of the murders of his ex-wife Nicole Brown and her friend Ron Goldman in a criminal court but was ruled responsible for their deaths in a subsequent civil case. He was forced to forfeit most of his wealth to pay damages to their families.

Perhaps the most famous provision of the Fifth Amendment is its protection against **self-incrimination**, or the right to remain silent. This provision is so well known that we have a phrase for it: “taking the Fifth.” People are not forced to give evidence in court or to law enforcement officers that might constitute an admission of guilt or responsibility for a crime. Moreover, in a criminal trial, if someone does not testify in his or her own defense, the prosecution cannot use that silence as evidence of guilt or imply that an innocent person would testify. This provision became embedded in the public consciousness following the Supreme Court's 1966 ruling in *Miranda v. Arizona*, whereby suspects were required to be informed of their most important rights, including the right against self-incrimination, before being interrogated in police custody.¹

1. *Miranda v. Arizona*, 384 U.S. 436 (1966).

However, contrary to some media depictions of the **Miranda warning**, law enforcement officials do not necessarily have to inform suspects of their rights before they are questioned in situations where the suspect is free to leave.

Like the Fourteenth Amendment's **due process** clause, the Fifth Amendment prohibits the federal government from depriving people of their "life, liberty, or property, without due process of law." Recall that due process is a guarantee that people will be treated fairly and impartially by government officials when the government seeks to fine or imprison them or take their personal property away from them. The courts have interpreted this provision to mean that government officials must establish consistent and fair procedures to decide when to limit people's freedoms; in other words, citizens cannot be detained, their freedom limited, or their property taken arbitrarily or on a whim by police or other government officials. As a result, an entire body of procedural safeguards is applied to the legal prosecution of crimes.

The final provision of the Fifth Amendment has little to do with crime at all. The *takings clause* says that "private property [cannot] be taken for public use, without just compensation." This provision, along with the due process clause's provisions limiting the taking of property, can be viewed as a protection of individuals' **economic liberty**: their right to obtain, use, and trade tangible and intangible property for their own benefit. For example, you have the right to trade your knowledge, skills, and labor for money through work or the use of your property, or trade money or goods for other things of value, such as clothing, housing, education, or food.

The greatest recent controversy over economic liberty results from the use of the power of **eminent domain** to take property for redevelopment. Traditionally eminent domain was primarily used to obtain property for transportation corridors like railroads, highways, canals and reservoirs, and pipelines, which require specific geographic routes. As any single property owner could effectively block a particular route or extract an unfair price for land if it was the last piece needed for a route, there are reasonable

arguments for using eminent domain as a last resort. This is particularly true for projects that convey substantial benefits to the public at large.

Increasingly though, eminent domain has been used to enable economic development for both government and private interests. Beneficiaries range from politically connected big businesses such as car manufacturers building new factories to highly profitable sports teams seeking ever-more-luxurious stadiums. While we traditionally think of property owners as well-off people whose rights are inherently more secure, frequently these cases pit lower- and middle-class homeowners against multinational corporations or multimillionaires with the ear of city and state officials. In a notorious 2005 case, *Kelo v. City of New London*, the Supreme Court sided with municipal officials taking homes in a middle-class neighborhood to obtain land for a large pharmaceutical company's corporate campus.²

The case led to a public backlash against eminent domain and subsequent legal changes in many states making it harder for cities to take property from one private party and give it to another for economic redevelopment.

Some disputes over economic liberty have gone beyond the idea of eminent domain. Recently the emergence of on-demand ride-sharing services like Lyft and Uber, direct sales by electric car manufacturer Tesla Motors, and short-term property rentals through companies like Airbnb have led to conflicts



AT&T Stadium in Arlington, Texas, sits on land taken by eminent domain. (credit: John Purget)

2. *Kelo et al. v. City of New London et al.*, 545 U.S. 469 (2005).

between people seeking to offer profitable services online, states and cities trying to regulate these businesses, and the incumbent service providers that compete with these new business models. In the absence of new public policies to clarify rights, the path forward is often determined through norms established in practice, by governments, or by court cases.

The Sixth Amendment

Once someone has been charged with a crime and indicted, the next stage in a criminal case is the trial. The Sixth Amendment governs these criminal trials; in full, it states:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic].”

The first guarantee is the right to a speedy, public trial by an impartial jury. Although the time allowed between an indictment and the trial is not specified, the Supreme Court notes that excessively lengthy delays must be justified and balanced against the potential harm to the defendant.³ In effect, the speedy trial requirement prevents the government from detaining people indefinitely. The courts *have* ruled that there are exceptions to the public trial requirement; if a public trial would undermine the

3. See, for example, *Barker v. Wingo*, 407 U.S. 514 (1972).

defendant's right to a *fair* trial, it can be held behind closed doors. Prosecutors can request closed proceedings only in certain, narrow circumstances (i.e., to protect witnesses from retaliation or to guard classified information). The prosecution must also be made in the "state and district" where the crime was committed; however, if the accused believe pre-trial publicity or other factors compromise their right to a *fair* trial where the crime occurred, they may ask for a change of venue (location) for that trial.



Although the Supreme Court's proceedings are not televised and there is no video of the courtroom, audio recordings of the oral arguments and decisions announced in cases have been made since 1955. A complete collection of these recordings can be found at the [Oyez Project](#) website along with full information about each case.

Most of the accused decline this right to a jury trial. A **plea bargain** is an agreement with the prosecutor in which the defendant pleads guilty to the charge(s) in question or to less serious charges in exchange for more lenient punishment. There are a number of motivations for this. The evidence against the accused may be so overwhelming that conviction is a near-certainty, and avoiding the more serious penalty (perhaps even the death penalty) is better than taking the small chance of acquittal. Someone accused of being part of a larger criminal organization might agree to testify against others in exchange for lighter punishment. Prosecutors facing a difficult trial can seek quick closure and a win by securing convictions for offenses they know they can prove, while avoiding a

lengthy trial on other charges they might lose. In general, they use prosecutorial discretion to manage cases and use plea bargaining to bring efficiencies and streamlining to the process.

The promise of an impartial jury is a critical component. The prosecution and the defense can reject potential jurors they believe cannot fairly decide that case without prejudice. The courts have also ruled that the composition of the jury as a whole may itself be prejudicial; potential jurors may not be excluded simply because of their race or sex, for example.⁴

The accused also have the right to present witnesses in their own defense (if necessary, compelling them to testify) and to confront and cross-examine witnesses presented by the prosecution. In general, the only testimony acceptable in a criminal trial must be given in a courtroom and be subject to cross-examination; hearsay, or testimony by one person about what another person has said, is generally inadmissible. Hearsay may be presented as evidence when it is an admission of guilt by the defendant or a “dying declaration” by a person who has passed away. Although both sides in a trial have the opportunity to examine and cross-examine witnesses, the judge may exclude testimony deemed irrelevant or prejudicial.

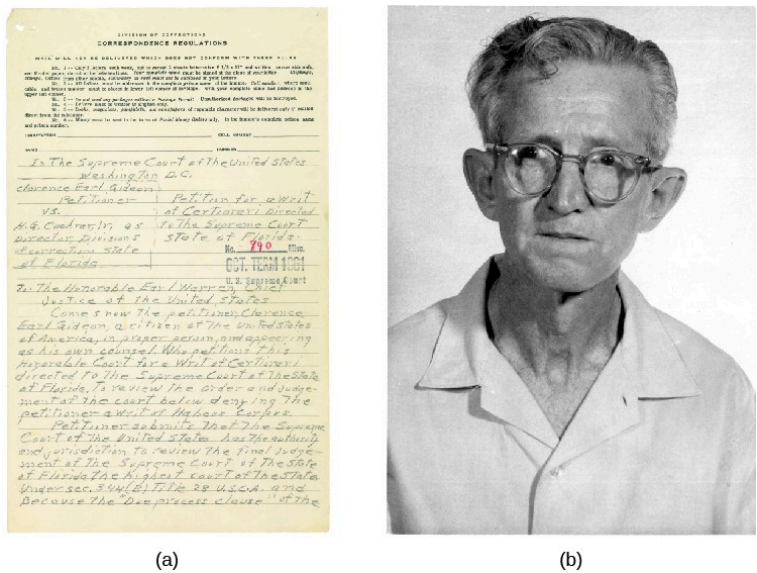
Finally, the Sixth Amendment guarantees the right of the accused to the assistance of an attorney in their defense. Historically, for most crimes many states did not provide attorneys to the accused when could not afford one themselves; even when provided, their assistance was often inadequate. This situation changed as a result of the Supreme Court’s decision in *Gideon v. Wainwright* (1963).⁵

A poor drifter named Clarence Gideon was accused of breaking into and stealing money and other items from a pool hall in Panama

4. See, for example, *Batson v. Kentucky*, 476 U.S. 79 (1986); *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994).

5. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

City, Florida. Denied a lawyer, Gideon was tried, convicted and sentenced to a five-year prison term. While in prison—still without legal assistance—he drafted a handwritten appeal and sent it to the Supreme Court, which agreed to hear his case. The justices unanimously ruled that Gideon, and anyone else accused of a serious crime, was entitled to the assistance of a lawyer even if they could not afford one, as part of the general due process right to a fair trial.



The handwritten petition for appeal (a) sent to the Supreme Court by Clarence Gideon, shown here circa 1961 (b), the year of his Florida arrest for breaking and entering.

The Supreme Court later extended the *Gideon v. Wainwright* ruling to apply to any case in which the accused faced the possibility of “loss of liberty,” even for one day. The courts have also overturned convictions in which people had incompetent or ineffective lawyers through no fault of their own. The *Gideon* ruling has increased the demand for professional public defenders, paid by the government

to represent those who cannot afford an attorney themselves. Alternatively, some states require practicing lawyers to represent poor defendants on a pro bono basis (essentially, donating their time and energy to the case).



The [National Association for Public Defense](#) represents public defenders, lobbying for better funding for public defense and improvements in the justice system in general.

Criminal Justice: Theory Meets Practice

Normally a person charged with a serious crime will have a brief hearing before a judge to be informed of the charges against him or her, to be made aware of the right to counsel, and to enter a plea. Other hearings may be held to decide on the admissibility of evidence seized or otherwise obtained by prosecutors.

If the two sides cannot agree on a plea bargain, the next stage is jury selection. A pool of potential jurors is summoned to the court and screened for impartiality, with the goal of seating twelve (in most states) and one

or two alternate jurors. All hear the evidence in the trial; unless an alternate must serve, the original twelve decide whether the evidence determines guilt or innocence beyond a reasonable doubt.

In the trial itself, the lawyers for the prosecution and defense make opening arguments, followed by testimony of witnesses for the prosecution (and any cross-examination), and then testimony of witnesses for the defense, including the defendant if he or she chooses. Additional prosecution witnesses may be called to rebut testimony by the defense. Finally, both sides make closing arguments. The judge then issues instructions to the jury, including an admonition not to discuss the case with anyone outside the jury room. The jury members leave the courtroom to enter the jury room and begin their deliberations.



A typical courtroom in the United States. The jury sits along one side, between the judge/witness stand and the tables for the defense and prosecution.

The jurors pick a foreman or forewoman to coordinate their deliberations. They may ask to review evidence or to hear transcripts of testimony. They deliberate in secret and their decision must be unanimous; if they are unable to agree on a verdict after extensive deliberation, a mistrial may be declared, which effectively requires the prosecution to try the case all over again with a new jury.

A defendant found not guilty of all charges will be immediately released unless other charges are pending (e.g., the defendant is wanted for a crime in another jurisdiction). If the defendant is found guilty of one or more offenses, the judge will choose an appropriate sentence based on the law and the circumstances; in the

federal system, this sentence will apply guidelines that assign point values to various offenses and facts in the case. If the prosecution is pursuing the death penalty, the jury will decide whether the defendant should be subject to capital punishment or life imprisonment.

The reality of court procedure is much less dramatic and exciting than what is typically portrayed in television shows and movies. Nonetheless, most Americans will participate in the legal system at least once in their lives as a witness, juror, or defendant.

Have you or any member of your family served on a jury? If so, was the experience a positive one? Did the trial proceed as expected? If you haven't served on a jury, is it something you look forward to? Why or why not?

The Seventh Amendment

The Seventh Amendment deals with the rights of those engaged in civil disputes; These are disagreements between individuals or businesses typically seeking compensation for some harm. For example, in an automobile accident, the person responsible is compelled to compensate any others (either directly or through his or her insurance company). Much of the legal system's work consists of efforts to resolve civil disputes. The Seventh Amendment, in full, reads:

“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall

be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

Because of this provision, all trials in civil cases must take place before a jury unless both sides waive their right to a jury trial. However, this right is not always incorporated; in many states, civil disputes—particularly those involving small sums of money which may be heard by a dedicated small claims court—need not be tried in front of a jury and may instead be decided by a judge working alone.

The Seventh Amendment limits the ability of judges to reconsider questions of fact, rather than of law, that were originally decided by a jury. For example, if a jury decides a person was responsible for an action and the case is appealed, the appeals judge cannot decide someone else was responsible. This preserves the traditional common-law distinction that judges are responsible for deciding questions of law while jurors are responsible for determining the facts of a particular case.

The Eighth Amendment

The Eighth Amendment says, in full:

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Bail is a payment of money allowing the accused to be freed pending trial; if you “make bail” in a case and do not show up for your trial, you will forfeit the money you paid. Since many cannot afford bail directly, they may get a *bail bond*, which allows them to pay a fee (typically 10 percent) to a bond seller, who in turn pays the full bail amount to the court. (In most states, the bond seller makes money because the defendant does not get back the money for the bond, and most people show up for their trials.) However, the court may identify the accused as a flight risk or a risk to the community

if freed before trial, and may deny bail and hold the accused in jail while awaiting trial.

Bail amounts are sometimes challenged as excessive, but such challenges are rarely successful. The Supreme Court has defined an excessive fine as one “so grossly excessive as to amount to deprivation of property without due process of law” or “grossly disproportional to the gravity of a defendant’s offense.”⁶ In practice the courts have rarely struck down fines as excessive either.

The ban on “cruel and unusual punishments” is the most controversial Eighth Amendment provision. Various torturous forms of execution common in the past—drawing and quartering, burning people alive, and the like—are prohibited.⁷ Recent controversies over lethal injections and firing squads suggest the topic is still salient. While the Supreme Court has never established a definitive test to define a cruel and unusual punishment, it has generally allowed most penalties short of death for adults, even when some outside observers may reasonably see that punishment as disproportionate or excessive.⁸

In recent years the Supreme Court has issued a series of rulings substantially narrowing death penalty application. As a result, defendants with mental disabilities may not be

6. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909); *United States v. Bajakajian*, 524 U.S. 321 (1998).

7. See, for example, the discussion in *Wilkinson v. Utah*, 99 U.S. 130 (1879).

8. Perhaps the most notorious example, *Harmelin v. Michigan*, 501 U.S. 957 (1991), upheld a life sentence where the defendant was convicted of possessing just over one pound of cocaine (and no other crime).

executed.⁹ Defendants under eighteen years of age when they committed an offense otherwise subject to the death penalty may not be executed.¹⁰ The court has generally rejected the use of the death penalty for crimes that did not result in the death of another human being, most notably in the case of rape.¹¹

While *permitting* the death penalty to be applied for murder in some cases, the Supreme Court has generally struck down laws *requiring* the the death penalty in certain circumstances. Still, the United States is among ten countries with the most executions worldwide.

Rate of Execution in the 10 Countries with the Most Executions, 2007–2012

Country	Number of annual executions, on average	Number of annual executions, per capita
Iran	277.2	0.000385%
Saudi Arabia	70.5	0.000257%
Iraq	42.7	0.000157%
China	1720–2450	0.000129–0.000188% (estimate)
Libya	6.5	0.000118%
Yemen	25.3	0.000109%
North Korea	17.5	0.000073%
Pakistan	28.5	0.000018%
United States	36.7	0.000012%
Vietnam	9.7	0.000002%

Source: Amnesty International, "Death Penalty Statistics, Country by Country," 2012.

The United States has the ninth highest per capita rate of execution in the world.

However, it appears that the public mood may have shifted against the death penalty, perhaps due in part to an overall decline in violent crime. The reexamination of past cases through DNA evidence has revealed dozens in which people were wrongfully executed.¹² For

9. *Atkins v. Virginia*, 536 U.S. 304 (2002).

10. *Roper v. Simmons*, 543 U.S. 551 (2005).

11. *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

12. Elizabeth Lopatto, “How Many Innocent People Are Sentenced To Death?” *Forbes*, 29 April 2014. <http://www.forbes.com/sites/elizabethlopatto/2014/>

example, Claude Jones was executed for murder based on 1990-era DNA testing of a single hair that was determined at that time to be his; however, with better DNA testing technology, it was later found to be that of the victim.¹³ Perhaps as a result of this and other cases, seven additional states have abolished capital punishment since 2007. As of 2015, nineteen states and the District of Columbia no longer apply the death penalty in new cases, and several other states do not carry out executions despite sentencing people to death.¹⁴ It remains to be seen whether this gradual state trend to eliminate the death penalty will continue, or whether the Supreme Court will eventually decide to follow former Justice Harry Blackmun's decision to "no longer... tinker with the machinery of death" and abolish it completely.

[04/29/how-many-innocent-people-are-sentenced-to-death/#6e9ae5175cc1](#) (March 1, 2016).

13. Dave Mann, "DNA Tests Undermine Evidence in Texas Execution: New Results Show Claude Jones was Put to Death on Flawed Evidence," *Texas Observer*, 11 November 2010. <http://www.texasobserver.org/texas-observer-exclusive-dna-tests-undermine-evidence-in-texas-execution/> (March 4, 2016).
14. See, for example, "States With and Without the Death Penalty," Death Penalty Information Center, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (March 4, 2016).

Questions to Consider

1. Explain why someone accused of a crime might negotiate a plea bargain rather than exercising the right to a trial by jury.
2. Explain the difference between a criminal case and a civil case.

Terms to Remember

double jeopardy—a prosecution pursued twice at the same level of government for the same criminal action

economic liberty—the right of individuals to obtain, use, and trade things of value for their own benefit

eminent domain—the power of government to take or use property for a public purpose after compensating its owner; also known as the takings clause of the Fifth Amendment

Miranda warning—a statement by law enforcement officers informing a person arrested or subject to interrogation of his or her rights

plea bargain—an agreement between the defendant and the prosecutor in which the defendant pleads guilty to the charge(s) in question or perhaps to less serious charges, in exchange for more lenient punishment than if convicted after a full trial

self-incrimination—an action or statement that admits guilt or responsibility for a crime

83. Civil Liberties: How are the Bill of Rights interpreted?

Learning Objectives

- Describe how the Ninth and Tenth Amendments reflect on our other rights
- Identify the two senses of “right to privacy” embodied in the Constitution
- Explain the controversy over privacy when applied to abortion and same-sex relationships

As this chapter has suggested, the provisions of the Bill of Rights have been interpreted and reinterpreted repeatedly over the past two centuries.

In this section, we consider the final two amendments of the Bill of Rights and the way they affect our understanding of the *Constitution* as a whole. Rather than protecting specific rights and liberties, the Ninth and Tenth Amendments indicate how to interpret the *Constitution* and the Bill of Rights, and lay out the residual powers of the state governments. We also examine privacy rights, an area the Bill of Rights does not address directly; instead, the emergence of defined privacy rights demonstrates how the Ninth and Tenth Amendments have been applied to expand the scope of rights protected by the *Constitution*.

The Ninth Amendment

We noted previously that James Madison and other framers were aware they might endanger some rights if they listed some in the *Constitution* and omitted others. To ensure that constitutional interpreters would recognize that the listing of freedoms and rights in the Bill of Rights was *not* exhaustive, the Ninth Amendment states:

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

These rights “retained by the people” include the common-law and natural rights inherited from the laws, traditions, and past court decisions of England. To this day, we regularly exercise and take for granted rights that are not written down, like the right to marry, the right to seek opportunities for employment and education, and the right to have children and raise a family. Supreme Court justices over the years have interpreted the Ninth Amendment differently; some have argued it was intended to extend the rights protected by the *Constitution* to those natural and common-law rights, while others have argued it does not prohibit states from changing their constitutions and laws to modify or limit those rights as they see fit.

Critics of a broad interpretation assert the *Constitution* provides ways to protect newly formalized rights through the amendment process. For example, in the nineteenth and twentieth centuries the right to vote was gradually expanded by constitutional amendments (the Fifteenth and Nineteenth) even though publicly controversial. However, supporters of a broad interpretation assert the rights of the people—particularly of political or demographic minorities—should not be subject to the whims of popular majorities. A general right to privacy is one the courts have said may be at least partially based on the Ninth Amendment.

The Tenth Amendment

The Tenth Amendment states:

“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.”

Unlike other Bill of Rights provisions, this focuses on *power* rather than rights. The courts have generally read the Tenth Amendment as merely stating, as Chief Justice Harlan Stone put it, a “truism that all is retained which has not been surrendered.”¹

In other words, rather than limiting the power of the federal government in any meaningful way, it simply restates what is made obvious elsewhere in the *Constitution*: the federal government has both enumerated and implied powers, but where the federal government does not (or chooses not to) exercise power, the states may do so.

At times, politicians and state governments have argued that this allows states to engage in *interposition* or *nullification* by blocking federal laws and actions they deem to exceed the constitutional powers of the national government. The courts have rarely agreed with these views, except when the federal government appears to directly require state and local officials to do something. For example, in 1997 the Supreme Court struck down part of a federal law requiring state and local law enforcement to conduct background checks for prospective gun purchasers. In 2012 the court ruled the government could not compel states to expand the joint state-federal Medicaid program by taking away all their existing Medicaid funding if they refused.²

1. *United States v. Darby Lumber*, 312 U.S. 100 (1941).

2. *Printz v. United States*, 521 U.S. 898 (1997); *National*

The Tenth Amendment also allows states to guarantee rights and liberties more fully or extensively than the federal government does, or to include additional rights. For example, many state constitutions guarantee the right to a free public education. Several states give victims of crimes certain rights. Eighteen states include the right to hunt game and/or fish.³

Some state constitutions explicitly guarantee equal rights for men and women. Some states permitted women to vote before the Nineteenth Amendment of 1920, and people aged 18–20 could vote in a few states before the Twenty-Sixth Amendment of 1971. Several states also explicitly recognize a right to privacy. State courts sometimes interpret state constitutional provisions to include broader protections for basic liberties than their federal counterparts. For example, although in general people do not have the right to free speech and assembly on private property without the owners permission, California's constitutional protection of freedom of expression was extended to portions of some privately owned shopping centers by the state's supreme court.⁴

These state protections do not extend the other way, however. If the federal government passes a law or adopts a constitutional

Federation of Independent Business v. Sebelius, 567 U.S. __ (2012).

3. See Douglas Shinkle, "State Constitutional Right to Hunt and Fish." National Conference of State Legislatures, November 9, 2015. <http://www.ncsl.org/research/environment-and-natural-resources/state-constitutional-right-to-hunt-and-fish.aspx> (March 4, 2016).

4. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

amendment that restricts rights or liberties, or a Supreme Court decision interprets the *Constitution* in a way that narrows these rights, the state's protection no longer applies. For example, if Congress decided to outlaw hunting and fishing and the Supreme Court decided this law was a valid exercise of federal power, the state constitutional provisions that protect the right to hunt and fish would effectively be meaningless. The people would have to amending the *Constitution* through a national convention of the states. More concretely, federal laws that control weapons and drugs override state laws and constitutional provisions that otherwise permit them. While federal marijuana policies are not strictly enforced, state-level marijuana policies in Colorado and Washington provide a prominent exception to that clarity.

The Right to Privacy

Although the specific term *privacy* does not appear in the Constitution or Bill of Rights, scholars have interpreted several Bill of Rights provisions as an indication that James Madison and Congress sought to protect a common-law **right to privacy** as they understood it: a freedom from government intrusion into personal lives, particularly at home. For example, we could view the Second Amendment as reinforcing the common-law right to self-defense in the home; the Third Amendment confirming that soldiers should not be housed in anyone's home; the Fourth Amendment as constraining the state's ability to intrude on someone's home; and the due process and takings clauses of the Fifth Amendment as applying an equally high legal standard to the government's taking a home or property (reinforced after the Civil War by the Fourteenth Amendment). Alternatively, we could argue that the Ninth Amendment anticipated the existence of a common-law right to

privacy when it acknowledged the existence of basic natural rights not listed in the Bill of Rights or the body of the Constitution itself.⁵

Although several state constitutions do list the right to privacy as a protected right, the explicit constitutional recognition by the Supreme Court emerged in 1965 when the court spelled out the right to privacy for the first time in *Griswold v. Connecticut*, a case that struck down a state law forbidding even married individuals to use any form of contraception.⁶

Although many subsequent Supreme Court cases also dealt with privacy in the course of intimate sexual conduct, privacy also matters in the context of surveillance and monitoring.

Sexual Privacy

Although the *Griswold* case originally pertained only to married couples, in 1972 it was extended to apply the right to obtain contraception to unmarried people as well.⁷

Although neither decision was without controversy, the “sexual revolution” at the time may have contributed to a sense that anti-contraception laws were at the very least dated, if not in violation of people’s rights. The contraceptive coverage controversy of the Hobby Lobby case demonstrates the topics continuing relevance.

The Supreme Court’s application of the right to privacy doctrine

5. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). This discussion parallels the debate among the members of the Supreme Court in the *Griswold* case.

6. *Griswold v. Connecticut*, 381 U.S. 479 (1965)

7. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

to abortion rights was legally and politically problematic. In 1972 four states permitted abortions without restrictions, while thirteen allowed abortions “if the pregnant woman’s life or physical or mental health were endangered, if the fetus would be born with a severe physical or mental defect, or if the pregnancy had resulted from rape or incest”; abortions were completely illegal in Pennsylvania and heavily restricted in the remaining states.⁸ The unalienable right to life is the central question with an abortion procedure. Questions and controversy over abortion remain in the public arena today as a result. *Does one life take precedence over another? When is a fetus a human being with unalienable rights? When does life begin? Is abortion government sanctioned murder?* The government had traditionally erred on the side of the life prior to *Roe v. Wade*. The legal landscape changed dramatically as a result of the 1973 ruling in *Roe v. Wade*,⁹ when the Supreme Court decided the right to privacy encompassed a right for women to terminate a pregnancy, under certain scenarios. The justices ruled that while the government did have an interest in protecting the “potentiality of human life,” nonetheless this had to be balanced against the interests of both women’s health and women’s right to decide whether to have an abortion. Accordingly, the court established a framework to decide whether abortions could be regulated based on the fetus’s viability (i.e., potential to survive outside the womb) and the stage of pregnancy, with no restrictions permissible during

8. See Rachel Benson Gold. March 2003. “Lessons from Before Roe: Will Past be Prologue?” *The Guttmacher Report on Public Policy* 6, No. 1. <https://www.guttmacher.org/pubs/tgr/06/1/gr060108.html> (March 4, 2016).

9. *Roe v. Wade*, 410 U.S. 113 (1973).

the first three months of pregnancy (i.e., the first trimester), during which abortions were deemed safer for women than childbirth itself.

Starting in the 1980s, Supreme Court justices appointed by Republican presidents began to roll back the *Roe* decision. A key turning point was the court's ruling in *Planned Parenthood v. Casey* in 1992, in which a plurality of the court rejected *Roe*'s framework based on trimesters of pregnancy and replaced it with the **undue burden test**, which allows restrictions prior to viability that are not "substantial obstacle[s]" (undue burdens) to women seeking an abortion.¹⁰

Thus, the court upheld some state restrictions, including a required waiting period between arranging and having an abortion, parental consent (or, if not possible for some reason such as incest, authorization of a judge) for minors, and the requirement that women be informed of abortion health consequences. Other restrictions such as a requirement that a married woman notify her spouse in advance were struck down as an undue burden. Since the *Casey* decision, many states have passed other restrictions, banning certain procedures, requiring women to have and view an ultrasound before an abortion, and implementing more stringent licensing and inspection requirements for facilities where abortions are performed.

10. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).



(a)



(b)

A “March for Life” in Knoxville, Tennessee, on January 20, 2013 (a), marks the anniversary of the *Roe v. Wade* decision. On November 15, 2014, protestors in Chicago demonstrate against a crisis pregnancy center (b), a type of organization that counsels against abortion. (credit a: modification of work by Brian Stansberry; credit b: modification of work by Samuel Henderson)

Beyond the issues of contraception and abortion, the right to privacy has been interpreted to encompass a more general right for adults to have noncommercial, consensual sexual relationships in private. However, this legal development is relatively new; as recently as 1986, the Supreme Court ruled that states could still criminalize sex acts between two people of the same sex.¹¹

That decision was overturned in 2003 in *Lawrence v. Texas*, which invalidated state laws that criminalized sodomy.¹²

The state and national governments still have leeway to regulate sexual morality to some degree; “anything goes” is not the law of the land, even for actions that are consensual. The Supreme Court has declined to strike down laws in a few states that outlaw the sale of vibrators and other sex toys. Prostitution remains illegal in every state except in certain rural counties in Nevada; both polygamy (marriage to more than one other person) and bestiality (sex with

11. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

12. *Lawrence v. Texas*, 539 U.S. 558 (2003).

animals) are illegal everywhere. And, as we saw earlier, the states may regulate obscene materials and, in certain situations, material that may be harmful to minors or otherwise indecent; to this end, states and localities have sought to ban or regulate the production, distribution, and sale of pornography.

Privacy of Communications and Property

Another example of heightened modern era privacy concerns is the recognition that society is under pervasive surveillance. Monitoring the public used to be difficult. During the Cold War, regimes in the Soviet bloc employed millions of people as domestic spies and informants to suppress internal dissent through constant public monitoring. This was expensive in required human and monetary capital and proved remarkably ineffective. Groups like the East German Stasi and the Romanian Securitate were unable to suppress popular uprisings undermining communist one-party rule in most of those countries in the late 1980s.

Technology has now made it much easier to track and monitor people. Police cars and roadways are equipped with cameras that can photograph the license plate of every passing car or truck and record it in a database; while allowing police to recover stolen vehicles and catch fleeing suspects, this data can also be used to track the movements of law-abiding citizens. But law enforcement officials don't even have to go to this much work; millions of car and truck drivers pay tolls electronically without stopping at toll booths thanks to transponders attached to their vehicles, which can be read by scanners well away from any toll road or bridge to monitor traffic flow or any other purpose. The pervasive use of GPS (Global Positioning System) raises similar issues.



One form of technology that has made it easier to potentially monitor people's movements is electronic toll collection, such as the E-ZPass system in the Midwest and Northeast, FasTrak in California, and I-Pass in Illinois. (credit: modification of work by Kerry Ceszyk)

Even pedestrians and cyclists are relatively easy to track today. Cameras pointed at sidewalks and roadways can employ facial recognition software to identify people. Most people carry smartphones that constantly report their location to the nearest cell phone tower and broadcast a beacon signal to nearby wireless hotspots and Bluetooth devices. Police can

set up a small Stingray device that identifies and tracks all cell phones that attempt to connect to it within a radius of several thousand feet. With the right software, law enforcement and criminals can remotely activate a phone's microphone and camera, effectively planting a bug in someone's pocket without the person even knowing it.

These are not just gimmicks in a bad science fiction movie; businesses and governments have openly admitted they are using these methods. Research shows that even metadata—information about the messages we send and the calls we make and receive, such as time, location, sender, and recipient but excluding their content—can reveal much to governments and businesses. Even when information is collected in anonymously it can often be traced back to individuals, since people travel and communicate in largely predictable patterns.

Drones (small preprogrammed or remotely piloted aircraft) are becoming the next frontier of privacy issues. Drones can fly virtually undetected and monitor events from overhead. They can peek into fenced backyards and monitor activity inside houses and other buildings using infrared cameras. The Fourth Amendment was written in an era when finding out what was going on in someone's home meant either going inside or peeking through a window;

applying its protections today, when seeing into someone's house can be as easy as viewing a remote computer screen, is no longer simple.

In the United States, many civil liberties advocates are concerned that laws such as the USA PATRIOT Act (i.e., Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act), passed weeks after the 9/11 attacks in 2001, have given the federal government too much power by making it easy for officials to seek and obtain search warrants or in some cases to bypass warrant requirements altogether. Critics argue that the Patriot Act has largely been used to prosecute ordinary criminals, in particular drug dealers, rather than the intended terrorists. Most European countries, at least on paper, have opted for laws that protect against such government surveillance, perhaps mindful of past experience with communist and fascist regimes. European countries also tend to have stricter laws limiting the collection, retention, and use of private data by companies, which makes it harder for governments to obtain and use that data. Most recently, the battle between Apple Inc. and the National Security Agency (NSA) over whether Apple should allow the government access to key encrypted information has intensified this debate.



Several groups lobby the government, such as [The Electronic Frontier Foundation](#) and [The Electronic Privacy Information Center](#), on issues related to privacy in the information age, particularly on the Internet.

All this is not to say that technological surveillance tools do not have value or are inherently bad. They can be used for many purposes that would benefit society and, perhaps, even enhance our freedoms. Spending less time stuck in traffic because we know there's been an accident—detected automatically because the cell phones that normally whiz by at the speed limit are now crawling along—gives us time to spend on more valuable activities. Capturing criminals and terrorists by recognizing them or their vehicles before they can continue their agendas will protect the life, liberty, and property of the public at large. At the same time, however, the emergence of these technologies means calls for vigilance and limits on what businesses and governments can do with the information they collect and the length of time they may retain it. We might also be concerned about how this technology could be used by more oppressive regimes. If the technological resources employed by today's governments had been available to the East German Stasi and the Romanian Securitate, would those repressive regimes have fallen? How much privacy and freedom should citizens sacrifice in order to feel safe?

The courts continue to define the interrelationship of constitutional amendments over time. Because it was not explicitly laid out in the *Constitution*, privacy rights required clarification through public laws and court precedents. Important cases addressing the right to privacy relate to abortion, sexual behavior, internet activity, and the privacy of personal texts and cell phone calls. Where we draw the line between privacy and public safety is an ongoing discussion and the courts are a significant player.

Questions to Consider

1. Explain the difference between a right listed in the

Bill of Rights and a common-law right.

2. Describe two ways in which new technological developments challenge traditional notions of privacy.
3. Which rights and freedoms for citizens do you think our government does a good job of protecting? Why?
4. Which rights and freedoms could it better protect, and how?
5. In which areas do you think people's rights and liberties are at risk of government intrusion? Why? Which solutions would you propose?
6. What are the implications of the Supreme Court decision in *Burwell v. Hobby*?
7. How does the provision for and the protection of individual rights and freedoms consume government resources of time and money? Since these are in effect the people's resources, do you think they are being well spent? Why or why not?
8. There is an old saying that it is better for 100 guilty people to go free than for an innocent person to be unjustly punished. Do you agree? Why or why not? What do you think is the right balance for our society to strike?

Terms to Remember

right to privacy—the right to be free of government intrusion

undue burden test—a means of deciding whether a law that makes it harder for women to seek abortions is constitutional

PART XVIII

CIVIL RIGHTS

84. Civil Rights: People Challenging the Rules

“Daughters of a Chief” painting by Edward S. Curtis of two Native American women on horses looking into the distance.

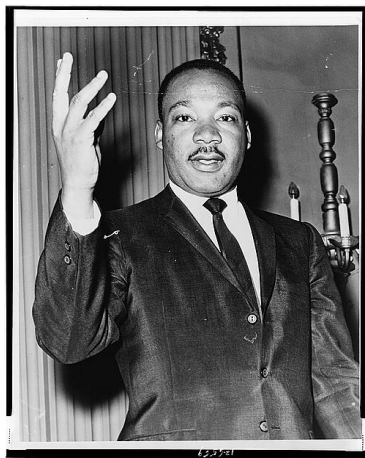
“Daughters of a Chief” from the National Archives collection; Edward S. Curtis’s *The North American Indian*.

The United States’ founding principles are liberty, equality, and justice. However, not all its citizens enjoy equal opportunities, the same treatment under the law, or all the liberties extended to others. Well into the twentieth century, many were routinely discriminated against because of sex, race, ethnicity or country of origin, religion, sexual orientation, or physical or mental abilities—deprivation of basic rights and opportunities and sometimes of citizenship itself.

The fight to secure equal rights for all continues today. While many changes must still be made, the past one hundred years, have brought significant gains for people long discriminated against. Yet, people still encounter prejudice, injustice, and negative stereotypes that lead to discrimination, marginalization, and even exclusion from civic life.

Some prejudice and injustice arises with people’s opinions, attitudes and behavior. Other injustice is promoted through rules, regulations, and laws. In

The United States’ founding principles are liberty, equality, and justice. However, not all its citizens enjoy equal opportunities, the same treatment under the law, or all the liberties extended to others. Well into the twentieth



Rev. Dr. Martin Luther King, Jr. photo by Dick DeMarisco, 1964, Library of Congress

addition to two types of discrimination against individuals or groups, there are two types of law involved in as well. Maintaining a basic understanding of these two types of law is essential to continued progress in the area of expanding civil rights as well as expansion of basic civil liberties.

Civil Rights: Questions to Consider

1. What is the difference between civil liberties and civil rights?
2. What is the difference between positive and natural law (unalienable rights)?
3. How did the African American struggle for civil rights evolve?
4. What challenges did women overcome in securing the right to vote?
5. What obstacles do women and other groups of citizens still face?

85. Civil Rights: How are rights identified?

Learning Objectives

- Define the concept of civil rights
- Describe the standards that courts use when deciding whether a discriminatory law or regulation is unconstitutional
- Identify three core questions for recognizing a civil rights problem

The belief that people should be treated equally under the law is one of the cornerstones of political thought in the United States. Yet not all citizens have been treated equally throughout the nation's history, and some are treated differently even today. For example, until 1920, nearly all women in the United States lacked the right to vote. Black men received the right to vote in 1870, but as late as 1940 only 3 percent of African American adults living in the South were registered to vote, largely due to laws designed to keep them from the polls.¹

1. Constitutional Rights Foundation. "Race and Voting in the Segregated South," <http://www.crf-usa.org/black-history-month/race-and-voting-in-the-segregated-south> (April 10, 2016).

Americans were not allowed to enter into legal marriage with a member of the same sex in many U.S. states until 2015. Some types of unequal treatment are considered acceptable, while others are not. No one would consider it acceptable to allow a ten-year-old to vote, because a child lacks the ability to understand important political issues, but all reasonable people would agree that it is wrong to mandate racial segregation or to deny someone the right to vote on the basis of race. It is important to understand which types of inequality are unacceptable and why.

Defining Civil Rights



Catherine Natsuko Yamaguchi, Red Cross instructor, Manzanar Relocation Center, Cal. / photograph by Ansel Adams. Adams, Ansel, 1902- Manzanar War Relocation Center photographs; Repository Library of Congress Prints and Photographs Division Washington, D.C. 20540 USA at <https://www.loc.gov/item/2001704616>.

Civil rights are, at the most fundamental level, guarantees by the government that it will treat people equally, particularly people belonging to groups that have historically been denied the same rights and opportunities as others. The proclamation that “all men are created equal” appears in the Declaration of Independence, and the due process clause of the Fifth Amendment to the U.S. Constitution requires that the federal government treat people equally. According to Chief Justice Earl Warren in the Supreme Court case of *Bolling v.*

Sharpe (1954), “discrimination may be so unjustifiable as to be violative of due process.”²

Additional guarantees of equality are provided by the **equal protection clause** of the Fourteenth Amendment, ratified in 1868, which states in part that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” Thus, between the Fifth and Fourteenth Amendments, neither state governments nor the federal government may treat people unequally unless unequal treatment is necessary to maintain important governmental interests, like public safety.

We can contrast *civil rights* with *civil liberties*, which are limitations on government power designed to protect our fundamental freedoms. For example, the Eighth Amendment prohibits the application of “cruel and unusual punishments” to those convicted of crimes, a limitation on government power. As another example, the guarantee of equal protection means the laws and the Constitution must be applied on an equal basis, limiting the government’s ability to discriminate or treat some people differently, unless the unequal treatment is based on a valid reason, such as age. A law that imprisons Asian Americans twice as long as Latinos for the same offense, or a law that says people with disabilities don’t have the right to contact members of Congress while other people do, would treat some people differently from others for no valid reason and might well be unconstitutional. According to the Supreme Court’s interpretation of the Equal Protection Clause, “all persons similarly circumstanced shall be treated alike.”³

If people are not similarly circumstanced, however, they may be

2. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

3. *Phyller v. Doe*, 457 U.S. 202 (1982); *F. S. Royster Guano v. Virginia*, 253 U.S. 412 (1920).

treated differently. Asian Americans and Latinos who have broken the same law are similarly circumstanced; however, a blind driver or a ten-year-old driver is differently circumstanced than a sighted, adult driver.

Identifying Discrimination

Laws that treat one group of people differently from others are not always unconstitutional. In fact, the government engages in legal discrimination quite often. In most states, you must be eighteen years old to smoke cigarettes and twenty-one to drink alcohol; these laws discriminate against the young. To get a driver's license so you can legally drive a car on public roads, you have to be a minimum age and pass tests showing your knowledge, practical skills, and vision.

Perhaps you are attending a public college or university run by the government; the school you attend has an open admission policy, which means the school admits all who apply. Not all public colleges and universities have an open admissions policy, however. These schools may require that students have a high school diploma or a particular score on the SAT or ACT or a GPA above a certain number. In a sense, this is discrimination, because these requirements treat people unequally; people who do not have a high school diploma or a high enough GPA or SAT score are not admitted. How can the



Utes-Chief Sevara [i.e., Severo] and family; c1899; photomechanical print; Reproduction Number: LC-USZC4-4168 (color film copy transparency); Rights Advisory: No known restrictions on publication; Call Number: LOT 12914; Repository: Library of Congress Prints and Photographs Division Washington, D.C. 20540 USA <http://hdl.loc.gov/loc.pnp/pp.print>.

federal, state, and local governments discriminate in all these ways even though the equal protection clause seems to suggest that everyone be treated the same?

The answer to this question lies in the *purpose* of the discriminatory practice. In most cases when the courts are deciding whether discrimination is unlawful, the government has to demonstrate only that it has a good reason for engaging in it. Unless the person or group challenging the law can prove otherwise, the courts will generally decide the discriminatory practice is allowed. In these cases, the courts are applying the **rational basis test**. That is, as long as there's a reason for treating some people differently that is "rationally related to a legitimate government interest," the discriminatory act or law or policy is acceptable.⁴

For example, since letting blind people operate cars would be dangerous to others on the road, the law forbidding them to drive is reasonably justified on the grounds of safety; thus, it is allowed even though it discriminates against the blind. Similarly, when universities and colleges refuse to admit students who fail to meet a certain test score or GPA, they can discriminate against students with weaker grades and test scores because these students most likely do not possess the knowledge or skills needed to do well in their classes and graduate from the institution. The universities and colleges have a legitimate reason for denying these students entrance.

The courts, however, are much more skeptical when it comes to certain other forms of discrimination. Because of the United States' history of discrimination against people of non-white ancestry,

4. Cornell University Law School: Legal Information Institute. "Rational Basis," https://www.law.cornell.edu/wex/rational_basis (April 10, 2016); *Nebbia v. New York*, 291 U.S. 502 (1934).

women, and members of ethnic and religious minorities, the courts apply more stringent rules to policies, laws, and actions that discriminate on the basis of race, ethnicity, gender, religion, or national origin.⁵

Discrimination based on gender or sex is generally examined with intermediate scrutiny. The standard of intermediate scrutiny was first applied by the Supreme Court in *Craig v. Boren* (1976) and again in *Clark v. Jeter* (1988).⁶

It requires the government to demonstrate that treating men and women differently is “substantially related to an important governmental objective.” This puts the burden of proof on the government to demonstrate why the unequal treatment is justifiable, not on the individual who alleges unfair discrimination has taken place. In practice, this means laws that treat men and women differently are sometimes upheld, although usually they are not. For example, in the 1980s and 1990s, the courts ruled that states could not operate single-sex institutions of higher education and that such schools, like South Carolina’s military college The Citadel must admit both male and female students.⁷

Women in the military are now also allowed to serve in all combat roles.⁸

5. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

6. *Craig v. Boren*, 429 U.S. 190 (1976); *Clark v. Jeter*, 486 U.S. 456 (1988).

7. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *United States v. Virginia*, 518 U.S. 515 (1996).

8. Matthew Rosenberg and Dave Philipps, “All Combat Roles Open to Women, Defense Secretary Says,” *New York*



(a)



(b)

While the first female cadets graduated from the U.S. Military Academy at West Point in 1980 (a), The Citadel, a military college in South Carolina (b), was an all-male institution until 1995 when a young woman named Shannon Faulkner enrolled in the school.

Discrimination against members of racial, ethnic, or religious groups or those of various national origins is reviewed to the greatest degree by the courts, which apply the **strict scrutiny** standard in these cases. Under **strict scrutiny**, the burden of proof is on the government to demonstrate that there is a compelling governmental interest in treating people from one group differently from those who are not part of that group—the law or action can be

Times, 3 December 2015; *Rostker v. Goldberg*, 453 U.S. 57 (1981); Steinhauer, Jennifer, “Senate Votes to Require Women to Register for the Draft,” *New York Times*, 14 June 2016. <http://www.nytimes.com/2016/06/15/us/politics/congress-women-military-draft.html>

“narrowly tailored” to achieve the goal in question, and that it is the “least restrictive means” available to achieve that goal.⁹

In other words, if there is a non-discriminatory way to accomplish the goal in question, discrimination should not take place. In the modern era, laws and actions that are challenged under strict scrutiny have rarely been upheld. Strict scrutiny, however, was the legal basis for the Supreme Court’s 1944 upholding of the legality of the internment of Japanese Americans during World War II, discussed later in this chapter.¹⁰

Finally, **affirmative action** consists of government programs and policies designed to benefit members of groups historically subject to discrimination. Much of the controversy surrounding affirmative action is about whether strict scrutiny should be applied to these cases.

Putting Civil Rights in the *Constitution*

At the time of the nation’s founding, of course, the treatment of many groups was unequal: hundreds of thousands of people of African descent were not free, the rights of women were decidedly fewer than those of men, and the native peoples of North America were generally not considered U.S. citizens at all. While the early United States was perhaps a more inclusive society than most of the world at that time, equal treatment of all was at best still a radical idea.

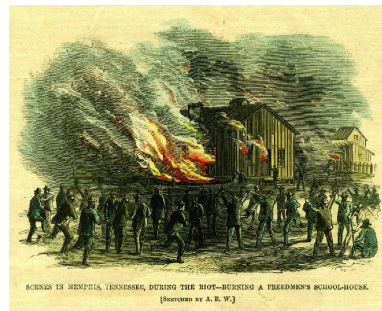
The aftermath of the Civil War marked a turning point for civil rights. The Republican majority in Congress was enraged by the

9. *Johnson v. California*, 543 U.S. 499 (2005).

10. *Korematsu v. United States*, 323 U.S. 214 (1944).

actions of the reconstituted governments of the southern states. In these states, many former Confederate politicians and their sympathizers returned to power and attempted to circumvent the Thirteenth Amendment's freeing of slaves by passing laws known as the black codes. These laws were designed to reduce former slaves to the status of serfs or indentured servants; blacks were not just denied the right to vote but also could be arrested and jailed for vagrancy or idleness if they lacked jobs. Blacks were excluded from public schools and state colleges and were subject to violence at the hands of whites.¹¹

To override the southern states' actions, lawmakers in Congress proposed two amendments to the Constitution designed to give political equality and power to former slaves; once passed by Congress and ratified by the necessary number of states, these became the Fourteenth and Fifteenth Amendments. The Fourteenth Amendment, in addition to including the equal protection clause as noted above, also was designed to ensure that the states would respect the civil liberties of



A school built by the federal government for former slaves burned after being set on fire during a race riot in Memphis, Tennessee, in 1866. White southerners, angered by their defeat in the Civil War and the loss of their slave property, attacked and killed former slaves, destroyed their property, and terrorized white northerners who attempted to improve the freed slaves' lives.

11. "Mississippi Black Code," <https://chnm.gmu.edu/courses/122/recon/code.html> (April 10, 2016); "Black Codes and Pig Laws," <http://www.pbs.org/tpt/slavery-by-another-name/themes/black-codes/> (April 10, 2016).

freed slaves. The Fifteenth Amendment was proposed to ensure the right to vote for black men, which will be discussed in more detail later in this chapter.

Identifying Civil Rights Issues

When we look back at the past, it's relatively easy to identify civil rights issues that arose. But looking into the future is much harder. For example, few people fifty years ago would have identified the rights of the LGBT community as an important civil rights issue or predicted it would become one, yet in the intervening decades it has certainly done so. Similarly, in past decades the rights of those with disabilities, particularly mental disabilities, were often ignored by the public at large. Many people with disabilities were institutionalized and given little further thought, and within the past century, it was common for those with mental disabilities to be subject to forced sterilization.¹²

12. Catherine K. Harbour, and Pallab K. Maulik. 2010. "History of Intellectual Disability." In *International Encyclopedia of Rehabilitation*, eds. J. H. Stone and M. Blouin. <http://cirrie.buffalo.edu/encyclopedia/en/article/143/> (April 10, 2016).



Civil rights institutes are found throughout the United States and especially in the south. One of the most prominent civil rights institutes is the [Birmingham Civil Rights Institute](#), which is located in Alabama.

Question to Consider

1. What is the difference between civil rights and civil liberties?

Terms to Remember

affirmative action—the use of programs and policies designed to assist groups that have historically been subject to discrimination

equal protection clause—a provision of the Fourteenth Amendment that requires the states to treat all residents equally under the law

intermediate scrutiny—the standard used by the courts

to decide cases of discrimination based on gender and sex; burden of proof is on the government to demonstrate an important governmental interest is at stake in treating men differently from women

rational basis test—the standard used by the courts to decide most forms of discrimination; the burden of proof is on those challenging the law or action to demonstrate there is no good reason for treating them differently from other citizens

strict scrutiny—the standard used by the courts to decide cases of discrimination based on race, ethnicity, national origin, or religion; burden of proof is on the government to demonstrate a compelling governmental interest is at stake and no alternative means are available to accomplish its goals

86. Civil Rights : What has occurred in the struggle for equality?

Learning Objectives

- Identify key events in the history of African American civil rights
- Explain how the courts, Congress, and the executive branch supported the civil rights movement
- Describe the role of grassroots efforts in the civil rights movement

Many groups in U.S. history have sought recognition as equal citizens. Although each group's efforts have been notable and important, arguably the greatest, longest, and most violent struggle was that of African Americans, whose once-inferior legal status was even written into the text of the Constitution. Their fight for freedom and equality provided the legal and moral foundation for others who sought recognition of their equality later on.

Slavery and the Civil War

In the *Declaration of Independence*, Thomas Jefferson made the

radical statement that “all men are created equal” and “are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” Yet like other wealthy landowners of his time, Jefferson also owned dozens of other human beings as his personal property. He recognized this contradiction and personally considered the institution of slavery to be a “hideous blot” on the nation.¹

However, in order to forge a political union that would stand the test of time, he and the other founders—and later the framers of the *Constitution*—chose not to address the issue in any definitive way. Political support for abolition was very much a minority stance at the time, although after the Revolution many of the northern states did abolish slavery for a variety of reasons.²

As the new United States expanded westward, however, the issue of slavery became harder to ignore and ignited much controversy. Many opponents of slavery were willing to accept the institution if it remained largely confined to the South but did not want it to spread westward. They feared the expansion of slavery would lead to the

1. Lucia Stanton. 2008. “Thomas Jefferson and Slavery,” https://www.monticello.org/site/plantation-and-slavery/thomas-jefferson-and-slavery#footnoteref3_srni04n.
2. “How Did Slavery Disappear in the North?” <http://www.abolitionseminar.org/how-did-northern-states-gradually-abolish-slavery/> (April 10, 2016); Nicholas Boston and Jennifer Hallam, “The Slave Experience: Freedom and Emancipation,” <http://www.pbs.org/wnet/slavery/experience/freedom/history.html> (April 10, 2016).

political dominance of the South over the North and would deprive small farmers in the newly acquired western territories who could not afford slaves.³

Abolitionists, primarily in the North, also argued that slavery was both immoral and opposed basic U.S. values; they demanded an end to it.

The spread of slavery into the West seemed inevitable, however, following the Supreme Court's ruling in the case **Dred Scott v. Sandford**,⁴ decided in 1857. Scott, who had been born into slavery but had spent time in free states and territories, argued that his temporary residence in a territory where slavery had been banned by the federal government had made him a free man. The Supreme Court rejected his argument. In fact, the Court's majority stated that Scott had no legal right to sue for his freedom at all because blacks (whether free or slave) were not and could not become U.S. citizens. Thus, Scott lacked the standing to even appear before the court. The Court also held that Congress lacked the power to decide whether slavery would be permitted in a territory that had been acquired after the *Constitution* was ratified, in effect prohibiting the federal government from passing any laws that would limit the expansion of slavery into any part of the West.

Ultimately, of course, the issue was decided by the Civil War (1861–1865), with the southern states seceding to defend their “states’ rights” to determine their own destinies without interference by the federal government. Foremost among the rights

3. Eric Foner. 1970. *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War*. New York: Oxford University Press, 28, 50, 54.

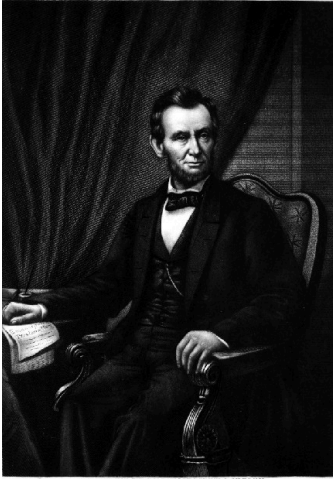
4. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

claimed by the southern states was the right to decide whether their residents would be allowed to own slaves.⁵

Although at the beginning of the war President Abraham Lincoln had been willing to allow slavery to continue in the South to preserve the Union, he changed his policies regarding abolition over the course of the war. The first step was the issuance of the Emancipation Proclamation on January 1, 1863. Although it stated “all persons held as slaves . . . henceforward shall be free,” the proclamation was limited in effect to the states that had rebelled. Slaves in states that had remained within the Union, such as Maryland and Delaware, and in parts of the Confederacy that were already occupied by the Union army, were not set free. Although slaves in states in rebellion were technically freed, because Union troops controlled relatively small portions of these states at the time, it was impossible to ensure that enslaved people were freed in reality and not simply on paper.⁶

5. David M. Potter. 1977. *The Impending Crisis, 1848–1861*. New York: Harper & Row, 45.

6. David Herbert Donald. 1995. *Lincoln*. New York: Simon & Schuster, 407.



(a)



(b)

In this memorial engraving from 1865 (the year he was assassinated), President Abraham Lincoln is shown with his hand resting on a copy of the Emancipation Proclamation (a). Despite popular belief, the Emancipation Proclamation (b) actually freed very few slaves, though it did change the meaning of the war.

Reconstruction

At the end of the Civil War, the South entered a period called Reconstruction (1865–1877) during which state governments were reorganized before the rebellious states were allowed to be readmitted to the Union. As part of this process, the Republican Party pushed for a permanent end to slavery. A constitutional amendment to this effect was passed by the House of Representatives in January 1865, after having already been approved by the Senate in April 1864, and it was ratified in December 1865 as the **Thirteenth Amendment**. The amendment's first section states, “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their

jurisdiction.” In effect, this amendment outlawed slavery in the United States.

The changes wrought by the **Fourteenth Amendment** were more extensive. In addition to introducing the equal protection clause to the *Constitution*, this amendment also extended the due process clause of the Fifth Amendment to the states, required the states to respect the privileges or immunities of all citizens, and, for the first time, defined citizenship at the national and state levels. People could no longer be excluded from citizenship based solely on their race. Although some of these provisions were rendered mostly toothless by the courts or the lack of political action to enforce them, others were pivotal in the expansion of civil rights.

The **Fifteenth Amendment** stated that people could not be denied the right to vote based on “race, color, or previous condition of servitude.” This construction allowed states to continue to decide the qualifications of voters as long as those qualifications were ostensibly race-neutral. Thus, while states could not deny African American men the right to vote on the basis of race, they could deny it to women on the basis of sex or to people who could not prove they were literate.

Although the immediate effect of these provisions was quite profound, over time the Republicans in Congress gradually lost interest in pursuing Reconstruction policies, and the Reconstruction ended with the end of military rule in the South and the withdrawal of the Union army in 1877.⁷

Following the army’s removal, political control of the South fell once again into the hands of white men, and violence was used

7. Erik Foner. 1988. *Reconstruction: America’s Unfinished Revolution, 1863–1877*. New York: Harper & Row, 524–527.

to discourage blacks from exercising the rights they had been granted.⁸

The revocation of voting rights, or **disenfranchisement**, took a number of forms; not every southern state used the same methods, and some states used more than one, but they all disproportionately affected black voter registration and turnout.⁹

Perhaps the most famous of the tools of disenfranchisement were **literacy tests** and **understanding tests**. Literacy tests, which had been used in the North since the 1850s to disqualify naturalized European immigrants from voting, called on the prospective voter to demonstrate his (and later her) ability to read a particular passage of text. However, since voter registration officials had discretion to decide what text the voter was to read, they could give easy passages to voters they wanted to register and more difficult passages to those whose registration they wanted to deny. Understanding tests required the prospective voter to explain the *meaning* of a particular passage of text, often a provision of the U.S. *Constitution*, or answer a series of questions related to citizenship. Again, since the official examining the prospective voter could decide which passage or questions to choose, the difficulty of the test might vary dramatically between white and black applicants.¹⁰

Even had these tests been administered fairly and equitably, however, most blacks would have been at a huge disadvantage, because few could read. Although schools for blacks had existed

8. Ibid., 595; Alexander Keyssar. 2000. *The Right to Vote: The Contested History of Democracy in the United States*. New York: Basic Books, 105–106.

9. Keyssar, 114–115.

10. Keyssar, 111–112.

in some places, southern states had made it largely illegal to teach slaves to read and write. At the beginning of the Civil War, only 5 percent of blacks could read and write, and most of them lived in the North.¹¹

Some were able to take advantage of educational opportunities after they were freed, but many were not able to gain effective literacy.

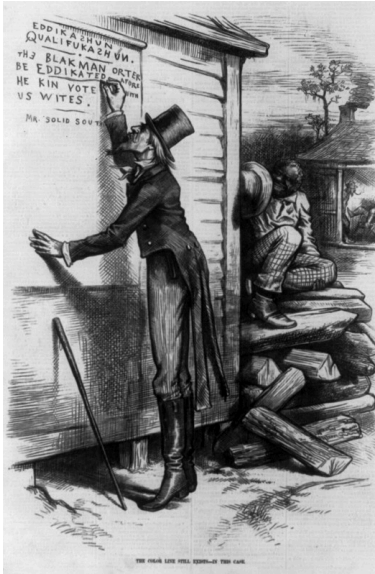
In some states, poorer, less literate white voters feared being disenfranchised by the literacy and understanding tests. Some states introduced a loophole, known as the **grandfather clause**, to allow less literate whites to vote. The grandfather clause exempted those who had been allowed to vote in that state prior to the Civil War and their descendants from literacy and understanding tests.¹²

Because blacks were not allowed to vote prior to the Civil War, but most white men had been voting at a time when there were no literacy tests, this loophole allowed most illiterate whites to vote while leaving obstacles in place for blacks who wanted to vote as well. Time limits were often placed on these provisions because state legislators realized that they might quickly be declared unconstitutional, but they lasted long enough to allow illiterate white men to register to vote.¹³

11. Kimberly Sambol-Tosco, “The Slave Experience: Education, Arts, and Culture,” <http://www.pbs.org/wnet/slavery/experience/education/history2.html> (April 10, 2016).

12. Keyssar, 112.

13. Alan Greenblat, “The Racial History of the ‘Grandfather Clause,’” *NPR Code Switch*, 22 October 2013. <http://www.npr.org/sections/codeswitch/2013/10/21/>



A magazine cartoon from 1879 ridicules the practice of illiterate, southern whites requiring that a “blakman” be “eddikated” before he could vote. The grandfather clause made such a situation possible.

In states where the voting rights of poor whites were less of a concern, another tool for disenfranchisement was the **poll tax**. This was an annual per-person tax, typically one or two dollars (on the order of \$20 to \$50 today), that a person had to pay to register to vote. People who didn't want to vote did not have to pay, but in several states the poll tax was cumulative, so if you decided to vote you would have to pay not only the tax due for that year but any poll tax from previous years as well. Because former slaves were usually quite poor, they were less likely than white men to be able to pay poll taxes.¹⁴

239081586/the-racial-history-of-the-grandfather-clause.

14. Keyssar, 111.

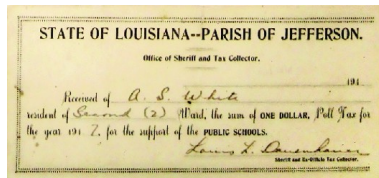
The **24th Amendment** eliminated poll taxes on January 23, 1964. “Do you know I’ve never voted in my life, never been able to exercise my right as a citizen because of the poll tax?” “Citizen” to Mr. Pike, interviewer, Atlanta, Georgia. American Life Histories, 1936 – 1940. More than 20 years after “Citizen” spoke those words, the poll tax was abolished. At the ceremony in 1964 formalizing the 24th Amendment, President Lyndon Johnson noted that: “There can be no one too poor to vote.”



“Voters at the Voting Booths, ca. 1945”
from the Prints and Photographs
Division, Library of Congress.

Thanks to the 24th Amendment, the right of all U.S. citizens to freely cast their votes has been secured.¹⁵

Although these methods were usually sufficient to ensure that blacks were kept away from the polls, some dedicated African Americans did manage to register to vote despite the obstacles placed in their way. To ensure their vote



According to this receipt, a man named A. S. White paid his \$1 poll tax in Jefferson Parish, Louisiana, in 1917.

15. The 24th Amendment Ended the Poll Tax, America’s Story from America’s Library, The Library of Congress at http://www.americaslibrary.gov/jb/modern/jb_modern_polltax_2_e.html

was largely meaningless, the white elites used their control of the Democratic Party to create the **white primary**: primary elections in which only whites were allowed to vote. The state party organizations argued that as private groups, rather than part of the state government, they had no obligation to follow the Fifteenth Amendment's requirement not to deny the right to vote on the basis of race. Furthermore, they contended, voting for nominees to run for office was not the same as electing those who would actually hold office. They held primary elections to choose the Democratic nominee in which only white citizens were allowed to vote.¹⁶

Once the nominee had been chosen, he or she might face token opposition from a Republican or minor-party candidate in the general election, but since white voters had agreed beforehand to support whoever won the Democrats' primary, the outcome of the general election was a foregone conclusion.

With blacks effectively disenfranchised, the restored southern state governments undermined guarantees of equal treatment in the Fourteenth Amendment. They passed laws that excluded African Americans from juries and allowed the imprisonment and forced labor of "idle" black citizens. The laws also called for segregation of whites and blacks in public places under the doctrine known as "separate but equal." As long as nominally equal facilities were provided for both whites and blacks, it was legal to require members of each race to use the facilities designated for them. Similarly, state and local governments passed laws limiting what neighborhoods blacks and whites could live in. Collectively, these discriminatory laws came to be known as **Jim Crow laws**. The Supreme Court upheld the separate but equal doctrine in 1896 in **Plessy v. Ferguson**,

16. Keyssar, 247.

consistent with the Fourteenth Amendment's equal protection clause, and allowed segregation to continue.¹⁷

Civil Rights in the Courts

By the turn of the twentieth century, the position of African Americans was quite bleak. Even outside the South, racial inequality was a fact of everyday life. African American leaders and thinkers themselves disagreed on the right path forward. Some, like Booker T. Washington, argued that acceptance of inequality and segregation over the short term would allow African Americans to focus their efforts on improving their educational and social status until whites were forced to acknowledge them as equals. W. E. B. Du Bois, however, argued for a more confrontational approach and in 1909 founded the National Association for the Advancement of Colored People (NAACP) as a rallying point for securing equality. Liberal whites dominated the organization in its early years, but African Americans assumed control over its operations in the 1920s.¹⁸

The NAACP soon focused on a strategy of overturning Jim Crow laws through the courts. Perhaps its greatest series of legal successes consisted of its efforts to challenge segregation in education. Early cases brought by the NAACP dealt with racial discrimination in higher education. In 1938, the Supreme Court essentially gave states a choice: they could either integrate

17. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

18. "NAACP: 100 Years of History," <https://donate.naACP.org/pages/naACP-history> (April 10, 2016).

institutions of higher education, or they could establish an equivalent university or college for African Americans.¹⁹

Southern states chose to establish colleges for blacks rather than allow them into all-white state institutions. Although this ruling expanded opportunities for professional and graduate education in areas such as law and medicine for African Americans by requiring states to provide institutions for them to attend, it nevertheless allowed segregated colleges and universities to continue to exist.



The [NAACP](#) was pivotal in securing African American civil rights and today continues to address civil rights violations, such as police brutality and the disproportionate percentage of African American convicts that are given the death penalty.

The landmark court decision of the judicial phase of the civil rights movement settled the **Brown v. Board of Education** case in 1954.²⁰

In this case, the Supreme Court unanimously overturned its decision in *Plessy v. Ferguson* as it pertained to public education, stating that a separate but equal education was a logical impossibility. Even with the same funding and equivalent facilities, a segregated school could not have the same teachers or environment as the equivalent school for another race. The court also rested

19. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

20. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

its decision in part on social science studies suggesting that racial discrimination led to feelings of inferiority among African American children. The only way to dispel this sense of inferiority was to end segregation and integrate public schools.

It is safe to say this ruling was controversial. While integration of public schools took place without much incident in some areas of the South, particularly where there were few black students, elsewhere it was often confrontational—or nonexistent. In recognition of the fact that southern states would delay school integration for as long as possible, civil rights activists urged the federal government to enforce the Supreme Court's decision. Organized by A. Philip Randolph and Bayard Rustin, approximately twenty-five thousand African Americans gathered in Washington, DC, on May 17, 1957, to participate in a Prayer Pilgrimage for Freedom.²¹

A few months later, in Little Rock, Arkansas, governor Orval Faubus resisted court-ordered integration and mobilized National Guard troops to keep black students out of Central High School. President Eisenhower then called up the Arkansas National Guard for federal duty (essentially taking the troops out of Faubus's hands) and sent soldiers of the 101st Airborne Division to escort students to and from classes. To avoid integration, Faubus closed four high schools in Little Rock the following school year.²²

21. "Prayer Pilgrimage for Freedom," http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_prayer_pilgrimage_for_freedom_1957/ (April 10, 2016).

22. Jason Sokol. 2006. *There Goes My Everything: White*



Opposition to the 1957 integration of Little Rock's all-white Central High School led President Eisenhower to call in soldiers of the 101st Airborne Division. For a year, they escorted nine African American students to and from school and to and from classes within the school. (credit: The U.S. Army)

In Virginia, state leaders employed a strategy of “massive resistance” to school integration, which led to the closure of a large number of public schools across the state, some for years.²³

Although ***de jure* segregation**, segregation mandated by law, had ended on paper, in practice, few efforts were made to integrate schools in most school districts with substantial black student populations until the late 1960s. Many white

southerners who objected to sending their children to school with blacks then established private academies that admitted only white students.²⁴

Advances were made in the courts in areas other than public education. In many neighborhoods in northern cities, which technically were not segregated, residents were required to sign restrictive real estate covenants promising that if they moved, they would not sell their houses to African Americans and sometimes

Southerners in the Age of Civil Rights. New York: Alfred A. Knopf, 116–117.

23. *Ibid.*, 118–120.

24. *Ibid.*, 120, 171, 173.

not to Chinese, Japanese, Mexicans, Filipinos, Jews, and other ethnic minorities as well.²⁵

In the case of *Shelley v. Kraemer* (1948), the Supreme Court held that while such covenants did not violate the Fourteenth Amendment because they consisted of agreements between private citizens, their provisions could not be enforced by courts.²⁶

Because state courts are government institutions and the Fourteenth Amendment prohibits the government from denying people equal protection of the law, the courts' enforcement of such covenants would be a violation of the amendment. Thus, if a white family chose to sell its house to a black family and the other homeowners in the neighborhood tried to sue the seller, the court would not hear the case. In 1967, the Supreme Court struck down a Virginia law that prohibited interracial marriage in ***Loving v. Virginia***.²⁷

Legislating Civil Rights

Beyond these favorable court rulings, however, progress toward equality for African Americans remained slow in the 1950s. In 1962, Congress proposed what later became the Twenty-Fourth Amendment, which banned the poll tax in elections to federal (but not state or local) office; the amendment went into effect after being

25. Robert M. Fogelson. 2005. *Bourgeois Nightmares: Suburbia, 1870–1930*. New Haven, CT: Yale University Press, 102–103.

26. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

27. *Loving v. Virginia*, 388 U.S. 1 (1967).

ratified in early 1964. Several southern states continued to require residents to pay poll taxes in order to vote in state elections until 1966 when, in the case of *Harper v. Virginia Board of Elections*, the Supreme Court declared that requiring payment of a poll tax in order to vote in an election at any level was unconstitutional.²⁸

The slow rate of progress led to frustration within the African American community. Newer, grassroots organizations such as the Southern Christian Leadership Conference (SCLC), Congress of Racial Equality (CORE), and Student Non-Violent Coordinating Committee (SNCC) challenged the NAACP's position as the leading civil rights organization and questioned its legal-focused strategy. These newer groups tended to prefer more confrontational approaches, including the use of **direct action** campaigns relying on marches and demonstrations. The strategies of nonviolent resistance and **civil disobedience**, or the refusal to obey an unjust law, had been effective in the campaign led by Mahatma Gandhi to liberate colonial India from British rule in the 1930s and 1940s. Civil rights pioneers adopted these measures in the 1955–1956 Montgomery bus boycott. After Rosa Parks refused to give up her bus seat to a white person and was arrested, a group of black women carried out a day-long boycott of Montgomery's public transit system. This boycott was then extended for over a year and overseen by union organizer E. D. Nixon. The effort desegregated public transportation in that city.²⁹

28. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

29. "Gandhi, Mohandas Karamchand (1869–1948)," http://kingencyclopedia.stanford.edu/encyclopedia/encyclopedia/enc_gandhi_mohandas_karamchand_1869_1948/index.html (April 10, 2016); "Nixon, E. D. (1899–1987),"

Direct action also took such forms as the sit-in campaigns to desegregate lunch counters that began in Greensboro, North Carolina, in 1960, and the 1961 Freedom Rides in which black and white volunteers rode buses and trains through the South to enforce a 1946 Supreme Court decision that desegregated interstate transportation (*Morgan v. Virginia*).³⁰

While such focused campaigns could be effective, they often had little impact in places where they were not replicated. In addition, some of the campaigns led to violence against both the campaigns' leaders and ordinary people; Rosa Parks, a longtime NAACP member and graduate of the Highlander Folk School for civil rights activists, whose actions had begun the Montgomery boycott, received death threats, E. D. Nixon's home was bombed, and the Freedom Riders were attacked in Alabama.³¹

As the campaign for civil rights continued and gained momentum, President John F. Kennedy called for Congress to pass new civil rights legislation, which began to work its way through Congress in 1963. The resulting law (pushed heavily and then signed by President

<http://www.blackpast.org/aah/nixon-e-d-nixon-1899-1987>(April 10, 2016).

30. *Morgan v. Virginia*, 328 U.S. 373 (1946).

31. See Lynne Olson. 2002. *Freedom's Daughters: The Unsung Heroines of the Civil Rights Movement from 1830–1970*. New York: Scribner, 97; D. F. Gore et al. 2009. *Want to Start a Revolution? Radical Women in the Black Freedom Struggle*. New York: New York University Press; Raymond Arsenault. 2007. *Freedom Riders: 1961 and the Struggle for Racial Justice*. New York: Oxford University Press.

Lyndon B. Johnson after Kennedy's assassination) was the **Civil Rights Act of 1964**, which had wide-ranging effects on U.S. society. Not only did the act outlaw government discrimination and the unequal application of voting qualifications by race, but it also, for the first time, outlawed segregation and other forms of discrimination by most businesses that were open to the public, including hotels, theaters, and restaurants that were not private clubs. It outlawed discrimination on the basis of race, ethnicity, religion, sex, or national origin by most employers, and it created the Equal Employment Opportunity Commission (EEOC) to monitor employment discrimination claims and help enforce this provision of the law. The provisions that affected private businesses and employers were legally justified not by the Fourteenth Amendment's guarantee of equal protection of the laws but instead by Congress's power to regulate interstate commerce.³²

Even though the Civil Rights Act of 1964 had a monumental impact over the long term, it did not end efforts by many southern whites to maintain the white-dominated political power structure in the region. Progress in registering African American voters remained slow in many states despite increased federal activity supporting it, so civil rights leaders including Martin Luther King, Jr. decided to draw the public eye to the area where the greatest resistance to voter registration drives were taking place. The SCLC and SNCC particularly focused their attention on the city of Selma, Alabama, which had been the site of violent reactions against civil rights activities.

The organizations' leaders planned a march from Selma to Montgomery in March 1965. Their first attempt to march was violently broken up by state police and sheriff's deputies. The

32. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964), which built on *Wickard v. Filburn*, 317 U.S. 111 (1942).

second attempt was aborted because King feared it would lead to a brutal confrontation with police and violate a court order from a federal judge who had been sympathetic to the movement in the past. That night, three of the marchers, white ministers from the north, were attacked and beaten with clubs by members of the Ku Klux Klan; one of the victims died from his injuries. Televised images of the brutality against protesters and the death of a minister led to greater public sympathy for the cause. Eventually, a third march was successful in reaching the state capital of Montgomery.³³



The 1987 PBS documentary [*Eyes on the Prize*](#) won several Emmys and other awards for its coverage of major events in the civil rights movement, including the Montgomery bus boycott, the battle for school integration in Little Rock, the

march from Selma to Montgomery, and Martin Luther King, Jr.'s leadership of the march on Washington, DC.

The events at Selma galvanized support in Congress for a follow-up bill solely dealing with the right to vote. The Voting Rights Act of 1965 went beyond previous laws by requiring greater oversight of elections by federal officials. Literacy and understanding tests, and other devices used to discriminate against voters on the basis of race, were banned. The Voting Rights Act proved to have much more immediate and dramatic effect than the laws that preceded it; what had been a fairly slow process of improving voter registration

33. See David Garrow. 1978. *Protest at Selma*. New Haven, CT: Yale University Press; David J. Garrow. 1988. *Bearing the Cross: Martin Luther King Jr. and the Southern Christian Leadership Conference*. London: Jonathan Cape.

and participation was replaced by a rapid increase of black voter registration rates—although white registration rates increased over this period as well.³⁴

Not all African Americans in the civil rights movement were comfortable with gradual change. Instead of using marches and demonstrations to change people's attitudes, calling for tougher civil rights laws, or suing for their rights in court, they favored more immediate action that forced whites to give in to their demands. Men like Malcolm X, the leader of the Nation of Islam, and groups like the Black Panthers were willing to use violence to achieve their goals.³⁵

These activists called for Black Power and Black Pride, not assimilation into white society. Their position was attractive to many young African Americans, especially after Martin Luther King, Jr. was assassinated in 1968.

34. Keyssar, 263–264.

35. Louis E. Lomax. 1963. *When the Word is Given: A Report on Elijah Muhammad, Malcolm X, and the Black Muslim World*. Cleveland, OH: World Publishing, 173–174; David Farber. 1994. *The Age of Great Dreams: America in the 1960s*. New York: Hill and Wang, 207.

Continuing Challenges for African Americans

The civil rights movement for African Americans did not end with the passage of the **Voting Rights Act** in 1965. For the last fifty years, the African American community has faced challenges related to both past and current discrimination; progress on both fronts remains slow, uneven, and often frustrating.

Legacies of the *de jure* segregation of the past remain in much of the United States.

Many African Americans still live in predominantly black neighborhoods where their ancestors were forced by laws and housing covenants to live.³⁶

Even those who live in the suburbs, once largely white, tend to live in suburbs that are mostly black.³⁷



Martin Luther King, Jr. (left) and Malcolm X (right) adopted different approaches to securing civil rights for African Americans. This occasion, a Senate debate of the Civil Rights Act of 1964, was the only time the two men ever met.

36. Dan Keating, “Why Whites Don’t Understand Black Segregation,” *Washington Post*, 21 November 2014. <https://www.washingtonpost.com/news/wonk/wp/2014/11/21/why-whites-dont-understand-black-segregation/>.

37. Alana Semuels, “White Flight Never Ended,” *The Atlantic*,

Some two million African American young people attend schools whose student body is composed almost entirely of students of color.³⁸

During the late 1960s and early 1970s, efforts to tackle these problems were stymied by large-scale public opposition, not just in the South but across the nation. Attempts to integrate public schools through the use of busing—transporting students from one segregated neighborhood to another to achieve more racially balanced schools—were particularly unpopular and helped contribute to “white flight” from cities to the suburbs.³⁹

This white flight has created **de facto segregation**, a form of segregation that results from the choices of individuals to live in segregated communities without government action or support.

Today, a lack of high-paying jobs in many urban areas, combined with persistent racism, has trapped many African Americans in poor neighborhoods. While the **Civil Rights Act** of 1964 created opportunities for members of the black middle class to advance economically and socially, and to live in the same neighborhoods as the white middle class did, their departure left many black neighborhoods mired in poverty and without the strong community ties that existed during the era of legal segregation. Many of these

30 July 2015. <http://www.theatlantic.com/business/archive/2015/07/white-flight-alive-and-well/399980/>.

38. Lindsey Cook, “U.S. Education: Still Separate and Unequal,” *U.S. News and World Report*, 28 January 2015. <http://www.usnews.com/news/blogs/data-mine/2015/01/28/us-education-still-separate-and-unequal>.

39. Sokol, 175–177.

neighborhoods also suffered from high rates of crime and violence.⁴⁰

Police also appear, consciously or subconsciously, to engage in racial profiling: singling out blacks (and Latinos) for greater attention than members of other racial and ethnic groups, as FBI director James B. Comey has admitted.⁴¹

When incidents of real or perceived injustice arise, as recently occurred after a series of deaths of young black men at the hands of police in Ferguson, Missouri; Staten Island, New York; and Baltimore, Maryland, many African Americans turn to the streets to protest because they believe that politicians—white and black alike—fail to pay sufficient attention to these problems.

The most serious concerns of the black community today appear to revolve around poverty resulting from the legacies of slavery and Jim Crow. While the public mood may have shifted toward greater concern about economic inequality in the United States, substantial policy changes to immediately improve the economic standing of African Americans in general have not followed, that is, if government-based policies and solutions are the answer. The Obama administration recently proposed new rules under the Fair

40. Jacqueline Jones. 1992. *The Dispossessed: America's Underclasses From the Civil War to the Present*. New York: Basic Books, 274, 290–292.

41. James B. Comey. February 12, 2015. “Hard Truths: Law Enforcement and Race” (speech). <https://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race>.

Housing Act that may, in time, lead to more integrated communities in the future.⁴²

Meanwhile, grassroots movements to improve neighborhoods and local schools have taken root in many black communities across America, and perhaps in those movements is the hope for greater future progress.

Affirmative Action

One of the major controversies regarding race in the United States today is related to affirmative action, the practice of ensuring that members of historically disadvantaged or underrepresented groups have equal access to opportunities in education, the workplace, and government contracting. The phrase *affirmative action* originated in the Civil Rights Act of 1964 and Executive Order 11246, and it has drawn controversy ever since. The Civil Rights Act of 1964 prohibited discrimination in employment, and Executive Order 11246, issued in 1965, forbade employment discrimination not only within the

42. Julie Hirschfeld Davis and Binyamin Appelbaum, “Obama Unveils Stricter Rules Against Segregation in Housing,” *New York Times*, 8 July 2015. http://www.nytimes.com/2015/07/09/us/hud-issuing-new-rules-to-fight-segregation.html?_r=0.

federal government but by federal contractors and contractors and subcontractors who received government funds.

Clearly, African Americans, as well as other groups, have been subject to discrimination in the past and present, limiting their opportunity to compete on a level playing field with those who face no such challenge. Opponents of affirmative action, however, point out that many of its beneficiaries are ethnic minorities from relatively affluent backgrounds, while whites and Asian Americans who grew up in poverty are expected to succeed despite facing many of the same handicaps.

Because affirmative action attempts to redress discrimination on the basis of race or ethnicity, it is generally subject to the strict scrutiny standard, which means the burden of proof is on the government to demonstrate the necessity of racial discrimination to achieve a compelling governmental interest. In 1978, in *Bakke v. California*, the Supreme Court upheld affirmative action and said that colleges and universities could consider race when deciding whom to admit but could not establish racial quotas.⁴³

In 2003, the Supreme Court reaffirmed the *Bakke* decision in *Grutter v. Bollinger*, which said that taking race or ethnicity into account as one of several factors in admitting a student to a college or university was

43. *Bakke v. California*, 438 U.S. 265 (1978).

acceptable, but a system setting aside seats for a specific quota of minority students was not.⁴⁴

All these issues are back under discussion in the Supreme Court with the re-arguing of *Fisher v. University of Texas*.⁴⁵

Should race be a factor in deciding who will be admitted to a particular college? Why or why not?

Questions to Consider

1. What were the key provisions of the Civil Rights Act of 1964?
2. How have voting rights been denied to individuals?
3. What laws and amendments help remove de jure discrimination?

44. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

45. *Fisher v. University of Texas*, 570 U.S. ____ (2013).

Terms to Remember

Brown v. Board of Education—the 1954 Supreme Court ruling that struck down *Plessy v. Ferguson* and declared segregation and “separate but equal” to be unconstitutional in public education

civil disobedience—an action taken in violation of the letter of the law to demonstrate that the law is unjust

de facto segregation—segregation that results from the private choices of individuals

de jure segregation—segregation that results from government discrimination

direct action—civil rights campaigns that directly confronted segregationist practices through public demonstrations

disenfranchisement—the revocation of someone’s right to vote

Dred Scott v. Sandford—the Court’s majority stated that Scott had no legal right to sue for his freedom because blacks (whether free or slave) were not and could not become U.S. citizens; Scott lacked the standing to even appear before the court; court also held that Congress lacked the power to decide whether slavery would be permitted in a territory that had been acquired after the *Constitution* was ratified, in effect prohibiting the federal government from passing any laws that would limit the expansion of slavery into any part of the West

grandfather clause—the provision in some southern states that allowed illiterate whites to vote because their

ancestors had been able to vote before the Fifteenth Amendment was ratified

Jim Crow laws—state and local laws that promoted racial segregation and undermined black voting rights in the south after Reconstruction

literacy tests—tests that required the prospective voter in some states to be able to read a passage of text and answer questions about it; often used as a way to disenfranchise racial or ethnic minorities

Loving v. Virginia—the Supreme Court ruling overturning Virginia law against interracial marriage

Plessy v. Ferguson—the 1896 Supreme Court ruling that allowed “separate but equal” racial segregation under the equal protection clause of the Fourteenth Amendment

poll tax—annual tax imposed by some states before a person was allowed to vote

understanding tests—tests requiring prospective voters in some states to be able to explain the meaning of a passage of text or to answer questions related to citizenship; often used as a way to disenfranchise black voters

white primary—a primary election in which only whites are allowed to vote

87. Civil Rights: How has the fight for women's rights progressed?

Learning Objectives

- Describe early efforts to achieve rights for women
- Explain why the Equal Rights Amendment failed to be ratified
- Describe the ways in which women acquired greater rights in the twentieth century
- Analyze why women continue to experience unequal treatment

Along with African Americans, women of all races and ethnicities have long been discriminated against in the United States, and the women's rights movement began at the same time as the movement to abolish slavery in the United States. Indeed, the women's movement came about largely as a result of the difficulties women encountered while trying to abolish slavery. The trailblazing Seneca Falls Convention for women's rights was held in 1848, a few years before the Civil War. But the abolition and African American civil rights movements largely eclipsed the women's movement throughout most of the nineteenth century. Women began to campaign actively again in the late nineteenth and early twentieth centuries, and another movement for women's rights began in the 1960s.

The Early Women's Rights Movement and Women's Suffrage



Smiling woman, three-quarter-length portrait of unidentified person standing outdoors; 1935 Summer; Library of Congress at <https://www.loc.gov/item/2007660325/>.

At the time of the American Revolution, women had few rights. Although single women were allowed to own property, married women were not. When women married, their separate legal identities were erased under the legal principle of **coverture**. Not only did women adopt their husbands' names, but all personal property they owned legally became their husbands' property. Husbands could not sell their wives' real property—such as land or in some states slaves—without their permission, but they were allowed to manage it and retain

the profits. If women worked outside the home, their husbands were entitled to their wages.¹

So long as a man provided food, clothing, and shelter for his wife,

1. Mary Beth Norton. 1980. *Liberty's Daughters: The Revolutionary Experience of American Women, 1750–1800*. New York: Little, Brown, and Company, 46.

she was not legally allowed to leave him. Divorce was difficult and in some places impossible to obtain.²

Higher education for women was not available, and women were barred from professional positions in medicine, law, and ministry.

Following the Revolution, women's conditions did not improve. Women were not granted the right to vote by any of the states except New Jersey, which at first allowed all taxpaying property owners to vote. However, in 1807, the law changed to limit the vote to men.³

Changes in property laws actually hurt women by making it easier for their husbands to sell their real property without their consent.

Although women had few rights, they nevertheless played an important role in transforming American society. This was especially true in the 1830s and 1840s, a time when numerous social reform movements swept across the United States. Many women were active in these causes, especially the abolition movement and the temperance movement, which tried to end the excessive consumption of liquor. They often found they were hindered in their efforts, however, either by the law or by widely held beliefs that they were weak, silly creatures who should leave important issues to men.⁴

One of the leaders of the early women's movement, Elizabeth Cady Stanton, was shocked and angered when she sought to attend

2. Ibid., 47.

3. Jan Ellen Lewis. 2011. "Rethinking Women's Suffrage in New Jersey, 1776-1807," *Rutgers Law Review* 63, No. 3, <http://www.rutgerslawreview.com/wp-content/uploads/archive/vol63/Issue3/Lewis.pdf>.

4. Keyssar, 174.

an 1840 antislavery meeting in London, only to learn that women would not be allowed to participate and had to sit apart from the men. At this convention, she made the acquaintance of another American female abolitionist, Lucretia Mott, who was also appalled by the male reformers' treatment of women.⁵

In 1848, Stanton and Mott called for a women's rights convention, the first ever held specifically to address the subject, at Seneca Falls, New York. At the Seneca Falls Convention, Stanton wrote the Declaration of Sentiments, which was modeled after the Declaration of Independence



Elizabeth Cady Stanton (a) and Lucretia Mott (b) both emerged from the abolitionist movement as strong advocates of women's rights.

and proclaimed women were equal to men and deserved the same rights. Among the rights Stanton wished to see granted to women was suffrage, the right to vote. When called upon to sign the Declaration, many of the delegates feared that if women demanded the right to vote, the movement would be considered too radical and its members would become a laughingstock. The Declaration passed, but the resolution demanding suffrage was the only one that did not pass unanimously.⁶

Along with other feminists (advocates of women's equality), such

5. Elizabeth Cady Stanton. 1993. *Eighty Years and More: Reminiscences, 1815–1897*. Boston: Northeastern University Press, 148.
6. Elizabeth Cady Stanton et al. 1887. *History of Woman Suffrage*, vol. 1. Cambridge, MA: Harvard University Press, 73.

as her friend and colleague Susan B. Anthony, Stanton fought for rights for women besides suffrage, including the right to seek higher education. As a result of their efforts, several states passed laws that allowed married women to retain control of their property and let divorced women keep custody of their children.⁷

Amelia Bloomer, another activist, also campaigned for dress reform, believing women could lead better lives and be more useful to society if they were not restricted by voluminous heavy skirts and tight corsets.

The women's rights movement attracted many women who, like Stanton and Anthony, were active in either the temperance movement, the abolition movement, or both movements. Sarah and Angelina Grimke, the daughters of a wealthy slaveholding family in South Carolina, became first abolitionists and then women's rights activists.⁸

Many of these women realized that their effectiveness as reformers was limited by laws that prohibited married women from signing contracts and by social proscriptions against women addressing male audiences. Without such rights, women found it difficult to rent halls in which to deliver lectures or to hire printers to produce antislavery literature.

Following the Civil War and the abolition of slavery, the women's rights movement fragmented. Stanton and Anthony denounced the

7. Jean H. Baker. 2005. *Sisters: The Lives of America's Suffragists*. New York: Hill and Wang, 109.

8. Angelina Grimke. October 2, 1837. "Letter XII Human Rights Not Founded on Sex." In *Letters to Catherine E. Beecher: In Reply to an Essay on Slavery and Abolitionism*. Boston: Knapp, 114–121.

Fifteenth Amendment because it granted voting rights only to black men and not to women of any race.⁹

The fight for women's rights did not die, however. In 1869, Stanton and Anthony formed the National Woman Suffrage Association (NWSA), which demanded that the Constitution be amended to grant the right to vote to all women. It also called for more lenient divorce laws and an end to sex discrimination in employment. The less radical Lucy Stone formed the American Woman Suffrage Association (AWSA) in the same year; AWSA hoped to win the suffrage for women by working on a state-by-state basis instead of seeking to amend the Constitution.¹⁰

Four western states—Utah, Colorado, Wyoming, and Idaho—did extend the right to vote to women in the late nineteenth century, but no other states did.

Women were also granted the right to vote on matters involving liquor licenses, in school board elections, and in municipal elections in several states. However, this was often done because of stereotyped beliefs that associated women with moral reform and concern for children, not as a result of a belief in women's equality. Furthermore, voting in municipal elections was restricted to women who owned property.¹¹

In 1890, the two suffragist groups united to form the National American Woman Suffrage Association (NAWSA). To call attention to their cause, members circulated petitions, lobbied politicians, and held parades in which hundreds of women and girls marched through the streets.

9. Keyssar, 178.

10. Keyssar, 184.

11. Keyssar, 175, 186–187.



In October 1917, suffragists marched down Fifth Avenue in New York demanding the right to vote. They carried a petition that had been signed by one million women.

The more radical National Woman's Party (NWP), led by Alice Paul, advocated the use of stronger tactics. The NWP held public protests and picketed outside the White House.¹²

Demonstrators were often beaten and arrested, and suffragists were subjected to cruel treatment in jail. When some, like Paul, began hunger strikes to call attention to their cause, their jailers force-fed them, an incredibly painful and invasive experience for the women.¹³

Finally, in 1920, the triumphant passage of the **Nineteenth Amendment** granted all women the right to vote.

12. Keyssar, 214.

13. "Alice Paul," <https://www.nwhm.org/education-resources/biography/biographies/alice-paul/> (April 10, 2016).

Civil Rights and the Equal Rights Amendment



Just as the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments did not result in equality for African Americans, the Nineteenth Amendment did not end discrimination against women in education, employment, or

Members of the National Woman's Party picketed outside the White House six days a week from January 10, 1917, when President Woodrow Wilson took office, until June 4, 1919, when the Nineteenth Amendment was passed by Congress. The protesters wore banners proclaiming the name of the institution of higher learning they attended.

other areas of life, which continued to be legal. Although women could vote, they very rarely ran for or held public office. Women continued to be underrepresented in the professions, and relatively few sought advanced degrees. Until the mid-twentieth century, the ideal in U.S. society was typically for women to marry, have children, and become housewives. Those who sought work for pay outside the home were routinely denied jobs because of their sex and, when they did find employment, were paid less than men. Women who wished to remain childless or limit the number of children they had in order to work or attend college found it difficult to do so. In some states it was illegal to sell contraceptive devices, and abortions were largely illegal and difficult for women to obtain.

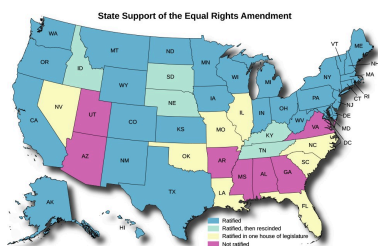
A second women's rights movement emerged in the 1960s to address these problems. Title VII of the Civil Rights Act of 1964 prohibited discrimination in employment on the basis of sex as well as race, color, national origin, and religion. Nevertheless, women continued to be denied jobs because of their sex and were often sexually harassed at the workplace. In 1966, feminists who were angered by the lack of progress made by women and by the government's lackluster enforcement of Title VII organized the National Organization for Women (NOW). NOW promoted workplace equality, including equal pay for women, and also called

for the greater presence of women in public office, the professions, and graduate and professional degree programs.

NOW also declared its support for the **Equal Rights Amendment** (ERA), which mandated equal treatment for all regardless of gender/sex. The ERA, written by Alice Paul and Crystal Eastman, was first proposed to Congress, unsuccessfully, in 1923. It was introduced in every Congress thereafter but did not pass both the House and the Senate until 1972. The amendment was then sent to the states for ratification with a deadline of March 22, 1979. Although many states ratified the amendment in 1972 and 1973, the ERA still lacked sufficient support as the deadline drew near. Opponents, including both women and men, argued that passage would subject women to military conscription and deny them alimony and custody of their children should they divorce.¹⁴

In 1978, Congress voted to extend the deadline for ratification to June 30, 1982. Even with the extension, however, the amendment failed to receive the support of the required thirty-eight states; by the time the deadline arrived, it had been ratified by only thirty-five, some of those had rescinded their ratifications, and no new state had ratified the ERA during the extension period.

14. Deborah Rhode. 2009. *Justice and Gender: Sex Discrimination and the Law*. Cambridge, MA: Harvard University Press, 66–67.



The map shows which states supported the ERA and which did not. The dark blue states ratified the amendment. The amendment was ratified but later rescinded in the light blue states and was ratified in only one branch of the legislature in the yellow states. The ERA was never ratified by the purple states.

Although the ERA failed to be ratified, **Title IX** of the United States Education Amendments of 1972 passed into law as a federal statute (not as an amendment, as the ERA was meant to be). Title IX applies to all educational institutions that receive federal aid and prohibits discrimination on the basis of sex in academic programs, dormitory space, health-care access, and school activities including sports.

Thus, if a school receives federal aid, it cannot spend more funds on programs for men than on programs for women.

Continuing Challenges for Women

There is no doubt that women have made great progress since the Seneca Falls Convention. Today, more women than men attend college, and they are more likely than men to graduate.¹⁵

15. Mark Hugo Lopez and Ana Gonzalez-Barrera. 6 March 2014. "Women's College Enrollment Gains Leave Men Behind," <http://www.pewresearch.org/fact-tank/2014/03/06/womens-college-enrollment-gains-leave-men-behind/>; Allie Bidwell, "Women More Likely to Graduate College, but Still Earn Less Than Men," *U.S. News & World Report*, 31 October 2014.

Women are represented in all the professions, and approximately half of all law and medical school students are women.¹⁶

Women have held Cabinet positions and have been elected to Congress. They have run for president and vice president, and three female justices currently serve on the Supreme Court. Women are also



*Filipino Womens Club Meeting
Washington, D.C. 1944, Library of
Congress, [https://www.loc.gov/
resource/fsa.8d42581/](https://www.loc.gov/resource/fsa.8d42581/)*

represented in all branches of the military and can serve in combat.

Nevertheless, women are still underrepresented in some jobs and are less likely to hold executive positions than are men. Many believe the **glass ceiling**, an invisible barrier caused by discrimination, prevents women from rising to the highest levels of American organizations, including corporations, governments, academic institutions, and religious groups. Women earn less money than men for the same work. As of 2014, fully employed women earned seventy-nine cents for every dollar earned by a fully

16. “A Current Glance at Women in the Law–July 2014,” *American Bar Association*, July 2014; “Medical School Applicants, Enrollment Reach All-Time Highs,” *Association of American Medical Colleges*, October 24, 2013.

employed man.¹⁷ Women are also more likely to be single parents than are men.¹⁸

As a result, more women live below the poverty line than do men, and, as of 2012, households headed by single women are twice as likely to live below the poverty line than those headed by single men.¹⁹

Women remain underrepresented in elective offices. They currently hold only about 20 percent of seats in Congress and only about 25 percent of seats in state legislatures.²⁰

Women remain subject to sexual harassment in the workplace and are more likely than men to be the victims of domestic violence. Approximately one-third of all women have experienced domestic violence; one in five women is assaulted during her college years.²¹

17. "Pay Equity and Discrimination," <http://www.iwpr.org/initiatives/pay-equity-and-discrimination> (April 10, 2016).
18. Gretchen Livingston. 2 July 2013. "The Rise of Single Fathers," <http://www.pewsocialtrends.org/2013/07/02/the-rise-of-single-fathers/>.
19. "Poverty in the U.S.: A Snapshot," National Center for Law and Economic Justice, <http://www.nclej.org/poverty-in-the-us.php>.
20. "Current Numbers," <http://www.cawp.rutgers.edu/current-numbers> (April 10, 2016).
21. "Statistics," <http://www.ncadv.org/learn/statistics> (April 10, 2016); "Statistics About Sexual Violence,"

Many in the United States continue to call for a ban on abortion, and states have attempted to restrict women's access to the procedure. For example, many states have required abortion clinics to meet the same standards set for hospitals, such as corridor size and parking lot capacity, despite lack of evidence regarding the benefits of such standards. Abortion clinics, which are smaller than hospitals, often cannot meet such standards. Other restrictions include mandated counseling before the procedure and the need for minors to secure parental permission.²²

Furthermore, the federal government will not pay for abortions for low-income women except in cases of rape or incest or in situations in which carrying the fetus to term would endanger the life of the mother.²³

http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf (April 10, 2016).

22. Heather D. Boonstra and Elizabeth Nash. 2014. "A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs," *Guttmacher Policy Review* 17, No. 1, <https://www.guttmacher.org/about/gpr/2014/03/surge-state-abortion-restrictions-puts-providers-and-women-they-serve-crosshairs>.
23. Heather D. Boonstra. 2013. "Insurance Coverage of Abortion: Beyond the Exceptions for Life Endangerment, Rape and Incest," *Guttmacher Policy Review* 16, No. 3, <https://www.guttmacher.org/about/gpr/2013/09/insurance-coverage-abortion-beyond-exceptions-life-endangerment-rape-and-incest>.

To address these issues, many have called for additional protections for women. These include laws mandating equal pay for equal work. According to the doctrine of **comparable worth**, people should be compensated equally for work requiring comparable skills, responsibilities, and effort. Thus, even though women are underrepresented in certain fields, they should receive the same wages as men if performing jobs requiring the same level of accountability, knowledge, skills, and/or working conditions, even though the specific job may be different.

For example, garbage collectors are largely male. The chief job requirements are the ability to drive a sanitation truck and to lift heavy bins and toss their contents into the back of truck. The average wage for a garbage collector is \$15.34 an hour.²⁴ Daycare workers are largely female, and the average pay is \$9.12 an hour.²⁵

However, the work arguably requires more skills and is a more responsible position. Daycare workers must be able to feed, clean, and dress small children; prepare meals for them; entertain them; give them medicine if required; and teach them basic skills. They must be educated in first aid and assume responsibility for the children's safety. In terms of the skills and physical activity required and the associated level of responsibility of the job, daycare workers should be paid at least as much as garbage collectors and perhaps more. Women's rights advocates also call for stricter enforcement

24. "Garbage Man Salary (United States)," http://www.payscale.com/research/US/Job=Garbage_Man/Hourly_Rate (April 10, 2016).

25. "Child Care/Day Care Worker Salary (United States)," http://www.payscale.com/research/US/Job=Child_Care_%2F_Day_Care_Worker/Hourly_Rate (April 10, 2016).

of laws prohibiting sexual harassment, and for harsher punishment, such as mandatory arrest, for perpetrators of domestic violence.

Harry Burn and the Tennessee General Assembly

In 1918, the proposed **Nineteenth Amendment** to the Constitution, extending the right to vote to all adult female citizens of the United States, was passed by both houses of Congress and sent to the states for ratification. Thirty-six votes were needed. Throughout 1918 and 1919, the Amendment dragged through legislature after legislature as pro- and anti-suffrage advocates made their arguments. By the summer of 1920, only one more state had to ratify it before it became law. The Amendment passed through Tennessee's state Senate and went to its House of Representatives. Arguments were bitter and intense. Pro-suffrage advocates argued that the amendment would reward women for their service to the nation during World War I and that women's supposedly greater morality would help to clean up politics. Those opposed claimed women would be degraded by entrance into the political arena and that their interests were already represented by their male relatives. On August 18, the amendment was brought for a vote before the House. The vote was closely divided, and it seemed unlikely it would pass. But as a young anti-suffrage representative waited for his vote to be counted, he

remembered a note he had received from his mother that day. In it, she urged him, “Hurrah and vote for suffrage!” At the last minute, Harry Burn abruptly changed his ballot. The amendment passed the House by one vote, and eight days later, the Nineteenth Amendment was added to the Constitution.

How are women perceived in politics today compared to the 1910s? What were the competing arguments for Harry Burn’s vote?



The website for the [Women’s National History Project](#) contains a variety of resources for learning more about the women’s rights movement and women’s history. It features a history of the women’s movement, a “This Day in Women’s History” page, and quizzes to test your knowledge.

At the time of the Revolution and for many decades following it, married women had no right to control their own property, vote, or run for public office. Beginning in the 1840s, a women’s movement began among women who were active in the abolition and temperance movements. Although some of their goals, such as achieving property rights for married women, were reached early on, their biggest goal—winning the right to vote—required the 1920 passage of the Nineteenth Amendment. Women secured more

rights in the 1960s and 1970s, such as reproductive rights and the right not to be discriminated against in employment or education. Women continue to face many challenges: they are still paid less than men and are underrepresented in executive positions and elected office.

Questions to Consider

1. Why did the Equal Rights Amendment fail ratification?
2. How have women acquired recognition of rights?
3. Do women continue to experience unequal treatment?

Terms to Remember

comparable worth—a doctrine calling for the same pay for workers whose jobs require the same level of education, responsibility, training, or working conditions

coverture—a legal status of married women in which their separate legal identities were erased

Equal Rights Amendment (ERA)—the proposed amendment to the Constitution that would have prohibited all discrimination based on sex

glass ceiling—an invisible barrier caused by discrimination that prevents women from rising to the

highest levels of an organization—including corporations, governments, academic institutions, and religious organizations

Title IX—the section of the U.S. Education Amendments of 1972 that prohibits discrimination in education on the basis of sex

88. Civil Rights: Native Americans, Alaskans, and Hawaiians--how has the fight expanded?

Learning Objectives

- Outline the history of discrimination against Native Americans
- Describe the expansion of Native American civil rights from 1960 to 1990
- Discuss the persistence of problems Native Americans face today

Native Americans have long suffered the effects of segregation and discrimination imposed by the U.S. government and the larger white society. Ironically, Native Americans were not granted the full rights and protections of U.S. citizenship until long after African Americans and women were, with many having to wait until the Nationality Act of 1940 to become citizens.¹

1. Theodore Haas. 1957. "The Legal Aspects of Indian Affairs from 1887 to 1957," *American Academy of Political Science* 311, 12-22.

This was long after the passage of the Fourteenth Amendment in 1868, which granted citizenship to African Americans but not, the Supreme Court decided in *Elk v. Wilkins* (1884), to Native Americans.²

White women had been citizens of the United States since its very beginning even though they were not granted the full rights of citizenship. Furthermore, Native Americans are the only group of Americans who were forcibly removed en masse from the lands on which they and their ancestors had lived so that others could claim this land and its resources.

2. *Elk v. Wilkins*, (1884)112 U.S. 94.

Civil Rights: Native Americans, Alaskans, and Hawaiians--how has the fight expanded? | 1057



Creator(s): Curtis, Edward S., 1868-1952, photographer

Date Created/Published: c1908 November 19; Summary: Four Atsina women and a dog, their backs to camera, sitting some distance from tipis and others; Rights Advisory: No known restrictions on publication. No renewal in Copyright office.

Call Number: LOT 12322-A [item] [P&P]; Repository: Library of Congress Prints and Photographs Division Washington, D.C. 20540 USA; Library of Congress at <http://www.loc.gov/pictures/item/2002722343/>.

Native Americans Lose Their Land and Their Rights

From the very beginning of European settlement in North America, Native Americans were abused and exploited. Early British settlers attempted to enslave the members of various tribes, especially in the southern colonies and states.³

Following the American Revolution, the U.S. government assumed responsibility for conducting negotiations with Indian tribes, all of which were designated as sovereign nations, and regulating commerce with them. Because Indians were officially regarded as citizens of other nations, they were denied U.S. citizenship.⁴

As white settlement spread westward over the course of the nineteenth century, Indian tribes were forced to move from their homelands. Although the federal government signed numerous treaties guaranteeing Indians the right to live in the places where they had traditionally farmed, hunted, or fished, land-hungry white settlers routinely violated these agreements and the federal government did little to enforce them.⁵

3. See Alan Galloway. 2009. *Indian Slavery in Colonial America*. Lincoln: University of Nebraska Press.
4. See James Wilson. 1998. *The Earth Shall Weep: A History of Native America*. New York: Grove Press.
5. Ibid; Gloria Jahoda. 1975. *Trail of Tears: The Story of American Indian Removal, 1813–1855*. New York: Henry Holt.

In 1830, Congress passed the **Indian Removal Act**, which forced Native Americans to move west of the Mississippi River.⁶



Not all tribes were willing to leave their land, however. The Cherokee in particular resisted, and in the 1820s, the state of Georgia tried numerous tactics to force them from their territory. Efforts intensified in 1829 after gold was discovered there. Wishing to remain where they were, the tribe sued the state of Georgia.⁷

The Library of Congress presents America's Story from America's Library at http://www.americaslibrary.gov/jb/nation/jb_nation_tears_1.html. John Ross, as Cherokee chief, had to lead his people on the "Trail of Tears." Prints and Photographs Division, Library of Congress. Reproduction Number Lc-USZC4-3156.

6. See Wilson. 1998. *The Earth Shall Weep*.

7. See John Ehle. 1988. *Trail of Tears: The Rise and Fall of the Cherokee Nation*. New York: Doubleday; Theda Perdue and Michael Green. 2007. *The Cherokee Nation and the Trail of Tears*. New York: Penguin Books.

In 1831, the Supreme Court decided in *Cherokee Nation v. Georgia* that Indian tribes were not sovereign nations, but also that tribes were entitled to their ancestral lands and could not be forced to move from them.⁸

The next year, in *Worcester v. Georgia*, the Court ruled that whites could not enter tribal lands without the tribe's permission. White Georgians, however, refused to abide by the Court's decision, and President Andrew Jackson, a former Indian fighter, refused to enforce it.⁹

Between 1831 and 1838, members of several southern tribes, including the Cherokees, were forced by the U.S. Army to move west along routes shown in the map below. The forced removal of the Cherokees to Oklahoma Territory, which had been set aside for settlement by



Gary Tomahsah, a Comanche from Apache, Oklahoma, prepares for Men's Traditional dance competition at 1999 Powwow; Photograph Photo by Midge Durbin, for "Trail of Tears Powwow," at http://www.americaslibrary.gov/es/ky/es_ky_powwow_1_e.html.

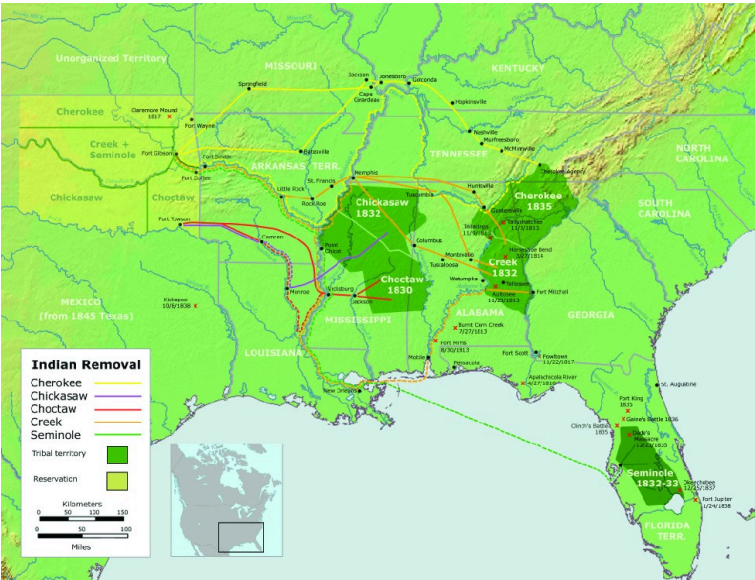
8. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

9. Francis Paul Prucha. 1984. *The Great Father: The United States Government and American Indians*, vol. 1. Lincoln: University of Nebraska Press, 212; Robert V. Remini. 2001. *Andrew Jackson and His Indian Wars*. New York: Viking, 257; *Worcester v. Georgia*, 31 U.S. 515 (1832).

Civil Rights: Native Americans, Alaskans, and Hawaiians--how has the fight expanded? | 1061

displaced tribes and designated Indian Territory, resulted in the death of one-quarter of the tribe's population.¹⁰

The Cherokees remember this journey as the Trail of Tears.



After the passage of the Indian Removal Act, the U.S. military forced the removal of the Cherokee, Chickasaw, Choctaw, Creek, and Seminole from the Southeast to the western territory (present-day Oklahoma), marching them along the routes shown here. The lines in yellow mark the routes taken by the Cherokee on the Trail of Tears.

By the time of the Civil War, most Indian tribes had been relocated west of the Mississippi. However, once large numbers of white

10. Prucha, 241; Ehle, 390–392; Russell Thornton. 1991. “Demography of the Trail of Tears,” In *Cherokee Removal: Before and After*, ed. William L. Anderson. Athens: University of Georgia Press, 75–93.

Americans and European immigrants had also moved west after the Civil War, Native Americans once again found themselves displaced. They were confined to reservations, which are federal lands set aside for their use where non-Indians could not settle. Reservation land was usually poor, however, and attempts to farm or raise livestock, not traditional occupations for most western tribes anyway, often ended in failure. Unable to feed themselves, the tribes became dependent on the Bureau of Indian Affairs (BIA) in Washington, DC, for support. Protestant missionaries were allowed to “adopt” various tribes, to convert them to Christianity and thus speed their assimilation. In an effort to hasten this process, Indian children were taken from their parents and sent to boarding schools, many of them run by churches, where they were forced to speak English and abandon their traditional cultures.¹¹

In 1887, the **Dawes Severalty Act**, another effort to assimilate Native Americans to white society, divided reservation lands into individual allotments. Native Americans who accepted these allotments and agreed to sever tribal ties were also given U.S. citizenship. All lands remaining after the division of reservations into allotments were offered for sale by the federal government to white farmers and ranchers. As a result, Indians swiftly lost control of reservation land.¹²

11. “Indian Reservations,” http://ic.galegroup.com/ic/uhic/ReferenceDetailsPage/ReferenceDetailsWindow?zid=2a87fa28f20f1e66b5f663e76873fd8c&action=2&catId=&documentId=GALE%7CCX3401802046&userGroupName=lnoca_hawken&jsid=f44511ddfece4faafab082109e34a539 (April 10, 2016).

12. Ibid.

In 1898, the **Curtis Act** dealt the final blow to Indian sovereignty by abolishing all tribal governments.¹³

The Fight for Native American Rights

As Indians were removed from their tribal lands and increasingly saw their traditional cultures being destroyed over the course of the nineteenth century, a movement to protect their rights began to grow. Sarah Winnemucca, member of the Paiute tribe, lectured throughout the east in the 1880s in order to acquaint white audiences with the injustices suffered by the western tribes.¹⁴

Lakota physician Charles Eastman also worked for Native American rights. In 1924, the Indian Citizenship Act granted citizenship to all Native Americans born after its passage. Native Americans born before the act took effect, who had not already become citizens as a result of the Dawes Severalty Act or service in the army in World War I, had to wait until the Nationality Act of 1940 to become citizens. In 1934, Congress passed the Indian Reorganization Act, which ended the division of reservation land into allotments. It returned to Native American tribes the right to institute self-government on their reservations, write constitutions, and manage their remaining lands and resources. It also provided

13. "Curtis Act (1898)," <http://www.okhistory.org/publications/enc/entry.php?entry=CU006> (April 10, 2016).

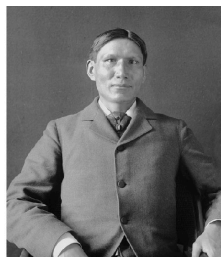
14. See Gae Whitney Canfield. 1888. *Sarah Winnemucca of the Northern Paiutes*. Norman: University of Oklahoma Press.

funds for Native Americans to start their own businesses and attain a college education.¹⁵

Despite the Indian Reorganization Act, conditions on the reservations did not improve dramatically. Most tribes remained impoverished, and many Native Americans, despite the fact that they were now U.S. citizens, were denied the right to vote by the states in which they lived. States justified this violation of the Fifteenth Amendment by claiming that Native Americans

might be U.S. citizens but were not state residents because they lived on reservations. Other states denied Native Americans voting rights if they did not pay taxes.¹⁶

Despite states' actions, the federal government continued to



Sarah Winnemucca (a), called the “Paiute Princess” by the press, and Dr. Charles Eastman (b), of the Lakota tribe, campaigned for Native American rights in the late nineteenth and early twentieth centuries. Winnemucca wears traditional dress for a publicity photograph.

15. Indian Reorganization Act of 1934 (P.L. 73-383); “Indian Reservations,” http://ic.galegroup.com/ic/uhic/ReferenceDetailsPage/ReferenceDetailsWindow?zid=2a87fa28f20f1e66b5f663e76873fd8c&action=2&catId=&documentId=GALE|CX3401802046&userGroupName=lnoca_hawken&jsid=f44511ddfec4faafab082109e34a539 (April 10, 2016).
16. Daniel McCool, Susan M. Olson, and Jennifer L. Robinson. 2007. *Native Vote*. Cambridge, MA: Cambridge University Press, 9, 19.

uphold the rights of tribes to govern themselves. Federal concern for tribal sovereignty was part of an effort on the government's part to end its control of, and obligations to, Indian tribes.¹⁷

In the 1960s, a modern Native American civil rights movement, inspired by the African American civil rights movement, began to grow. In 1969, a group of Native American activists from various tribes, part of a new Pan-Indian movement, took control of Alcatraz Island in San Francisco Bay, which had once been the site of a federal prison. Attempting to strike a blow for Red Power, the power of Native Americans united by a Pan-Indian identity and demanding federal recognition of their rights, they maintained control of the island for more than a year and a half. They claimed the land as compensation for the federal government's violation of numerous treaties and offered to pay for it with beads and trinkets. In January 1970, some of the occupiers began to leave the island. Some may have been disheartened by the accidental death of the daughter of one of the activists. In May 1970, all electricity and telephone service to the island was cut off by the federal government, and more of the occupiers began to leave. In June, the few people remaining on the island were removed by the government. Though the goals of the activists were not achieved, the occupation of Alcatraz had brought national attention to the concerns of Native American activists.¹⁸

17. "Indian Reservations," http://ic.galegroup.com/ic/uhic/ReferenceDetailsPage/ReferenceDetailsWindow?zid=2a87fa28f20f1e66b5f663e76873fd8c&action=2&catId=&documentId=GALE|CX3401802046&userGroupName=lnoca_hawken&jsid=f44511ddfec4faafab082109e34a539 (April 10, 2016).

18. See Troy R. Johnson. 1996. *The Occupation of Alcatraz*
1066 | Civil Rights: Native Americans, Alaskans, and Hawaiians--how has the fight expanded?

In 1973, members of the **American Indian Movement (AIM)**, a more radical group than the occupiers of Alcatraz, temporarily took over the offices of the Bureau of Indian Affairs in Washington, DC. The following year, members of AIM and some two hundred Oglala Lakota supporters occupied the town of Wounded Knee on the Lakota tribe's Pine Ridge Reservation in South Dakota, the site of an 1890 massacre of Lakota men, women, and children by the U.S. Army. Many of the Oglala were protesting the actions of their half-white tribal chieftain, who they claimed had worked too closely with the BIA. The occupiers also wished to protest the failure of the Justice Department to investigate acts of white violence against Lakota tribal members outside the bounds of the reservation.

The occupation led to a confrontation between the Native American protestors and the FBI and U.S. Marshals. Violence erupted; two Native American activists were killed, and a marshal was shot. After the second death, the Lakota called for an end to the occupation and negotiations began with the federal government. Two of AIM's leaders, Russell Means and Dennis Banks, were arrested, but the case against them was later dismissed.¹⁹

Violence continued on the Pine Ridge Reservation for several years after the siege; the reservation had the highest per capita murder rate in the United States. Two FBI agents were among those

Island: Indian Self-Determination and the Rise of Indian Activism. Urbana: University of Illinois Press.

19. Emily Chertoff, "Occupy Wounded Knee: A 71-Day Siege and a Forgotten Civil Rights Movement," *The Atlantic*, 23 October 2012. <http://www.theatlantic.com/national/archive/2012/10/occupy-wounded-knee-a-71-day-siege-and-a-forgotten-civil-rights-movement/263998/>.

who were killed. The Oglala blamed the continuing violence on the federal government.²⁰



(a)



(b)

A memorial stone (a) marks the spot of the mass grave of the Lakotas killed in the 1890 massacre at Wounded Knee. The bullet-riddled car (b) of FBI agent Ronald Williams reveals the level of violence reached during—and for years after—the 1973 occupation of the town.



The official website of the [American Indian Movement](#) provides information about ongoing issues in Native American communities in both North and South America.

20. Ibid.

1068 | Civil Rights: Native Americans, Alaskans, and Hawaiians--how has the fight expanded?

The current relationship between the U.S. government and Native American tribes was established by the Indian Self-Determination and Education Assistance Act of 1975. Under the act, tribes assumed control of programs that had formerly been controlled by the BIA, such as education and resource management, and the federal government provided the funding.²¹

Many tribes have also used their new freedom from government control to legalize gambling and to open casinos on their reservations. Although the states in which these casinos are located have attempted to control gaming on Native American lands, the Supreme Court and the Indian Gaming Regulatory Act of 1988 have limited their ability to do so.²²

The 1978 American Indian Religious Freedom Act granted tribes the right to conduct traditional ceremonies and rituals, including those that use otherwise prohibited substances like peyote cactus and eagle bones, which can be procured only from vulnerable or protected species.²³

21. Public Law 93-638: Indian Self-Determination and Education Assistance Act, as Amended.

22. W. Dale Mason. 2000. *Indian Gaming: Tribal Sovereignty and American Politics*. Norman: University of Oklahoma Press, 60-64.

23. Public Law 95-341: American Indian Religious Freedom, Joint Resolution.

Alaska Natives and Native Hawaiians Regain Some Rights



Alaskan Eskimos with their winter home half underground in village of Stebbins; Created / Published [between ca. 1900 and ca. 1930]; Forms part of: Frank and Frances Carpenter collection (Library of Congress). - Gift; Mrs. W. Chapin Huntington; 1951.<https://lccn.loc.gov/99615185>.

Forms part of: Frank and Frances Carpenter collection (Library of Congress).- Gift; Mrs. W. Chapin Huntington; 1951.

Format

HeadingsPhotographic prints-1890-1940.Notes- Title transcribed from caption accompanying item.- Forms part of: Frank and Frances Carpenter collection (Library of Congress).- Gift; Mrs. W. Chapin Huntington; 1951.Medium1 photographic

print.Call Number/Physical LocationLOT 11453-5, no. 20 [P&P]RepositoryLibrary of Congress Prints and Photographs Division Washington, D.C. 20540 USADigital Idppmsc 02437 //hdl.loc.gov/loc.pnp/ppmsc.02437Library of Congress Control Number99615185Reproduction NumberLC-DIG-ppmsc-02437 (digital file from original)Rights AdvisoryNo known restrictions on publication.

Alaska Natives and Native Hawaiians suffered many of the same abuses as Native Americans, including loss of land and forced assimilation. Following the discovery of oil in Alaska, however, the state, in an effort to gain undisputed title to oil rich land, settled the issue of Alaska Natives' land claims with the passage of the Alaska Native Claims Settlement Act in 1971. According to the terms of the act, Alaska Natives received 44 million acres of resource-rich land

and more than \$900 million in cash in exchange for relinquishing claims to ancestral lands to which the state wanted title.²⁴

Native Hawaiians also lost control of their land—nearly two million acres—after the Hawaiian Islands were annexed by the United States in 1893. The indigenous population rapidly decreased in number, and white settlers tried to erase all trace of traditional Hawaiian culture. Two acts passed by Congress in 1900 and 1959, when the territory was granted statehood, returned slightly more than one million acres of federally owned land to the state of Hawaii. The state was to hold it in trust and use profits from the land to improve the condition of Native Hawaiians.²⁵

In September 2015, the U.S. Department of Interior, the same department that contains the Bureau of Indian Affairs, created guidelines for Native Hawaiians who wish to govern themselves in a relationship with the federal government similar to that established with Native American and Alaska Native tribes. Such a relationship would grant Native Hawaiians power to govern themselves while remaining U.S. citizens. Voting began in fall 2015 for delegates to a constitutional convention that would determine whether or not

24. U.S. Commission on Civil Rights, “Racism’s Frontier: The Untold Story of Discrimination and Division in Alaska,” <http://www.usccr.gov/pubs/sac/ak0402/ch2.htm> (April 10, 2016).

25. Ryan Mielke, “Hawaiians’ Years of Mistreatment,” *Chicago Tribune*, 4 September 1999. http://articles.chicagotribune.com/1999-09-04/news/9909040141_1_hawaiians-oha-land-trust.

such a relationship should exist between Native Hawaiians and the federal government.²⁶

When non-Native Hawaiians and some Native Hawaiians brought suit on the grounds that, by allowing only Native Hawaiians to vote, the process discriminated against members of other ethnic groups, a federal district court found the election to be legal. However, the Supreme Court has ordered that votes not be counted until an appeal of the lower court's decision be heard by the Ninth U.S. Circuit Court of Appeals.²⁷

Despite significant advances, American Indians, Alaska Natives, and Native Hawaiians still trail behind U.S. citizens of other ethnic backgrounds in many important areas. These groups continue to suffer widespread poverty and high unemployment. Some of the poorest counties in the United States are those in which Native American reservations are



Hawaiian fisherman by Charles William Bartlett, 1860-1940, artist; LCCN Permalink <https://lccn.loc.gov/92512980> at the Library of Congress.

26. Brittany Lyte, “Historic Election Could Return Sovereignty to Native Hawaiians,” *Aljazeera America* 30 Oct. 2015, <http://america.aljazeera.com/articles/2015/10/30/historic-election-could-return-sovereignty-to-native-hawaiians.html>.

27. Chloe Fox. 2 December 2015. “Supreme Court Blocks Native Hawaiians’ Attempt to Form Own Government,” http://www.huffingtonpost.com/entry/supreme-court-hawaii-election_us_565f6849e4b079b2818d1767.

located. These minorities are also less likely than white Americans, African Americans, or Asian Americans to complete high school or college.²⁸

Many American Indian and Alaskan tribes endure high rates of infant mortality, alcoholism, and suicide.²⁹

Native Hawaiians are also more likely to live in poverty than whites in Hawaii, and they are more likely than white Hawaiians to be homeless or unemployed.³⁰

At the beginning of U.S. history, Indians were considered citizens of sovereign nations and thus ineligible for citizenship, and they were forced off their ancestral lands and onto reservations. Interest in Indian rights arose in the late nineteenth century, and in the 1930s, Native Americans were granted a degree of control over

28. Jens Manuel Krogstad. 13 June 2014. "One-in-Four Native Americans and Alaska Natives Are Living in Poverty," <http://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/>.

29. Karina L. Walters, Jane M. Simoni, and Teresa Evans-Campbell. 2002. "Substance Use Among American Indians and Alaska Natives: Incorporating Culture in an 'Indigenist' Stress-Coping Paradigm," *Public Health Reports* 117: S105.

30. Kehaulani Lum, "Native Hawaiians' Trail of Tears," *Chicago Tribune*, 24 August 1999. http://articles.chicagotribune.com/1999-08-24/news/9908240280_1_native-hawaiians-hawaiian-people-aleuts.

reservation lands and the right to govern themselves. Following World War II, they won greater rights to govern themselves, educate their children, decide how tribal lands should be used—to build casinos, for example—and practice traditional religious rituals without federal interference. Alaska Natives and Native Hawaiians have faced similar difficulties, but since the 1960s, they have been somewhat successful in having lands restored to them or obtaining compensation for their loss. Despite these achievements, members of these groups still tend to be poorer, less educated, less likely to be employed, and more likely to suffer addictions or to be incarcerated than other racial and ethnic groups in the United States.

Questions to Consider

1. How are the experiences of Native Americans and Native Hawaiians different?
2. What was the impact of the Dawes Act?

Terms to Remember

American Indian Movement (AIM)—the Native American civil rights group responsible for the occupation of Wounded Knee, South Dakota, in 1973

Dawes Severalty Act—another effort to assimilate Indians to white society, divided reservation lands into individual allotments

Trail of Tears—the name given to the forced migration of the Cherokees from Georgia to Oklahoma in 1838–1839

89. Civil Rights: How is equal protection achieved?

Learning Objectives

- Discuss the discrimination faced by Hispanic/Latino Americans and Asian Americans
- Describe the influence of the African American civil rights movement on Hispanic/Latino, Asian American, and LGBT civil rights movements
- Describe federal actions to improve opportunities for people with disabilities
- Describe discrimination faced by religious minorities

Many groups in American society have faced and continue to face challenges in achieving equality, fairness, and equal protection under the laws and policies of the federal government and/or the states. Some of these groups are often overlooked because they are not as large of a percentage of the U.S. population as women or African Americans, and because organized movements to achieve equality for them are relatively young. This does not mean, however, that the discrimination they face has not been as longstanding or as severe.

Hispanic/Latino Civil Rights

Hispanics and Latinos in the United States have faced many of the same problems as African Americans and Native Americans. Although the terms Hispanic and Latino are often used interchangeably, they are not the same. *Hispanic* usually refers to native speakers of Spanish. *Latino* refers to people who come from, or whose ancestors came from, Latin America. Not all Hispanics are Latinos. Latinos may be of any race or ethnicity; they may be of European, African, Native American descent, or they may be of mixed ethnic background. Thus, people from Spain are Hispanic but are not Latino.¹

Many Latinos became part of the U.S. population following the annexation of Texas by the United States in 1845 and of California, Arizona, New Mexico, Nevada, Utah, and Colorado following the War with Mexico in 1848. Most were subject to



Mexican cabbage packer, Alamo, Texas by Russell Lee, 1903-1986, photographer, 1939; Farm Security Administration – Office of War Information Photograph Collection; Library of Congress Prints and Photographs Division Washington, DC 20540 USA <http://hdl.loc.gov/loc.pnp/pp.print>.

1. “Hispanic v. Latino,” <http://www.soaw.org/resources/anti-opp-resources/108-race/830-hispanic-vs-latino> (April 10, 2016).

discrimination and could find employment only as poorly paid migrant farm workers, railroad workers, and unskilled laborers.²

The Spanish-speaking population of the United States increased following the Spanish-American War in 1898 with the incorporation of Puerto Rico as a U.S. territory. In 1917, during World War I, the **Jones Act** granted U.S. citizenship to Puerto Ricans.

In the early twentieth century, waves of violence aimed at Mexicans and Mexican Americans swept the Southwest. Mexican Americans in Arizona and in parts of Texas were denied the right to vote, which they had previously possessed, and Mexican American children were barred from attending Anglo-American schools. During the Great Depression of the 1930s, Mexican immigrants and many Mexican Americans, both U.S.-born and naturalized citizens, living in the Southwest and Midwest were deported by the government so that Anglo-Americans could take the jobs that they had once held.³

When the United States entered World War II, however, Mexicans were invited to immigrate to the United States as farmworkers under the Bracero (*bracero* meaning “manual laborer” in Spanish) Program to make it possible for these American men to enlist in the armed services.⁴

2. David G. Gutierrez. 1995. *Walls and Mirrors: Mexican Americans, Mexican Immigrants, and the Politics of Ethnicity*. Berkeley: University of California Press, chapter 1.
3. See Abraham Hoffman. 1974. *Unwanted Americans in the Great Depression: Repatriation Pressures, 1929–1939*. Tucson: University of Arizona Press.
4. See Michael Snodgrass. 2011. “The Bracero

Mexican Americans and Puerto Ricans did not passively accept discriminatory treatment, however. In 1903, Mexican farmworkers joined with Japanese farmworkers, who were also poorly paid, to form the first union to represent agricultural laborers. In 1929, Latino civil rights activists formed the League of United Latin American Citizens (LULAC) to protest against discrimination and to fight for greater rights for Latinos.⁵

Just as in the case of African Americans, however, true civil rights advances for Hispanics and Latinos did not take place until the end of World War II. Hispanic and Latino activists targeted the same racist practices as did African Americans and used many of the same tactics to end them. In 1946, Mexican American parents in California, with the assistance of the NAACP, sued several California school districts that forced Mexican and Mexican American children to attend segregated schools. In the case of *Mendez v. Westminster* (1947), the Court of Appeals for the Ninth Circuit Court held that the segregation of Mexican and Mexican American students into separate schools was unconstitutional.⁶

Although Latinos made some civil rights advances in the decades following World War II, discrimination continued. Alarmed by the large number of undocumented Mexicans crossing the border into

Program, 1942–1964” In *Beyond the Border: The History of Mexican–U.S. Migration*, ed. Mark Overmyer-Velásquez. New York: Oxford University Press, 79–102.

5. See Benjamin Marquez. 1993. *LULAC: The Evolution of a Mexican American Political Organization*. Austin: University of Texas Press.
6. *Mendez v. Westminster School District*, 64 F. Supp. 544 (S.D. Cal. 1946).

the United States in the 1950s, the United States government began Operation Wetback (*wetback* is a derogatory term for Mexicans living unofficially in the United States). From 1953 to 1958, more than three million Mexican immigrants, and some Mexican Americans as well, were deported from California, Texas, and Arizona.⁷

To limit the entry of Hispanic and Latino immigrants to the United States, in 1965 Congress imposed an immigration quota of 120,000 newcomers from the Western Hemisphere.

At the same time that the federal government sought to restrict Hispanic and Latino immigration to the United States, the Mexican American civil rights movement grew stronger and more radical, just as the African American civil rights movement had done. While African Americans demanded Black Power and called for Black Pride, young Mexican American civil rights activists called for Brown Power and began to refer to themselves as Chicanos, a term disliked by many older, conservative Mexican Americans, in order to stress their pride in their hybrid Spanish-Native American cultural identity.⁸

Demands by Mexican American activists often focused on

7. See Avi Astor. 2009. "Unauthorized Immigration, Securitization, and the Making of Operation Wetback," *Latino Studies* 7: 5–29.

8. See John R. Chavez. 1997. "The Chicano Image and the Myth of Aztlan Rediscovered." In *Myth America: A Historical Anthology* (volume II), eds. Patrick Gerster and Nicholas Cords. New York: Brandywine Press; F. Arturo Rosales. 1996. *Chicano! The History of the Mexican American Civil Rights Movement*. Houston, Texas: Arte Público Press.

improving education for their children, and they called upon school districts to hire teachers and principals who were bilingual in English and Spanish, to teach Mexican and Mexican American history, and to offer instruction in both English and Spanish for children with limited ability to communicate in English.⁹

East L.A. Student Walkouts

In March 1968, Chicano students at five high schools in East Los Angeles went on strike to demand better education for students of Mexican ancestry. Los Angeles schools did not allow Latino students to speak Spanish in class and gave no place to study Mexican history in the curriculum. Guidance counselors also encouraged students, regardless of their interests or ability, to pursue vocational careers instead of setting their sights on college. Some students were placed in classes for the mentally challenged even though they were of normal intelligence. As a result, the dropout rate among Mexican American students was very high.

School administrators refused to meet with the student protestors to discuss their grievances. After a week, police were sent in to end the strike. Thirteen of the organizers of the walkout were arrested and charged with conspiracy to disturb the peace. After Sal

9. See Rosales, *American Civil Rights Movement*.

Castro, a teacher who had led the striking students, was dismissed from his job, activists held a sit-in at school district headquarters until Castro was reinstated. Student protests spread across the Southwest, and in response many schools did change. That same year, Congress passed the Bilingual Education Act, which required school districts with large numbers of Hispanic or Latino students to provide instruction in Spanish.¹⁰

Bilingual education remains controversial, even among Hispanics and Latinos. What are some arguments they might raise both for and against it? Are these different from arguments coming from whites?

Mexican American civil rights leaders were active in other areas as well. Throughout the 1960s, Cesar Chavez and Dolores Huerta fought for the rights of Mexican American agricultural laborers through their organization, the **United Farm Workers** (UFW), a union for migrant workers they founded in 1962. Chavez, Huerta, and the UFW proclaimed their solidarity with Filipino farm workers by joining them in a strike against grape growers in Delano, California, in 1965. Chavez consciously adopted the tactics of the African American civil rights movement. In 1965, he called upon all U.S. consumers to boycott California grapes, and in 1966, he led the UFW on a 300-mile march to Sacramento, the state capital, to

10. See Sal Castro. 2011. *Blowout! Sal Castro and the Chicano Struggle for Educational Justice*. Chapel Hill: University of North Carolina Press.

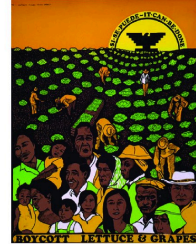
bring the state farm workers' problems to the attention of the entire country. The strike finally ended in 1970 when the grape growers agreed to give the pickers better pay and benefits.¹¹

As Latino immigration to the United States increased in the late twentieth and early twenty-first centuries, discrimination also increased in many places. In 1994, California voters passed Proposition 187. The proposition sought to deny non-emergency health services, food stamps, welfare, and Medicaid to undocumented immigrants. It also banned children from attending public school unless they could present proof that they and their parents were legal

residents of the United States. A federal court found it unconstitutional in 1997 on the grounds that the law's intention was to regulate immigration, a power held only by the federal government.¹²



(a)



(b)

Protestors picket a grocery store in 1973, urging consumers not to buy grapes or lettuce picked by underpaid farm workers (a). The boycott, organized by Cesar Chavez and the **United Farm Workers** using the slogan “Si se puede” or “Yes, it can be done!” (b), ultimately forced California growers to improve conditions for migrant laborers.

11. See Randy Shaw. 2008. *Beyond the Fields: Cesar Chavez, the UFW, and the Struggle for Justice in the 21st Century*. Berkeley: University of California Press; Susan Ferriss, Ricardo Sandoval, and Diana Hembree. 1998. *The Fight in the Fields: Cesar Chavez and the Farmworkers Movement*. New York: Houghton Mifflin Harcourt.

12. CNN. 19 March 1998. “Most of California’s Prop. 187 Ruled

In 2005, discussion began in Congress on proposed legislation that would make it a felony to enter the United States illegally or to give assistance to anyone who had done so. Although the bill quickly died, on May 1, 2006, hundreds of thousands of people, primarily Latinos, staged public demonstrations in major U.S. cities, refusing to work or attend school for one day.¹³

The protestors claimed that people seeking a better life should not be treated as criminals and that undocumented immigrants already living in the United States should have the opportunity to become citizens.

Following the failure to make undocumented immigration a felony under federal law, several states attempted to impose their own sanctions on illegal immigration. In April 2010, Arizona passed a law that made illegal immigration a state crime. The law also forbade undocumented immigrants from seeking work and allowed law enforcement officers to arrest people suspected of being in the U.S. illegally. Thousands protested the law, claiming that it encouraged racial profiling. In 2012, in *Arizona v. United States*, the U.S. Supreme Court struck down those provisions of the law that made it a state crime to reside in the United States illegally, forbade undocumented

Unconstitutional,” <http://www.cnn.com/ALLPOLITICS/1998/03/19/prop.187/>; Patrick J. McDonnell, “Prop. 187 Found Unconstitutional by Federal Judge,” *Los Angeles Times*, 15 November 1997. <http://articles.latimes.com/1997/nov/15/news/mn-54053>.

13. Teresa Watanabe and Hector Becerra, “500,000 Pack Streets to Protest Immigration Bills,” *Los Angeles Times*, 26 March 2006.

immigrants to take jobs, and allowed the police to arrest those suspected of being illegal immigrants.¹⁴

The court, however, upheld the authority of the police to ascertain the immigration status of someone suspected of being an undocumented alien if the person had been stopped or arrested by the police for other reasons.¹⁵ Today, Latinos constitute the largest minority group in the United States. They also have one of the highest birth rates of any ethnic group.¹⁶

Although Hispanics lag behind whites in terms of income and high school graduation rates, they are enrolling in college at higher rates than whites.¹⁷

14. *Arizona v. United States*, 567 U.S. __ (2012).

15. *Arizona*, 567 U.S.

16. Center for Public Affairs Research. 24 November 2015. "UNO Study: Fertility Rate Gap Between Races, Ethnicities is Shrinking," <http://www.unomaha.edu/news/2015/01/fertility.php>.

17. Rakesh Kochhar and Richard Fry. 12 December 2014. "Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession," <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/>; "State High School Graduation Rates By Race, Ethnicity," <http://www.governing.com/gov-data/education-data/state-high-school-graduation-rates-by-race-ethnicity.html> (April 10, 2016); Mark Hugo Lopez and Richard Fry. 4 September 2013. "Among Recent High

Asian American Civil Rights

Because Asian Americans are often stereotypically regarded as “the model minority” (because it is assumed they are generally financially successful and do well academically), it is easy to forget that they have also often been discriminated against and denied their civil rights. Indeed, in the nineteenth century, Asians were among the most despised of all immigrant groups and were often subjected to the same laws enforcing segregation and forbidding interracial marriage as were African Americans and American Indians.

The Chinese were the first large group of Asians to immigrate to the United States. They arrived in large numbers in the mid-nineteenth century to work in the mining industry and on the Central Pacific Railroad. Others worked as servants or cooks or operated laundries. Their willingness to work for less money than whites led white workers in California to call for a ban on Chinese immigration. In 1882, Congress passed the Chinese Exclusion Act, which prevented Chinese from immigrating to the United States for ten years and prevented Chinese already in the country from becoming citizens. In 1892, the Geary Act extended the ban on Chinese immigration for another ten years. In 1913, California passed a law preventing all Asians, not just the Chinese, from owning land. With the passage of the Immigration Act of 1924, all Asians, with the exception of Filipinos, were prevented from immigrating to the United States or becoming naturalized citizens. Laws in several

School Grads, Hispanic College Enrollment Rates
Surpasses That of Whites,”
[http://www.pewresearch.org/fact-tank/2013/09/04/
hispanic-college-enrollment-rate-surpasses-whites-
for-the-first-time/](http://www.pewresearch.org/fact-tank/2013/09/04/hispanic-college-enrollment-rate-surpasses-whites-for-the-first-time/).

states barred marriage between Chinese and white Americans, and some cities with large Asian populations required Asian children to attend segregated schools.¹⁸

During World War II, citizens of Japanese descent living on the West Coast, whether naturalized immigrants or Japanese Americans born in the United States, were subjected to the indignity of being removed from their communities and interned under Executive Order 9066. The reason was fear that they might prove disloyal to the United States and give assistance to Japan. Although Italians and Germans suspected of disloyalty were also interned by the U.S. government, only the Japanese were imprisoned solely on the basis of their ethnicity. None of the more than 110,000 Japanese and Japanese Americans internees was ever found to have committed a disloyal act against the United States, and many young Japanese American men served in the U.S. army during the war.¹⁹

Although Japanese American Fred Korematsu challenged the right of the government to imprison law-abiding citizens, the Supreme Court decision in the 1944 case of **Korematsu v. United States** upheld the actions of the government as a necessary precaution in a time of war.²⁰

When internees returned from the camps after the war was over,

18. See Gabriel Chin and Hrishi Kathrikeyan. 2002. "Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910–1950," *Asian Law Journal* 9.
19. See Greg Robinson. 2010. *A Tragedy of Democracy: Japanese Confinement in North America*. New York: Columbia University Press.
20. *Korematsu v. United States*, 323 U.S. 214 (1944).

many of them discovered that the houses, cars, and businesses they had left behind, often in the care of white neighbors, had been sold or destroyed.²¹



Japanese Americans displaced from their homes by the U.S. government during World War II stand in line outside the mess hall at a relocation center in San Bruno, California, on April 29, 1942.

21. Robinson, *Tragedy of Democracy*.



Explore the resources at [Japanese American Internment](#) and [Digital History](#) to learn more about experiences of Japanese Americans during World War II.

The growth of the African American, Chicano, and Native American civil rights movements in the 1960s inspired many Asian Americans to demand their own rights. Discrimination against Asian Americans, regardless of national origin, increased during the Vietnam War. Ironically, violence directed indiscriminately against Chinese, Japanese, Koreans, and Vietnamese caused members of these groups to unite around a shared pan-Asian identity, much as Native Americans had in the Pan-Indian movement. In 1968, students of Asian ancestry at the University of California at Berkeley formed the Asian American Political Alliance. Asian American students also joined Chicano, Native American, and African American students to demand that colleges offer ethnic studies courses.²²

In 1974, in the case of *Lau v. Nichols*, Chinese American students in San Francisco sued the school district, claiming its failure to

22. See William Wei. 1993. *The Asian American Movement*. Philadelphia: Temple University Press.

provide them with assistance in learning English denied them equal educational opportunities.²³

The Supreme Court found in favor of the students.

The Asian American movement is no longer as active as other civil rights movements are. Although discrimination persists, Americans of Asian ancestry are generally more successful than members of other ethnic groups. They have higher rates of high school and college graduation and higher average income than other groups.²⁴

Although educational achievement and economic success do not protect them from discrimination, it does place them in a much better position to defend their rights.

The LGBT Community

Laws against homosexuality existed in most states throughout the nineteenth and twentieth centuries.²⁵

As a result, lesbians, gay men, bisexuals, and transgender people, collectively known as the LGBT community, had to keep their sexual orientation hidden.

The secrecy made it difficult to organize to fight for their rights

23. *Lau v. Nichols*, 414 U.S. 563 (1974).

24. "The Rise of Asian Americans," <http://www.pewsocialtrends.org/asianamericans-graphics/> (April 10, 2016).

25. See Jonathan Ned Katz. 1995. *Gay and American History: Lesbians and Gay Men in the United States*. New York: Thomas Crowell.

as other, more visible groups had done. Some organizations did exist, however. The Mattachine Society, established in 1950, was one of the first groups to champion the rights of gay men. Its goal was to unite gay men who otherwise lived in secrecy and to fight against abuse. The Mattachine Society often worked with the Daughters of Bilitis, a lesbian rights organization. Among the early issues targeted by the Mattachine Society was police entrapment of male homosexuals.²⁶

New organizations promoting LGBT rights are more radical and confrontational than the Mattachine Society and the Daughters of Bilitis. These groups, like the Gay Activists Alliance and the Gay Liberation Front, called not just for equality before the law and protection against abuse but also for “liberation,” Gay Power, and Gay Pride.²⁷

In 1973, the American Psychological Association ended its classification of homosexuality as a mental disorder. In 1994, the U.S. military adopted the policy of “Don’t ask, don’t tell.” This act, Department of Defense Directive 1304.26, officially prohibited discrimination against suspected gays, lesbians, and bisexuals by the U.S. military. It also prohibited superior officers from asking about or investigating the sexual orientation of those below them

26. See Vern L. Bullough. 2002. *Before Stonewall: Activists for Gay and Lesbian Rights in Historical Context*. New York: Harrington Park Press.

27. See David Carter. 2004. *Stonewall: The Riots That Sparked the Gay Revolution*. New York: St. Martin’s Press; Martin Duberman. 1993. *Stonewall*. New York: Penguin Books.

in rank.²⁸ Those who spoke openly about their sexual orientation were subject to dismissal because it remained illegal for anyone except heterosexuals to serve in the armed forces. The policy ended in 2011.²⁹

In 2006, in the case of *Lawrence v. Texas*, the Supreme Court ruled unconstitutional state laws that criminalized sexual intercourse between consenting adults of the same sex.³⁰

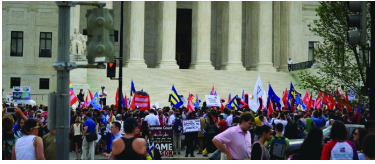
Beginning in 2000, several states made it possible for same-sex couples to enter into legal relationships known as civil unions or domestic partnerships. These arrangements extended many of the same protections enjoyed by heterosexual married couples to same-sex couples. LGBT activists, however, continued to fight for the right to marry. Same-sex marriages would allow partners to enjoy exactly the same rights as married heterosexual couples and accord their relationships the same dignity and importance. In 2004, Massachusetts became the first state to grant legal status to same-sex marriage. Other states quickly followed. Many states passed laws banning same-sex marriage, and many gay and lesbian couples challenged these laws, successfully, in the courts. In *Obergefell v. Hodges*, the Supreme Court overturned state bans and made same-sex marriage legal throughout the United States on June 26, 2015.³¹

28. Public Law 103-160: National Defense Authorization Act for Fiscal Year 1994.

29. NBC News. 22 July 2011. "Obama Certifies End of Military's Gay Ban," http://www.nbcnews.com/id/43859711/ns/us_news-life/#.VrAzFLxh-U.

30. *Lawrence v. Texas*, 539 U.S. 558 (2003).

31. *Obergefell v. Hodges*, 576 U.S. __ (2015).



Supporters of marriage equality celebrate outside the Supreme Court on June 26, 2015, following the announcement of the Court's decision in Obergefell v. Hodges declaring same-sex marriage a constitutional right under the Fourteenth Amendment. (credit: Matt Popovich)

Following swiftly upon the heels of the *Obergefell* ruling, the Indiana legislature passed a Religious Freedom Restoration Act (RFRA). Congress had already passed such a law in 1993; it was intended to extend protection to minority religions, such as allowing rituals of the Native American Church. However, the Supreme

Court in *City of Boerne v. Flores* (1997) ruled that the 1993 law applied only to the federal government and not to state governments.³²

Thus several state legislatures later passed their own Religious Freedom Restoration Acts. These laws state that the government cannot “substantially burden an individual’s exercise of religion” unless it would serve a “compelling governmental interest” to do so.

The enactment of the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, also known as the Matthew Shepard Act, in 2009 made it a federal hate crime to attack someone based on his or her gender, gender identity, sexual orientation, or disability and made it easier for federal, state, and local authorities to investigate hate crimes.

Civil Rights and the Americans with Disabilities Act

People with disabilities make up one of the last groups whose civil rights have been recognized. For a long time, they were denied

32. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

employment and access to public education, especially if they were mentally or developmentally challenged. Many were merely institutionalized. A Progressive Era **eugenics** movement in the United States in the late nineteenth and early to mid-twentieth centuries sought to encourage childbearing among physically and mentally fit individuals and discourage it among those with physical or mental disabilities. Many states passed laws prohibiting marriage among people who had what were believed to be hereditary “defects.” Among those affected were people who were blind or deaf, those with epilepsy, people with mental or developmental disabilities, and those suffering mental illnesses. In some states, programs existed to sterilize people considered “feeble minded” by the standards of the time, without their will or consent.³³

When this practice was challenged by a woman in a state institution in Virginia, the Supreme Court, in the 1927 case of *Buck v. Bell*, upheld the right of state governments to sterilize those people believed likely to have children who would become dependent upon public welfare.³⁴

Some of these programs persisted into the 1970s, as the map below shows.³⁵

33. See Edward J. Larson. 1995. *Sex, Race, and Science: Eugenics in The Deep South*. Baltimore, MD: Johns Hopkins University Press; Rebecca M. Kluchin. 2009. *Fit to Be Tied: Sterilization and Reproductive Rights in America 1950–1980*. New Brunswick, NJ: Rutgers University Press.

34. *Buck v. Bell*, 274 U.S. 200 (1927).

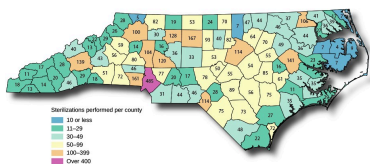
35. Kim Severson, “Thousands Sterilized, A State Weighs Restitution,” *New York Times*, 9 December 2011.

By the 1970s, however, concern for extending equal opportunities to all led to the passage of two important acts by Congress. In 1973, the Rehabilitation Act made it illegal to discriminate against people with disabilities in federal employment or in programs run by federal agencies or receiving federal funding. This was followed by

the Education for all Handicapped Children Act of 1975, which required public schools to educate children with disabilities. The act specified that schools consult with parents to create a plan tailored for each child's needs that would provide an educational experience as close as possible to that received by other children.

In 1990, the **Americans with Disabilities Act** (ADA) greatly expanded opportunities and protections for people of all ages with disabilities. It also significantly expanded the categories and definition of disability. The ADA prohibits discrimination in employment based on disability. It also requires employers to make reasonable accommodations available to workers who need them. Finally, the ADA mandates that public transportation and public accommodations be made accessible to those with disabilities. The Act was passed despite the objections of some who argued that the cost of providing accommodations would be prohibitive for small businesses.

Peak of Eugenic Program in North Carolina, July 1946–June 1968





States.

The community of people with disabilities is well organized in the twenty-first century, as evidenced by the considerable network of [disability rights organizations](#) in the United

The Rights of Religious Minorities

The right to worship as a person chooses was one of the reasons for the initial settlement of the United States. Beginning in the early nineteenth century with the immigration of large numbers of Irish Catholics to the United States, anti-Catholicism became a common feature of American life and remained so until the mid-twentieth century. Catholic immigrants were denied jobs, and in the 1830s and 1840s anti-Catholic literature accused Catholic priests and nuns of committing horrific acts. Anti-Mormon sentiment was also quite common, and Mormons were accused of kidnapping women and building armies for the purpose of dominating their non-Mormon neighbors. At times, these fears led to acts of violence. A convent in Charlestown, Massachusetts, was burned to the ground in

1834.³⁶ In 1844, Joseph Smith, the founder of the Mormon religion, and his brother were murdered by a mob in Illinois.³⁷

American Jews faced discrimination in employment, education, and housing based on their religion. Many of the restrictive real estate covenants that prohibited people from selling their homes to African Americans also prohibited them from selling to Jews. A tradition of confronting discrimination led many American Jews to become actively involved in the civil rights movements for women and African Americans.³⁸

Open discrimination against Jews in the United States is less common, although anti-Semitic sentiments still remain. In the twenty-first century, especially after the September 11 attacks, Muslims are a religious minority likely to face discrimination.³⁹

Christians have also been deprived of their rights because of religious beliefs. The owner of Hobby Lobby Stores, a conservative

36. See Nancy Lusignan Schultz. 2000. *Fire and Roses: The Burning of the Charlestown Convent*. New York: Free Press.

37. See Richard L. Bushman. 2005. *Joseph Smith: Rough Stone Rolling*. New York: Alfred A. Knopf.

38. See Frederic Cople Jaher. 1994. *A Scapegoat in the Wilderness: The Origins and Rise of Anti-Semitism in America*. Cambridge, MA: Harvard University Press.

39. "Combating Religious Discrimination and Protecting Religious Freedom," <http://www.justice.gov/crt/combating-religious-discrimination-and-protecting-religious-freedom-16> (April 10, 2016).

Christian, argued that his company's health-care plan should not have to pay for abortifacients because his religious beliefs are opposed to the practice of taking the life of an unborn child. In 2014, in the case of *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court ruled in his favor.⁴⁰

Questions to Consider

1. What is the better approach to civil rights—a peaceful, gradual one that focuses on passing laws and winning cases in court, or a radical one that includes direct action and acts of civil disobedience? Why?
2. Should public funds be used to provide programs for Native Americans, Alaska Natives, and Native Hawaiians even though no one living today was responsible for depriving them of their lands? Why or why not?
3. If a person's religious beliefs conflict with requests from other groups, should the government protect the exercise of those beliefs? Why or why not?

40. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. __ (2014).

Terms to Remember

Americans with Disabilities Act–(ADA) greatly expanded opportunities and protections for people of all ages with disabilities

Jones Act–granted U.S. citizenship to Puerto Ricans

United Farm Workers (UFW)–a union for migrant workers; strike against grape growers in Delano, California, in 1965; adopted the tactics of the African American civil rights movement

PART XIX

LIBERTY V.

SECURITY--WRAPPING IT
UP IN REVIEW

90. Liberty v. Security: A Short Review

Learning Objectives

- Review a few basic terms from the text.
- Discuss basic terms and general questions about balancing liberty protections and security concerns.

Questions for Open Discussion

1. Who is in charge of the government of the United States and why is this idea so important?
2. Should any individuals or groups receive special treatment under the laws and regulations of the United States?
3. How does the governmental structure of the United States balance the competing interests of the people's liberty and security?
4. Does a republic or a democracy better serve the needs of the people?
5. Should groups of individuals today pay the price for discrimination in the past?
6. How should the government provide for protection

against external threats?

7. Is it acceptable to collect massive amounts of public data without probable cause?
8. How do you decide what is acceptable behavior between individuals?
9. How do you decide what is acceptable control by the government?
10. Do people working in the government know better than the American people what the people's safety needs are? healthcare? education? business and economic concerns?

Terms to Remember for Review

consent of the governed = people consent to government; the people control the government

unalienable rights = rights people have not from government or law

liberties = freedoms possessed by people because they are human

rights = how much freedom is given up by the people for security

equal rights = all persons are treated equally under the law

basic functions of good government = unite the people; provide a system of justice to hold people

accountable; provide protection for domestic safety and security; provide protection against foreign threats & for defense; provide for the general welfare of all the people/ stable economy; protect the people's liberties

republic = *form* of government balancing power over and control of the people with protecting the liberties of the people

federal = *structure* of government balancing power between various levels of government (national/state/local) and between branches of government (legislative/executive/judicial)

PART XX

APPENDIX

91. Declaration of Independence

Declaration of Independence

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. —That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, —That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are

more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. —Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for

opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.

He has affected to render the Military independent of and superior to the Civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

For Quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing Taxes on us without our Consent:

For depriving us in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty &

perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Nor have We been wanting in attentions to our Brittish brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the

Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

The 56 signatures on the Declaration appear in the positions indicated:

<div>Column 1</div> <div>Georgia:</div> <div>Button Gwinnett</div> <div>Lyman Hall</div> <div>George Walton</div>	<div>Column 2</div> <div>North Carolina:</div> <div>William Hooper</div> <div>Joseph Hewes</div> <div>John Penn</div> <div>South Carolina:</div> <div>Edward Rutledge</div> <div>Thomas Heyward, Jr.</div> <div>Thomas Lynch, Jr.</div> <div>Arthur Middleton</div>	<div>Column 3</div> <div>Massachusetts:</div> <div>John Hancock</div> <div>Maryland:</div> <div>Samuel Chase</div> <div>William Paca</div> <div>Thomas Stone</div> <div>Charles Carroll of Carrollton</div> <div>Virginia:</div> <div>George Wythe</div> <div>Richard Henry Lee</div> <div>Thomas Jefferson</div> <div>Benjamin Harrison</div> <div>Thomas Nelson, Jr.</div> <div>Francis Lightfoot Lee</div> <div>Carter Braxton</div>	<div>Column 4</div> <div>Pennsylvania:</div> <div>Robert Morris</div> <div>Benjamin Rush</div> <div>Benjamin Franklin</div> <div>John Morton</div> <div>George Clymer</div> <div>James Smith</div> <div>George Taylor</div> <div>James Wilson</div> <div>George Ross</div> <div>Delaware:</div> <div>Caesar Rodney</div> <div>George Read</div> <div>Thomas McKean</div>		

Column 6

New Hampshire:

Josiah Bartlett
William Whipple

Massachusetts:

Samuel Adams
John Adams
Robert Tre Paine
Elbridge Gerry

Rhode Island:

Stephen Hopkins
William Ellery

Connecticut:

Roger Sherman
Samuel Huntington
William Williams

Oliver Wolcott

New Hampshire:

Matthew Thornton

92. The Articles of Confederation

The Articles of Confederation

To all to whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting.

Articles of Confederation and perpetual Union between the states of New Hampshire, Massachusetts-bay Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

I. The Stile of this Confederacy shall be
“The United States of America”.

II. Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.

III. The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other,

against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

If any person guilty of, or charged with, treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the Governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense.

Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

V. For the most convenient management of the general

interests of the United States, delegates shall be annually appointed in such manner as the legislatures of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

No State shall be represented in Congress by less than two, nor more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress, and the members of Congress shall be protected in their persons from arrests or imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

VI. No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, Prince or State;

nor shall any person holding any office of profit or trust under the United States, or any of them, accept any present, emolument, office or title of any kind whatever from any King, Prince or foreign State; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any King, Prince or State, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessel of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defense of such State, or its trade; nor shall any body of forces be kept up by any State in time of peace, except such number only, as in the judgement of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of filed pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State

be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the Kingdom or State and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

VII. When land forces are raised by any State for the common defense, all officers of or under the rank of colonel, shall be appointed by the legislature of each State respectively, by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

VIII. All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any

person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled.

IX. The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article — of sending and receiving ambassadors — entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever — of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated — of granting letters of marque and reprisal in times of peace — appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now

subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other causes whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the secretary of Congress shall strike in behalf of such party absent or refusing; and the judgement and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to

submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgement, which shall in like manner be final and decisive, the judgement or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgement, shall take an oath to be administered by one of the judges of the supreme or superior court of the State, where the cause shall be tried, 'well and truly to hear and determine the matter in question, according to the best of his judgement, without favor, affection or hope of reward': provided also, that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions as they may respect such lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States — fixing the standards of weights and measures throughout the United States — regulating the trade and managing all affairs with the

Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated — establishing or regulating post offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office — appointing all officers of the land forces, in the service of the United States, excepting regimental officers — appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States — making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated ‘A Committee of the States’, and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction — to appoint one of their members to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses — to borrow money, or emit bills on the credit of the United States, transmitting every half-year to the respective States an account of the sums of money so borrowed or emitted — to build and equip a navy — to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which

requisition shall be binding, and thereupon the legislature of each State shall appoint the regimental officers, raise the men and cloath, arm and equip them in a solid-like manner, at the expense of the United States; and the officers and men so clothed armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled. But if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller number of men than the quota thereof, such extra number shall be raised, officered, clothed armed and equipped in the same manner as the quota of each State, unless the legislature of such State shall judge that such extra number cannot be safely spread out in the same, in which case they shall raise, officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque or reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for

adjourning from day to day be determined, unless by the votes of the majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgement require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several States.

X. The Committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of the nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said Committee, for the exercise of which, by the Articles of Confederation, the voice of nine States in the Congress of the United States assembled be requisite.

XI. Canada acceding to this confederation, and adjoining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no

other colony shall be admitted into the same, unless such admission be agreed to by nine States.

XII. All bills of credit emitted, monies borrowed, and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

XIII. Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

And Whereas it hath pleased the Great Governor of the World to incline the hearts of the legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said Articles of Confederation and perpetual Union. Know Ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the

matters and things therein contained: And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said Confederation are submitted to them. And that the Articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual.

In Witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the State of Pennsylvania the ninth day of July in the Year of our Lord One Thousand Seven Hundred and Seventy-Eight, and in the Third Year of the independence of America.

On the part & behalf of the State of New Hampshire:

JOSIAH BARTLETT

JOHN WENTWORTH JUNR.

August 8th 1778

On the part and behalf of The State of Massachusetts Bay

JOHN HANCOCK

SAMUEL ADAMS

ELBRIDGE GERRY

FRANCIS DANA

JAMES LOVELL

SAMUEL HOLTEN

On the part and behalf of the State of Rhode Island and
Providence Plantations

WILLIAM ELLERY

HENRY MARCHANT

JOHN COLLINS

On the part and behalf of the State of Connecticut

ROGER SHERMAN

SAMUEL HUNTINGTON

OLIVER WOLCOTT

TITUS HOSMER ANDREW ADAMS

On the Part and Behalf of the State of New York

JAMES DUANE

FRANCIS LEWIS

WM DUER

GOUV MORRIS

On the Part and in Behalf of the State of New Jersey,
November 26, 1778.

JNO WITHERSPOON

NATHANIEL SCUDDER

On the part and behalf of the State of Pennsylvania

ROBT MORRIS

DANIEL ROBERDEAU

JOHN BAYARD SMITH.

WILLIAM CLINGAN

JOSEPH REED

22nd July 1778

On the part & behalf of the State of Delaware

THO McKEAN

February 12, 1779

JOHN DICKINSON

May 5th 1779

NICHOLAS VAN DYKE,

On the part and behalf of the State of Maryland

JOHN HANSON

March 1 1781

DANIEL CARROLL do

On the Part and Behalf of the State of Virginia

RICHARD HENRY LEE

JOHN BANISTER

THOMAS ADAMS

JNo HARVIE

FRANCIS LIGHTFOOT LEE

On the part and Behalf of the State of No Carolina

JOHN PENN

July 21st 1778

CORNs HARNETT

JNo WILLIAMS

On the part & behalf of the State of South Carolina

HENRY LAURENS

WILLIAM HENRY DRAYTON

JNo MATHEWS

RICHd HUTSON

THOs HEYWARD Junr

On the part & behalf of the State of Georgia JNo WALTON

24th July 1778

EDWD TELFAIR

EDWD LANGWORTHY

Enacted Maryland, 1 March 1781 in Philadelphia,
Pennsylvania

93. The Constitution of the United States

The Constitution of the United States of America

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I.

Section. 1.

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.

Section. 2.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six,

Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3.

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of

the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4.

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5.

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6.

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7.

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with

his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide

for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—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.

Section. 9.

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall

not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article. II.

Section. 1.

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole

Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act

accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and

with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3.

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section. 4.

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III.

Section. 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made,

under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted

of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article. IV.

Section. 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority

of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3.

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4.

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the

Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.

Article. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

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.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth In witness whereof We have hereunto subscribed our Names,

The Preamble to The Bill of Rights

Congress of the United States begun and held at the City of New-York, on Wednesday the fourth of March, one thousand seven hundred and eighty nine.

The Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all, or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz.

Articles in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

Note: The following text is a transcription of the first ten amendments to the Constitution in their original form. These amendments were ratified December 15, 1791, and form what is known as the “Bill of Rights.”

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons,

houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

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.

Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — the President of

the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. [And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President. —]* The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

**Superseded by Section 3 of the 20th amendment.*

Amendment XIII

Section 1.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,* and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution

of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

**Changed by Section 1 of the 26th amendment.*

Amendment XV

Section 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

Section 2.

The Congress shall have the power to enforce this article by appropriate legislation.

Amendment XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII

The Senate of the United States shall be composed of two

Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII

Section 1.

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2.

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XIX

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XX

Section 1.

The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2.

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3.

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a

President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4.

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5.

Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI

Section 1.

The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2.

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII

Section 1.

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII

Section 1.

The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2.

The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV

Section 1.

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2.

The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV

Section 1.

In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2.

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3.

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4.

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI

Section 1.

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied

or abridged by the United States or by any State on account of age.

Section 2.

The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXVII

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

94. Federalist No. 10

Federalist No. 10

Federalist Paper #10: The Union as a Safeguard Against Domestic Faction and Insurrection

From the New York Packet.

Friday, November 23, 1787.

Author: James Madison

To the People of the State of New York:

AMONG the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished; as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious

declamations. The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality, to contend that they have as effectually obviated the danger on this side, as was wished and expected. Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence, of known facts will not permit us to deny that they are in some degree true. It will be found, indeed, on a candid review of our situation, that some of the distresses under which we labor have been erroneously charged on the operation of our governments; but it will be found, at the same time, that other causes will not alone account for many of our heaviest misfortunes; and, particularly, for that prevailing and increasing distrust of public engagements, and alarm for private rights, which are echoed from one end of the continent to the other. These must be chiefly, if not wholly, effects of the unsteadiness and injustice with which a factious spirit has tainted our public administrations.

By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to

the permanent and aggregate interests of the community.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of

the respective proprietors, ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit

of party and faction in the necessary and ordinary operations of the government.

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or, in other words, the most powerful faction must be expected to prevail. Shall domestic manufactures be encouraged, and in what degree, by restrictions on foreign manufactures? are questions which would be differently decided by the landed and the manufacturing classes, and probably by neither with a sole regard to justice and the public good. The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice. Every shilling with which they overburden the inferior number, is a shilling saved to their own pockets.

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all

subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.

The inference to which we are brought is, that the CAUSES of faction cannot be removed, and that relief is only to be sought in the means of controlling its EFFECTS.

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum by which this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.

By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of

oppression. If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together, that is, in proportion as their efficacy becomes needful.

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of

the cure and the efficacy which it must derive from the Union.

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people. The question resulting is, whether small or extensive republics are more favorable to the election of proper guardians of the public weal; and it is clearly decided in favor of the latter by two obvious considerations:

In the first place, it is to be remarked that, however small the republic may be, the representatives must be raised to a certain number, in order to guard against the cabals of a few; and that, however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude. Hence, the number of representatives in the two cases not being in proportion to

that of the two constituents, and being proportionally greater in the small republic, it follows that, if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice.

In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit and the most diffusive and established characters.

It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representatives too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.

The other point of difference is, the greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests,

the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.

Hence, it clearly appears, that the same advantage which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic,—is enjoyed by the Union over the States composing it. Does the advantage consist in the substitution of representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and schemes of injustice? It will not be denied that the representation of the Union will be most likely to possess these requisite endowments. Does it consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest? In an equal degree does the increased variety of parties comprised within the Union, increase this security. Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and

interested majority? Here, again, the extent of the Union gives it the most palpable advantage.

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.

In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans, ought to be our zeal in cherishing the spirit and supporting the character of Federalists.

95. Federalist No. 51

Federalist No. 51

Federalist Paper #51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments

From the New York Packet.

Friday, February 8, 1788.

Author: Alexander Hamilton or James Madison

To the People of the State of New York:

TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and

structure of the government planned by the convention. In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them. It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal. But the great security against a gradual

concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State. But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily

predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department? If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion to the several State constitutions, and to the federal Constitution it will be found that if the latter does not perfectly correspond with them, the former are infinitely less able to bear such a test. There are, moreover, two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view. First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations

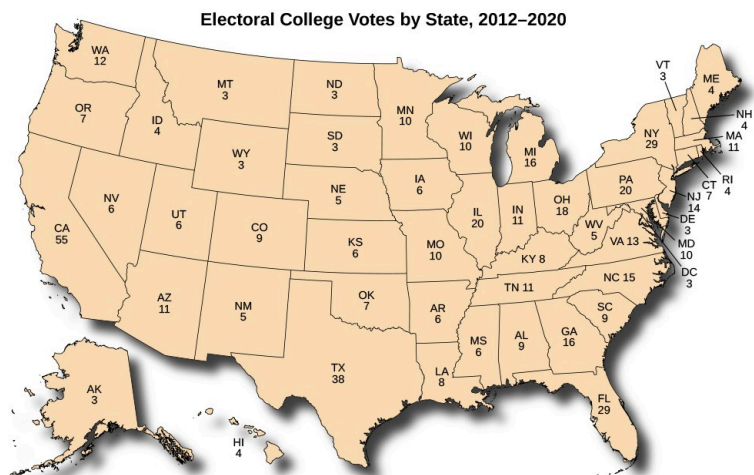
are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. Second. 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. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free

government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States oppressive combinations of a majority will be facilitated: the best security, under the republican forms, for the rights of every class of citizens, will be diminished: and consequently the stability and independence of some member of the government, the only other security, must be proportionately increased. Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful. It can be little doubted that if the State of Rhode Island was separated from the

Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practical sphere, the more duly capable it will be of self-government. And happily for the REPUBLICAN CAUSE, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the FEDERAL PRINCIPLE.

PUBLIUS.

96. Electoral College Votes by State, 2012–2020



The number of Electoral College votes granted to each state equals the total number of representatives and senators that state has in the U.S. Congress or, in the case of Washington, DC, as many electors as it would have if it were a state. The number of representatives may fluctuate based on state population, which is determined every ten years by the U.S. Census, mandated by Article I, Section 2 of the Constitution. The most recent census was conducted in 2010.

97. Selected Supreme Court Cases

A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

This case represented a challenge to the constitutionality of a law called the National Industrial Recovery Act. This law was a major part of President Franklin D. Roosevelt's attempt to rebuild the nation's economy during the Great Depression. Major industries in the United States, however, objected to the way the law empowered the president to regulate aspects of American industry, such as labor conditions and even pay. In the unanimous decision, the court determined that the act was unconstitutional because it shifted the power to regulate commerce from the legislative branch to the executive branch.

Arizona v. United States, 567 U.S. ___ (2012). This case involved federal attempts to prevent an Arizona state immigration law (S.B. 1070) from being enforced. The United States brought suit, arguing that immigration law is exclusively in the federal domain. Agreeing with the federal government, a federal district court enjoined specific provisions in the law. Arizona appealed to the Supreme Court to overturn the decision. In a 5–3 decision, the court found that specific provisions in the law did conflict with federal law, while others were constitutional.

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). This case represented a challenge to the principle of “separate but equal” established by *Plessy v. Ferguson* in 1896. The case was brought by students who were denied admittance to certain public schools based exclusively on race. The unanimous decision in *Brown v. Board* determined that the existence of racially segregated public schools violated the equal protection clause of the Fourteenth Amendment. The court decided that schools segregated by race perpetrated harm by giving legal sanction to the idea that African

Americans were inherently inferior. The ruling effectively overturned *Plessy v. Ferguson* and removed the legal supports for segregated schools nationwide.

***Buckley v. Valeo*, 424 U.S. 1 (1976).** This case concerned the power of the then recently created Federal Election Commission to regulate the financing of political campaigns. These restrictions limited the amount of contributions that could be made to candidates and required political contributions to be disclosed, among other things. In 1975, Senator James Buckley filed suit, arguing that these limits amounted to a violation of First Amendment protections on free speech and free association. In a series of decisions in this complex case, the court determined that these restrictions did not violate the First Amendment.

***Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___ (2014).** This case involved a challenge to the mandate in the Patient Protection and Affordable Care Act that required that all employment-based group health care plans provide coverage for certain types of contraceptives. The law, however, allowed exemptions for religious employers such as churches that held a religious-based opposition to contraception. The plaintiffs in the case argued that Hobby Lobby, a large family-owned chain of arts and crafts stores, was run based on Christian principles and therefore should be exempt as well because of the Religious Freedom Restoration Act of 1993 (RFRA). The 5–4 decision in *Burwell v. Hobby Lobby* agreed with the plaintiffs and declared that RFRA permits for-profit companies like Hobby Lobby to deny coverage for contraception in their health plans when that coverage violates a religious belief.

***Bush v. Gore*, 531 U.S. 98 (2000).** Following voting in the November 2000 presidential election, observers recognized that the outcome of the very close national election hinged on the outcome of the election in Florida. Because the Florida election was so close, manual recounts were called for by the state’s supreme court. Then-governor George W. Bush, who was ahead in the initial count, appealed to the U.S. Supreme Court to halt the manual recount and to declare that the method of manual recount being used violated

his rights to equal protection and due process. The court issued a two-part *per curiam* opinion on the case. (In a *per curiam* opinion, the court makes it clear that the decision in the case is not intended to set a legal precedent.) In the first part, the court ruled in a 7–2 decision that the manual recount did violate the plaintiffs right to equal protection. In the second part, decided by a smaller 5–4 margin, the court ruled that there was not sufficient time to adjust the recount procedure and conduct a full recount. The effect of this ruling gave the Florida electoral votes, and thus the presidency, to George W. Bush.

Citizens United v. Federal Election Commission, 558 U.S. 310 (2010). In 2007, the nonprofit corporation Citizens United was prevented by the Federal Election Commission (FEC) from showing a movie about then-presidential candidate Hillary Clinton. The FEC noted that showing the movie violated the Bipartisan Campaign Reform Act (BCRA). BCRA prohibited campaign communications one month before a primary election and two months before a general election, required donors to be disclosed, and prohibited corporations from using their general funds for campaign communications. The plaintiffs argued that these restrictions constituted a violation of the First Amendment. The 5–4 decision in *Citizens United v. FEC* agreed with the plaintiffs and concluded that the restrictions imposed by BCRA and enforced by the FEC violated the corporation's First Amendment right to free expression.

Dred Scott v. Sandford, 60 U.S. 393 (1856). This case concerned the constitutionality of the Missouri Compromise, which declared that certain states would be entirely free of slavery. Dred Scott, a slave, was brought by his owner into free territories. When the owner brought him back to Missouri, a slave state, Dred Scott sued claiming that his time living in free territory made him free. After failing in his attempts in Missouri, Scott appealed to the Supreme Court. In a 7–2 decision, the court declared that the relevant parts of the Missouri Compromise were unconstitutional, and that Scott remained a slave as a result.

Gideon v. Wainwright, 372 U.S. 335 (1963). In 1961, Clarence E.

Gideon was arrested and accused of breaking into a poolroom and stealing money from a cigarette machine. Not being able to afford a lawyer, and being denied a public defender by the judge, Gideon defended himself and was subsequently found guilty. Gideon appealed to the Supreme Court declaring that the denial by the trial judge constituted a violation of his constitutional right to representation. The unanimous decision by the court in *Gideon v. Wainwright* agreed that the Sixth Amendment required that those facing felony criminal charges be supplied with legal representation.

***King v. Burwell*, 576 U.S. ___ (2015).** When Congress wrote and passed the Patient Protection and Affordable Care Act in 2010, lawmakers intended for states to create exchanges through which residents in those states could purchase health care insurance plans. For those residents who could not afford the premiums, the law also allowed for tax credits to help reduce the cost. If states didn't create an exchange, the federal government created the exchange for the state. While the intention of the lawmakers was for the tax credits to apply to the federally created exchanges as well, the language of the law was somewhat unclear on this point. Residents in Virginia brought suit against the law arguing that the law should be interpreted in a way that withholds tax credits from those participating in the federally created exchange. In the 6-3 decision, the court disagreed, stating that viewing the law in its entirety made it clear that the intent of the law was to provide the tax credits to those participating in either exchange.

***Lawrence v. Texas*, 539 U.S. 558 (2003).** This case concerned two men in Houston who in 1998 were prosecuted and convicted under a Texas law that forbade certain types of intimate sexual relations between two persons of the same sex. The men appealed to the Supreme Court arguing that their Fourteenth Amendment rights to equal protection and privacy were violated when they were prosecuted for consensual sexual intimacy in their own home. In the 6-3 decision in *Lawrence v. Texas*, the court concluded that while so-called anti-sodomy statutes like the law in Texas did not violate one's right to equal protection, they did violate the due

process clause of the Fourteenth Amendment. The court stated that the government had no right to infringe on the liberty of persons engaging in such private and personal acts.

Marbury v. Madison, 5 U.S. 137 (1803). This case involved the nomination of justices of the peace in Washington, DC, by President John Adams at the end of his term. Despite the Senate confirming the nominations, some of the commissions were not delivered before Adams left office. The new president, Thomas Jefferson, decided not to deliver the commissions. William Marbury, one of the offended justices, sued, saying that the Judiciary Act of 1789 empowered the court to force Secretary of State James Madison to deliver the commissions. In the unanimous decision in *Marbury v. Madison*, the court declared that while Marbury's rights were violated when Madison refused to deliver the commission, the court did not have the power to force the secretary to do so despite what the Judiciary Act says. In declaring that the law conflicted with the U.S. Constitution, the case established the principle of judicial review wherein the Supreme Court has the power to declare laws passed by Congress and signed by the president to be unconstitutional.

McDonald v. Chicago, 561 U.S. 742 (2010). This case developed as a consequence of the decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), which dismissed a Washington, DC, handgun ban as a violation of the Second Amendment. In *McDonald v. Chicago*, the plaintiffs argued that the Fourteenth Amendment had the effect of applying the Second Amendment to the states, not just to the federal government. In a 5–4 decision, the court agreed with the plaintiffs and concluded that rights like the right to keep and bear arms are important enough for maintaining liberty that the Fourteenth Amendment rightly applies them to the states.

Miranda v. Arizona, 384 U.S. 436 (1966). When Ernesto Miranda was arrested, interrogated, and confessed to kidnapping in 1963, the arresting officers neglected to inform him of his Fifth Amendment right not to self-incriminate. After being found guilty at trial, Miranda appealed to the Supreme Court, insisting that the officers

violated his Fifth Amendment rights. The 5–4 decision in *Miranda v. Arizona* found that the right to not incriminate oneself relies heavily on the suspect’s right to be informed of these rights at the time of arrest. The opinion indicated that suspects must be told that they have the right to an attorney and the right to remain silent in order to ensure that any statements they provide are issued voluntarily.

***National Federation of Independent Business v. Sebelius*, 567 U.S. ____ (2012).** This case represented a challenge to the constitutionality of the Patient Protection and Affordable Care Act. The suing states argued that the Medicare expansion and the individual mandate that required citizens to purchase health insurance or pay a fine were both unconstitutional. The 5–4 decision found that the Medicare expansion was permissible, but that the federal government could not withhold all Medicare funding for states that refused to accept the expansion. More importantly, it found that Congress had the power to apply the mandate to purchase health insurance under its enumerated power to tax.

***New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).** This case began when the *New York Times* published a full-page advertisement claiming that the arrest of Martin Luther King, Jr. in Alabama was part of a concerted effort to ruin him. Insulted, an Alabama official filed a libel suit against the newspaper. Under Alabama law, which did not require that persons claiming libel have to show harm, the official won a judgment. The *New York Times* appealed to the Supreme Court, arguing that the ruling violated its First Amendment right to free speech. In a unanimous decision, the court declared that the First Amendment protects even false statements by the press, as long as those statements are not made with actual malice.

***Obergefell v. Hodges*, 576 U.S. ____ (2015).** This case concerned groups of same-sex couples who brought suits against a number of states and relevant agencies that refused to recognize same-sex marriages created in states where such marriages were legal. In the 5–4 decision, the court found that not only did the Fourteenth

Amendment provision for equal protection under the law require that states recognize same-sex marriages formed in other states, but that no state could deny marriage licenses to same-sex couples if they also issued them to other types of couples.

Plessy v. Ferguson, 163 U.S. 537 (1896). When Homer Plessy, a man of mixed racial heritage, sat in a whites-only railroad car in an attempt to challenge a Louisiana law that required railroad cars be segregated, he was arrested and convicted. Appealing his conviction to the Supreme Court, he argued that the segregation law was a violation of the principle of equal protection under the law in the Fourteenth Amendment. In a 7-1 decision, the court disagreed, indicating that the law was not a violation of the equal protection principle because the different train cars were separate but equal. Plessy v. Ferguson's "separate but equal" remained a guiding principle of segregation until *Brown v. Board of Education* (1954).

Roe v. Wade, 410 U.S. 113 (1973). This case involved a pregnant woman from Texas who desired to terminate her pregnancy. At the time, Texas only allowed abortions in cases where the woman's life was in danger. Using the pseudonym "Jane Roe," the woman appealed to the Supreme Court, arguing that the Constitution provides women the right to terminate an abortion. The 7-2 decision in *Roe v. Wade* sided with the plaintiff and declared that the right to privacy upheld in the decision in *Griswold v. Connecticut* (1965) included a woman's right to an abortion. In balancing the rights of the woman with the interests of the states to protect human life, the court created a trimester framework. In the first trimester, a pregnant woman could seek an abortion without restriction. In the second and third trimesters, however, the court asserted that states had an interest in regulating abortions, provided that those regulations were based on health needs.

Schechter Poultry Corp. v. United States. See **A. L. A. Schechter Poultry Corp. v. United States.**

Shelby County v. Holder, 570 U.S. ____ (2013). After decades in which African Americans encountered obstacles to voting, particularly in southern states, Congress passed the Voting Rights

Act of 1965. Among other things, the law prohibited certain congressional districts from changing election laws without federal authorization. In 2010, Shelby County in Alabama brought a suit against the U.S. attorney general, claiming that both section five of the act, which required districts to seek preapproval, and section four, which determined which districts had to seek preapproval, were unconstitutional. In a 5–4 decision, the court found that both sections violated the Tenth Amendment.

United States v. Windsor, 570 U.S. ___ (2013). When Thea Clara Spyer died in 2009, she left her estate to her wife, Edith Windsor, with whom she had been legally married in Canada years before. Because of a 1996 U.S. law called the Defense of Marriage Act (DOMA), this marriage was not recognized by the federal government. As a result, Windsor was compelled to pay an enormous tax on the inheritance, which she would not have had to pay had the federal government recognized the marriage. Appealing to the Supreme Court, Windsor argued that DOMA was unconstitutional because it deprives same-sex couples of their Fifth Amendment right to equal protection. In the 5–4 decision, the court agreed with Windsor, stating that DOMA was intended to treat certain married couples differently in blatant violation of their Fifth Amendment rights.

98. U. S. Department of Justice Legal Terms Glossary

A

acquittal – Judgment that a criminal defendant has not been proven guilty beyond a reasonable doubt.

affidavit – A written statement of facts confirmed by the oath of the party making it. Affidavits must be notarized or administered by an officer of the court with such authority.

affirmed – Judgment by appellate courts where the decree or order is declared valid and will stand as decided in the lower court.

Alford plea – A defendant's plea that allows him to assert his innocence but allows the court to sentence the defendant without conducting a trial. Essentially, the defendant is admitting that the evidence is sufficient to show guilt. Such a plea is often made for purposes of negotiating a deal with the prosecutor for lesser charges or a sentence.

allegation – Something that someone says happened.

answer – The formal written statement by a defendant responding to a civil complaint and setting forth the grounds for defense.

appeal – A request made after a trial, asking another court (usually the court of appeals) to decide whether the trial was conducted properly. To make such a request is “to appeal” or “to take an appeal.” Both the plaintiff and the defendant can appeal, and the party doing so is called the appellant. Appeals can be made for a variety of reasons including improper procedure and asking the court to change its interpretation of the law.

appellate – About appeals; an appellate court has the power to review the judgment of another lower court or tribunal.

arraignment – A proceeding in which an individual who is accused of committing a crime is brought into court, told of the charges, and asked to plead guilty or not guilty.

arrest warrant – A written order directing the arrest of a party. Arrest warrants are issued by a judge after a showing of probable cause.

B

bail – Security given for the release of a criminal defendant or witness from legal custody (usually in the form of money) to secure his/her appearance on the day and time appointed.

bankruptcy – Refers to statutes and judicial proceedings involving persons or businesses that cannot pay their debts and seek the assistance of the court in getting a fresh start. Under the protection of the bankruptcy court, debtors may discharge their debts, perhaps by paying a portion of each debt. Bankruptcy judges preside over these proceedings.

bench trial – Trial without a jury in which a judge decides the facts. In a jury trial, the jury decides the facts. Defendants will occasionally waive the right to a jury trial and choose to have a bench trial.

beyond a reasonable doubt – Standard required to convict a criminal defendant of a crime. The prosecution must prove the guilt so that there is no reasonable doubt to the jury that the defendant is guilty.

binding precedent – A prior decision by a court that must be followed without a compelling reason or significantly different facts or issues. Courts are often bound by the decisions of appellate courts with authority to review their decisions. For example, district courts are bound by the decisions of the court of appeals that can

review their cases, and all courts – both state and federal – are bound by the decisions of the Supreme Court of the United States.

brief – A written statement submitted by the lawyer for each side in a case that explains to the judge(s) why they should decide the case (or a particular part of a case) in favor of that lawyer's client.

C

capital offense – A crime punishable by death. In the federal system, it applies to crimes such as first degree murder, genocide, and treason.

case law – The use of court decisions to determine how other law (such as statutes) should apply in a given situation. For example, a trial court may use a prior decision from the Supreme Court that has similar issues.

chambers – A judge's office.

charge – The law that the police believe the defendant has broken.

charge to the jury – The judge's instructions to the jury concerning the law that applies to the facts of the case on trial.

chief judge – The judge who has primary responsibility for the administration of a court. The chief judge also decides cases, and the choice of chief judges is determined by seniority.

circumstantial evidence – All evidence that is not direct evidence (such as eyewitness testimony).

clerk of court – An officer appointed by the court to work with the chief judge in overseeing the court's administration, especially to assist in managing the flow of cases through the court and to maintain court records.

common law – The legal system that originated in England and is now in use in the United States. It is based on court decisions rather than statutes passed by the legislature.

complaint – A written statement by the plaintiff stating the wrongs allegedly committed by the defendant.

continuance – Decision by a judge to postpone trial until a later date.

contract – An agreement between two or more persons that creates an obligation to do or not to do a particular thing.

conviction – A judgment of guilt against a criminal defendant.

counsel – Legal advice; a term used to refer to lawyers in a case.

counterclaim – A claim that a defendant makes against a plaintiff. Counterclaims can often be brought within the same proceedings as the plaintiff's claims.

court – Government entity authorized to resolve legal disputes. Judges sometimes use “court” to refer to themselves in the third person, as in “the court has read the briefs.”

court reporter – A person who makes a word-for-word record of what is said in court and produces a transcript of the proceedings upon request.

cross-examine – Questioning of a witness by the attorney for the other side.

D

damages – Money paid by defendants to successful plaintiffs in civil cases to compensate the plaintiffs for their injuries.

default judgment – A judgment rendered because of the defendant's failure to answer or appear.

defendant – In a civil suit, the person complained against; in a criminal case, the person accused of the crime.

defense table – The table where the defense lawyer sits with the defendant in the courtroom.

deposition – An oral statement made before an officer authorized by law to administer oaths. Such statements are often taken to examine potential witnesses, to obtain discovery, or to be used later in trial.

direct evidence – Evidence that supports a fact without an inference.

discovery – Lawyers' examination, before trial, of facts and documents in possession of the opponents to help the lawyers prepare for trial.

docket – A log containing brief entries of court proceedings.

E

en banc – “In the bench” or “full bench.” Refers to court sessions with the entire membership of a court participating, rather than the usual quorum. U.S. courts of appeals usually sit in panels of three judges, but may expand to a larger number in certain cases they deem important enough to be decided by the entire court. They are then said to be sitting en banc.

evidence – Information presented in testimony or in documents that is used to persuade the fact finder (judge or jury) to decide the case for one side or the other.

exculpatory evidence – Evidence which tends to show the defendant's innocence.

F

federal question – Jurisdiction given to federal courts in cases involving the interpretation and application of the U.S. Constitution, acts of Congress, and treaties. In some cases, state courts can decide these issues, too, but the cases can always be brought in federal courts.

felony – A crime carrying a penalty of more than a year in prison.

file – To place a paper in the official custody of the clerk of court

to enter into the files or records of a case. Lawyers must file a variety of documents throughout the life of a case.

G

grand jury – A body of citizens who listen to evidence of criminal allegations, which are presented by the government, and determines whether there is probable cause to believe the offense was committed. As it is used in federal criminal cases, “the government” refers to the lawyers of the U.S. Attorney’s office who are prosecuting the case. Grand jury proceedings are closed to the public, and the person suspected of having committed the crime is not entitled to be present or have an attorney present. States are not required to use grand juries, but the federal government must do so under the Constitution.

H

habeas corpus – A writ that is often used to bring a prisoner before the court to determine the legality of his imprisonment. A prisoner wanting to argue that there is not sufficient cause to be imprisoned would file a writ of habeas corpus. It may also be used to bring a person in custody before the court to give testimony, or to be prosecuted.

hearsay – Statements by a witness who did not see or hear the incident in question but learned about it through secondhand information such as another’s statement, a newspaper, or a document. Hearsay is usually not admissible as evidence in court, but there are many exceptions to that rule.

I

impeachment – (1) The process of calling something into question, as in “impeaching the testimony of a witness.” (2) The constitutional process whereby the House of Representatives may “impeach” (accuse of misconduct) high officers of the federal government for trial in the Senate.

inculpatory evidence – Evidence which tends to show the defendant’s guilt.

indictment – The formal charge issued by a grand jury stating that there is enough evidence that the defendant committed the crime to justify having a trial; it is used primarily for felonies.

in forma pauperis – In the manner of a pauper. Permission given to a person to sue without payment of court fees on claim of indigence or poverty.

information – A formal accusation by a government attorney that the defendant committed a misdemeanor.

initial hearing – Court proceeding in which the defendant learns of his rights and the charges against him and the judge decides bail.

injunction – An order of the court prohibiting (or compelling) the performance of a specific act to prevent irreparable damage or injury.

interrogatories – Written questions asked to one party by an opposing party, who must answer them in writing under oath. Interrogatories are a part of discovery in a lawsuit.

interview – A meeting with the police or prosecutor.

issue – (1) The disputed point in a disagreement between parties in a lawsuit. (2) To send out officially, as in to issue an order.

J

judge – Government official with authority to decide lawsuits

brought before courts. Judicial officers of the Supreme Court and the highest court in each state are called justices.

judgment – The official decision of a court finally determining the respective rights and claims of the parties to a suit.

jurisdiction – (1) The legal authority of a court to hear and decide a case. Concurrent jurisdiction exists when two courts have simultaneous responsibility for the same case. Some issues can be heard in both state and federal courts. The plaintiff initially decides where to bring the suit, but in some cases, the defendant can seek to change the court. (2) The geographic area over which the court has authority to decide cases. A federal court in one state, for example, can usually only decide a case that arose from actions in that state.

juror – A person who is on the jury.

jury – Persons selected according to law and sworn to inquire into and declare a verdict on matters of fact. State court juries can be as small as six jurors in some cases. Federal juries for civil suits must have six jurors criminal suits must have twelve.

jury instructions – A judge's explanation to the jury before it begins deliberations of the questions it must answer and the law governing the case. Each party suggests jury instructions to the judge, but the judge chooses the final wording.

jury pool – The group of people from which the actual jury is chosen. The jury pool is randomly selected from a source such as voter registration banks. Lawyers in the case choose the actual jurors from the jury pool through a process called voir dire.

jurisprudence – The study of law and the structure of the legal system.

L

lawsuit – A legal action started by a plaintiff against a defendant based on a complaint that the defendant failed to perform a legal duty, resulting in harm to the plaintiff.

law clerk (or staff attorney) – Assist judges with research and drafting of opinions.

librarian – Meets the informational needs of the judges and lawyers.

litigation – A case, controversy, or lawsuit. Participants (plaintiffs and defendants) in lawsuits are called litigants.

M

magistrate judges – Judicial officers who assist U.S. district court judges in getting cases ready for trial. They may decide some criminal and civil trials when both parties agree to have the case heard by a magistrate judge instead of a district court judge.

misdemeanor – Usually a petty offense, a less serious crime than a felony, punishable by less than a year of confinement.

mistrial – An invalid trial caused by fundamental error. When a mistrial is declared, the trial must start again, beginning with the selection of a new jury.

motion – Attempt to have a limited issue heard by the court. Motions can be filed before, during, and after trial.

N

nolo contendere – No contest. Has the same effect as a plea of guilty as far as the criminal sentence is concerned, but the plea may not be considered an admission of guilt for any other purpose. Sometimes, a guilty plea could later be used to show fault in a lawsuit, but the plea of nolo contendere forces the plaintiff in the lawsuit to prove that the defendant committed the crime.

O

oath – A promise to tell the truth.

objection – A protest by an attorney, challenging a statement or question made at trial. Common objections include an attorney “leading the witness” or a witness making a statement that is hearsay. Once an objection is made, the judge must decide whether to allow the question or statement.

opinion – A judge’s written explanation of a decision of the court. In an appeal, multiple opinions may be written. The court’s ruling comes from a majority of judges and forms the majority opinion. A dissenting opinion disagrees with the majority because of the reasoning and/or the principles of law on which the decision is based. A concurring opinion agrees with the end result of the court but offers further comment possibly because they disagree with how the court reached its conclusion.

oral argument – An opportunity for lawyers to summarize their position before the court in an appeal and also to answer the judges’ questions.

P

panel – (1) In appellate cases, a group of judges (usually three) assigned to decide the case; (2) In the jury selection process, the group of potential jurors.

parties – Plaintiffs and defendants (petitioners and respondents) to lawsuits, also known as appellants and appellees in appeals, and their lawyers.

petit jury (or trial jury) – A group of citizens who hear the evidence presented by both sides at trial and determine the facts in dispute. Federal criminal juries consist of 12 persons. Federal civil juries consist of six persons.

plaintiff – The person who files the complaint in a civil lawsuit.

plea – In a criminal case, the defendant's statement pleading "guilty" or "not guilty" in answer to the charges in open court. A plea of nolo contendere or an Alford plea may also be made. A guilty plea allows the defendant to forego a trial.

plea deal (or plea bargain or agreement) – Agreement between the defendant and prosecutor where the defendant pleads guilty in exchange for a concession by the prosecutor. It may include lesser charges, a dismissal of charges, or the prosecutor's recommendation to the judge of a more lenient sentence.

pleadings – Written statements of the parties in a civil case of their positions. In federal courts, the principal pleadings are the complaint and the answer.

precedent – A court decision in an earlier case with facts and law similar to a dispute currently before a court. Precedent will ordinarily govern the decision of a later similar case, unless a party can show that it was wrongly decided or that it differed in some significant way. Some precedent is binding, meaning that it must be followed. Other precedents need not be followed by the court but can be considered influential.

procedure – The rules for the conduct of a lawsuit; there are rules of civil, criminal, evidence, bankruptcy, and appellate procedure.

preliminary hearing – A hearing where the judge decides whether there is enough evidence to require the defendant to go to trial. Preliminary hearings do not require the same rules as trials. For example, hearsay is often admissible during the preliminary hearing but not at trial.

pretrial conference – A meeting of the judge and lawyers to discuss which matters should be presented to the jury, to review evidence and witnesses, to set a timetable, and to discuss the settlement of the case.

probable cause – An amount of suspicion leading one to believe certain facts are probably true. The Fourth Amendment requires probable cause for the issuance of an arrest or search warrant.

probation – A sentencing alternative to imprisonment in which

the court releases convicted defendants under supervision as long as certain conditions are observed.

probation officers (or pretrial services officers) – Screen applicants for pretrial release and monitor convicted offenders released under court supervision.

pro se – A Latin term meaning “on one’s own behalf”; in courts, it refers to persons who present their own cases without lawyers.

prosecute – To charge someone with a crime. A prosecutor tries a criminal case on behalf of the government.

public defenders – Represent defendants who can’t afford an attorney in criminal matters.

R

record – A written account of all the acts and proceedings in a lawsuit.

remand – When an appellate court sends a case back to a lower court for further proceedings. The lower court is often required to do something differently, but that does not always mean the court’s final decision will change

reporter – Makes a record of court proceedings, prepares a transcript, and publishes the court’s opinions or decisions.

reverse – When an appellate court sets aside the decision of a lower court because of an error. A reversal is often followed by a remand. For example, if the defendant argued on appeal that certain evidence should not have been used at trial, and the appeals court agrees, the case will be remanded in order for the trial court to reconsider the case without that evidence.

S

search warrant – Orders that a specific location be searched for items, which if found, can be used in court as evidence. Search warrants require probable cause in order to be issued.

sentence – The punishment ordered by a court for a defendant convicted of a crime. Federal courts look to the United States Sentencing Commission Guidelines when deciding the proper punishment for a given crime.

service of process – The service of writs or summonses to the appropriate party.

settlement – Parties to a lawsuit resolve their difference without having a trial. Settlements often involve the payment of compensation by one party in satisfaction of the other party's claims.

sequester – To separate. Sometimes juries are sequestered from outside influences during their deliberations.

sidebar – A conference between the judge and lawyers held out of earshot of the jury and spectators.

statement – A description that a witness gives to the police and that the police write down.

statute – A law passed by a legislature.

statute of limitations – A law that sets the time within which parties must take action to enforce their rights.

subpoena – A command to a witness to appear and give testimony.

subpoena duces tecum – A command to a witness to produce documents.

summary judgment – A decision made on the basis of statements and evidence presented for the record without a trial. It is used when there is no dispute as to the facts of the case, and one party is entitled to judgment as a matter of law.

T

temporary restraining order – Prohibits a person from an action that is likely to cause irreparable harm. This differs from an injunction in that it may be granted immediately, without notice to the opposing party, and without a hearing. It is intended to last only until a hearing can be held.

testify – Answer questions in court.

testimony – Evidence presented orally by witnesses during trials or before grand juries.

tort – A civil wrong or breach of a duty to another person as outlined by law. A very common tort is negligent operation of a motor vehicle that results in property damage and personal injury in an automobile accident.

transcript – A written, word-for-word record of what was said, either in a proceeding such as a trial or during some other conversation.

trial – A hearing that takes place when the defendant pleads “not guilty,” and the parties are required to come to court to present evidence.

U

uphold – The decision of an appellate court not to reverse a lower court decision. Also called “affirm.”

U.S. Attorney (or federal prosecutor) – A lawyer appointed by the President in each judicial district to prosecute and defend cases for the federal government.

U.S. Marshal (or bailiff) – enforce the rules of behavior in courtrooms.

V

venue – The geographical location in which a case is tried.

verdict – The decision of a petit jury or a judge.

victim advocate – work with prosecutors and assist the victims of a crime.

voir dire – The process by which judges and lawyers select a petit jury from among those eligible to serve by questioning them to determine knowledge of the facts of the case and a willingness to decide the case only on the evidence presented in court. “Voir dire” is a phrase meaning “to speak the truth.”

W

warrant – An arrest warrant is a written order directing the arrest of a party. A search warrant orders that a specific location be searched for items, which if found, can be used in court as evidence. Search warrants require probable cause in order to be issued.

witness – A person called upon by either side in a lawsuit to give testimony before the court or jury.

writ – A formal written command, issued from the court, requiring the performance of a specific act.

writ of certiorari – An order issued by the Supreme Court directing the lower court to transmit records for a case for which it will hear on appeal. The Supreme Court is usually not required to hear appeals of cases. A denial of “cert” by the Supreme Court allows the previous ruling to stand.