

American Government

American Government

*FLORIDA STATE COLLEGE AT
JACKSONVILLE*



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PART I

MODULE 1: POLITICS AND GOVERNMENT

I. Module Introduction

Politics and Government

Module Introduction

Topics Covered

- Politics versus Government
- American Democracy
- Citizen Democracy

The terms “politics” and “government” are often used interchangeably in American polity; yet, the two words are remarkably distinct from one another. ⁽¹⁾ “Politics,” as Harry Lasswell so artlessly defined, concerns itself with “who gets what, when, and how.” ⁽⁷⁸⁾ This simple approach to public policy finds its roots in the idea that, in any society, resources are scarce at best. Such scarcity, then, is the primary purpose behind the formation of governments.

Government serves as the conduit for the distribution of common goods. As such, many seek to influence and control it. To this end, “government;” that is, institutions—Executive Branch, Legislative Branch, Judicial Branch, the Media, etc.—exist to maintain order in an otherwise “state of nature,” wherein lawlessness abounds. Thus, the absence of government necessitates the very presence thereof. ⁽¹⁾ Thomas Hobbes advocated this view in the classical piece, *Leviathan* (1651) in which he casts government—in particular, the reigning British Monarch of the day—as a benevolent order, working to save the people from themselves. ⁽⁸⁰⁾ John Locke (1689)

would later go on to challenge Hobbes' position in his Second Treatise of Government. Denouncing the absolutism of the monarch, Locke would revolutionize the political doctrine of the day with the notion of popular sovereignty. While recognizing the sovereignty of the monarch, Locke, likewise, acknowledged the autonomy of the people to have a say in the governance of themselves.⁽⁷⁹⁾

Locke's concept of citizen democracy would go to become the most prevailing influence on American political thought. The "will of the people" is enshrined in American democracy and is captured in our republican form of government. Overall, America's political landscape is comprised of a system wherein sovereignty is divided between the people, the states, and the national government. This is the essence of American Federal Government.⁽¹⁾

Reference

Saylor Academy. (2016). *Introduction to Political Science: Unit 1, Foundational Concept of Political Science*. Retrieved from <https://learn.saylor.org/course/view.php?id=46§ionid=470> on December 18, 2017

Locke, John. (1689). *John Locke, "Of Civil Government" (The Second Treatise of Government)*. Retrieved from <http://www.oercommons.org/courses/of-civil-government-the-second-treatise-of-government/view> on December 18, 2017

Hobbes, Thomas. (1651). *Leviathan (Book I and II)*. Retrieved from https://archive.org/details/leviathan_1_2_0802_librivox on December 18, 2017

Learning Outcomes

1. Students will be able to articulate an understanding of the individual in society.
2. Students will be able to think critically about institutions, cultures, and behaviors in their local and/or national environment.
3. Students will be able to think critically about institutions, cultures, and behaviors of the peoples of the world.
4. Students will develop a historical context for understanding current issues and events.
5. Students will develop a greater understanding of world events.

Objectives

Upon completion of this module, the student will be able to:

- Explain what government is and its role in society.
- Identify the type of government the U.S. has.
- Compare the U.S. government with other forms of government.
- Explain democracy as the standard by which American government and politics can be evaluated.
- Explain the role of citizen engagement in democratic institutions. ⁽¹⁾

Readings & Resources:

- [American Government](#) textbook by OpenStax
- [What is Government?](#) from OpenStax
- [Who Governs? Elitism, Pluralism, and Tradeoffs](#) from OpenStax

- [Engagement in a Democracy](#) from OpenStax

Supplemental Material/Resources

(Note: This material, in the media form of online videos, is considered supplemental and thus is not used for assessment purposes.)

- Reading: [Remember that study saying America is an oligarchy? 3 rebuttals say its wrong](#) by Dylan Mathews
- Reading: [The Citizens United Era of Money in Politics](#) from Lumen Learning

Assignments & Learning Activities

- Read the syllabus
- Review Readings & Resources
- Review Module 1 Learning Unit
- Participate in Greetings & Introductions
- Participate in Module 1 Discussion
- Take Quiz 1

2. Lecture Content

Lecture Content

Learning Unit 1

Politics and Government Learning Unit

American Democracy: Majority Rule

The word democracy does not appear in any of America's founding documents. For good reason, democracy, while championing popular rule, more oft than not, lends itself to tyranny and, in some cases, eventual demise⁽¹⁾. To this end, John Adams said that "remember, democracy never lasts long. It soon wastes, exhausts, and murders itself. There never was a democracy yet that did not commit suicide."⁽⁵⁾ Thus, being conscious of this tendency, the Framers constructed a republican form of government wherein the sole purpose of its existence was — and remains — to protect the rights of its citizens.

However, this limited form of government naturally conflicts with the predominate theme of democracy; that is, majority rule. This decision-making tool functions as the ultimate power behind democracy wherein the people rule outright or through elected officials. In either case, therein lies the propensity for minority rights to be overshadowed — and overruled — by the popular masses.

Concerned with this inclination toward mob rule, the Framers attempted to address this concern in a number of ways:

- The establishment of a bicameral legislature wherein power is diffused across two chambers rather than concentrated in one single entity.
- Presidential veto power over the 535 members of Congress.
- Election of the President via the Electoral College rather than by a majority/popular vote.

Notwithstanding, even in light of such provisions, American democracy has been plagued with egregious violations of majority rule.⁽¹⁾

Minority Rights

Nowhere in American society has majority rule been so prevalent than in the realm of minority rights. The term “minority” takes many forms, from race and ethnicity to gender, sexuality, religion, etc. With this in mind, note the following:

Segregation By “Popular” Demand

The plight of Black America is, by far, one of the most recognized perils of majority rule in American polity. State laws, by popular majority rule, in many jurisdictions sanctioned and blessed the notion of racial segregation. Even with the passage of the Civil War Amendments, white majority rule triumphed in America, specifically in the Southeastern half of the nation, as a “*democratically*” acceptable form of oppression. It would take a valiant effort by many

to launch the Civil Rights Movement of the 1950s and 60s to secure the blessing of liberty for African-Americans in the United States. ⁽¹⁾



[Color](#) by John Vachon is in [Public Domain](#).



[Lyndon B. Johnson signs the Civil Rights Act of 1964](#) by Cecil Stoughton, White House Press Office (WHPO) is in the [Public Domain](#).

Faith and Democracy

The historicity of American polity chronicles majority rule in religious matters. We see this phenomenon very early on during colonial times where state-sponsored religion was pervasive. For instance, Massachusetts state laid claim to the Anglican faith while the state of Connecticut expressed firm belief in the Christian Congregational Church. This trend would continue through the mid-to-late 19th century, only becoming null and void with the passage of the Fourteenth Amendment, which nixed discriminating state laws. Notwithstanding, even with the end of mandated religion, the legacy of this early endorsement would ensure that some faiths would be marginalized over others in times to come.

The Christian Congregation of Jehovah's Witnesses speaks well to such alienation. Formally organized in the 1870s, members of this faith have faced substantial challenges under democratic, majority rule. In particular, their very unique beliefs place them at odds with conventional Christian theology. For instance, their faith forbids them from taking "ungodly" oaths such as America's Pledge of Allegiance. While less controversial today, their refusal of such during the early part of the 20th century, amid two World Wars, was far more complicated and costly then. Indeed, for such resistance — unpatriotic resistance as it was deemed — children of Jehovah's Witnesses were often expelled from school. ⁽¹⁾

The initial democratic challenge to this obstacle came in the form of [*Minersville v. Gobitis* \(1940\)](#) wherein the Supreme Court's inequitable opinion upheld the mandatory flag salute. Be sure to review [*Minersville v. Gobitis* \(1940\)](#).⁽⁶⁾

Notwithstanding, members of the faith would continue to oppose such tyranny, and in 1943, the Supreme Court reversed its opinion with [*West Virginia Board of Education v. Barnette*](#). Be sure to review [*West Virginia Board of Education v. Barnette*](#).⁽⁵⁾

It is important to note that the basis of the Court's ruling, here, emanated from the First Amendment, as "The Court found that such a salute was a form of utterance [speech] and was a means of communicating ideas" (*West Virginia Board of Education v. Barnette*, 1943). However, the implications for religious liberty vis-à-vis majority rule were huge; that is, no longer could minority religious rights be trampled by the majority's 50 percent plus one rule. Thus, whether one be Catholic, Baptist, Atheist, and/or etc., the right to freely practice can be traced back to this one group, the Christian Congregation of Jehovah's Witnesses.⁽¹⁾



[Students pledging to the flag with the Bellamy salute](#) is in

the [Public Domain](#).

3. Reading: What is Government?

Learning outcomes

By the end of this section, you will be able to:

- Explain what government is and what it does
- Identify the type of government in the United States and compare it to other forms of government

Government affects all aspects of people's lives. 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 are all affected by government. Americans are often unaware of the pervasiveness of government in their everyday lives, and many are unsure precisely what it does. Here we will look at what government is, what it does, and how the government of the United States differs from other kinds of governments.

DEFINING GOVERNMENT

The term government describes the means by which a society organizes itself and allocates authority in order to accomplish collective goals and provide benefits that the society as a whole needs. Among the goals that governments around the world seek to accomplish are economic prosperity for the nation, secure national

borders, and the safety and well-being of citizens. Governments also provide benefits for their citizens. The type of benefits provided differ according to the country and their specific type of governmental system, but governments commonly provide such things as education, health care, and an infrastructure for transportation. The term politics refers to the process of gaining and exercising control within a government for the purpose of setting and achieving particular goals, especially those related to the division of resources within a nation.

Sometimes governmental systems are confused with economic systems. This is because certain types of political thought or governmental organization are closely related to or develop with certain types of economic systems. For example, the economic system of capitalism in Western Europe and North America developed at roughly the same time as ideas about democratic republics, self-government, and natural rights. At this time, the idea of liberty became an important concept. According to John Locke, an English political philosopher of the seventeenth century, all people have natural rights to life, liberty, and property. From this came the idea that people should be free to consent to being governed. In the eighteenth century, in Great Britain's North American colonies, and later in France, this developed into the idea that people should govern themselves through elected representatives and not a king; only those representatives chosen by the people had the right to make laws to govern them.

Similarly, Adam Smith, a Scottish philosopher who was born nineteen years after Locke's death, believed that all people should be free to acquire property in any way that they wished. Instead of being controlled by government, business, and industry, Smith argued, people should be allowed to operate as they wish and keep the proceeds of their work. Competition would ensure that prices remained low and faulty goods disappeared from the market. In this way, businesses would reap profits, consumers would have their needs satisfied, and society as a whole would prosper. Smith discussed these ideas, which formed the basis for industrial

capitalism, in his book *The Wealth of Nations*, which was published in 1776, the same year that the Declaration of Independence was written.

Representative government and capitalism developed together in the United States, and many Americans tend to equate democracy, a political system in which people govern themselves, with capitalism. In theory, a democratic government promotes individualism and the freedom to act as one chooses instead of being controlled, for good or bad, by government. Capitalism, in turn, relies on individualism. At the same time, successful capitalists prefer political systems over which they can exert at least some influence in order to maintain their liberty.

Democracy and capitalism do not have to go hand in hand, however. Indeed, one might argue that a capitalist economic system might be bad for democracy in some respects. Although Smith theorized that capitalism would lead to prosperity for all, this has not necessarily been the case. Great gaps in wealth between the owners of major businesses, industries, and financial institutions and those who work for others in exchange for wages exist in many capitalist nations. In turn, great wealth may give a very small minority great influence over the government—a greater influence than that held by the majority of the population, which will be discussed later.

Socialism is an alternative economic system. In socialist societies, the means of generating wealth, such as factories, large farms, and banks, are owned by the government and not by private individuals. The government accumulates wealth and then redistributes it to citizens, primarily in the form of social programs that provide such things as free or inexpensive health care, education, and childcare. In socialist countries, the government also usually owns and controls utilities such as electricity, transportation systems like airlines and railroads, and telecommunications systems. In many socialist countries the government is an oligarchy: only members of a certain political party or ruling elite can participate in government. For example, in China, the government is run by

members of the Chinese Communist Party. However, socialist countries can have democratic forms of government as well, such as Sweden. Although many Americans associate socialism with tyranny and a loss of individual liberties, this does not have to be the case, as we see in Sweden.

In the United States, the democratic government works closely together with its capitalist economic system. The interconnectedness of the two affects the way in which goods and services are distributed. The market provides many goods and services needed by Americans. For example, food, clothing, and housing are provided in ample supply by private businesses that earn a profit in return. These goods and services are known as private goods.

[Paul A. Samuelson. 1954. "The Pure Theory of Public Expenditure," *Review of Economics and Statistics* 36, No. 4: 387–389.](#)

People can purchase what they need in the quantity in which they need it. This, of course, is the ideal. In reality, those who live in poverty cannot always afford to buy ample food and clothing to meet their needs, or the food and clothing that they can afford to buy in abundance is of inferior quality. Also, it is often difficult to find adequate housing; housing in the most desirable neighborhoods—those that have low crime rates and good schools—is often too expensive for poor or working-class (and sometimes middle-class) people to buy or rent.

Thus, the market cannot provide everything (in enough quantity or at low enough costs) in order to meet everyone's needs. Therefore, some goods are provided by the government. Such goods or services that are available to all without charge are called public goods. Two such public goods are national security and education. It is difficult to see how a private business could protect the United States from attack. How could it build its own armies and create plans for defense and attack? Who would pay the men and women who served? Where would the intelligence come from? Due to its ability to tax, draw upon the resources of an entire nation, and

compel citizen compliance, only government is capable of protecting the nation.

Similarly, public schools provide education for all children in the United States. Children of all religions, races and ethnicities, socioeconomic classes, and levels of academic ability can attend public schools free of charge from kindergarten through the twelfth grade. It would be impossible for private schools to provide an education for all of the nation's children. Private schools do provide some education in the United States; however, they charge tuition, and only those parents who can afford to pay their fees (or whose children gain a scholarship) can attend these institutions. Some schools charge very high tuition, the equivalent to the tuition at a private college. If private schools were the only educational institutions, most poor and working-class children and many middle-class children would be uneducated. Private schooling is a type of good called a toll good. Toll goods are available to many people, and many people can make use of them, but only if they can pay the price. They occupy a middle ground between public and private goods. All parents may send their children to public schools in the United States. They can choose to send their children to a private school, but the private school will charge them. On the other hand, public schools, which are operated by the government, provide free education so all children can attend school. Therefore, everyone in the nation benefits from the educated voters and workers produced by the public school system. Another distinction between public and private goods is that public goods are available to all, typically without additional charge.

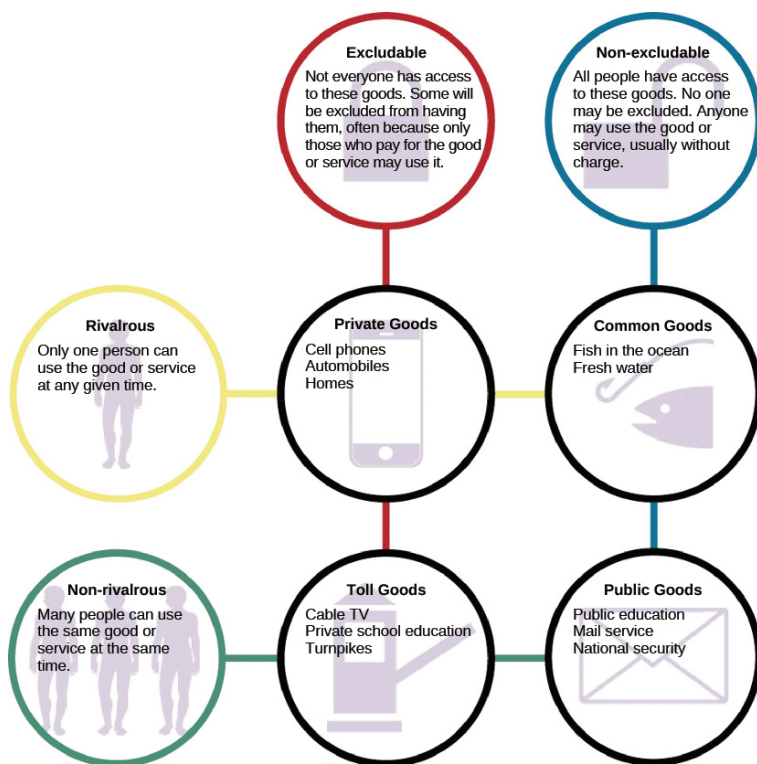
What other public goods does government provide in the United States? At the federal, state, and local level, government provides stability and security, not only in the form of a military but also in the form of police and fire departments. Government provides other valuable goods and services such as public education, public transportation, mail service, and food, housing, and health care for the poor ([Figure](#)). 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.



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 that 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. Some examples of common goods, private goods, public goods, and toll goods are listed below ([Figure](#)).



Source: John L. Mikesell. 2014. *Fiscal Administration: Analysis and Applications for the Public Sector*, 9th ed. Boston: Wadsworth.

One can distinguish between different types of goods by considering who has access to the goods (excludable/non-excludable) and how many people can access the good at the same time (rivalrous/non-rivalrous).

John L. Mikesell. 2014. *Fiscal Administration: Analysis and Applications for the Public Sector*, 9th ed. Boston: Wadsworth.



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

FISHING REGULATIONS

One of the many important things government does is regulate public access to common goods like natural resources. Unlike public goods, which all people may use without charge, common goods are in limited supply. If more public schools are needed, the government can build more. If more firefighters or mail carriers are needed, the government can hire them. 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.

Fish are one of the many common goods in which the government currently regulates access. It does so to ensure that certain species are not fished into extinction, thus depriving future generations of an important food source and a means to make a living. This idea is known as sustainability. Environmentalists want to set strict fishing limits on a variety of species. Commercial fishers resist these limits, claiming they are unnecessary and, if enforced, would drive them out of business ([Figure](#)). Currently, fishing limits are set by a combination of scientists, politicians, local resource managers, and groups representing the interests of fishers.

[Juliet Elperin, "U.S. Tightens Fishing Policy, Setting 2012 Catch Limits for All Mandated Species," *Washington Post*, 8 January 2012.](#)



Fishing provides income, as well as food, for many Americans. However, without government restrictions on the kinds and number of fish that can be caught, the fish population would decline and certain species could become extinct. This would ultimately lead to the loss of jobs and income as well as a valuable source of nourishment. (credit: Michael L. Baird)

Should the government regulate fishing? Is it right to interfere with people's ability to earn money today in order to protect the access of future generations to the nation's common goods?

Besides providing stability and goods and services for all, government also creates a structure by which goods and services can be made available to the people. In the United States, people elect representatives to city councils, state legislatures, and Congress. These bodies make laws to govern their respective jurisdictions. They also pass measures to raise money, through the imposition of taxes on such things as income, property, and sales. Local, state, and national governments also draft budgets to determine how the revenue taken in will be spent for services. On the local level, funds are allotted for education, police and fire departments, and maintenance of public parks. State governments

allocate money for state colleges and universities, maintenance of state roads and bridges, and wildlife management, among other priorities. On the national level, money goes to such things as defense, Social Security, pensions for veterans, maintenance of federal courts and prisons, and management of national parks. At each level, representatives elected by the people try to secure funding for things that will benefit those who live in the areas they represent. Once money has been allocated, government agencies at each level then receive funds for the purposes mentioned above and use them to provide services to the public.

Local, state, and national governments also make laws to maintain order and to ensure the efficient functioning of society, including the fair operation of the business marketplace. In the United States, for example, Congress passes laws regulating banking, and government agencies regulate such things as the amount of toxic gases that can be emitted by factories, the purity of food offered for sale, and the safety of toys and automobiles. In this way, government checks the actions of business, something that it would not do if capitalism in the United States functioned strictly in the manner that Adam Smith believed it should...almost entirely unregulated.

Besides providing goods to citizens and maintaining public safety, most governments also provide a means for citizens to participate in government and to make their opinions known to those in power. Western democracies like the United States, Britain, France, and others protect citizens' freedom of speech and the press. These nations, and others in the world, also allow citizens to vote.

As noted earlier, politics is the process by which choices are made regarding how resources will be allocated and which economic and social policies government will pursue. Put more simply, politics is the process of who gets what and how. Politics involves choosing which values government will support and which it will not. 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 answer.

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.

DIFFERENT TYPES OF GOVERNMENT

The government of the United States can best be described as a republic, or representative democracy. A democracy is a government in which political power—influence over institutions, leaders, and policies—rests in the hands of the people. In a representative democracy, however, the citizens do not govern directly. Instead, they elect representatives to make decisions and pass laws on behalf of all the people. Thus, 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. For example, let's say American society decided that atheists, people who do not believe that God exists, were evil and should be imprisoned or expelled from the country. Even though atheists only account for about 7 percent of the population, they would be protected due to minority rights.

[Michael Lipka. 5 November 2015. "7 Facts about Atheists."
<http://www.pewresearch.org/fact-tank/2015/11/05/7-facts-about-atheists/>.](http://www.pewresearch.org/fact-tank/2015/11/05/7-facts-about-atheists/)

Even though the number of Americans who believe in God far outweighs the number who do not, the minority is still protected. Because decisions are made through majority rule, making your opinions known and voting for those men and women who make decisions that affect all of us are critical and influential forms of civic engagement in a representative democracy such as the United States.

In a direct democracy, unlike representative democracy, people participate directly in making government decisions. For example, 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. Although neither the federal government nor any of the state governments function as a direct democracy—the Constitution requires the national and state governments to be representative forms of government—some elements of direct democracy do exist

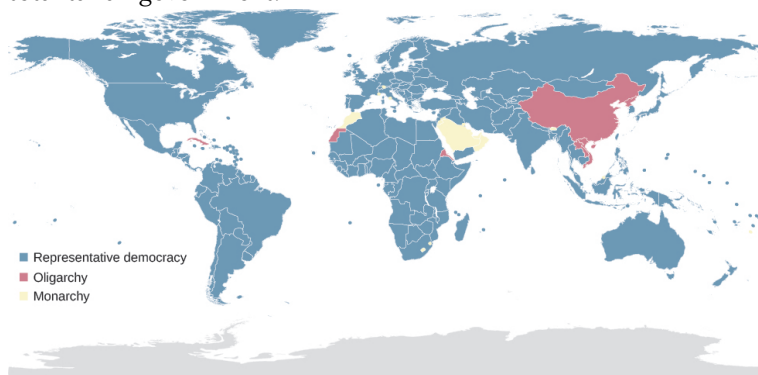
in the United States. While residents of the different states vote for people to represent them and to make laws in their behalf in the state legislatures and in Congress, people may still directly vote on certain issues. For example, a referendum or proposed law might be placed on the ballot for citizens to vote on directly during state or local elections instead of leaving the matter in the hands of the state legislature. At New England town meetings, all residents are allowed to debate decisions affecting the town ([Figure](#)). Such occasions provide additional opportunities for civic engagement.



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)

Most countries now have some form of representative government ([Figure](#)). 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 that makes laws for the country, this is not always the case. Many southwest Asian kingdoms, such as Saudi Arabia, Qatar, and the United Arab Emirates, have absolute monarchs whose power is unrestricted. As discussed earlier, another nondemocratic form of government is oligarchy, in which a handful of elite members of society, often those who belong to

a particular political party, hold all political power. For example, in Cuba, as in China, only members of the Communist Party are allowed to vote or hold public office, and the party's most important members make all government decisions. Some nondemocratic societies are totalitarian in nature. Under totalitarianism, the government is more important than the citizens, and it controls all aspects of citizens' lives. Citizens' rights are limited, and the government does not allow political criticism or opposition. These forms of government are fairly rare. North Korea is an example of a totalitarian government.



The map of the world shows the different forms of government that currently exist. Countries that are colored blue have some form of representative democracy, although the people may not have as much political power as they do in the United States. Countries that are colored red, like China, Vietnam, and Cuba, have an oligarchic form of government. Countries that are colored yellow are monarchies where the people play little part in governing.



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

Summary

Government provides stability to society, as well as many crucial services such as free public education, police and fire services, and mail delivery. It also regulates access to common goods, such as public land, for the benefit of all. Government creates a structure whereby people can make their needs and opinions known to public officials. This is one of the key factors that makes the United States a representative democracy. A country where people elect representatives to make political decisions for them depends on the ability and willingness of ordinary people to make their voices known, unlike an oligarchy dominated by only a small group of people.

What goods are available to all without direct payment?

- a. private goods
- b. public goods
- c. common goods
- d. toll goods

In which form of government does a small group of elite people hold political power?

- a. direct democracy
- b. monarchy
- c. oligarchy
- d. totalitarian

What is the difference between a representative democracy and a direct democracy?

What does government do for people?

glossary

common goods:

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

democracy:

a form of government where political power rests in the hands of the people

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:

the process by which we decide how resources will be allocated and which policies government will pursue

private goods:

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

public goods:

goods provided by government that anyone can use and that are available to all without charge

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

toll good:

a good that is available to many people but is used only by those who can pay the price to do so

totalitarianism:

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

4. Reading: Who Governs? Elitism, Pluralism, and Tradeoffs

Learning outcomes

By the end of this section, you will be able to:

- Describe the pluralism-elitism debate
- Explain the tradeoffs perspective on government

The United States allows its citizens to participate in government in many ways. The United States also has many different levels and branches of government that any citizen or group might approach. Many people take this as evidence that 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 handful of economic and political elites have any influence over government.

ELITISM VS. PLURALISM

Many Americans fear that a set of elite citizens is really in charge of government in the United States and that others have no influence. This belief is called the elite theory of government. In contrast to that perspective is the pluralist theory of government, which says

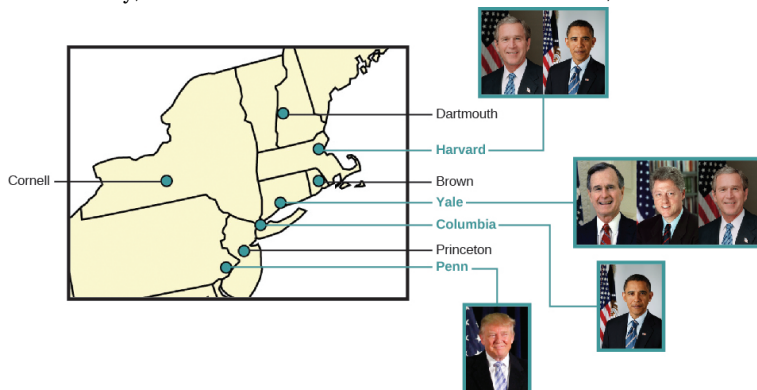
that political power rests with competing interest groups who share influence in government. Pluralist theorists assume that citizens who want to get involved in the system do so because of the great number of access points to government. That is, the U.S. system, with several levels and branches, has many places where people and groups can engage 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.

[C. Wright Mills. 1956. *The Power Elite*. New York: Oxford University Press.](#)

Most are highly educated, often graduating from prestigious universities ([Figure](#)). According to elite theory, the wealthy use their power to control the nation's economy in such a way that those below them cannot advance economically. Their wealth allows the elite to secure for themselves important positions in politics. They then use this power to make decisions and allocate resources in ways that benefit them. Politicians do the bidding of the wealthy instead of attending to the needs of ordinary people, and order is maintained by force. Indeed, 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.

Jack L. Walker. 1966. "A Critique of the Elitist Theory of Democracy," *The American Political Science Review* 60, No. 2: 295.



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

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.

[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 term is also used to connote academic excellence or social elitism.](#)

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

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

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

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/>.

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.

Manning, p. 3 (Table 2).

Approximately 80 percent of both the Senate and the House of Representatives are male, and fewer than 20 percent of members of

Congress are people of color ([Figure](#)). The nation's laws are made primarily by well-educated white male professionals and businessmen.



This official photograph of the the 114th Congress depicts the fairly uniform nature of congressional representation. Most are men, and nearly all are white. Members of Congress also tend to resemble one another in terms of income and level of education.

The makeup of Congress is important because race, sex, profession, education, and socioeconomic class have an important effect on people's political interests. For example, changes in the way taxes are levied and spent do not affect all citizens equally. A flat tax, which generally requires that everyone pay the same percentage rate, hurts the poor more than it does the rich. If the income tax rate was flat at 10 percent, all Americans would have to pay 10 percent of their income to the federal government. Someone who made \$40,000 a year would have to pay \$4,000 and be left with only \$36,000 to live on. Someone who made \$1,000,000 would have to pay \$100,000, a greater sum, but he or she would still be left with \$900,000. People who were not wealthy would probably pay more than they could comfortably afford, while the wealthy, who could

afford to pay more and still live well, would not see a real impact on their daily lives. Similarly, the allocation of revenue affects the rich and the poor differently. Giving more money to public education does not benefit the wealthy as much as it does the poor, because the wealthy are more likely than the poor to send their children to private schools or to at least have the option of doing so. However, better funded public schools have the potential to greatly improve the upward mobility of members of other socioeconomic classes who have no other option than to send their children to public schools.

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.

[Alan Rappeport, "Making it Rain: Members of Congress Are Mostly Millionaires," *New York Times*, 12 January 2016.](#)

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.

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).

Therefore, a Congress dominated by millionaires who send their children to private schools is more likely to believe that flat taxes are fair and that increased funding for public education is not a necessity. Their experience, however, does not reflect the experience of average Americans.

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.

["The Non-Governmental Order: Will NGOs Democratise, or Merely](#)

[Disrupt, Global Governance?" *The Economist*, 9 December 1999.](#)

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

Ronald J. Hrebenar. 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.

According to pluralist theory, people with shared interests will form groups in order to make their desires known to politicians. These groups include such entities as environmental advocates, unions, and organizations that represent the interests of various businesses. Because most people lack the inclination, time, or expertise necessary to decide political issues, these groups will speak for them. As groups compete with one another and find themselves in conflict regarding important issues, government policy begins to take shape. In this way, government policy is shaped from the bottom up and not from the top down, as we see 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.

[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](#) to track campaign contributions, congressional bills and committees, and interest groups and lobbyists.

THE TRADEOFFS PERSPECTIVE

Although elitists and pluralists present political influence as a tug-of-war with people at opposite ends of a rope trying to gain control of government, in reality government action and public policy are influenced by an ongoing series of tradeoffs or compromises. For instance, an action that will meet the needs of large numbers of people may not be favored by the elite members of society. Giving the elite what they want may interfere with plans to help the poor. As pluralists argue, public policy is created as a result of competition among groups. In the end, the interests of both the elite and the people likely influence government action, and compromises will often attempt to please them both.

Since the framing of the U.S. Constitution, tradeoffs have been made between those who favor the supremacy of the central government and those who believe that state governments should be more powerful. Should state governments be able to respond to the desires of citizen groups by legalizing the use of marijuana? Should the national government be able to close businesses that sell marijuana even in states where it is legal? Should those who control the Federal Bureau of Investigation (FBI) and the National Security Agency (NSA) be allowed to eavesdrop on phone conversations of Americans and read their email? Should groups like the American Civil Liberties Union (ACLU), which protect all citizens' rights to freedom of speech, be able to prevent this?

Many of the tradeoffs made by government are about freedom of speech. The First Amendment of the Constitution gives Americans the right to express their opinions on matters of concern to them; the federal government cannot interfere with this right. Because of the Fourteenth Amendment, state governments must protect this right also. At the same time, neither the federal government nor state governments can allow someone's right to free expression to interfere with someone else's ability to exercise his or her own rights. For example, in the United States, it is legal for women

to have abortions. Many people oppose this right, primarily for religious reasons, and often protest outside facilities that provide abortions. In 2007, the state of Massachusetts enacted a law that required protestors to stand thirty-five feet away from clinic entrances. The intention was to prevent women seeking abortions from being harassed or threatened with violence. Groups favoring the protection of women's reproductive rights supported the law. Groups opposed to abortion argued that the buffer zone prevented them from speaking to women to try to persuade them not to have the procedure done. In 2014, in the case of *McCullen v. Coakley*, the U.S. Supreme Court struck down the law that created a buffer zone between protestors and clinic entrances.

[McCullen v. Coakley, 573 U.S. ____ \(2014\); Melissa Jeltsen, "The Reality of Abortion Clinics without Buffer Zones," *The Huffington Post*, 13 July 2014.](#)

The federal government does not always side with those who oppose abortion, however. Several states have attempted to pass laws requiring women to notify their husbands, and often obtain their consent, before having an abortion. All such laws have been found unconstitutional by the courts.

Tradeoffs also occur as a result of conflict between groups representing the competing interests of citizens. Many Americans believe that the U.S. must become less dependent on foreign sources of energy. Many also would like people to have access to inexpensive sources of energy. Such people are likely to support fracking: the process of hydraulic fracturing that gives drilling companies access to natural gas trapped between layers of shale underground. Fracking produces abundant, inexpensive natural gas, a great benefit to people who live in parts of the country where it is expensive to heat homes during the winter. Fracking also creates jobs. At the same time, many scholars argue that fracking can result in the contamination of drinking water, air pollution, and increased risk of earthquakes. One study has even linked fracking to cancer. Thus, those who want to provide jobs and inexpensive natural gas

are in conflict with those who wish to protect the natural environment and human health (Figure). Both sides are well intentioned, but they disagree over what is best for people.

[Gail Bambrick, 11 December 2012. "Fracking: Pro and Con,"](#)

[https://now.tufts.edu/articles/fracking-pro-and-con.](https://now.tufts.edu/articles/fracking-pro-and-con)



(a)



(b)

A person in Ohio protests fracking (a). An announcement of a public meeting regarding fracking illustrates what some of the tradeoffs involved with the practice might be (b). (credit a: modification of work by "ProgressOhio/Flickr"; credit b: modification of work by Martin Thomas)

Tradeoffs are especially common in the United States Congress. Members of the Senate and the House of Representatives usually vote according to the concerns of people who live in their districts. Not only does this often pit the interests of people in different parts of the country against one another, but it also frequently favors the interests of certain groups of people over the interests of others within the same state. For example, allowing oil companies to drill off the state's coast may please those who need the jobs that will be created, but it will anger those who wish to preserve coastal lands as a refuge for wildlife and, in the event of an accident, may harm the interests of people who depend on fishing and tourism for their living. At times, House members and senators in Congress may ignore the voters in their home states and the groups that represent them in order to follow the dictates of the leaders of the political party to which they belong. For example, a member of Congress from a state with a large elderly population may be

inclined to vote in favor of legislation to increase benefits for retired people; however, his or her political party leaders, who disapprove of government spending on social programs, may ask for a vote against it. The opposite can occur as well, especially in the case of a legislator soon facing re-election. With two-year terms of office, we are more likely to see House members buck their party in favor of their constituents.

Finally, the government may attempt to resolve conflicting concerns within the nation as a whole through tradeoffs. After repeated incidents of mass shootings at schools, theaters, churches, and shopping malls, many are concerned with protecting themselves and their families from firearm violence. Some groups would like to ban the sale of automatic weapons completely. Some do not want to ban gun ownership; they merely want greater restrictions to be put in place on who can buy guns or how long people must wait between the time they enter the store to make a purchase and the time when they are actually given possession of the weapon. Others represent the interests of those who oppose any restrictions on the number or type of weapons Americans may own. So far, state governments have attempted to balance the interests of both groups by placing restrictions on such things as who can sell guns, where gun sales may take place, or requirements for background checks, but they have not attempted to ban gun sales altogether. For example, although federal law does not require private gun dealers (people who sell guns but do not derive most of their income from doing so) to conduct background checks before selling firearms to people at gun shows, some states have passed laws requiring this.

[“Gun Show Background Checks State Laws.”](#)

<http://www.governing.com/gov-data/safety-justice/gun-show-firearms-background-checks-state-laws-map.html> (February 18, 2016).

Summary

Many question whether politicians are actually interested in the needs of average citizens and debate how much influence ordinary people have over what government does. Those who support the elite theory of government argue that a small, wealthy, powerful elite controls government and makes policy to benefit its members and perpetuate their power. Others favor the pluralist theory, which maintains that groups representing the people's interests do attract the attention of politicians and can influence government policy. In reality, government policy usually is the result of a series of tradeoffs as groups and elites fight with one another for influence and politicians attempt to balance the demands of competing interests, including the interests of the constituents who elected them to office.

The elite theory of government maintains that _____.

- a. special interest groups make government policy
- b. politicians who have held office for a long time are favored by voters
- c. poor people and people of color should not be allowed to vote
- d. wealthy, politically powerful people control government, and government has no interest in meeting the needs of ordinary people

According to the pluralist theory of government, _____.

- a. government does what the majority of voters want it to do
- b. government policy is formed as a result of the competition between groups with different goals and interests
- c. ordinary people acting on their own have a significant influence on government
- d. wealthy people decide what government policy will be, and politicians have no interest in pleasing anyone else

Which of the following is a good example of a tradeoff?

- a. The government pleases environmental activists by preserving public lands but also pleases ranchers by allowing them to rent public lands for grazing purposes.
- b. The government pleases environmental activists by reintroducing wolves to Yellowstone National Park but angers ranchers by placing their cattle in danger.
- c. The government pleases oil companies by allowing them to drill on lands set aside for conservation but allows environmental activist groups to protest the drilling operations.
- d. Groups that represent a variety of conflicting interests are all allowed to protest outside Congress and the White House.

glossary

elite theory:

claims political power rests in the hands of a small, elite group of people

pluralist theory:

claims political power rests in the hands of groups of people

5. Reading: Engagement in a Democracy

Learning outcomes

By the end of this section, you will be able to:

- Explain the importance of citizen engagement in a democracy
- Describe the main ways Americans can influence and become engaged in government
- Discuss factors that may affect people's willingness to become engaged in government

Participation in government matters. Although people may not get all that they want, they can achieve many goals and improve their lives through civic engagement. According to the pluralist theory, government cannot function without active participation by at least some citizens. Even if we believe the elite make political decisions, participation in government through the act of voting can change who the members of the elite are.

WHY GET INVOLVED?

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, impersonal ones with thousands of members. 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. These organizations are different from the types of groups Americans used to belong to, like church groups or bowling leagues. Although people are still interested in volunteering and working for the public good, they are more interested in either working individually or joining large organizations where they have little opportunity to interact with others. Putnam considers a number of explanations for this decline in small group membership, including increased participation by women in the workforce, a decrease in the number of marriages and an increase in divorces, and the effect of technological developments, such as the internet, that separate people by allowing them to feel connected to others without having to spend time in their presence.

[Robert D. Putnam. 2001. *Bowling Alone: The Collapse and Revival of American Community*. New York: Simon & Schuster, 75.](#)

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 this decline in membership in small, interactive groups.

[———. 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> \(May 2, 2016\).](#)

Included in social capital are such things as networks of individuals, a sense that one is part of an entity larger than oneself, concern for the collective good and a willingness to help others, and the ability to trust others and to work with them to find solutions to problems. This, in turn, has hurt people's willingness and ability to engage in representative government. If Putnam is correct, this

trend is unfortunate, because becoming active in government and community organizations is important for many reasons.



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 important people can influence the policies that affect their lives and change the direction taken by government. U.S. history is filled with examples of people actively challenging the power of elites, gaining rights for themselves, and protecting their interests. For example, 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 granted citizenship because of the actions of abolitionists. 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. Similarly, the right to vote once belonged solely to white men until the Fifteenth Amendment gave the vote to African American men. The Nineteenth Amendment extended the vote to include women, and the Voting Rights Act of 1965 made exercising the right to vote a reality for African American men and women in the South. None of this would have happened, however, without the efforts of people who marched in protest, participated in boycotts, delivered speeches, wrote letters to politicians, and sometimes risked arrest in order to be heard ([Figure](#)). The tactics used to influence the government and effect change by abolitionists and members of the

women’s rights and African American civil rights movements are still used by many activists today.



The print above, published in 1870, celebrates the extension of the right to vote to African American men. The various scenes show legal rights black slaves did not have.

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. Although legal discrimination against gays and lesbians still remains, consensual intercourse between homosexual adults is no

longer illegal anywhere in the United States, and same-sex couples have the right to legally marry.

Activism can improve people's lives in less dramatic ways as well. 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 affects people's quality of life. The actions of individual Americans can make their own lives better and improve their neighbors' lives as well.

Representative democracy cannot work effectively without the participation of informed citizens, however. Engaged citizens familiarize themselves with the most important issues confronting the country and with the plans different candidates have for dealing with those issues. Then 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. One of the simplest ways is to stay informed about debates and events in the community, in the state, and in the nation. Awareness is the first step toward engagement. News is available from a variety of reputable sources, such as newspapers like the *New York Times*; national news shows,

including those offered by the Public Broadcasting Service and National Public Radio; and reputable internet sites.



Visit [Avaaz](#) and [Change.org](#) for more information on current political issues.

Another form of individual engagement is to write or email political representatives. Filing a complaint with the city council is another avenue of engagement. City officials cannot fix problems if they do not know anything is wrong to begin with. Responding to public opinion polls, actively contributing to a political blog, or starting a new blog are all examples of different ways to be involved.

One of the most basic ways to engage with government as an individual is to vote ([Figure](#)). Individual votes do matter. City council members, 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, but it is usually a simple process, and many states allow registration online. (We discuss voter registration and voter turnout in more depth in a later chapter.)



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 then-senator Barack Obama. (credit: Dean Beeler)

Voting, however, is not the only form of political engagement in which people may participate. Individuals can 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 people to become involved in political activism provide petitions that can be circulated through email. Taking part in a poll or survey is another simple way to make your voice heard.

VOTES FOR EIGHTEEN-YEAR-OLDS

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.

Are you engaged in or at least informed about actions of the federal or local government? Are you registered to vote? How would you feel if you were not allowed to vote until age twenty-one?

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 that are of concern to them. People who wish to be more active often work for political campaigns. Engaging in 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 that promote the causes they favor.

GETTING INVOLVED

In many ways, the pluralists were right. There is plenty of room for average citizens to become active in government, whether it is through a city council subcommittee or another type of local organization. Civic organizations always need volunteers, sometimes for only a short while and sometimes for much longer.

For example, [Common Cause](#) is a non-partisan organization that seeks to hold government accountable for its actions. 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. Therefore, one could be sure that election results were reliable and that the winning candidate had in fact received the votes counted in their favor. 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.

Follow-up activity: Choose one of the following websites to connect with organizations and interest groups in need of help:

- [Common Cause](#);
- [Friends of the Earth](#) which mobilizes people to protect the natural environment;
- [Grassroots International](#) which works for global justice;
- [The Family Research Council](#) which promotes traditional marriage and Judeo-Christian values; or
- [Eagle Forum](#) which supports greater restrictions on immigration and fewer restrictions on home schooling.

Political activity is not the only form of engagement, and many people today seek other opportunities to become involved. This is particularly true of young Americans. Although young people today often shy away from participating in traditional political activities, they do express deep concern for their communities and seek out volunteer opportunities.

[Jared Keller. 4 May 2015. "Young Americans are Opting Out of Politics, but Not Because They're Cynical."](#)

<http://www.psmag.com/politics-and-law/young-people-are-not-so-politically-inclined>.

Although they may not realize it, becoming active in the community and engaging in a wide variety of community-based volunteer efforts are important forms of civic engagement and help government do its job. The demands on government are great, and funds do not always exist to enable it to undertake all the projects it may deem necessary. Even when there are sufficient funds,

politicians have differing ideas regarding how much government should do and what areas it should be active in. Volunteers and community organizations help fill the gaps. Examples of community action include tending a community garden, building a house for Habitat for Humanity, cleaning up trash in a vacant lot, volunteering to deliver meals to the elderly, and tutoring children in after-school programs ([Figure](#)).



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)

Some people prefer even more active and direct forms of engagement such as 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. Likewise, the sit-ins (and sleep-ins and pray-ins) staged by African American civil rights activists, which they employed successfully to desegregate lunch counters, motels, and churches, have been adopted today by movements such as Black Lives Matter and Occupy Wall Street ([Figure](#)). Other tactics,

such as boycotting businesses of whose policies the activists disapproved, are also still common. Along with boycotts, 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.



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



Many ordinary people have become political activists. Read [“19 Young Activists Changing America”](#) to learn about people who are working to make people’s lives better.

RITCHIE TORRES

In 2013, at the age of twenty-five, Ritchie Torres became the

youngest member of the New York City Council and the first gay council member to represent the Bronx (Figure). Torres became interested in social justice early in his life. He was raised in poverty in the Bronx by his mother and a stepfather who left the family when Torres was twelve. The mold in his family's public housing apartment caused him to suffer from asthma as a child, and he spent time in the hospital on more than one occasion because of it. His mother's complaints to the New York City Housing Authority were largely ignored. In high school, Torres decided to become a lawyer, participated in mock trials, and met a young and aspiring local politician named James Vacca. After graduation, he volunteered to campaign for Vacca in his run for a seat on the City Council. After Vacca was elected, he hired Torres to serve as his housing director to reach out to the community on Vacca's behalf. While doing so, Torres took pictures of the poor conditions in public housing and collected complaints from residents. In 2013, Torres ran for a seat on the City Council himself and won. He remains committed to improving housing for the poor.

[Winston Ross, "Ritchie Torres: Gay, Hispanic and Powerful," *Newsweek*, 25 January 2015.](#)



(a)



(b)

Ritchie Torres (a) currently serves alongside his mentor, James

Vacca (b), on the New York City Council. Both men represent the Bronx.

Why don't more young people run for local office as Torres did? What changes might they effect in their communities if they were elected to a government position?

FACTORS OF ENGAGEMENT

Many Americans engage in political activity on a regular basis. A survey conducted in 2008 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 a great deal of interaction with others, such as signing petitions, contacting elected representatives, or contributing money to campaigns.

[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/.](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 traditional forms of 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 organization or had volunteered for a political campaign. Only slightly more said that they had gone to political rallies.

[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.](http://www.iop.harvard.edu/sites/default/files_new/pictures/151208_Harvard_IOP_Fall_2015_Topline.pdf)

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 year.

Keller, “Young Americans are Opting Out.”

Why are younger Americans less likely to become involved in traditional political organizations? 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.

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

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 ([Figure](#)). Instead of identifying with a particular political party, young Americans are increasingly concerned about specific issues, such as same-sex marriage.

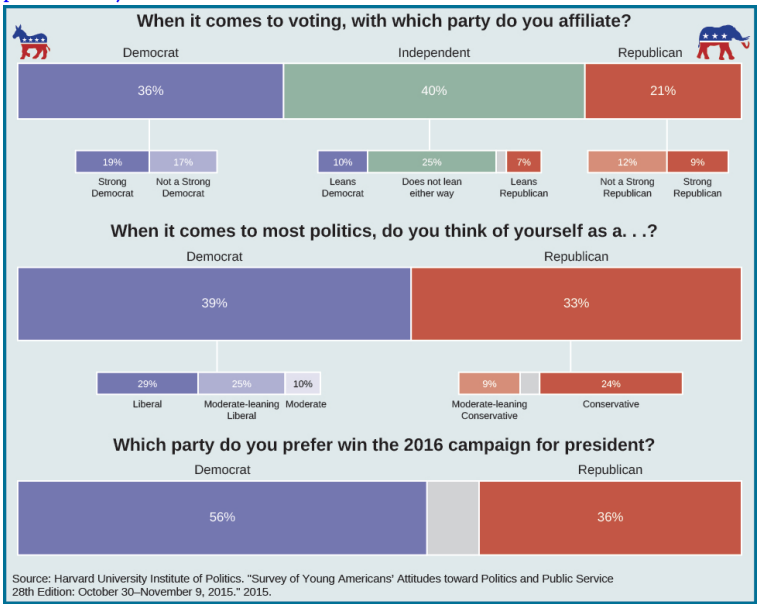
[Keller, “Young Americans are Opting Out.”](#)

People whose votes are determined based on single issues are unlikely to vote according to party affiliation.

The other factor involved in low youth voter turnout in the past was that younger Americans did not feel that candidates generally

tackle issues relevant to their lives. When younger voters cannot relate to the issues put forth in a campaign, such as entitlements for seniors, they lose interest. This dynamic changed somewhat in 2016 as Democratic candidate Bernie Sanders made college costs an issue, even promising free college tuition for undergraduates at public institutions. Senator Sanders enjoyed intense support on college campuses across the United States. After his nomination campaign failed, this young voter enthusiasm faded. Despite the fact that Democratic nominee Hillary Clinton eventually took up the free tuition issue, young people did not flock to her as well as they had to Sanders. In the general election, won by Republican nominee Donald Trump, turnout was down and Clinton received a smaller proportion of the youth vote than President Obama had in 2012.

[Tami Luhby and Jennifer Agiesta. 8 November 2016. "Exit Polls: Clinton Fails to Energize African-Americans, Latinos and the Young." http://www.cnn.com/2016/11/08/politics/first-exit-polls-2016/.](http://www.cnn.com/2016/11/08/politics/first-exit-polls-2016/)



Young Americans are likely to identify as an Independent rather than a Democrat or a Republican. However, younger voters are

more likely to lean in a liberal direction on issues and therefore favor the Democratic Party at the ballot box.

While some Americans disapprove of partisanship in general, others are put off by the ideology—established beliefs and ideals that help shape political policy—of one of the major parties. This is especially true among the young. As some members of the Republican Party have become more ideologically conservative (e.g., opposing same-sex marriage, legalization of certain drugs, immigration reform, gun control, separation of church and state, and access to abortion), those young people who do identify with one of the major parties have in recent years tended to favor the Democratic Party.

[Harvard Institute of Politics, “No Front-Runner among Prospective Republican Candidates,” <http://iop.harvard.edu/no-front-runner-among-prospective-republican-candidates-hillary-clinton-control-democratic-primary> \(May 2, 2016\).](http://iop.harvard.edu/no-front-runner-among-prospective-republican-candidates-hillary-clinton-control-democratic-primary)

Of the Americans under age thirty who were surveyed by Harvard in 2015, more tended to hold a favorable opinion of Democrats in Congress than of Republicans, and 56 percent reported that they wanted the Democrats to win the presidency in 2016 ([Figure](#)). Even those young Americans who identify themselves as Republicans are more liberal on certain issues, such as being supportive of same-sex marriage and immigration reform, than are older Republicans. The young Republicans also may be more willing to see similarities between themselves and Democrats.

Jocelyn Kiley and Michael Dimock. 25 September 2014. “The GOP’s Millennial Problem Runs Deep,” <http://www.pewresearch.org/fact-tank/2014/09/25/the-gops-millennial-problem-runs-deep/>.

Once again, support for the views of a particular party does not necessarily mean that someone will vote for members of that party.

Other factors may keep even those college students who do wish to vote away from the polls. Because many young Americans attend colleges and universities outside of their home states, they may find it difficult to register to vote. In places where a state-issued ID is

required, students may not have one or may be denied one if they cannot prove that they paid in-state tuition rates.

["Keeping Students from the Polls," *New York Times*, 26 December 2011.](#)

The likelihood that people will become active in politics also depends not only on age but on such factors as 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.

[18 October 2006. "Who Votes, Who Doesn't, and Why."](#)

[http://www.people-press.org/2006/10/18/who-votes-who-doesnt-and-why/.](http://www.people-press.org/2006/10/18/who-votes-who-doesnt-and-why/)

Political involvement also depends on how strongly people feel about current political issues. Unfortunately, public opinion polls, which politicians may rely on when formulating policy or deciding how to vote on issues, capture only people's latent preferences or beliefs. Latent preferences are not deeply held and do not remain the same over time. They may not even represent a person's true feelings, since they may be formed on the spot when someone is asked a question about which he or she has no real opinion. Indeed, voting itself may reflect merely a latent preference because even people who do not feel strongly about a particular political candidate or issue vote. On the other hand, intense preferences are based on strong feelings regarding an issue that someone adheres to over time. People with intense preferences tend to become more engaged in politics; they are more likely to donate time and money to campaigns or to attend political rallies. The more money that one has and the more highly educated one is, the more likely that he or she will form intense preferences and take political action.

Jonathan M. Ladd. 11 September 2015. "Don't Worry about Special Interests," [https://www.vox.com/mischiefs-of-faction/2015/9/11/9279615/economic-inequality-special-interests.](https://www.vox.com/mischiefs-of-faction/2015/9/11/9279615/economic-inequality-special-interests)

Summary

Civic and political engagement allows politicians to know how the people feel. It also improves people's lives and helps them to build connections with others. Individuals can educate themselves on important issues and events, write to their senator or representative, file a complaint at city hall, attend a political rally, or vote. People can also work in groups to campaign or raise funds for a candidate, volunteer in the community, or protest a social injustice or an unpopular government policy. Although wealthier, older, more highly educated citizens are the most likely to be engaged with their government, especially if they have intense preferences about an issue, younger, less wealthy people can do much to change their communities and their country.

Supporting the actions of the Democratic Party simply because one identifies oneself as a member of that party is an example of _____.

- a. partisanship
- b. ideology
- c. latent preference
- d. social capital

When a person is asked a question about a political issue that he or she has little interest in and has not thought much about, that person's answer will likely reflect _____.

- a. ideology
- b. partisanship
- c. intense preferences
- d. latent preferences

What kinds of people are most likely to become active in politics or community service?

What political activities can people engage in other than running for office?

Is citizen engagement necessary for a democracy to function? Explain.

Which is the more important reason for being engaged: to gain power or improve the quality of life? Why?

Are all Americans equally able to become engaged in government? What factors make it more possible for some people to become engaged than others? What could be done to change this?

Which pathways of engagement in U.S. government do you plan to follow? Why do you prefer these approaches?

Are there any redeeming qualities to elitism and any downsides to pluralism? Are there benefits to having elites rule? Are there problems with allowing interest groups to exercise influence over government? Explain.

Books:

Dahl, Robert A. 1991. *Democracy and Its Critics*. New Haven, CT: Yale University Press.

———. 1961. *Who Governs? Democracy and Power in an American City*. New Haven, CT: Yale University Press.

Dolan, Julie, Melissa M. Deckman, and Michele L. Swers. 2015. *Women and Politics: Paths to Power and Political Influence*. Lanham, MD: Rowman & Littlefield.

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

Olson, Mancur. 1971. *The Logic of Collective Action: Public Goods and the Theory of Groups*. Cambridge: Harvard University Press.

Putnam, Robert D. 2001. *Bowling Alone: The Collapse and Revival of American Community*. New York: Simon & Schuster.

Films:

1949. *All the King's Men*.

1976. *All the President's Men*.
1972. *The Candidate*.
2007. *Charlie Wilson's War*.
2008. *Frost/Nixon*.
1933. *Gabriel over the White House*.
2008. *Milk*.
1939. *Mr. Smith Goes to Washington*.

glossary

ideology:

the beliefs and ideals that help to shape political opinion and eventually policy

intense preferences:

beliefs and preferences based on strong feelings regarding an issue that someone adheres to over time

latent preferences:

beliefs and preferences people are not deeply committed to and that change over time

partisanship:

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

social capital:

connections with others and the willingness to interact and aid them

PART II

MODULE 2:
CONSTITUTIONAL
FRAMEWORK

6. Module Introduction

Constitutional Framework

Module Introduction

Topic Covered

- The Founding of the United States
- The Design of the U.S. Constitution
- The constitutional principles that structure American politics

Democracy can be captured in three distinct categories; that is, the difficulty in which it is achieved, the unending battle to sustain it, and the perplexity in understanding it. The 1788 constitutional framework captures this observation.⁽¹⁾

Achieving Democracy

Early American history dictates the grueling challenges of democratic development. British colonists in America, in response to the imposition of taxes, countered with the American Revolutionary War. However, the resulting independence that followed would soon prove difficult for the new nation. The fear of tyranny, like that experienced under the British Crown, led the newly formed United States to form a most ineffective government under the nation's first constitution, the Articles of Confederation.

The deficits of the Articles were such that they threatened to completely dismantle the order the former colonists had fought long and hard for.⁽¹⁾ Thus, the need for the Constitutional Convention of 1787, which had as its motivating purpose the goal of preserving what has been deemed “*a grand experiment in self-government.*”⁽⁸²⁾

Sustaining Democracy

One story out of the Constitutional Convention of 1787 entails Benjamin Franklin’s response to a very poignant question posed; that is, “*What type of government have you given us?*” (In response, Mr. Franklin is alleged to have replied “*A republic if you can keep it.*”⁽⁸¹⁾ His response clearly indicates that democracy is an ongoing process that must continually be nourished in effort to thrive. America’s political landscape demonstrates this determination toward political longevity. For instance, the U.S. Constitution has, over time, progressed into greater liberty for its citizens; though this progression was not without its woes. Indeed, from the Civil War to the championing of Gay Rights, and everything in between, we find a system that is typified by political — and sometimes physical — melees for the cause of freedom. Were it so that democracy was easy to maintain, our Constitution would have largely gone unchanged and nixed important, historical developments like that of the Bill of Rights and the Civil War Amendments.⁽¹⁾

Understanding Democracy

American politics are complex to say the least.⁽¹⁾ From the Electoral College and the popular vote debate to the nation’s vast election

system — encompassing some 89,004 local governments, a national government, and 50 state governments — politics in American can be elusive.⁽⁸³⁾ This fact, alone, causes many to turn away from the subject altogether. Adding to this intricacy is the contemporary state of American federal government, which includes occurrences that the Founding Fathers could not possibly have anticipated. This gap in knowledge and time means that a Constitution written more than two centuries ago must now be interpreted and applied to a society that looks remarkably different than it did during the nation's founding. Political issues such as recreational marijuana use, transgender rights, social media/virtual speech, etc., support this line of thought. As such, public policy in these areas — and others — often promote conflict, cynicism, and polarization as citizens struggle to find constitutional meaning in unpopular legislation.⁽¹⁾

Moreover, the age of the Internet further complicates American polity. In an era where facts are often overshadowed by opinions, the democratic values housed in the Constitution are often eclipsed. Thus, the goal of this module is to assist you in identifying the Constitution as America's political blueprint, with particular emphasis on the structure it outlines and the function it authorizes.⁽¹⁾

Reference

Franklin, Benjamin. (1787). [AT THE CLOSE OF THE CONSTITUTIONAL CONVENTION OF 1787](#) on December 18, 2017

de Tocqueville, Alexis. (1835). [DEMOCRACY IN AMERICA](#) on December 18, 2017

United States Census Bureau. (2012, August 30). [CENSUS BUREAU REPORTS THERE ARE 89,004 LOCAL GOVERNMENTS IN THE UNITED STATES](#). on December 18, 2017

Learning Outcomes

1. Students will be able to articulate an understanding of the individual in society.
2. Students will be able to think critically about institutions, cultures, and behaviors in their local and/or national environment.
3. Students will be able to think critically about institutions, cultures, and behaviors of the peoples of the world.
4. Students will develop a historical context for understanding current issues and events
5. Students will develop a greater understanding of world events

Objectives

Upon completion of this module, the student will be able to:

- Analyze the developments that led to the American Revolution.
- Describe the system of governance established by our first Constitution.
- Analyze the developments that led to the Constitutional Convention.
- Evaluate the framework for government that the Constitutional Convention created. ⁽¹⁾

Readings & Resources:

- [The Philosophical Perspective](#) from Lumen Learning
- [The First American Political System](#) from Lumen Learning
- [Creating and Ratifying the Constitution](#) from Lumen Learning
- [Constitutional Principles and Provisions](#) from Lumen Learning

- [Putting it Together](#) from Lumen Learning

Supplemental Material/Resources

(Note: This material, in the media form of online videos, is considered supplemental and thus is not used for assessment purposes.)

- Video: [Democracy and Majority Rule I](#) from Lumen Learning
- Video: [Democracy and Majority Rule II](#) from Lumen Learning
- Reading: [We, All of the People](#) from Lumen Learning

Assignments & Learning Activities

- Review Module 2 Learning Unit
- Review Readings & Resources
- Participate in Module 2 Discussion
- Join a team for Assignment: Assembling Your Team
- Take Quiz 2

7. Lecture Content

Lecture Content

Learning Unit 2

Structural Arrangements

The Constitution of the United States identifies six key structural arrangements that are essential to understanding American democracy: national supremacy, federalism, republicanism, separation of powers, checks and balances, and judicial review.



[The Constitutional Convention, 1787](#) by US Capitol is in [Public](#)

National Supremacy

Article VI of the Constitution designates the national supremacy clause, which assigns the Constitution as the supreme law of the land. Such distinction served as a grand departure from the Articles of Confederation wherein state laws, more oft than not, dominated national law. More than this, the national supremacy clause is also credited with crafting national unity among the states. At a time when the states operated as private entities, the national supremacy clause transformed the nation from “the United States are” to “the United States is.”

Federalism

The states came together to create the national government. As such, the principle of federalism divides power between the states and the nation's central government. In this way, state governments retain a degree of autonomy to make and pass laws on behalf of their constituents while simultaneously being subject to the Constitution's supremacy clause. Such freedom, though, is not without consequence. The existence of two spheres of influence has, over the years, created a push-pull effect between the states and the national government, often leaving the Supreme Court to determine the constitutional boundaries between the two governments. Early on, it would be the states that dominated in the contest of federalism, with power shifting back and forth between the two units over the years.

However, historical and current trends give way to a rapidly expanding national government at the expense of the states. To this

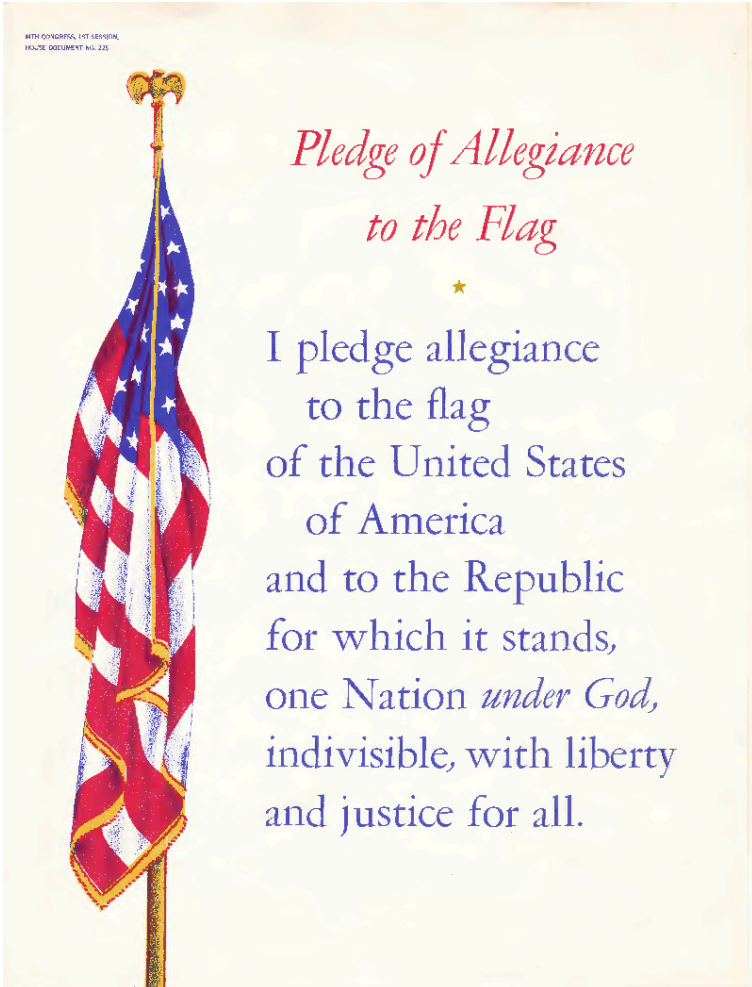
end, many have called for the return of state's rights in a number of policymaking areas. Environmental policy represents one of these areas. In fact, see the brief footage below where Scott Pruitt, Director of the Environmental Protection Agency, calls for the restoration of state power per the Tenth Amendment of the Constitution.⁽¹⁾

Republicanism

The definition of a republic has varied over time. Generally speaking, many scholars find meaning in James Madison's Federalist 10 wherein the term points to a representative democracy; that is, a system of governance where the people, themselves, choose representatives who make political decisions on their behalf⁽¹⁶⁾ In fact, so important is the concept of republicanism that the Constitution was fashioned to indefinitely embody this principle in Article IV of the Constitution, which states:⁽¹⁾

“The United States shall guarantee to every state in this union a **republican form of government...**”⁽¹³⁾

Further, a much simpler way to convey the significance of republicanism in American polity is to observe the nation's Pledge of Allegiance. Founded in 1887 as an oath of allegiance to the United States, the “Pledge” captures, well, the notion of a republican reform of government. Consider the image:



[A musical setting for “The Pledge of Allegiance to the Flag” created by Irving Caesar](#) from United States Government Printing Office is in the [Public Domain](#)

These are words that most, if not all, of us have recited countless times. Notice the phrase: ⁽¹⁾ “to the Republic for which it stands” ⁽¹⁷⁾. Now, take note that it does not state “to the democracy.” Remember, the word “democracy” is not found in any of our nation’s founding documents. Rather, the “Pledge” seeks to emphasize our

representative form of government wherein sovereignty is vested in more than one person. Without this piece of the American, political pie, the idea of the “will of the people” crumbles.⁽¹⁾

Separation of Powers

In the interest of liberty, political power in America has been divided between three, distinct, co-equal branches of government (the legislative, the executive, and the judicial branches of government). Additional measures towards freedom can be seen in the inception of American federalism.⁽¹⁾ Deemed as “double-security,” federalism spreads power across two layers of government, national and state; thus, negating opportunity for the ambitions of one unit to overshadow the rights of the other.⁽¹⁴⁾

Still, the principle of checks and balances has been much more distinctive among the three branches themselves. Constitutional scholar, Louis Fisher captures this development in his scrutiny of presidential power.⁽¹⁾ Referencing the French philosopher Montesquieu's *THE SPIRIT OF THE LAWS* details Montesquieu's take on the separation of power; that is, America's institutions of government have been arranged so as to never place absolute power in a single individual or body.⁽¹⁸⁾ In terms of tyranny, and the prevention thereof, the doctrine of separation of powers serves as a fine political tool. However, the consequences of such lie in the fact that “separated” systems are prone to government stalemate. The danger of such gridlock can be viewed through the lenses of public policy, like that of healthcare and/or tax reform. America's rigid system of checks and balances, makes issues like these difficult to address; thus, imposing on the will of the people.⁽¹⁾

Checks and Balances

In as much as the three branches are independent of one another, they do, however, rely heavily upon the other to operate. Such interdependency exists at the behest of the Founders. James Madison, in particular, believed that ⁽¹⁾ “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.” ⁽¹⁵⁾

The effects of such “checks” can be viewed in all three branches of government but are more oft than not played out in what has become a most contentious relationship between the president and Congress. From partisan gridlock to veto power and presidential impeachments, our system of checks and balances essentially keeps each branch involved in the other’s business, even unto matters that may be perceived as personal in nature. The impeachment of Bill Clinton in 1999 speaks well to the intrusiveness of these checks and balances. ⁽¹⁾



[Tickets to President Bill Clinton’s impeachment trial](#) from the

Gerald R. Ford Presidential Museum is in the [Public Domain](#)

Judicial Review

Alexander Hamilton, in making the case for a federal judiciary, made an interesting observation that, today, would seem highly ironic considering American's political development. In particular, he remarked: ⁽¹⁾

“The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments. This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power.” ⁽¹⁶⁾

Hamilton's stance on the judiciary would later go on to be curbed with the landmark case *MARBURY V. MADISON* 1803 . In this instance, the Supreme Court would execute its power of judicial review; that is, its power to overturn unconstitutional acts of the executive and legislative branches of government. Though not explicitly stated in the Constitution, the application of such secured the Supreme Court's standing as a co-equal branch of the federal government in spite of Hamilton's earlier quip.

However, the notion of judicial review is not without complaint. The chief grievance of the Court's power is its juxtaposition with majority rule. In leaving the Constitution, and the interpretation thereof, in the hands of nine individuals, the concept of majority rule is lost, as the Supreme Court is the final arbiter of the nation's laws, not the people. Further, because these nine justices are confirmed —

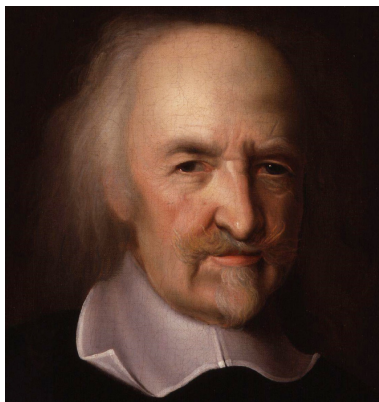
not elected — for life, the will of the people has often been dwarfed by unpopular rulings.

Nevertheless, despite such criticism, the notion of judicial review has, in fact, been beneficial for American politics. Minority rights, in particular, have largely been advanced by judicial review. Landmark cases such as *BROWN V. BOARD OF EDUCATION* and *OBERGEFELL V. HODGES* legitimize the Court's power of judicial review.⁽¹⁾

8. Reading: The Philosophical Perspective

Introduction

Why do we need government? In search of the answer to this question, two English philosophers, both writing in the later half of the seventeenth century, asked another question: What would the world be like if there were no government?



John Michael Wright, *Portrait of Thomas Hobbes*, National Portrait Gallery, Washington, DC

Thomas Hobbes

In *Leviathan* (1651), Thomas Hobbes (1588–1679), conjured up a time and place before governments existed. Humankind before the invention of government, Hobbes believed, was in a “state of nature” in which the life-sustaining needs and passions of individuals dictated their interactions with each other. With no governmental authority to settle disputes between individuals, each person acted as a sovereign—an authority that answers to no one but itself. Because every individual in the state of nature was autonomous and because food and other items people wanted were scarce, life in the state of nature would be characterized by an incessant war of “every man against every man.” It was an existence that Hobbes characterized as “solitary, poor, nasty, brutish and short.”

Hobbes argued that it was the violence and uncertainty of life in the state of nature that motivated people to form governments. Because life was so bad in the state of nature, Hobbes argued that the desire for peace and stability would become so profound that the people would seek out a “sovereign” or ruler to whom they could transfer or give their own sovereignty. In return, the sovereign would provide the peace and stability the people wanted. So long as they abided by the laws the sovereign established, the people would then be free to pursue happiness without constantly fearing for their lives and property.

At the time when government was formed, Hobbes maintained that the people gave up their sovereignty absolutely and permanently. The sovereign, however, did not participate directly in the agreement made by the people to transfer their sovereignty because that might limit the sovereign’s efforts to ensure the peace and stability. For example, Hobbes argued that a ruthless sovereign might actually promote order because the people would be motivated by fear to obey the laws of the sovereign. Hobbes further argued that because the transfer of sovereignty was permanent, the right to revolt against the sovereign was nonexistent. In fact, any attempt to reform a government through disobedience (revolution) would be an injustice that would produce more harm than good. Better to suffer the excesses of an unjust king than to overthrow him and be left with anarchy.

The arguments Hobbes presented in *Leviathan* were radically original perspectives on the nature of man and the origins of government. Being in the employ of the monarchy, at least one motive behind Hobbes’ writings was a desire to create a plausible defense of the monarchy. In defending the monarchy, however, Hobbes ultimately defended the absolute authority of the sovereign, monarch or not. It was an argument neither the people nor the king was comfortable with.

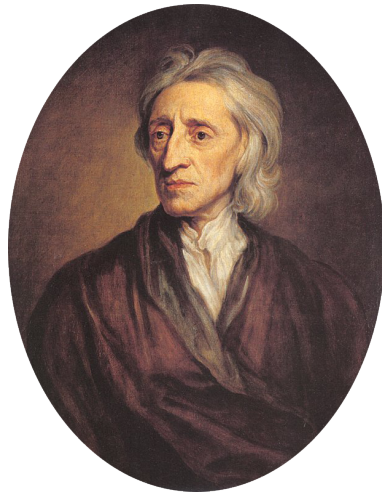
In his defense, Hobbes was fighting against insurmountable forces which would continue to weaken the monarchy until it was finally reduced to the figurehead role it occupies today. Even as he was

writing *Leviathan*, the rising merchant class was growing ever wearier of the monarchy's abuses of power. Indeed, it was precisely because the monarchy was already losing its credibility that Hobbes was commissioned to write *Leviathan*.

By defending the monarchy in the manner he did, Hobbes unwittingly laid the groundwork for just the kind of popular revolts he decried in *Leviathan*. By claiming that individuals in the state of nature were the original source of sovereignty, and not God or kings, Hobbes created a doctrine on which others base compelling arguments for natural rights, popular government and revolution. One such man was John Locke.

John Locke

John Locke (1632–1704), in his [Second Treatise of Civil Government](#), declared that Hobbes's description of life before government was only half right. While the state of nature *might* be a state of war, Locke argued that it could just as easily be characterized by “peace, goodwill, mutual assistance and preservation.” While agreeing with Hobbes' that individuals in the state of nature would naturally and rationally come together to form a government, Locke argued that the contract people entered into with each other and the leaders of their new government was not permanent because the people did not unconditionally surrender their sovereignty to



Sir Godfrey Kneller, Portrait of John Locke, Britain, 1697

their leaders. Rather, Locke argued, individuals would grant authority to a government so long as it provided for the common good—protection from the dangers of the state of nature. Because life in the state of nature is fraught with peril, Locke wrote, man was:

. . . willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without reason, that he seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property.

In other words, Locke agreed with Hobbes that government was necessary to rescue humankind from the state of nature, but not because the state of nature was a horrible dangerous place to be escaped at all cost. In Locke's view, when the people agreed to become subject to governmental authority, not only did they expect their government to provide stability and order, but they also expected it to protect their rights and liberties. The purpose of government, then, was to provide enough protection of life, liberty and property that individuals could enjoy them.

There are two significant implications of Locke's "essay concerning the true original extent and end of civil government" that are worth noting. First, by turning Hobbes' argument on its head, Locke argued that because the people were the source of government's power in the first instance, the people remained the source of governmental power even after it was established. The notion of popular sovereignty, that power was vested in the people, was lent greater intellectual credibility.

Second, if the people were the source of the government's authority, it followed that the government was accountable to the people. Consequently, political leaders were just as obligated to obey the laws of society as the people were. More important, Locke argued that the government could only legitimately exercise its authority so long as it protected the inalienable individual rights of

the people. If government ever acted “contrary to their trust,” the people were justified in taking action against it.

Today, Locke’s writings are recognized as a source of some of the most important contributions to political philosophy. His emphasis on popular sovereignty and individual rights was groundbreaking. His influence on the Framers of the American Constitution was at least of equal significance. In his writings, Locke spoke of “life, liberty and property,” a phrase which was modified only slightly by Thomas Jefferson when he wrote in the [Declaration of Independence](#) that: “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*” (emphasis added). So profound is Locke’s influence on American political thought that one author has called Locke the “massive national cliché” in America.

Locke’s influence on the Founders is discussed at greater length in “[The Constitutional Convention](#).”

9. Reading: The First American Political System

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What was the Stamp Act Congress?
2. What was the Continental Congress?
3. What are the principles contained in the Declaration of Independence?
4. What were the Articles of Confederation?

We can understand what the Constitution was designed to accomplish by looking at the political system it replaced: the Articles of Confederation, the United States' first written constitution, which embodied political ideals expressed by the Declaration of Independence.

From Thirteen Colonies to United States

By the mid-eighteenth century, Britain's thirteen colonies on North America's east coast stretched from Georgia to New Hampshire. Each colony had a governor appointed by the king and a legislature elected by landholding voters. These colonial assemblies, standing for the colonialists' right of self-government, clashed with the royal governors over issues of power and policies. Each colony, and the newspapers published therein, dealt with the colonial power in London and largely ignored other colonies.

The Stamp Act Congress

British policy eventually pushed politics and news across colonial boundaries. In 1763, the British antagonized the colonialists in two important ways. A royal proclamation closed off the frontier to colonial expansion. Second, the British sought to recoup expenses borne defending the colonies. They instituted the first ever direct internal taxes in North America. The most famous, the Stamp Act, required the use of paper embossed with the royal seal to prove that taxes had been paid.

Such taxes on commerce alienated powerful interests, including well-off traders in the North and prosperous planters in the South, who complained that the tax was enacted in England without the colonists' input. Their slogan, "No taxation without representation," shows a dual concern with political ideals and material self-interest that persisted through the adoption of the Constitution.

Among the opponents of the Stamp Act were printers who produced newspapers and pamphlets.

The arduous technology of typesetting and hand-printing individual pages did not permit sizable

production.¹² Newspapers reached large audiences by being passed around—“circulated”—or by being read aloud at taverns.⁴ Printers’ precarious financial condition made them dependent on commissions from wealthy people and official subsidies from government, and thus they were eager to please people in power. Crusading journalism against government authorities was rare.⁶ The Stamp Act, however, was opposed by powerful interests and placed

financial burdens on printers, so it was easy for newspaper printers to oppose it vigorously with hostile stories.



Printing newspapers was a small, labor-intensive business. Printers were often identifiable around town, not only for being ink stained, but also because the physical strain of pulling their presses shut made one shoulder rise considerably higher than the other.

1. ³

2.

3. [1]

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5. [2]

6. ⁷

7. ⁸

8. [3]

During the Stamp Act crisis, news began to focus on events throughout the thirteen colonies. Benjamin Franklin, postmaster of the British government for the colonies, developed a system of post roads linking the colonies. Printers now could send newspapers to each other free of charge in the mail, providing content for each other to copy. Colonial legislatures proposed a meeting of delegates from across the colonies to address their grievances. This gathering, the Stamp Act Congress, met for two weeks in 1765. Delegates sent a petition to the king that convinced British authorities to annul the taxes.

Link: Declaration of Rights

See the text of the [Stamp Act Congress's Declaration of Rights](#).

The Continental Congress

In 1773, the British government awarded the East India Company a monopoly on importing and selling tea to the American colonies. This policy, too, hurt powerful interests: colonial traders and merchants. Rebellious Bostonians ransacked the East India Company's ships and pushed cartons of tea overboard. The British reacted harshly to this "Boston Tea Party": they closed the port of Boston, deported rebels to England for trial, and restricted settlement in and trade to the west of the country.

Once again, delegates from the various colonies met, this time in a gathering known as the Continental Congress, to address the difficulties with Britain. But this congress's petitions, unlike those of the Stamp Act Congress, were rebuffed. Repressive policies were kept in place. The Continental Congress launched a boycott of

British products, initiated the Revolutionary War, and passed the Declaration of Independence.⁹

The Declaration of Independence

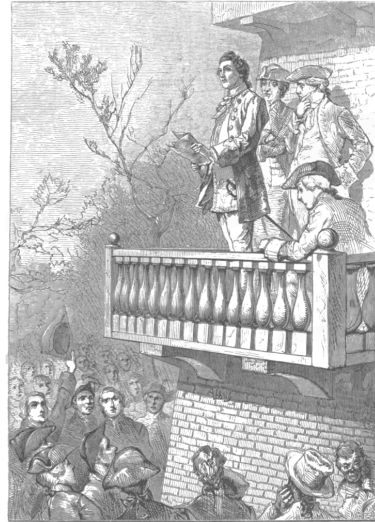
The Declaration of Independence, issued on July 4, 1776, announced that the thirteen colonies were independent of Britain. It was designed to be read aloud in public and to be sent to international audiences. Its point-by-point charges against British rule give equal weight to how the king damaged America's economic interests and how he ignored principles of self-government.

9. ¹⁰

10. ¹¹

11. [4]

The Declaration is a deeply democratic document.¹² It is democratic in what it *did*—asserting the right of the people in American colonies to separate from Britain. And it is democratic in what it *said*: “We hold these truths to be self-evident, that all men are created equal” and have inviolable rights to “life, liberty, and the pursuit of happiness.” The Declaration concludes that the people are free to “alter or abolish” repressive forms of government. Indeed, it assumes that the people are the best judges of the quality of government and can act wisely on their own behalf.



The soaring phrases of the Declaration were crafted in part to be declaimed in public. Indeed, one of the copies owned by Jefferson himself—not a confident public speaker—shows where he marked the document to pause, perhaps for laudatory huzzahs and applause.

Link: The Declaration of Independence

For more information on the Declaration of Independence, visit the [National Archives online](#).

^{12.}¹³

^{13.} [5]

The Articles of Confederation

Drafted in 1777, the Articles of Confederation were the first political constitution for the government of the United States. They codified the Continental Congress's practices and powers. The United States of America was a confederation of states. Although the confederation was superior to the individual states, it had no powers without their consent.

Link: The Articles of Confederation

Read the text of the [Articles of Confederation](#).

Under the Articles, the Continental Congress took over the king's powers to make war and peace, send and receive ambassadors, enter into treaties and alliances, coin money, regulate Indian affairs, and run a post office. But the confederation could not raise taxes and relied on revenues from each of the states. There was no president to enforce the laws and no judiciary to hear disputes between and among the states.

Each state delegation cast a single vote in the Continental Congress. Nine states were needed to enact legislation, so few laws were passed. States usually refused to fund policies that hampered their own interests.¹⁴ Changes in the Articles required an all-but-impossible unanimous vote of all thirteen delegations. The weakness of the Articles was no accident. The fights with Britain created widespread distrust of central authority. By restricting the national government, Americans could rule themselves in towns and

14.¹⁵

15. [6]

states. Like many political thinkers dating back to ancient Greece, they assumed that self-government worked best in small, face-to-face communities.

Key Takeaways

The first American political system, as expressed in the Articles of Confederation, reflected a distrust of a national government. Its powers were deliberately limited in order to allow Americans to govern themselves in their cities and states.

1. See Stephen Botein, “Meer Mechanics’ and an Open Press: The Business and Political Strategies of Colonial American Printers,” *Perspectives in American History* 9 (1975): 127–225; and “Printers and the American Revolution,” in *The Press and the American Revolution*, ed. Bernard Bailyn and John B. Hench (Worcester, MA: American Antiquarian Society, 1980), 11–57. Also, Charles E. Clark, *The Public Prints: The Newspaper in Anglo-American Culture* (New York: Oxford University Press, 1994), chap. 9; and “The Press the Founders Knew,” in *Freeing the Presses: The First Amendment in Action*, ed. Timothy E. Cook (Baton Rouge: Louisiana State University Press, 2005). [↩](#)
2. Thomas C. Leonard, *News for All: America’s Coming-of-Age with the Press* (New York: Oxford University Press, 1995), chap. 1. [↩](#)
3. For amplification of this argument, Timothy E. Cook, *Governing with the News: The News Media as a Political Institution* (Chicago: University of Chicago Press, 1998), chap. 2. [↩](#)
4. See Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (New York: Knopf, 1979). [↩](#)

5. Staughton Lynd, *The Intellectual Origins of American Radicalism* (New York: Vintage, 1969); Garry Wills, *Inventing America: Jefferson's Declaration of Independence* (New York: Vintage, 1979); and Pauline Maier, *American Scripture: Making the Declaration of Independence* (New York: Knopf, 1997). [↓](#)
6. Keith L. Dougherty, *Collective Action under the Articles of Confederation* (New York: Cambridge University Press, 2001), chaps. 4–5. [↓](#)

10. Reading: Creating and Ratifying the Constitution

Learning Objectives

After reading this section, you should be able to answer the following questions:

- What was Shays's Rebellion?
- What was the Constitutional Convention?
- What were the three cross-cutting divides at the Constitutional Convention?
- What were the main compromises at the Constitutional Convention?
- Who were the Federalists and the Anti-Federalists?
- What factors explain ratification of the Constitution?

The Constitution was a reaction against the limitations of the Articles of Confederation and the democratic experiments begun by the Revolution and the Declaration of Independence.

The Case against the Articles of Confederation

The Articles could not address serious foreign threats. In the late 1780s, Britain denied American ships access to British ports in a trade war. Spain threatened to close the Mississippi River to American vessels. Pirates in the Mediterranean captured American ships and sailors and demanded ransom. The national government had few tools to carry out its assigned task of foreign policy.^A

synopsis is Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*(New York: Knopf, 1996), 25–28. More generally, see Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (New York: Oxford University Press, 2004).

There was domestic ferment as well. Millions of dollars in paper money issued by state governments to fund the Revolutionary War lost their value after the war. Gordon S. Wood, “Interests and Disinterestedness in the Making of a Constitution,” in *Beyond Confederation: Origins of the Constitution and American National Identity*, ed. Richard Beeman, Stephen Botein, and Edward C. Carter II (Chapel Hill: University of North Carolina Press, 1987), 69–109. Financial interests were unable to collect on debts they were owed. They appealed to state governments, where they faced resistance and even brief armed rebellions.

Newspapers played up Shays’s Rebellion, an armed insurrection by debt-ridden farmers to prevent county courts from foreclosing mortgages on their farms. See Leonard A. Richards, *Shays’s Rebellion: The American Revolution’s Final Battle* (Philadelphia: University of Pennsylvania Press, 2002). Led by Captain Daniel Shays, it began in 1786, culminated with a march on the federal arsenal in Springfield, Massachusetts, and wound down in 1787.

The Continental Congress voted unanimously to raise an army to put down Shays’s Rebellion but could not coax the states to provide the necessary funds. The army was never assembled. See Keith L. Dougherty, *Collective Action under the Articles of Confederation*(New York: Cambridge University Press, 2001), chap. 6.

Link: Shay’s Rebellion

To learn more about Shays’s Rebellion, visit the [National Park Service online](#).

Leaders who supported national government portrayed Shays’s

Rebellion as a vivid symbol of state governments running wild and proof of the inability of the Articles of Confederation to protect financial interests. Ordinary Americans, who were experiencing a relatively prosperous time, were less concerned and did not see a need to eliminate the Articles.

Calling a Constitutional Convention

The Constitutional Convention was convened in 1787 to propose limited reforms to the Articles of Confederation. Instead, however, the Articles would be replaced by a new, far more powerful national government.

Twelve state legislatures sent delegates to Philadelphia (Rhode Island did not attend). Each delegation would cast a single vote.

Who Were the Delegates?

The delegates were not representative of the American people. They were well-educated property owners, many of them wealthy, who came mainly from prosperous seaboard cities, including Boston and New York. Most had served in the Continental Congress and were sensitive to the problems faced by the United States. Few delegates had political careers in the states, and so they were free to break with existing presumptions about how government should be organized in America.

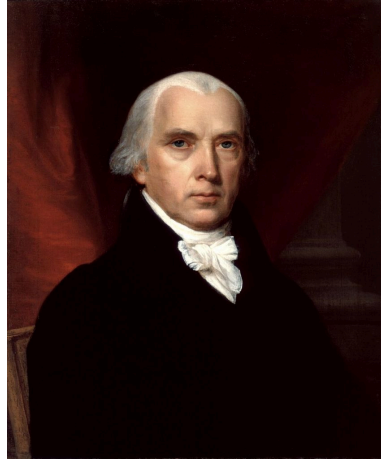
Link: Constitutional Convention

Learn more about the delegates to the Constitutional Convention [here](#).

The Constitutional Convention was a mix of great and minor characters. Exalted figures and brilliant intellects sat among nonentities, drunkards, and nincompoops. The convention's driving force and chief strategist was a young, bookish politician from Virginia named James Madison. He successfully pressured revered figures to attend the convention, such as George Washington, the commanding officer of the victorious American revolutionaries, and Benjamin Franklin, a man at the twilight of a remarkable career as printer, scientist, inventor, postmaster, philosopher, and diplomat.

Madison drafted the first working proposal for a Constitution and took copious notes at the convention. Published after his death in 1836, they are the best historical source of the debates; they reveal the extraordinary political complexity of the deliberations and provide remarkable insight into what the founders had in mind. The standard edition of Madison's notes is in *The Records of the Federal Convention of 1787*, ed. Max Farrand, 3 vols. (New Haven, CT: Yale University Press, 1937).

Once the Constitution was drafted, Madison helped write and publish a series of articles in a New York newspaper. These Federalist papers defend the political system the Constitutional Convention had crafted.



The unassuming and slight James Madison made an unusual teammate for the dashing, aristocratic ex-soldier Alexander Hamilton and the august diplomat John Jay. But despite these contrasts and some political divides, they merged their voices in the Federalist papers, published in New York newspapers under the pseudonym "Publius." Soon after the ratification of the Constitution, The Federalist was widely republished in book format. Scholars now regard it as the fullest explication of the logic underlying the Constitution.

Interests and the Constitution

In the early twentieth century, historian Charles Beard asserted that the Constitution was "an economic document for economic ends," pushed by investors and industrialists who would profit more from a national economic and political system than from one favoring

small-scale agricultural interests. Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1913). Research has not upheld Beard's stark division of reaction to the Constitution into well-off supporters and poor, democratic adversaries. Many local, well-to-do patriarchs opposed the Constitution; many small merchants wanted a national government.

But Beard's focus on economic and social interests is revealing. Paper money, debt relief, and Shays's Rebellion concerned those committed to existing economic and social orders. Consider Federalist No. 10, the most famous of Madison's Federalist papers. In it, he decried the dangers of democracy; he started with "a rage for paper money" and "an abolition of debts," then the specter of "an equal division of property," all of which he found an "improper or wicked project." Madison paid attention to the right to acquire and maintain property, which the Declaration brushed aside. He claimed that political systems were created to maintain liberty—including the liberty to accumulate wealth. Political equality meant only that each person had a right to express himself or herself.

Ideas and the Constitution

The Constitutional Convention responded to ideas, not just interests. Delegates doubted that the people could wisely rule. They sought to replace *democracy* with a *republic*, in which officials would be chosen to act on the people's behalf. Federalist No. 10 makes the case.

Madison was concerned with threats to order and stability from what he called factions, groups pursuing their self-interest above the public good. For Madison, factions were inevitable. His worst nightmare was of a faction becoming a political majority, trampling on the rights of its helpless opponents, and quickly enacting its program. He favored a large republic, which, he believed, would

discourage a faction's rise to power. Madison expected that in a republic, the number of locally oriented interests would increase and diversify, which would make it harder for any one of them to dominate. Minority factions could pass legislation by forming temporary majorities, Madison reasoned, but these diverse majorities would not be able to agree on a single project long enough to be oppressive.

Drafting the Constitution

Delegates to the Constitutional Convention first gathered on May 25, 1787, in what is now called [Independence Hall in Philadelphia](#). Their goal was to devise a constitution, a system of fundamental laws and principles outlining the nature and functions of the government. George Washington presided. Delegates worked in an intimate setting without committees. The structure of power created by the Constitution in Philadelphia resulted from a deeply political process. Political scientists have revealed the degree to which the Constitutional Convention and the ratification conventions can be understood to be the result of manipulation of parliamentary rules, strategic voting, shifting coalitions, and the “agenda-setting” and “framing” use of mass communication. Our analysis draws on these authors, especially John P. Roche, “The Founding Fathers: A Reform Caucus in Action,” *American Political Science Review* 55 (December 1961): 799–816; Calvin C. Jillson, *Constitution Making: Conflict and Consensus in the Federal Convention of 1787* (New York: Agathon Press, 1988); and William H. Riker, *The Strategy of Rhetoric: Campaigning for the American Constitution* (New Haven, CT: Yale University Press, 1996).

The Secrecy of the Constitutional Convention

Deliberations took place in secret, as delegates did not want the press and the public to know the details of what they were considering ([Note “Comparing Content”](#)). Newspapers hardly mentioned the convention at all, and when they did, it was in vague references praising the high caliber of the delegates. See John K. Alexander, *The Selling of the Constitutional Convention: A History of News Coverage* (Madison, WI: Madison House, 1990).

Comparing Content: The Convention’s Gag Rule

Press coverage of the Constitutional Convention cannot be compared because one of the first decisions made in the Constitutional Convention was that “nothing spoken in the House be printed, or otherwise published or communicated.” Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1937), vol. 1, 17. The delegates feared that exposure through newspapers would complicate their work. The delegate who is today regarded as the great defender of civil liberties, George Mason, wrote to his son approvingly:

This I think myself a proper precaution to prevent mistakes and misrepresentation until the business shall have been completed, when the whole may have a very different complexion from that in the several crude and indigested parts might in their first shape appear if submitted to the public eye. Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1937), vol. 3, 28.

This gag rule was rigorously enforced. One day the presiding officer, George Washington, noticed that an inattentive delegate had

dropped his notes on the floor when leaving the hall. Washington broke his usual silence and rebuked the unknown infractor:

I am sorry to find that some one Member of this Body, has been so neglectful of the secrets of the convention as to drop in the State House a copy of their proceedings, which by accident was picked up and delivered to me this morning. I must entreat Gentlemen to be more careful, least our transactions get into the News Papers, and disturb the public repose by premature speculations.

Throwing the notes on the table, Washington exclaimed, “I know not whose Paper it is, but there it is, let him who owns it take it.” Delegate William Pierce, who recorded this tale, noted that Washington “bowed, picked up his Hat, and quitted the room with a dignity so severe that every Person seemed alarmed.” Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1937), vol. 3, 86–87.

The founders were not unanimous about the threat posed by the press. Thomas Jefferson was in Paris as an ambassador. In August 1787, he wrote to his counterpart in London, John Adams, that there was no news from the convention:

I am sorry they began their deliberations by so abominable a precedent as that of tying up the tongues of their members. Nothing can justify this example but the innocence of their intentions, & ignorance of the value of public discussions. I have no doubt that all their other measures will be good and wise. Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1937), vol. 3, 76.

In 1787, the powers of the press were identified in ways we recognize in the twenty-first century. Washington was concerned that news about the political process might produce rumors, confusion, worry, and public opposition to worthwhile policies. But as Jefferson

recognized, the news can also lead to productive public debate, dialogue, and deliberation.



The membership of the Constitutional Convention was so small—never more than fifty on a given day—that they could proceed largely in “a committee of the whole.” This size enabled them to continue their discussions in private at their preferred boardinghouses and taverns—and to keep a tight lid on public discussion.

The Cross-Cutting Divides

The delegates immediately discarded the Continental Congress’s mandate that they recommend amendments to the Articles of Confederation. They agreed to draft a new Constitution from scratch in order to create a national government superior to and independent of the states.

This crucial decision was followed by disagreement about exactly how to create a national government. The states varied widely in economic bases, population sizes, and numbers of slaves.

Three cross-cutting divides existed among the states:

- Large states versus small states: The terms “large state” and “small state” are misleading. Some small states had larger populations than large states. The small states all shared economic vulnerability and an inability to grow, usually because they were boxed in by other states on their western edge, which made it impossible to hope for westward expansion.
- Cosmopolitan, centrally located states (Connecticut to Virginia) versus parochial states on the northern and southern borders
- Southern states, reliant on slavery in their economies, versus Northern states, which were not

The powers and structures of the Constitution resulted from a series of compromises designed to bridge these three divides.

Large and Small States

The most threatening split in the convention emerged initially between large and small states.

Large states fired the first salvo. The Virginia Plan, drafted by Madison, foresaw a strong national government that could veto any state laws it deemed contrary to the national interest. The central institution was a bicameral (two-chamber) legislature. The people would elect the lower house, which would in turn select the members of the upper house; the two chambers together would then elect the executive and judiciary. Breaking with the Articles of Confederation’s equal representation of states, the Virginia Plan allotted seats to both chambers of the legislature by population size alone. The text of the Virginia Plan (and its main rival, the New Jersey Plan) can be found in Clinton Rossiter, 1787: *The Grand Convention* (New York: Macmillan, 1966), 361–63 and 369–71.

Cosmopolitan, centrally located states, provided strong initial

support for the Virginia Plan against scattered opposition from border states. But Madison could not hold this coalition behind both a strong national government and a legislature allocated by population. Delegates from the small states of New Jersey, Delaware, and Maryland liked a strong national government, but they feared being overpowered. Delegates from populous Massachusetts and three fast-growing Southern states joined the two largest states, Virginia and Pennsylvania, to support legislative districts based on population, but they disliked the Virginia Plan's sweeping powers for the national government.

On June 15, the small states proposed an alternative. The New Jersey Plan enhanced the national government's powers to levy taxes and regulate commerce but left remaining powers to the states. The plan had a federal executive, elected by the legislature, to enforce states' compliance with national law, and a federal judiciary to settle disputes among the states and between the states and the national government. Any national law would become "the supreme law of the respective States." The New Jersey Plan preserved the core of the Articles of Confederation—equal representation of states in a unicameral (single-chamber) legislature.

Only three states voted for the New Jersey Plan, but the Virginia Plan's vulnerability was exposed. Facing an impasse, delegates from Connecticut suggested a compromise. Borrowing the Virginia Plan's idea of a bicameral legislature, they proposed that one chamber, the House of Representatives, be made up of representatives from districts of equal population, while in the Senate each state would be equally represented with two senators.

This Connecticut Compromise (also known as the Great Compromise) was adopted by the convention with only Virginia and Pennsylvania in opposition. Thus the configuration of today's Congress emerged not so much from principled deliberations between the Constitution's founders as from the necessity for compromise between competing state interests. In essence, the founders decided to split the difference. David Brian Robertson,

“Madison’s Opponents and Constitutional Design,” *American Political Science Review* 99 (2005): 225–44.

North and South

After this vote, North versus South displaced the divide between large and small states. The convention became preoccupied by how the new government would be empowered to deal with slavery. Northerners feared the South’s growth and room for expansion. Southerners worried that the North would threaten the practice of slavery, which, although legal in all states, was a central part only of Southern economies.

Northern interests in a strong national government acceded to Southern demands on slavery. Southerners argued that slaves should be counted when allocating legislative seats. Eventually, the convention settled on a three-fifths clause: 60 percent of the enslaved population would be counted for purposes of representation. Northern delegates, convinced that the largest slave-holding states would never have a majority in the Senate, gave in.

Link: The Three-Fifths Clause

Aaron Magruder’s comic strip *The Boondocks* ran this installment during the 2004 presidential campaign. Showing a depressed black man talking about the three-fifths clause, it powerfully illustrates the Constitution’s long-lasting affront to African Americans, almost all of whom were enslaved and, thus, for the purpose of the census (and of representation in Congress and the Electoral College), would be counted as three-fifths of a person.

Read the comic [here](#).

As the convention considered the national government's powers, an alliance of delegates from New England and the Deep South emerged to defend local control and their states' economic self-interest. Southerners sought to maintain slavery, while New Englanders wanted national tariffs to protect their commerce. They struck a deal that resulted in New England delegates voting to require the return of fugitive slaves and to prevent Congress from regulating the slave trade until 1808.

The delegates did not confront slavery head on (indeed, the word "slavery" is not directly mentioned in the Constitution). As a result, the issue of slavery would overshadow much of federal politics until its bloody resolution in the Civil War of the 1860s.

The Executive

By now, the Constitutional Convention could not break down, because the document had something for everybody. Small states liked the security of a national government and their equal representation in the Senate. The Deep South and New England valued the protection of their economic bases. Pennsylvania and Virginia—the two most populous, centrally located states—foresaw a national government that would extend the reach of their commerce and influence.

The convention's final sticking point was the nature of the executive. The debate focused on how many people would be president, the power of the office, the term of the office, how presidents would be elected, and whether they could serve multiple terms.

To break the logjam on the presidency, the convention created the Electoral College as the method of electing the president, a political solution that gave something to each of the state-based interests. The president would not be elected directly by the popular vote of citizens. Instead, electors chosen by state

legislatures would vote for president. Small states got more electoral votes than warranted by population, as the number of electors is equal to the total of representatives *and* senators. If the Electoral College did not produce a majority result, the president would be chosen by the popularly elected House, but with one vote per state delegation. The quoted phrase comes from John P. Roche, “The Founding Fathers: A Reform Caucus in Action,” *American Political Science Review* 55 (December 1961): 810. With all sides mollified, the convention agreed that the office of president would be held by one person who could run for multiple terms.

Bargaining, Compromise, and Deal Making

The Constitutional Convention began with a principled consensus on establishing a stronger national government; it ended with bargaining, compromise, and deal making. State delegations voted for their political and economic self-interests, and often worked out deals enabling everyone to have something to take home to constituents. Some complex matters, such as the structures of the executive and judicial branches, were left up to the new congress. As one scholar writes, the Constitution is “a patch-work sewn together under the pressure of both time and events by a group of extremely talented . . . politicians.” John P. Roche, “The Founding Fathers: A Reform Caucus in Action,” *American Political Science Review* 55 (December 1961): 815; see also David Brian Robertson, “Madison’s Opponents and Constitutional Design,” *American Political Science Review* 99 (2005): 225–44.

Link: The Constitution

To learn more about the Constitution, visit the [National Constitution Center](#).

Ratifying the Constitution

The signing of the Constitution by the delegates on September 17, 1787, was just the beginning. The Constitution would go into effect only after being approved by specially elected ratifying conventions in nine states.

Ratification was not easy to win. In most states, property qualifications for voting had broadened from landholding to taxpaying, thereby including most white men, many of whom benefited from the public policies of the states. Popular opinion for and against ratification was evenly split. In key states like Massachusetts and Virginia, observers thought the opposition was ahead. Jackson Turner Main, *The Antifederalists: Critics of the Constitution, 1781–1788* (Chapel Hill: University of North Carolina Press, 1961), 249; Evelyn C. Fink and William H. Riker, “The Strategy of Ratification” in *The Federalist Papers and the New Institutionalism*, ed. Bernard Grofman and Donald Wittman (New York: Agathon Press, 1989), 220–55.

The Opposition to Ratification

The elections to the ratifying conventions revealed that opponents of the Constitution tended to come from rural inland areas (not from cities and especially not from ports, where merchants held sway). They held to the ideals of the Declaration of Independence, which favored a deliberately weak national government to enhance

local and state self-government. See Herbert Storing, *What the Anti-Federalists Were For* (Chicago: University of Chicago Press, 1988). They thought that the national government's powers, the complex system of government, lengthy terms of office, and often indirect elections in the new Constitution distanced government from the people unacceptably.

Opponents also feared that the strength of the proposed national government posed a threat to individual freedoms. They criticized the Constitution's lack of a Bill of Rights—clauses to guarantee specific liberties from infringement by the new government. A few delegates to the Constitutional Convention, notably George Mason of Virginia and Elbridge Gerry of Massachusetts, had refused to sign the document in the absence of a Bill of Rights.

The Campaign for Ratification

Despite such objections and obstacles, the campaign for ratification was successful in all thirteen states. Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* (New York: Simon & Schuster, 2010). The advocates of the national political system, benefiting from the secrecy of the Constitutional Convention, were well prepared to take the initiative. They called themselves not nationalists but Federalists. Opponents to the Constitution were saddled with the name of Anti-Federalists, though they were actually the champions of a federation of independent states.

By asking conventions to ratify the Constitution, the Federalists evaded resistance from state legislatures. Federalists campaigned to elect sympathetic ratifiers and hoped that successive victories, publicized in the press, would build momentum toward winning ratification by all thirteen states.



The Federalists' media strategies included images, too. A famous woodcut at the start of the Revolution was of a serpent cut into thirteen sections with the admonition "Join or Die." Federalists provided a new twist on this theme. They kept track of the ratification by an edifice of columns, elevated one by one as each state ratified. The next state convention on the list would be represented by a hand lifting the column, often accompanied by the confident motto "Rise It Will."

Anti-Federalists did not decry the process by which the Constitution was drafted and ratified. Instead, they participated in the ratification process, hoping to organize a new convention to remedy the Constitution's flaws.

Newspapers and Ratification

The US newspaper system boosted the Federalist cause. Of the approximately one hundred newspapers being published during the ratification campaign of 1787–88, "not more than a dozen . . . could

be classed as avowedly antifederal.” Robert Allen Rutland, *The Ordeal of the Constitution: The Antifederalists and the Ratification Struggle of 1787–1788* (Norman: University of Oklahoma Press, 1966), 38. Anti-Federalist arguments were rarely printed and even less often copied by other newspapers. William H. Riker, *The Strategy of Rhetoric: Campaigning for the American Constitution* (New Haven, CT: Yale University Press, 1996), 26–28. Printers followed the money trail to support the Federalists. Most newspapers, especially those whose stories were reprinted by others, were based in port cities, if only because arriving ships provided good sources of news. Such locales were dominated by merchants who favored a national system to facilitate trade and commerce. Newspapers were less common in rural interior locations where Anti-Federalist support was greatest.

Federalists also pressured the few Anti-Federalist newspapers that existed. They wrote subscribers and advertisers and urged them to cancel. Anti-Federalist printers often moved to other cities, went out of business, or began reprinting Federalist articles. Federalists hailed such results as the voice of the people. When an Anti-Federalist paper in Philadelphia halted publication, Federalists exulted, “There cannot be a greater proof that the body of the people are federal, that the antifederal editors and printers fail of support.” More specifically, see Robert A. Rutland, “The First Great Newspaper Debate: The Constitutional Crisis of 1787–88,” *Proceedings of the American Antiquarian Society* (1987): 43–58. These examples come from Robert Allen Rutland, *The Ordeal of the Constitution: The Antifederalists and the Ratification Struggle of 1787–1788* (Norman: University of Oklahoma Press, 1966), 73–74, 135–38, 265–66; and John P. Kaminski and Gaspare J. Saladino, eds., *Commentaries on the Constitution, Public and Private* (Madison, WI: State Historical Society of Wisconsin, 1981), vol. 1, xxxii–xxxix.

Today the most famous part of this newspaper campaign is the series of essays (referred to earlier) written by Alexander Hamilton, John Jay, and James Madison, and published in New York newspapers under the collective pseudonym “Publius.” The authors

used their skills at legal argumentation to make the strongest case they could for the document that emerged from the Constitutional Convention. These Federalist papers, steeped in discussion of political theory and history, offer the fullest logic for the workings of the Constitution. However, they were rarely reprinted outside New York and were a minor part of the ratification campaign.

Link: *The Federalist*

Read *The Federalist* at the [Library of Congress online](#).

Newspapers instead played on public sentiment, notably the adulation of George Washington, presiding officer of the convention, and his support of the Constitution. On the most commonly reprinted articles, see William H. Riker, *The Strategy of Rhetoric: Campaigning for the American Constitution* (New Haven, CT: Yale University Press, 1996), chap. 6, esp. table 6.1. The most widely disseminated story concerned his return trip from Philadelphia to Virginia. A bridge collapsed but Washington escaped unharmed. The tale implied that divine intervention had ensured Washington's leadership by "the providential preservation of the valuable life of this great and good man, on his way home from the Convention." John P. Kaminski and Gaspare J. Saladino, eds., *Commentaries on the Constitution, Public and Private* (Madison, WI: State Historical Society of Wisconsin, 1981), vol. 1, 243.

Not all states were eager to ratify the Constitution, especially since it did not specify what the federal government could not do and did not include a Bill of Rights. Massachusetts narrowly voted in favor of ratification, with the provision that the first Congress take up recommendations for amending the Constitution. New Hampshire, Virginia, and New York followed this same strategy. Once nine states had ratified it, the Constitution was approved.

Madison was elected to the first Congress and proposed a Bill of Rights, the first ten amendments to the Constitution. Only after the Congress had approved the Bill of Rights did North Carolina and Rhode Island ratify the Constitution.

Key Takeaways

We have shown that the Constitution was a political document, drafted for political purposes, by skillful politicians who deployed shrewd media strategies. At the Constitutional Convention, they reconciled different ideas and base self-interests. Through savvy compromises, they resolved cross-cutting divisions and achieved agreement on such difficult issues as slavery and electing the executive. In obtaining ratification of the Constitution, they adroitly outmaneuvered or placated their opponents. The eighteenth-century press was crucial to the Constitution's success by keeping its proceedings secret and supporting ratification.

II. Reading: Constitutional Principles and Provisions

Learning Objectives

After reading this section, you should be able to answer the following questions:

- What is the separation of powers?
- What are checks and balances?
- What is bicameralism?
- What are the Articles of the Constitution?
- What is the Bill of Rights?

The Principles Underlying the Constitution

While the Constitution established a national government that did not rely on the support of the states, it limited the federal government's powers by listing ("enumerating") them. This practice of *federalism* means that some policy areas are exclusive to the federal government, some are exclusive to the states, and others are shared between the two levels.

Federalism aside, three key principles are the crux of the Constitution: separation of powers, checks and balances, and bicameralism.

Separation of Powers

Separation of powers is the allocation of three domains of governmental action—law making, law execution, and law adjudication—into three distinct branches of government: the legislature, the executive, and the judiciary. Each branch is assigned specific powers that only it can wield (see Table 1, “The Separation of Powers and Bicameralism as Originally Established in the Constitution,” below).

Table 1. The Separation of Powers and Bicameralism as Originally Established in the Constitution

Branch of Government	Term	How Selected	Distinct Powers
Legislative			
House of Representatives	2 years	Popular vote	Initiate revenue legislation; bring articles of impeachment
Senate	6 years; 3 classes staggered	Election by state legislatures	Confirm executive appointments; confirm treaties; try impeachments
Executive			
President	4 years	Electoral College	Commander-in-chief; nominate executive officers and Supreme Court justices; veto; convene both houses of Congress; issue reprieves and pardons
Judicial			
Supreme Court	Life (during good behavior)	Presidential appointment and Senate confirmation (stated more or less directly in Federalist No. 78)	Judicial review (implicitly in Constitution but stated more or less directly in Federalist No. 78)



In perhaps the most abiding indicator of the separation of powers, Pierre L'Enfant's plan of Washington, DC, placed the President's House and the Capitol at opposite ends of Pennsylvania Avenue. The plan notes the importance of the two branches being both geographically and politically distinct.

This separation is in the Constitution itself, which divides powers and responsibilities of each branch in three distinct articles: Article I for the legislature, Article II for the executive, and Article III for the judiciary.

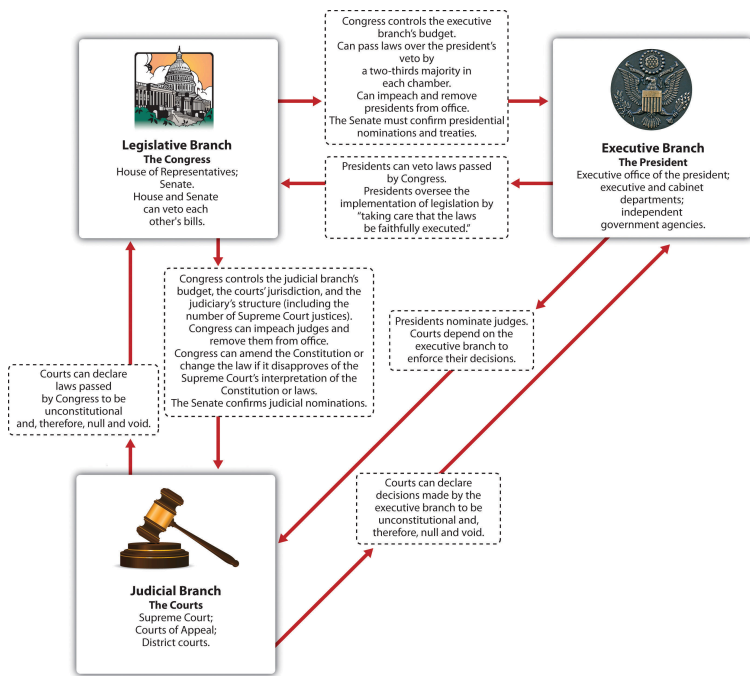
Checks and Balances

At the same time, each branch lacks full control over all the powers

allotted to it. Political scientist Richard Neustadt put it memorably: “The Constitutional Convention of 1787 is supposed to have created a government of ‘separated powers.’ It did nothing of the sort. Rather, it created a government of separated institutions *sharing* powers.” Richard E. Neustadt, *Presidential Power* (New York: Wiley, 1960), 33. Of course, whether the founders intended this outcome is still open to dispute. No branch can act effectively without the cooperation—or passive consent—of the other two.

Most governmental powers are shared among the various branches in a system of checks and balances, whereby each branch has ways to respond to, and if necessary, block the actions of the others. For example, only Congress can pass a law. But the president can veto it. Supreme Court justices can declare an act of Congress unconstitutional through judicial review. Figure 1, “Checks and Balances,” below, shows the various checks and balances between the three branches.

Figure 1. Checks and Balances



Source: Adapted from George C. Edwards, Martin P. Wattenberg, and Robert L. Lineberry, *Government in America: People, Politics, and Policy* (White Plains, NY: Pearson Longman, 2011), 46.

The logic of checks and balances echoes Madison's skeptical view of human nature. In Federalist No. 10 he contends that all individuals, even officials, follow their own selfish interests. Expanding on this point in Federalist No. 51, he claimed that officeholders in the three branches would seek influence and defend the powers of their respective branches. Therefore, he wrote, the Constitution provides "to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."

Bicameralism

Government is made yet more complex by splitting the legislature into two separate and distinct chambers—the House of Representatives and the Senate. Such bicameralism was common in state legislatures. One chamber was supposed to provide a close link to the people, the other to add wisdom. Gordon S. Wood, *The Creation of the American Republic* (Chapel Hill: University of North Carolina Press, 1969), chap. 6. The Constitution makes the two chambers of Congress roughly equal in power, embedding checks and balances inside the legislative branch itself.

Bicameralism recalls the founders' doubts about majority rule. To check the House, directly elected by the people, they created a Senate. Senators, with six-year terms and election by state legislatures, were expected to work slowly with a longer-range understanding of problems and to manage popular passions. A story, possibly fanciful, depicts the logic: Thomas Jefferson, back from France, sits down for coffee with Washington. Jefferson inquires why Congress will have two chambers. Washington asks Jefferson, "Why did you pour that coffee into your saucer?" Jefferson replies, "To cool it," following the custom of the time. Washington concludes, "Even so, we pour legislation into the senatorial saucer to cool it." This version comes from Richard F. Fenno Jr., *The United States Senate: A Bicameral Perspective* (Washington, DC: American Enterprise Institute, 1982), 5.

The Bias of the System

The US political system is designed to prevent quick agreement within the legislature and between the branches. Senators, representatives, presidents, and Supreme Court justices have

varying terms of offices, distinctive means of selection, and different constituencies. Prospects for disagreement and conflict are high. Accomplishing any goal requires navigating a complex obstacle course. At any point in the process, action can be stopped. Maintaining the status quo is more likely than enacting significant changes. Exceptions occur in response to dire situations such as a financial crisis or external attacks.

What the Constitution Says

The text of the Constitution consists of a preamble and seven sections known as “articles.” The preamble is the opening rhetorical flourish. Its first words—“We the People of the United States”—rebuke the “We the States” mentality of the Articles of Confederation. The preamble lists reasons for establishing a national government.

The first three articles set up the branches of government. We briefly summarize them here, leaving the details of the powers and responsibilities given to these branches to specific chapters.

Article I establishes a legislature that the founders believed would make up the heart of the new government. By specifying many domains in which Congress is allowed to act, Article I also lays out the powers of the national government.

Article II takes up the cumbersome process of assembling an Electoral College and electing a president and a vice president—a process that was later modified by the Twelfth Amendment. The presidential duties listed here focus on war and management of the executive branch. The president’s powers are far fewer than those enumerated for Congress.

The Constitutional Convention punted decisions on the structure of the judiciary below the Supreme Court to the first Congress to decide. Article III states that judges of all federal courts hold office for life “during good Behaviour.” It authorizes the Supreme Court to

decide all cases arising under federal law and in disputes involving states. Judicial review, the central power of the Supreme Court, is not mentioned. Asserted in the 1804 case of *Marbury v. Madison*, it is the ability of the Court to invalidate a law passed by Congress or a decision made by the executive on the basis that it violates the Constitution.

Article IV lists rights and obligations among the states and between the states and the national government.

Article V specifies how to amend the Constitution. This shows that the framers intended to have a Constitution that could be adapted to changing conditions. There are two ways to propose amendments. States may call for a convention. (This has never been used due to fears it would reopen the entire Constitution for revision.) The other way to propose amendments is for Congress to pass them by a two-thirds majority in both the House and Senate.

Then there are two ways to approve an amendment. One is through ratification by three-fourths of state legislatures. Alternatively, an amendment can be ratified by three-fourths of specially convoked state conventions. This process has been used once. “Wets,” favoring the end of Prohibition, feared that the Twenty-First Amendment—which would have repealed the Eighteenth Amendment prohibiting the sale and consumption of alcohol—would be blocked by conservative (“dry”) state legislatures. The wets asked for specially called state conventions and rapidly ratified repeal—on December 5, 1933.

Thus a constitutional amendment can be stopped by one-third of either chamber of Congress or one-fourth of state legislatures—which explains why there have been only twenty-seven amendments in over two centuries.

Article VI includes a crucial provision that endorses the move away from a loose confederation to a national government superior to the states. Lifted from the New Jersey Plan, the supremacy clause states that the Constitution and all federal laws are “the supreme Law of the Land.”

Article VII outlines how to ratify the new Constitution.

Constitutional Evolution

The Constitution has remained essentially intact over time. The basic structure of governmental power is much the same in the twenty-first century as in the late eighteenth century. At the same time, the Constitution has been transformed in the centuries since 1787. Amendments have greatly expanded civil liberties and rights. Interpretations of its language by all three branches of government have taken the Constitution into realms not imagined by the founders. New practices have been grafted onto the Constitution's ancient procedures. Intermediary institutions not mentioned in the Constitution have developed important governmental roles. Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall and the Rise of Presidential Democracy* (Cambridge, MA.: Belknap Press of Harvard, 2005).

Amendments

Many crucial clauses of the Constitution today are in the amendments. The Bill of Rights, the first ten amendments ratified by the states in 1791, defines civil liberties to which individuals are entitled. After the slavery issue was resolved by a devastating civil war, equality entered the Constitution with the Fourteenth Amendment, which specified that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” This amendment provides the basis for civil rights, and further democratization of the electorate was guaranteed in subsequent ones. The right to vote became anchored in the Constitution with the addition of the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, which stated that such a right, granted to all citizens aged eighteen years or more, could not be denied on the basis of race or sex, nor could it be dependent on the payment

of a poll tax. See Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000).

Link: The Full Text of the Constitution

Find the full text of the Constitution at the [National Archives online](#).

Constitutional Interpretation

The Constitution is sometimes silent or vague, making it flexible and adaptable to new circumstances. Interpretations of constitutional provisions by the three branches of government have resulted in changes in political organization and practice. The power of all three branches to develop the vague language of the Constitution is well documented in Neal Devins and Louis Fisher, *The Democratic Constitution* (New York: Oxford University Press, 2004).

For example, the Constitution is silent about the role, number, and jurisdictions of executive officers, such as cabinet secretaries; the judicial system below the Supreme Court; and the number of House members or Supreme Court justices. The first Congress had to fill in the blanks, often by altering the law. David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801* (Chicago: University of Chicago Press, 1997).

The Supreme Court is today at center stage in interpreting the Constitution. Before becoming chief justice in 1910, Charles Evans Hughes proclaimed, “We are under a Constitution, but the Constitution is what the Court says it is.” Hughes was then Governor of New York. Quoted in Edward S. Corwin, *The Constitution and What It Means Today* (Princeton, NJ: Princeton University Press, 1954), xiii. By examining the Constitution’s clauses and applying

them to specific cases, the justices expand or limit the reach of constitutional rights and requirements. However, the Supreme Court does not always have the last word, since state officials and members of the national government's legislative and executive branches have their own understanding of the Constitution that they apply on a daily basis, responding to, challenging, and sometimes modifying what the Court has held. See Neal Devins and Louis Fisher, *The Democratic Constitution* (New York: Oxford University Press, 2004).

New Practices

Specific sections of the Constitution have evolved greatly through new practices. Article II gives the presidency few formal powers and responsibilities. During the first hundred years of the republic, presidents acted in limited ways, except during war or massive social change, and they rarely campaigned for a legislative agenda. See Jeffrey Tulis, *The Rhetorical Presidency* (Princeton, NJ: Princeton University Press, 1987). Article II's brevity would be turned to the office's advantage by President Theodore Roosevelt at the dawn of the twentieth century. He argued that the president is "a steward of the people . . . bound actively and affirmatively to do all he could for the people." So the president is obliged to do whatever is best for the nation as long as it is not specifically forbidden by the Constitution. Jeffrey K. Tulis, "The Two Constitutional Presidencies," in *The Presidency and the Political System*, 6th ed., ed. Michael Nelson (Washington, DC: CQ Press, 2000), 93–124.

Intermediary Institutions

The Constitution is silent about various intermediary

institutions—political parties, interest groups, and the media—that link government with the people and bridge gaps caused by a separation-of-powers system. The political process might stall in their absence. For example, presidential elections and the internal organization of Congress rely on the party system. Interest groups represent different people and are actively involved in the policy process. The media are fundamental for conveying information to the public about government policies as well as for letting government officials know what the public is thinking, a process that is essential in a democratic system.

Key Takeaways

The Constitution established a national government distinguished by federalism, separation of powers, checks and balances, and bicameralism. It divided power and created conflicting institutions—between three branches of government, across two chambers of the legislature, and between national and state levels. While the structure it created remains the same, the Constitution has been changed by amendments, interpretation, new practices, and intermediary institutions. Thus the Constitution operates in a system that is democratic far beyond the founders' expectations.

12. Putting It Together

Summary

We have shown that the Constitution was a political document, drafted for political purposes by its framers, who worked to replace the “first political system” of the post-revolutionary nation with one characterized by more national power than had existed under the Articles of Confederation. At the Constitutional Convention, the framers reconciled lofty ideals and base self-interests. Through savvy compromises, they resolved cross-cutting divisions and achieved agreement on such difficult issues as slavery and electing the president, though their solution to the former proved to be a temporary one. By getting the Constitution ratified, the framers adroitly outmaneuvered or placated their opponents, in part by promising to pass a Bill of Rights during the first session of the newly created Congress.

The Constitution established a national government distinguished by federalism, separation of powers, checks and balances, bicameralism, and a commitment to government by, for, and of The People. It divided power and created conflicting institutions—between three branches of government, across two chambers of the legislature, and between national and state levels. While the structure it created remains the same, the Constitution has been changed by amendments, interpretation, new practices, and intermediary institutions. Thus the Constitution operates in a system that is democratic far beyond the founders’ expectations. Though it is far from perfect, it is the oldest existing written constitution on the planet, and has provided the basis through which the American people have negotiated both emergent and perennial challenges, from the rise of industrial capitalism, to the practice of democracy itself.

The Constitution always was—and remains—a political document created and developed in political ways for political purposes, and it continues to be the object of political engagement in the twenty-first century.

Additional Resources

PART III

MODULE 3: AMERICAN FEDERALISM

13. Module Introduction

American Federalism

Module Introduction

Topic Covered

- The constitutional foundations of federalism
- Enumerated, concurrent, and reserved powers
- The evolution of federalism

Who governs? This is the prevailing question in American politics. In fact, in every pressing political matter of the day, this is the resounding cry: Do the people rule or does power emanate solely from the states and/or the national government? The constitutional principle of federalism functions to address this concern.

As a part of the doctrine of separation of powers, federalism was fashioned as “double security” for the rights of the people (Hamilton or Madison, 1788). Premised upon the notion that states are “closer” to the people and are, thus, better positioned to protect citizen’s rights, federalism’s design was to construct a divide between national and state powers. This distribution of power, while somewhat articulated in Article IV of the Constitution, is much more pronounced in the Tenth Amendment wherein it is expressed that “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.” Such verbiage, appears to create a clear line of demarcation between national and state powers. However, the

evolution of American society, alongside changes in the international order, has consistently challenged the validity of this principle.

Chief among these challenges was the American Civil War, with the consequences of such — the abolishment of slavery — being the most marked restraint on states' rights in American history. Followed by the New Deal recovery, shifts in social order (Jim Crow segregation), America's war on terror, and even the ongoing marijuana and healthcare debates, federalism, as a constitutional principle, remains as a regularly contested part of American federal government. And for good reason. At the Constitutional Convention of 1787, it was the states that came together to form the national government. Early on, it would seem that the national government was created to be an agent of the states, but as time would have it, the states, by virtue of court rulings, have morphed into agents of the federal government.

I recommend you to search and review — What is Federalism? Why is it important? ⁽¹⁾

Reference

Hamilton A. or Madison, J. (1788). [*The Federalist #51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*](#).

Learning Outcomes

1. Students will be able to articulate an understanding of the individual in society.
2. Students will be able to think critically about institutions, cultures, and behaviors in their local and/or national

environment.

3. Students will be able to think critically about institutions, cultures, and behaviors of the peoples of the world.
4. Students will develop a historical context for understanding current issues and events
5. Students will develop a greater understanding of world events

Objectives

Upon completion of this module, the student will be able to:

- Identify the constitutional origins of federalism.
- Identify powers enumerated to the national government.
- Identify powers reserved to the states.
- Evaluate the role and evolution of federalism in American democracy. ⁽¹⁾

Readings & Resources:

- [Federalism As a Structure for Power](#) from Lumen Learning
- [The Powers of the National Government](#) from Lumen Learning
- [The Meanings of Federalism](#) from Lumen Learning
- [Why Federalism Works \(More or Less\)](#) from Lumen Learning
- [Putting it Together](#) from Lumen Learning
- Video: [The Affordable Care Act Challenges – the Individual Mandate & the Commerce Clause](#) by oyez today

Supplemental Material/Resources

(Note: This material, in the media form of online videos, is considered supplemental and thus is not used for assessment purposes.)

- Video: [Las Vegas Isn't Las Vegas](#) from Lumen Learning
- Reading: [State Legislatures as “Laboratories of Democracy”](#) from Lumen Learning
- Video: [United States of ALEC – A Follow Up](#) from Lumen Learning
- Reading: [Police Power](#) from Lumen Learning and SBCTS
- Video: [The spread of marijuana, legalization explained](#) from Vox . Pay attention to notecard 6. Marijuana is illegal under federal law even in states that legalize it.
- Video: [The Supreme Court's same-sex marriage battle, explained](#) from Vox.

Assignments & Learning Activities

- Review Assigned Readings
- Review Module 3 Learning Unit
- Work on a Case Study
- Take Quiz 3

14. Lecture Content

Lecture Content

Learning Unit 3

The Supremacy Clause

The notion of American federalism can be segmented into three very important constitutional clauses: the supremacy clause, the commerce clause, and the reservation clause, also known as the Tenth Amendment.

The Supremacy Clause

The U.S. Constitution is a limiting document; that is, it is limited in its ability to intrude upon the individual rights and liberties of the American people. Even so, in spite of such limitations, it is, by virtue of Article VI, the supreme law of the land, preempting any inferior law that contradicts with its established principles; thus, making this clause a major battlefield for American politics. The marijuana debate captures the essence of this struggle well. Consider the flowchart below as it examines the role of constitutional supremacy vis-à-vis the personal use and/or possession of this drug.⁽¹⁾



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The Commerce Clause

In terms of federalism, there is no other area that sparks more debate than that of Congress's Commerce Clause. Per Article I, Section 8, Clause III, "the United States Congress shall have power 'To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.'" ⁽³⁴⁾ Originally meant to quell economic disputes between the states as they existed under the Articles of Confederation, the interpretation of this provision by

the Supreme Court has taken on new meaning in contemporary America. ⁽¹⁾

From the growth of wheat in *WICKARD V. FILBURN* (1942), to the possession of marijuana in *GONZALES V. RAICH* (2004), state rights and laws have continually been preempted by the controversial commerce clause. In recent years, the most contentious area of commerce emerged out of the Obama Administration's universal healthcare plan, which included the notorious individual mandate. ⁽¹⁾ In *NATIONAL FEDERATION OF INDEPENDENT BUSINESSES V. SEBELIUS*, 2011, the Supreme Court opined that under Congress's taxing and spending power, a form of commerce, the Obama Administration could, in fact, require American citizens to take part in the Affordable Care Act (ACA). ⁽³⁵⁾ Listen below as the commerce clause is weighed against the ACA. Be sure to review the video the Individual Mandate & the Commerce Clause under Reading and Resources on the Module 3 Page. ⁽²⁴⁾

The Reservation Clause

The Tenth Amendment

The Tenth Amendment provides that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” ⁽³⁶⁾ This is often referred to as the reservation clause. Examples of reserved powers possessed by states include criminal law, public education, contract law, and family law. ⁽¹⁾

Further, the wording of this clause suggests that the Framers understood that Americans would be more strongly attached to their state and local governments than to the national government and that they would not support reserving all power to that national government. ⁽¹⁾ To this end, Alexander Hamilton, in *FEDERALIST NO.*

17, deemed the states “the great cement of society,” better equipped to protect liberty than processes at the national level. ⁽³⁷⁾

But have states better preserved individual rights at the state level than their counterparts at the federal end? A simple answer to this question is no. In terms of civil liberties and civil rights, state governments are without the best track record. In the way of civil rights, states have long disregarded minority rights, and it is because of such gross neglect that the power of the national government has expanded. Take, for example, gay rights in America. Because family law is not a power delegated to the national government, state governments have continuously exercised jurisdiction in this area even unto defining marriage as an institution between a man and a woman. To this end, the rights and liberties of same-sex couples were trodden. It would take the supremacy of the U.S. Constitution, by virtue of the Supreme Court’s interpretation of case law, to advance the cause of gay rights — to include marriage equality — in America. ⁽¹⁾

15. Reading: Federalism As a Structure for Power

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What is federalism?
2. What powers does the Constitution grant to the national government?
3. What powers does the Constitution grant to state governments?

State vs. National Powers

The Constitution and its amendments outline distinct powers and tasks for national and state governments. Some of these constitutional provisions enhance the power of the national government; others boost the power of the states. Checks and balances protect each level of government against encroachment by the others.

National Powers

The Constitution gives the national government three types of

power. In particular, Article I authorizes Congress to act in certain enumerated domains.

Exclusive Powers

The Constitution gives exclusive powers to the national government that states may not exercise. These are foreign relations, the military, war and peace, trade across national and state borders, and the monetary system. States may not make treaties with other countries or with other states, issue money, levy duties on imports or exports, maintain a standing army or navy, or make war.

Concurrent Powers

The Constitution accords some powers to the national government without barring them from the states. These concurrent powers include regulating elections, taxing and borrowing money, and establishing courts. National and state governments both regulate commercial activity. In its commerce clause, the Constitution gives the national government broad power to “regulate Commerce with foreign Nations, and among the several States and with the Indian tribes.” This clause allowed the federal government to establish a national highway system that traverses the states. A state may regulate any and all commerce that is entirely within its borders. National and state governments alike make and enforce laws and choose their own leaders. They have their own constitutions and court systems. A state’s Supreme Court decision may be appealed to the US Supreme Court provided that it raises a “federal question,” such as an interpretation of the US Constitution or of national law.

Implied Powers

The Constitution authorizes Congress to enact all laws “necessary and proper” to execute its enumerated powers. This necessary and proper clause allows the national government to claim implied powers, logical extensions of the powers explicitly granted to it. For example, national laws can and do outlaw discrimination in employment under Congress’s power to regulate interstate commerce.

States’ Powers

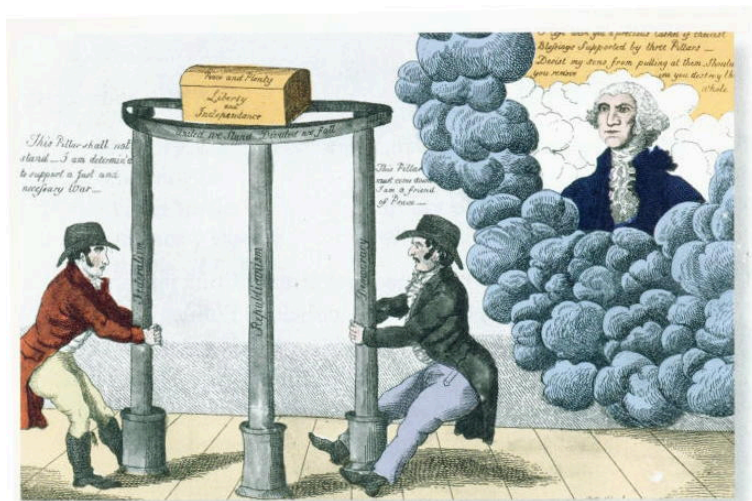
The states existed before the Constitution, so the founders said little about their powers until the Tenth Amendment was added in 1791. It holds that “powers not delegated to the United States...nor prohibited by it [the Constitution] to the States, are reserved to the States...or to the people.” States maintain inherent powers that do not conflict with the Constitution. Notably, in the mid-nineteenth century, the Supreme Court recognized that states could exercise police powers to protect the public’s health, safety, order, and morals.

Reserved Powers

Some powers are reserved to the states, such as ratifying proposed amendments to the Constitution and deciding how to elect Congress and the president. National officials are chosen by state elections. Congressional districts are drawn within states. Their boundaries are reset by state officials after the decennial census. So the party that controls a state’s legislature and governorship is able to manipulate districts in its favor. Republicans, having taken over

many state governments in the 2010 elections, benefited from this opportunity.

National Government's Responsibilities to the States



The pillars of Federalism, Republicanism, and Democracy made up the foundation of the Federalist party in early American government.

The Constitution lists responsibilities the national government has to the states. The Constitution cannot be amended to deny the equal representation of each state in the Senate. A state's borders cannot be altered without its consent. The national government must guarantee each state "a republican form of government" and defend any state, upon its request, from invasion or domestic upheaval.

States' Responsibilities to Each Other

Article IV lists responsibilities states have to each other: each state must give “full faith and credit” to acts of other states. For instance, a driver’s license issued by one state must be recognized as legal and binding by another. No state may deny “privileges and immunities” to citizens of other states by refusing their fundamental rights. States can, however, deny benefits to out-of-staters if they do not involve fundamental rights. Courts have held that a state may require newly arrived residents to live in the state for a year before being eligible for in-state (thus lower) tuition for public universities, but may not force them to wait as long before being able to vote or receive medical care. Officials of one state must extradite persons upon request to another state where they are suspected of a crime. States dispute whether and how to meet these responsibilities. Conflicts sometimes are resolved by national authority. In 2003, several states wanted to try John Muhammad, accused of being the sniper who killed people in and around Washington, DC. The US attorney general, John Ashcroft, had to decide which jurisdiction would be first to put him on trial. Ashcroft, a proponent of capital punishment, chose the state with the toughest death-penalty law, Virginia.

“The Supreme Law of the Land” and Its Limits

Article VI’s supremacy clause holds that the Constitution and all national laws are “the supreme law of the land.” State judges and officials pledge to abide by the US Constitution. In any clash between national laws and state laws, the latter must give way. However, as we shall see, boundaries are fuzzy between the powers national and state governments may and may not wield. Implied powers of the national government, and those reserved to the states

by the Tenth Amendment, are unclear and contested. The Constitution leaves much about the relative powers of national and state governments to be shaped by day-to-day politics in which both levels have a strong voice.

A Land of Many Governments

“Disliking government, Americans nonetheless seem to like governments, for they have so many of them.”¹ Table 3.1 “Governments in the United States” catalogs the 87,576 distinct governments in the fifty states. They employ over eighteen million full-time workers. These numbers would be higher if we included territories, Native American reservations, and private substitutes for local governments such as gated developments’ community associations.

Governments in the United States

National government	1
States	50
Counties	3,034
Townships	16,504
Municipalities	19,429
Special districts	35,052
Independent school districts	13,506
Total governmental units in the United States	87,576

The US Bureau of the Census compiles this data, categorizing those

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entities that are organized, usually chosen by election, with a governmental character and substantial autonomy.

States

In one sense, all fifty states are equal: each has two votes in the US Senate. The states also have similar governmental structures to the national government: three branches—executive, legislative, and judicial (only Nebraska has a one chamber—unicameral—legislature). Otherwise, the states differ from each other in numerous ways. These include size, diversity of inhabitants, economic development, and levels of education. Differences in population are politically important as they are the basis of each state's number of seats in the House of Representatives, over and above the minimum of one seat per state. States get less attention in the news than national and local governments. Many state events interest national news organizations only if they reflect national trends, such as a story about states passing laws regulating or restricting abortions.³ A study of Philadelphia local television news in the early 1990s found that only 10 percent of the news time concerned state occurrences, well behind the 18 percent accorded to suburbs, 21 percent to the region, and 37 percent to the central city.⁵ Since then, the commitment of local news outlets to state news has waned further.⁷

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Native American Reservations

In principle, Native American tribes enjoy more independence than states but less than foreign countries. Yet the Supreme Court, in 1831, rejected the Cherokee tribe's claim that it had the right as a foreign country to sue the state of Georgia. The justices said that the tribe was a "domestic dependent nation."⁹ As wards of the national government, the Cherokee were forcibly removed from land east of the Mississippi in ensuing years.

Native Americans have slowly gained self-government. Starting in the 1850s, presidents' executive orders set aside public lands for reservations directly administered by the national [Bureau of Indian Affairs](#) (BIA). During World War II, Native Americans working for the BIA organized to gain legal autonomy for tribes. Buttressed by Supreme Court decisions recognizing tribal rights, national policy now encourages Native American nations on reservations to draft constitutions and elect governments.¹¹

Since the Constitution gives Congress and the national government exclusive "power to regulate commerce...with the Indian tribes," states have no automatic authority over tribe members on reservations within state borders.¹³ As a result, many Native American tribes have built profitable casinos on reservations within states that otherwise restrict most gambling.¹⁵

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Local Governments

All but two states are divided into administrative units known as counties.¹⁷ States also contain municipalities, whether huge cities or tiny hamlets. They differ from counties by being established by local residents, but their powers are determined by the state. Cutting across these borders are thousands of school districts as well as special districts for drainage and flood control, soil and water conservation, libraries, parks and recreation, housing and community development, sewerage, water supply, cemeteries, and fire protection.¹⁹

Key Takeaways

Federalism is the American political system's arrangement of powers and responsibilities among—and ensuing relations between—national, state, and local governments. The US Constitution specifies exclusive and concurrent powers for the national and state governments. Other powers are implied and determined by day-to-day politics.

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1. Martha Derthick, *Keeping the Compound Republic: Essays on American Federalism* (Washington, DC: Brookings, 2001), 83. [↩](#)
 2. John Leland, "Abortion Foes Advance Cause at State Level," *New*

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York Times, June 3, 2010, A1, 16. ↵

3. Phyllis Kaniss, *Making Local News* (Chicago: University of Chicago Press, 1991), table 4.4. ↵
4. A survey of state capitol news coverage in 2002 revealed that thirty-one state capitols had fewer newspaper reporters than in 2000. Charles Layton and Jennifer Dorroh, "[Sad State](#)," *American Journalism Review*, June 2002. ↵
5. *Cherokee Nation v. Georgia*, 30 US 1 (1831). ↵
6. See Charles F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* (New Haven, CT: Yale University Press, 1987); George Pierre Castile, *To Show Heart: Native American Self-Determination and Federal Indian Policy, 1960–1975* (Tucson: University of Arizona Press, 1998); and Kenneth R. Philp, *Termination Revisited: American Indians on the Trail to Self-Determination, 1933–1953* (Lincoln: University of Nebraska Press, 1999). ↵
7. *Worcester v. Georgia*, 31 US 515 (1832). ↵
8. *Montana v. Blackfeet Tribe of Indians*, 471 US 759 (1985); *California v. Cabazon Band of Indians*, 480 US 202 (1987); *Seminole Tribe of Florida v. Florida*, 517 US 44 (1996). ↵
9. The two exceptions are Alaska, which has boroughs that do not cover the entire area of the state, and Louisiana, where the equivalents of counties are parishes. ↵
10. The US Bureau of the Census categorizes those entities that are organized (usually chosen by election) with a governmental character and substantial autonomy. US Census Bureau, [Government Organization: 2002 Census of Governments 1](#), no. 1: 6. ↵

16. Reading: The Powers of National Government

Learning Objective

- Describe the power-sharing arrangements enshrined in the Constitution

The Powers of National Government

The federal government is composed of three branches: legislative, executive, and judicial. Powers are vested in Congress, in the President, and the federal courts by the United States Constitution. The powers and duties of these branches are further defined by acts of Congress, including the creation of executive departments and courts inferior to the Supreme Court. The government was formed in 1789, making the United States one of the world's first, if not the first, modern national constitutional republic. It is based on the principle of federalism, where power is shared between the federal government and state governments. The powers of the federal government have generally expanded greatly since the Civil War. However, there have been periods of legislative branch dominance since then. Also, states' rights proponents have succeeded in limiting federal power through legislative action, executive prerogative, or constitutional interpretation by the courts. A theoretical pillar of the United States Constitution is the idea of checks and balances between the powers and responsibilities of

the three branches of American government.



Congress

The U.S. Congress holds legislative power.

Congress is the legislative branch of the federal government. It is bicameral, comprised of the Senate and the House of Representatives. The Constitution grants numerous powers to Congress, including the power to:

- levy and collect taxes,
- coin money and regulate its value,

- provide punishment for counterfeiting,
- establish post offices and roads,
- promote progress of science by issuing patents,
- create federal courts inferior to the Supreme Court,
- combat piracies and felonies,
- declare war,
- raise and support armies,
- provide and maintain a navy,
- make rules for the regulation of land and naval forces,
- exercise exclusive legislation in the District of Columbia,
- make laws necessary to properly execute powers.

Since the United States was formed, many disputes have arisen over the limits on the powers of the federal government in the form of lawsuits ultimately decided by the Supreme Court. The executive power in the federal government is vested in the President, although power is often delegated to the Cabinet members and other officials. The President and Vice President are elected as running mates by the Electoral College for which each state, as well as the District of Columbia, is allocated a number of seats based on its representation in both houses of Congress. The President is limited to a maximum of two four-year terms. If the President has already served two years or more of a term to which some other person was elected, he may only serve one more additional four-year term. The Judiciary explains and applies the laws. This branch hears and eventually makes decisions on various legal cases. Article III, section I of the Constitution establishes the Supreme Court of the United States and authorizes the United States Congress to establish inferior courts as their need shall arise. Section I also establishes a lifetime tenure for all federal judges and states that their compensation may not be diminished during their time in office. Article II, section II establishes that all federal judges are to be appointed by the president and confirmed by the Senate.



2008 Democratic Party Presidential Candidate Barack Obama

Key Takeaways

- Congress is the legislative branch and is comprised of the Senate and the House of Representatives. The Constitution grants powers to Congress and any disputes are decided by the Supreme Court.
- The executive power is vested in the President, although power is often delegated to the Cabinet members and other officials.
- The judiciary explains and applies the laws. This branch makes decisions on various legal cases.

Terms

- Bicameral: having, or pertaining to, two separate legislative chambers or houses.
- Tenure: a status of possessing a thing or an office; an incumbency.

Learn to [solve the Rubix Cube](#) with the easiest method, memorizing only six algorithms.

17. Reading: The Meanings of Federalism

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. How has the meaning of federalism changed over time?
2. Why has the meaning of federalism changed over time?
3. What are states' rights and dual, cooperative, and competitive federalism?

The meaning of federalism has changed over time. During the first decades of the republic, many politicians held that states' rights allowed states to disobey any national government that in their view exceeded its powers. Such a doctrine was largely discredited after the Civil War. Then dual federalism, a clear division of labor between national and state government, became the dominant doctrine. During the New Deal of the 1930s, cooperative federalism, whereby federal and state governments work together to solve problems, emerged and held sway until the 1960s. Since then, the situation is summarized by the term competitive federalism, whereby responsibilities are assigned based on whether the national government or the state is thought to be best able to handle the task.

States' Rights

The ink had barely dried on the Constitution when disputes arose over federalism. Treasury Secretary Alexander Hamilton hoped to build a strong national economic system; Secretary of State Thomas Jefferson favored a limited national government. Hamiltonian and Jeffersonian factions in President George Washington's cabinet led to the first political parties: respectively, the Federalists, who favored national supremacy, and the Republicans, who supported states' rights.

Compact Theory

In 1798, Federalists passed the Alien and Sedition Acts, outlawing malicious criticism of the government and authorizing the president to deport enemy aliens. In response, the Republican Jefferson drafted a resolution passed by Kentucky's legislature, the first states' rights manifesto. It set forth a compact theory, claiming that states had voluntarily entered into a "compact" to ratify the Constitution. Consequently, each state could engage in "nullification" and "judge for itself" if an act was constitutional and refuse to enforce it. Forrest McDonald, *States' Rights and the Union: Imperium in Imperio, 1776–1876* (Lawrence: University Press of Kansas, 2000), 38–43. However, Jefferson shelved states' rights when, as president, he directed the national government to purchase the enormous Louisiana Territory from France in 1803.

Links: Alien and Sedition Acts; Jefferson's Role

Read more about the [Alien and Sedition Acts online](#).

Read more about [Jefferson's role online](#).

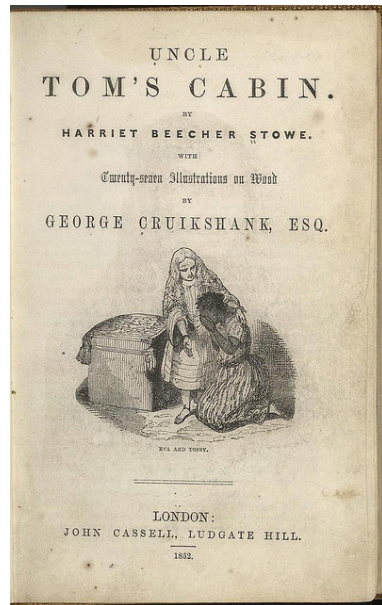
Slavery and the Crisis of Federalism

After the Revolutionary War, slavery waned in the North, where slaves were domestic servants or lone farmhands. In the South, labor-intensive crops on plantations were the basis of Southern prosperity, which relied heavily on slaves. This section draws on James M. McPherson, *Battle Cry of Freedom: The Civil War Era* (New York: Oxford University Press, 1988).

In 1850, Congress faced the prospect of new states carved from land captured in the Mexican War and debated whether they would be slave or free states. In a compromise, Congress admitted California as a free state but directed the national government to capture and return escaped slaves, even in free states. Officials in Northern states decried such an exertion of national power favoring the South. They passed state laws outlining rights for accused fugitive slaves and forbidding state officials from capturing fugitives. Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780–1861* (Baltimore, MD: Johns Hopkins University Press, 1974). The Underground Railroad transporting escaped slaves northward grew. The saga of hunted fugitives was at the heart of Harriet Beecher Stowe's 1852 novel *Uncle Tom's Cabin*, which sold more copies proportional to the American population than any book before or since.

In 1857, the Supreme Court stepped into the fray. Dred Scott, the slave of a deceased Missouri army surgeon, sued for freedom, noting he had accompanied his master for extended stays in a free state and a free territory. An encyclopedic account of this case is Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978). The justices dismissed Scott's claim. They stated that blacks, excluded from the Constitution, could never be U.S. citizens and could not sue in federal court. They added that any national restriction on slavery in territories violated the Fifth Amendment, which

bars the government from taking property without due process of law. To many Northerners, the Dred Scott decision raised doubts about whether *any* state could effectively ban slavery. In December 1860, a convention in South Carolina repealed the state's ratification of the Constitution and dissolved its union with the other states. Ten other states followed suit. The eleven formed the Confederate States of America.



Lithograph from Uncle Tom's Cabin. The plight of fugitive slaves, vividly portrayed in the mega best seller of the 1850s, Uncle Tom's Cabin, created a crisis in federalism that led directly to the Civil War.

Links: The Underground Railroad and the Dred Scott Case

Learn more about the [Underground Railroad online](#).

Learn more about the Dred Scott case from the [Library of Congress](#).

Enduring Image: The Confederate Battle Flag

The American flag is an enduring image of the United States' national unity. The Civil War battle flag of the Confederate States of America is also an enduring image, but of states' rights, of opposition to a national government, and of support for slavery. The blue cross studded with eleven stars for the states of the Confederacy was not its official flag. Soldiers hastily pressed it into battle to avoid confusion between the Union's Stars and Stripes and the Confederacy's Stars and Bars. After the South's defeat, the battle flag, often lowered for mourning, was mainly a memento of gallant human loss. See especially Robert E. Bonner, *Colors and Blood: Flag Passions of the Confederate South* (Princeton, NJ: Princeton University Press, 2002).

The flag's meaning was transformed in the 1940s as the civil rights movement made gains against segregation in the South. One after another Southern state flew the flag above its capitol or defiantly redesigned the state flag to incorporate it. Over the last sixty years, a myriad of meanings arousing deep emotions have become attached to the flag: states' rights; Southern regional pride; a general defiance of big government; nostalgia for a bygone era; racist support of segregation; or "equal rights for whites." For overviews of these meanings see Tony Horwitz, *Confederates in the Attic: Dispatches from the Unfinished Civil War* (New York: Random House, 1998) and J. Michael Martinez, William D. Richardson, and

Ron McNinch-Su, eds., *Confederate Symbols in the Contemporary South*(Gainesville: University of Florida Press, 2000).

The battle flag appeals to politicians seeking resonant images. But its multiple meanings can backfire. In 2003, former Vermont governor Howard Dean, a candidate for the Democratic presidential nomination, addressed the Democratic National



The Confederate flag

Committee and said, “White folks in the South who drive pickup trucks with Confederate flag decals on the back ought to be voting with us, and not them [Republicans], because their kids don’t have health insurance either, and their kids need better schools too.” Dean received a rousing ovation, so he probably thought little of it when he told the *Des Moines Register*, “I still want to be the candidate for guys with Confederate flags in their pickup trucks.” All quotes come from [“Dems Battle over Confederate Flag,”](#) CNN, November 2, 2003. Dean, the Democratic front runner, was condemned by his rivals who questioned his patriotism, judgment, and racial sensitivity. Dean apologized for his remark. [“Dean: ‘I Apologize’ for Flag Remark,”](#) CNN, November 7, 2003.

The South’s defeat in the Civil War discredited compact theory and nullification. Since then, state officials’ efforts to defy national orders have been futile. In 1963, Governor George Wallace stood in the doorway of the University of Alabama to resist a court order to desegregate the all-white school. Eventually, he had no choice but to accede to federal marshals. In 1994, Pennsylvania governor Robert Casey, a pro-life Democrat, decreed he would not allow state officials to enforce a national order that state-run Medicaid

programs pay for abortions in cases of rape and incest. He lost in court.¹

Dual Federalism

After the Civil War, the justices of the Supreme Court wrote, “The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”³ They endorsed dual federalism, a doctrine whereby national and state governments have clearly demarcated domains of power. The national government is supreme, but only in the areas where the Constitution authorizes it to act.

The basis for dual federalism was a series of Supreme Court decisions early in the nineteenth century. The key decision was *McCulloch v. Maryland* (1819). The Court struck down a Maryland state tax on the Bank of the United States chartered by Congress. Chief Justice Marshall conceded that the Constitution gave Congress no explicit power to charter a national bank,⁵ but concluded that the Constitution’s necessary-and-proper clause enabled Congress and the national government to do whatever it deemed “convenient or useful” to exercise its powers. As for Maryland’s tax, he wrote, “the power to tax involves the power to destroy.” Therefore, when a state’s laws interfere with the national government’s operation, the latter takes precedence. From the

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1780s to the Great Depression of the 1930s, the size and reach of the national government were relatively limited. As late as 1932, local government raised and spent more than the national government or the states.

On two subjects, however, the national government increased its power in relationship to the states and local governments: sin and economic regulation.

Link: *McCulloch v. Maryland*

Read more about [McCulloch v. Maryland \(1819\) online](#).

The Politics of Sin

National powers were expanded when Congress targeted obscenity, prostitution, and alcohol.⁷ In 1872, reformers led by Anthony Comstock persuaded Congress to pass laws blocking obscene material from being carried in the U.S. mail. Comstock had a broad notion of sinful media: all writings about sex, birth control, abortion, and childbearing, plus tabloid newspapers that allegedly corrupted innocent youth.

As a result of these laws, the national government gained the power to exclude material from the mail even if it was legal in individual states.

The power of the national government also increased when prostitution became a focus of national policy. A 1910 exposé

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in McClure's magazine roused President William Howard Taft to warn Congress about prostitution rings operating across state lines. The ensuing media frenzy depicted young white girls torn from rural homes and degraded by an urban "white slave trade." Using the commerce clause, Congress passed the Mann Act to prohibit the transportation "in interstate commerce...of any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."⁹ The bill turned enforcement over to a tiny agency concerned with antitrust and postal violations, the Bureau of Investigations. The Bureau aggressively investigated thousands of allegations of "immoral purpose," including unmarried couples crossing state lines to wed and interracial married couples.

The crusade to outlaw alcohol provided the most lasting expansion of national power. Reformers persuaded Congress in 1917 to bar importation of alcohol into dry states, and, in 1919, to amend the Constitution to allow for the nationwide prohibition of alcohol. Pervasive attempts to evade the law boosted organized crime, a rationale for the Bureau of Investigations to bloom into the [Federal Bureau of Investigation](#) (FBI), the equivalent of a national police force, in the 1920s.

Prohibition was repealed in 1933. But the FBI under J. Edgar Hoover, its director from the 1920s to the 1970s, continued to call attention through news and entertainment media to the scourge of organized crime that justified its growth, political independence, and Hoover's power. The FBI supervised film depictions of the lives of criminals like John Dillinger and long-running radio and television shows like *The FBI*. The heroic image of federal law enforcement would not be challenged until the 1960s when the classic film *Bonnie and Clyde* romanticized the tale of two small-time criminals into a saga of rebellious outsiders crushed by the ominous rise of authority across state lines.

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Economic Regulation

Other national reforms in the late nineteenth century that increased the power of the national government were generated by reactions to industrialization, immigration, and urban growth. Crusading journalists decried the power of big business. Upton Sinclair's 1906 novel *The Jungle* exposed miserable, unsafe working conditions in America's factories. These reformers feared that states lacked the power or were reluctant to regulate railroads, inspect meat, or guarantee food and drug safety. They prompted Congress to use its powers under the commerce clause for economic regulation, starting with the Interstate Commerce Act in 1887 to regulate railroads and the Sherman Antitrust Act in 1890 to outlaw monopolies.

The Supreme Court, defending dual federalism, limited such regulation. It held in 1895 that the national government could only regulate matters *directly* affecting interstate commerce.¹¹ In 1918, it ruled that Congress could not use the commerce clause to deal with local matters like conditions of work. The national government could regulate interstate commerce of harmful products such as lottery tickets or impure food.¹³ A similar logic prevented the U.S. government from using taxation powers to the same end.¹⁵

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Cooperative Federalism

The massive economic crises of the Great Depression tolled the death knell for dual federalism. In its place, cooperative federalism emerged. Instead of a relatively clear separation of policy domains, national, state, and local governments would work together to try to respond to a wide range of problems.

The New Deal and the End of Dual Federalism

Elected in 1932, Democratic president Franklin Delano Roosevelt (FDR) sought to implement a “New Deal” for Americans amid staggering unemployment. He argued that the national government could restore the economy more effectively than states or localities. He persuaded Congress to enact sweeping legislation. New Deal programs included boards enforcing wage and price guarantees; programs to construct buildings and bridges, develop national parks, and create artworks; and payments to farmers to reduce acreage of crops and stabilize prices.



Dorothea Lange photograph, Gordonton, North Carolina, 1939. The 1930s New Deal programs included commissioning photographers to document social conditions during the Great Depression. The resultant photographs are both invaluable historical documents and lasting works of art.

By 1939, national government expenditures equaled state and local expenditures combined.¹⁷ FDR explained his programs to nationwide audiences in “fireside chats” on the relatively young medium of radio. His policies were highly popular, and he was reelected by a landslide in 1936. The Supreme Court, after rejecting several New Deal measures, eventually upheld national authority over such once-forbidden terrain as labor-management relations,

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minimum wages, and subsidies to farmers.¹⁹ The Court thereby sealed the fate of dual federalism.

Links: The New Deal and Fireside Chats

Learn more about the [New Deal online](#).

Read the [Fireside Chats online](#).

Grants-in-Aid

Cooperative federalism's central mechanisms were grants-in-aid: the national government passes funds to the states to administer programs. Starting in the 1940s and 1950s, national grants were awarded for infrastructure (airport construction, interstate highways), health (mental health, cancer control, hospital construction), and economic enhancement (agricultural marketing services, fish restoration).²¹

Grants-in-aid were cooperative in three ways. First, they funded policies that states already oversaw. Second, categorical grants required states to spend the funds for purposes specified by Congress but gave them leeway on how to do so. Third, states' and localities' core functions of education and law enforcement had little national government supervision.²³

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Competitive Federalism

During the 1960s, the national government moved increasingly into areas once reserved to the states. As a result, the essence of federalism today is competition rather than cooperation.²⁵

Judicial Nationalizing

Cooperative federalism was weakened when a series of Supreme Court decisions, starting in the 1950s, caused states to face much closer supervision by national authorities. As you'll see, the Court extended requirements of the Bill of Rights and of "equal protection of the law" to the states.

The Great Society

In 1963, President Lyndon Johnson proposed extending the New Deal policies of his hero, FDR. Seeking a "Great Society" and declaring a "War on Poverty," Johnson inspired Congress to enact massive new programs funded by the national government. Over two hundred new grants programs were enacted during Johnson's five years in office. They included a Jobs Corps and Head Start, which provided preschool education for poor children.

The Great Society undermined cooperative federalism. The new national policies to help the needy dealt with problems that states

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and localities had been unable or reluctant to address. Many of them bypassed states to go straight to local governments and nonprofit organizations.²⁷

Link: The Great Society

Read more about [The Great Society](#).

Obstacles and Opportunities

In competitive federalism, national, state, and local levels clash, even battle with each other.²⁹ Overlapping powers and responsibilities create friction, which is compounded by politicians' desires to get in the news and claim credit for programs responding to public problems.

Competition between levels of federalism is a recurring feature of films and television programs. For instance, in the eternal television drama *Law and Order* and its offshoots, conflicts between local, state, and national law enforcement generate narrative tension and drama. This media frame does not consistently favor one side or the other. Sometimes, as in the film *The Fugitive* or stories about civil rights like *Mississippi Burning*, national law enforcement agencies take over from corrupt local authorities. Elsewhere, as in the action

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film *Die Hard*, national law enforcement is less competent than local or state police.

Mandates

Under competitive federalism, funds go from national to state and local governments with many conditions—most notably, directives known as mandates.³¹ State and local governments want national funds but resent conditions. They especially dislike “unfunded mandates,” according to which the national government directs them what to do but gives them no funds to do it.

After the Republicans gained control of Congress in the 1994 elections, they passed a rule to bar unfunded mandates. If a member objects to an unfunded mandate, a majority must vote to waive the rule in order to pass it. This reform has had little impact: negative news attention to unfunded mandates is easily displaced by dramatic, personalized issues that cry out for action. For example, in 1996, the story of Megan Kanka, a young New Jersey girl killed by a released sex offender living in her neighborhood, gained huge news attention. The same Congress that outlawed unfunded mandates passed “Megan’s Law”—including an unfunded mandate ordering state and local law enforcement officers to compile lists of sex offenders and send them to a registry run by the national government.

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Key Takeaways

Federalism in the United States has changed over time from clear divisions of powers between national, state, and local governments in the early years of the republic to greater intermingling and cooperation as well as conflict and competition today. Causes of these changes include political actions, court decisions, responses to economic problems (e.g., depression), and social concerns (e.g., sin).

1. David L. Shapiro, *Federalism: A Dialogue* (Evanston, IL: Northwestern University Press, 1995), 98 n. 139. [↩](#)
2. *Texas v. White*, 7 Wall. 700 (1869). [↩](#)
3. *McCulloch v. Maryland*, 4 Wheat. 316 (1819). [↩](#)
4. This section draws on James A. Morone, *Hellfire Nation: The Politics of Sin in American History* (New Haven, CT: Yale University Press, 2003), chaps. 8–11. [↩](#)
5. Quoted in James A. Morone, *Hellfire Nation: The Politics of Sin in American History* (New Haven, CT: Yale University Press, 2003), 266. [↩](#)
6. *United States v. E. C. Knight*, 156 US 1 (1895). [↩](#)
7. *Hammer v. Dagenhart*, 247 US 251 (1918). [↩](#)
8. *Bailey v. Drexel Furniture Company*, 259 US 20 (1922). [↩](#)
9. Thomas Anton, *American Federalism & Public Policy: How the System Works* (Philadelphia, PA: Temple University Press, 1988), 41. [↩](#)
10. Respectively, *National Labor Relations Board v. Jones & Laughlin Steel*, 301 US 1 (1937); *United States v. Darby*, 312 US 100 (1941); *Wickard v. Filburn*, 317 US 111 (1942). [↩](#)
11. David B. Walker, *The Rebirth of Federalism: Slouching toward Washington* (Washington, DC: CQ Press, 1999), 99. [↩](#)

12. Martha Derthick, *Keeping the Compound Republic: Essays on American Federalism* (Washington, DC: Brookings, 2001), 17. [↩](#)
13. Paul E. Peterson, Barry George Rabe, and Kenneth K. Wong, *When Federalism Works* (Washington, DC: Brookings, 1986), especially chap. 5; Martha Derthick, *Keeping the Compound Republic: Essays on American Federalism* (Washington, DC: Brookings, 2001), chap. 10. [↩](#)
14. David B. Walker, *The Rebirth of Federalism: Slouching toward Washington* (Washington, DC: CQ Press, 1999), 123–25. [↩](#)
15. The term “competitive federalism” is developed in Thomas R. Dye, *American Federalism: Competition among Governments* (Lexington, MA: Lexington Books, 1990). [↩](#)
16. This definition is drawn from Michael Fix and Daphne Kenyon, eds., *Coping with Mandates: What Are the Alternatives?* (Washington, DC: Urban Institute Press, 1988), 3–4. [↩](#)

18. Reading: Why Federalism Works (More or Less)

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. How do national, state, and local governments interact to make federalism work more or less?
2. How are interest groups involved in federalism?
3. What are the ideological and political attitudes toward federalism of the Democratic and Republican parties?

When Hurricane Katrina hit New Orleans and the surrounding areas on August 29, 2005, it exposed federalism's frailties. The state and local government were overwhelmed, yet there was uncertainty over which level of government should be in charge of rescue attempts. Louisiana governor Kathleen Blanco refused to sign an order turning over the disaster response to federal authorities. She did not want to cede control of the National Guard and did not believe signing the order would hasten the arrival of the troops she had requested. President Bush failed to realize the magnitude of the disaster, then believed that the federal response was effective. In fact, as was obvious to anyone watching television, it was slow and ineffective. New Orleans mayor C. Ray Nagin and state officials accused the Federal Emergency Management Agency (FEMA) of failing to deliver urgently needed help and of thwarting other efforts through red tape.

Hurricane Katrina was an exceptional challenge to federalism. Normally, competition between levels of government does not

careen out of control, and federalism works, more or less. We have already discussed one reason: a legal hierarchy—in which national law is superior to state law, which in turn dominates local law—dictates who wins in clashes in domains where each may constitutionally act.

There are three other reasons.¹ First, state and local governments provide crucial assistance to the national government. Second, national, state, and local levels have complementary capacities, providing distinct services and resources. Third, the fragmentation of the system is bridged by interest groups, notably the intergovernmental lobby that provides voices for state and local governments. We discuss each reason.

Applying Policies Close to Home

State and local governments are essential parts of federalism because the federal government routinely needs them to execute national policy. State and local governments adjust the policies as best they can to meet their political preferences and their residents' needs. Policies and the funds expended on them thus vary dramatically from one state to the next, even in national programs such as unemployment benefits.⁴

This division of labor, through which the national government sets goals and states and localities administer policies, makes for

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incomplete coverage in the news. National news watches the national government, covering more the political games and high-minded intentions of policies than the nitty-gritty of implementation. Local news, stressing the local angle on national news, focuses on the local impact of decisions in distant Washington.

Comparing Content: Passage of No Child Left Behind Act

The No Child Left Behind (NCLB) Act vastly expanded the national government's supervision of public education with requirements for testing and accountability. Amid the final push toward enacting the law, Washington reporters for national newspapers were caught up in a remarkable story: the bipartisan coalition uniting staunch opponents President George W. Bush and liberal senator Edward Kennedy (D-MA) civilly working together on a bold, historic piece of legislation. Dana Milbank's *Washington Post* story was typical. Milbank termed the bill "the broadest rewriting of federal education policy in decades," and he admired "Washington's top bipartisan achievement of 2001."⁷ The looming problems of funding and implementing the act were obscured in the national media's celebration of the love fest.

By contrast, local newspapers across the country calculated the benefits and costs of the new legislation on education in their states and localities—in particular, how much money the state would receive under NCLB and whether or not the law's requirements and

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deadlines were reasonable. On January 9, 2002, the *Boston Globe's* headline was "Mass. Welcomes Fed \$\$; Will Reap \$117M for Schools, Testing," and the *Denver Post* noted, "Colorado to Get \$500 million for Schools."¹⁰

Local newspapers sought out comments of state and local education officials and leaders of local teachers' unions, who were less smitten by the new law. The *Sacramento Bee* published a lengthy front-page story by reporter Erika Chavez on January 3, shortly before Bush signed the law. Chavez contrasted the bill's supporters who saw it as "the most meaningful education reform in decades" with opponents who found that "one crucial aspect of the legislation is nothing more than a pipe dream." Discussing the bill's provision that all teachers must be fully credentialed in four years, a staffer at the State Department of Education was quoted as saying "The numbers don't add up, no matter how you look at them." The California Teachers' Association's president called it "fantasy legislation," adding, "It's irresponsible to pass this kind of law and not provide the assistance needed to make the goals attainable. I can't understand the reason or logic that went into this legislation. It's almost a joke."¹³

Complementary Capacities

The second reason federalism often works is because national, state,

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and local governments specialize in different policy domains.¹⁶ The main focus of local and state government policy is economic development, broadly defined to include all policies that attract or keep businesses and enhance property values. States have traditionally taken the lead in highways, welfare, health, natural resources, and prisons.¹⁹ Local governments dominate in education, fire protection, sewerage, sanitation, airports, and parking.

The national government is central in policies to serve low-income and other needy persons. In these redistributive policies, those paying for a service in taxes are not usually those receiving the service.²² These programs rarely get positive coverage in the local news, which often shows them as “something-for-nothing” benefits that undeserving individuals receive, not as ways to address national problems.²⁵

States cannot effectively provide redistributive benefits. It is impossible to stop people from moving away because they think they are paying too much in taxes for services. Nor can states with generous benefits stop outsiders from moving there—a key reason

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why very few states enacted broad health care coverage²⁸—and why President Obama pressed for and obtained a national program. Note, however, that, acknowledging federalism, it is the states' insurance commissioners who are supposed to interpret and enforce many of the provisions of the new federal health law

The three levels of government also rely on different sources of taxation to fund their activities and policies. The national government depends most heavily on the national income tax, based on people's ability to pay. This enables it to shift funds away from the wealthier states (e.g., Connecticut, New Jersey, New Hampshire) to poorer states (e.g., New Mexico, North Dakota, West Virginia).

Taxes of local and state governments are more closely connected to services provided. Local governments depend mainly on property taxes, the more valuable the property the more people pay. State governments collect state income taxes but rely most on sales taxes gathered during presumably necessary or pleasurable consumer activity.

Link: Tax and Budget Information for Federal, State, and Local Governments

Find more information about government budgets and taxes:

[Federal](#)

[State](#)

[Local](#)

The language of “no new taxes” or “cutting taxes” is an easy slogan

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for politicians to feature in campaign ads and the news. As a result, governments often increase revenues on the sly, by lotteries, cigarette and alcohol taxes, toll roads, and sales taxes falling mostly on nonresidents (like hotel taxes or surcharges on car rentals).³¹

The Intergovernmental Lobby

A third reason federalism often works is because interest groups and professional associations focus simultaneously on a variety of governments at the national, state, and local levels. With multiple points of entry, policy changes can occur in many ways.³⁴

In bottom-up change, a problem is first identified and addressed, but not resolved at a local level. People, and often the media, then pressure state and national governments to become involved. Bottom-up change can also take place through an interest group calling on Congress for help.³⁷ In 1996, pesticide manufacturers, fed up with different regulations from state to state, successfully pushed Congress to set national standards to make for more uniform, and less rigorous, regulation.

In top-down change, breaking news events inspire simultaneous

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policy responses at various levels. Huge publicity for the 1991 beating that motorist Rodney King received from Los Angeles police officers propelled police brutality onto the agenda nationwide and inspired many state and local reforms.⁴⁰

Policy diffusion is a horizontal form of change.⁴³ State and local officials watch what other state and local governments are doing. States can be “laboratories of democracy,” experimenting with innovative programs that spread to other states. They can also make problems worse with ineffective or misdirected policies.

These processes—bottom-up, top-down, and policy diffusion—are reinforced by the intergovernmental lobby. State and local governments lobby the president and Congress. Their officials band together in organizations, such as the National Governors Association, National Association of Counties, the U.S. Conference of Mayors, and the National Conference of State Legislatures. These associations trade information and pass resolutions to express common concerns to the national government. Such meetings are one-stop-shopping occasions for the news media to gauge nationwide trends in state and local government.

Democrats, Republicans, and Federalism

The parties stand for different principles with regard to federalism. Democrats prefer policies to be set by the national government.

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They opt for national standards for consistency across states and localities, often through attaching stringent conditions to the use of national funds. Republicans decry such centralization and endorse devolution, giving (or, they say, “returning”) powers to the states—and seeking to shrink funds for the national government.

Principled distinctions often evaporate in practice. Both parties have been known to give priority to other principles over federalism and to pursue policy goals regardless of the impact on boundaries between national, state, and local governments.⁴⁶

So Republicans sometimes champion a national policy while Democrats look to the states. In 2004, the Massachusetts Supreme Court ruled that the state could not deny marriage licenses to same-sex couples, and officials in cities like San Francisco defied state laws and began marrying same-sex couples. Led by President George W. Bush, Republicans drafted an amendment to the U.S. Constitution to define marriage as between a man and a woman. Bush charged that “activist judges and local officials in some parts of the country are not letting up in their efforts to redefine marriage for the rest of America.”⁴⁹ Democrats, seeking to defuse the amendment’s appeal, argued that the matter should be left to each of the states. Democrats’ appeal to federalism swayed several Republican senators to vote to kill the amendment.

“The American Recovery and Reinvestment Act,” enacted in February 2009, is another example. This was a dramatic response by Congress and the newly installed Obama administration to the country’s dire economic condition. It included many billions of

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dollars in a fiscal stabilization fund: aid to the states and localities struggling with record budget deficits and layoffs. Most Democratic members of Congress voted for the legislation even though it gave the funds unconditionally. Republicans opposed the legislation, preferring tax cuts over funding the states.

Economic Woes

The stimulus package was a stopgap measure. After spending or allocating most of the federal funds, many states and localities still faced a dire financial situation. The federal government, running a huge budget deficit, was unlikely to give the states significant additional funding. As unemployment went up and people's incomes went down, states' tax collections decreased and their expenditures for unemployment benefits and health care increased. Many states had huge funding obligations, particularly for pensions they owed and would owe to state workers.

State governors and legislators, particularly Republicans, had promised in their election campaigns not to raise taxes. They relied on cutting costs. They reduced aid to local governments and cities. They fired some state employees, reduced pay and benefits for others, slashed services and programs (including welfare, recreation, and corrections), borrowed funds, and engaged in accounting maneuvers to mask debt.

At the University of California, for example, staff were put on furlough, which cut their pay by roughly 8 percent, teaching assistants were laid off, courses cut, library hours reduced, and recruitment of new faculty curtailed. Undergraduate fees (tuition) were increased by over 30 percent, provoking student protests and demonstrations.

At the local level, school districts' budgets declined as they received less money from property taxes and from the states (about one quarter of all state spending goes to public schools). They fired

teachers, hired few new ones (resulting in a horrendous job market for recent college graduates wanting to teach), enlarged classes, cut programs, shortened school hours, and closed schools.

KEY TAKEAWAYS

The federal system functions, more or less, because of the authority of national over state laws, which trump local laws; crucial assistance provided by states and local governments to execute national policy; the complementary capacities of the three levels of government; and the intergovernmental lobby. The functioning of the system is being challenged by the economic woes faced by government at all levels. The Democratic and Republican parties differ ideologically about federalism, although these differences can be changed to achieve political objectives.

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1. See also John D. Nugent, *Safeguarding Federalism: How States Protect Their Interests in National Policymaking* (Norman: University of Oklahoma Press, 2009). [↩](#)
 2. Thomas R. Dye, *American Federalism: Competition among Governments* (Lexington, MA: Lexington Books, 1990), chap. 2; Paul E. Peterson, *The Price of Federalism* (Washington, DC: Brookings, 1995), chap. 4. [↩](#)
 3. Dana Milbank, "With Fanfare, Bush Signs Education Bill," *Washington Post*, January 9, 2002, A3. [↩](#)
 4. Ed Hayward, "Mass. Welcomes Fed Dollars; Will Reap \$117M for Schools, Testing," *Boston Globe*, January 9, 2002, 7; Monte Whaley, "Colorado to Get \$500 Million for Schools," *Denver Post*, January 9, 2002, A6. [↩](#)
 5. Erika Chavez, "Federal Teacher Goal is Blasted; Congress' Mandate that Instructors Get Credentials in 4 Years is Called

- Unrealistic,” *Sacramento Bee*, January 3, 2002, A1. [↩](#)
6. This section draws on Paul E. Peterson, *The Price of Federalism* (Washington, DC: Brookings, 1995). [↩](#)
 7. Thomas Anton, *American Federalism & Public Policy: How the System Works* (Philadelphia, PA: Temple University Press, 1988), table 3.3. [↩](#)
 8. This definition comes from Paul E. Peterson, Barry George Rabe, and Kenneth K. Wong, *When Federalism Works* (Washington, DC: Brookings, 1986), 15. [↩](#)
 9. Paul E. Peterson, Barry George Rabe, and Kenneth K. Wong, *When Federalism Works* (Washington, DC: Brookings, 1986), 19. [↩](#)
 10. Mark C. Rom and Paul E. Peterson, *Welfare Magnets: A New Case for a New National Standard* (Washington, DC: Brookings, 1990). [↩](#)
 11. Glenn R. Beamer, *Creative Politics: Taxes and Public Goods in a Federal System* (Ann Arbor: University of Michigan Press, 1999), chap. 4. [↩](#)
 12. Thomas Anton, *American Federalism & Public Policy: How the System Works* (Philadelphia, PA: Temple University Press, 1988), chap. 5. [↩](#)
 13. David R. Berman, *Local Government and the States: Autonomy, Politics, and Policy* (Armonk, NY: M.E. Sharpe, 2003), 20. [↩](#)
 14. Regina G. Lawrence, *The Politics of Force: Media and the Construction of Police Brutality* (Berkeley: University of California Press, 2000). [↩](#)
 15. Jack L. Walker, “Diffusion of Innovations among American States,” *American Political Science Review* 63 (1969): 880–99. [↩](#)
 16. Paul L. Posner, *The Politics of Unfunded Mandates: Whither Federalism?* (Washington, DC: Georgetown University Press, 1998), 223. [↩](#)
 17. Carl Hulse, “Senators Block Initiative to Ban Same-Sex Unions,” *New York Times*, July 15, 2004, A1. [↩](#)

19. Putting It Together

Summary

Federalism is the American political system's arrangement of powers and responsibilities among national, state, and local governments. While the general principle of divided power under federalism is fairly easy to grasp, in practice the commitment to this sort of "sovereignty sharing" has become far more complex over time. During the early years of the republic, the clear divisions of authority between the levels of government gradually evolved into a more interconnected and cooperative reality—a reality that also includes ongoing conflict and competition as the nation grapples with policy challenges the framers of our system didn't anticipate.

In this modern context the national government has accumulated far more power than was originally designed into the system, mostly because of continuing attempts to deal with the consequences of industrialization, as well as increased efforts to defend civil rights and liberties. Big-ticket political controversies of the day have focused attention on debates over the proper arrangement and location of governing power. Republicans—especially since the 1970s—tend to be associated with calls to "devolve" power back toward the states in the name of democracy, however problematic that may be in a post-industrial era characterized by concentrated private power. Meanwhile, Democrats are often more comfortable moving authoritative decisions up the ladder to the federal level. Of course we need to be careful with these generalizations since, as we have seen, they tend to break down from time to time depending on the issue at hand. It's complicated!

20. Video: The Affordable Care Act Challenges - the Individual Mandate & the Commerce Clause

[The Affordable Care Act Challenges – the Individual Mandate & the Commerce Clause](#)

PART IV

MODULE 4: CONGRESS: TO THE REPUBLIC

2I. Module Introduction

Congress: To the Republic

Module Introduction

Topic Covered

- The constitutional foundations of Congress
- The organization of Congress
- The legislative process

While nearly, if not all of the issues presented at the 1787 Constitutional Convention were of great importance, the form of the legislative branch proved to be the most crucial topic of the day. So critical was this debate that it was settled with what became known as the Great Compromise. The Connecticut Compromise, as it is likewise known by, produced a two-chamber, bicameral legislative body with proportional representation in the House and equal representation in the Senate. This arrangement not only solved the large state-small state divide, but more importantly it served as a tremendous step towards establishing a strong, central government; an element that was noticeably absent from the nation's first constitution, the Articles of Confederation.

The strength and importance of Congress can also be viewed through its expansive list of constitutional powers. Article I, Section 8 of the Constitution lists 17, detailed powers delegated to the national government. This is in stark contrast to the powers granted to the executive and judicial branches of government wherein

vagueness, in terms of the allocation of power, abounds. Such detail on behalf of the Framers points to Congress as the most important organ of the national government. However, with time, this design has oft been challenged by political elements such as judicial review — as exercised in *Marbury v. Madison* (1803) and thereafter — and the modern presidency.

A final test of Congress's power can be found in the legislative process itself. Lawmaking, no doubt the most important function of Congress, has been stalled in recent years. The onslaught of presidential executive orders, coupled with partisan gridlock, have constrained this very important work of Congress. The gross negative effect of this is its counter-productivity to democracy itself. Democracy dictates that government policy reflect the will of the people. How can the will of the people prevail when the policy process is stalled? ⁽¹⁾

Learning Outcomes

1. Students will be able to articulate an understanding of the individual in society.
2. Students will be able to think critically about institutions, cultures, and behaviors in their local and/or national environment.
3. Students will develop a historical context for understanding current issues and events

Objectives

Upon completion of this module, the student will be able to:

- Identify the constitutional foundations of Congress.

- Describe the structure and function of Congress.
- Evaluate the legislative process of Congress. ⁽¹⁾

Readings & Resources:

- [The Powers of Congress](#) from Lumen Learning
- [A Bicameral Legislation Branch](#) from Lumen Learning
- [Congressional Elections](#) from Lumen Learning
- [Parties in Congress](#) from Lumen Learning
- [The Legislative Process](#) from Lumen Learning
- [Congress in the Information Age](#) from Lumen Learning
- [Putting it together](#) from Lumen Learning

Supplemental Material/Resources

(Note: These materials including the media form of online videos are considered supplemental and thus is not used for assessment purposes.)

- [House Leadership](#) from Lumen Learning
- [Senate Leadership](#) from Lumen Learning
- [Committees](#) from Lumen Learning
- [7 Myths About the Filibuster](#) from Lumen Learning
- [Going Nuclear](#) from Lumen Learning
- Video: [How a Bill Really Becomes Law](#) from Lumen Learning
- [Members of Congress](#) from Lumen Learning
- [Congressional Dysfunction](#) from Lumen Learning
- Video: [The Decline of America in One Graph](#) from Lumen Learning

Assignments & Learning Activities

- Review Readings & Resources
- Review Module 4 Learning Unit
- Participate in Greetings & Introductions
- Take Quiz 4

22. Lecture Content

Lecture Content

Learning Unit 4

Congressional Term Limits

The idea of congressional term limits has become a resounding cry in American politics. Amid hyper-partisanship and the resulting political gridlock, many have pointed to congressional term limits as the cure-all for the ills of government stalemate. What would be the net gains and losses for the American people under such a system? To answer this question, it is important to weigh the practical judgement of the Framers on this matter.¹

Job Satisfaction

Looking at FEDERALIST NO. 72, Alexander Hamilton (1788) argued that people take more interest in their jobs with knowledge that in doing so, they will be rewarded. So, if members of Congress recognize that they must leave office at a designated time, they are, then, less apt to take their jobs seriously.⁴⁶ Thus, in the interest of the electorate, congressional term limits were purposefully nixed in favor of a working body of legislators whose reelection would serve as the impetus for both public approval and personal fulfillment.¹

Corruption

Hamilton (1788) opined that term limits entice politicians toward corruption. With an understanding that they will ultimately be stripped of their positions, congressmen are likely to be swayed in the direction of bribery and other forms of fraud.⁴⁶ This argument is, perhaps, the most ineffective of Hamilton's reasoning. Historically, congressional term limits have not prevented instances of corruption. From the Credit Mobilier scandal of 1867 to the likes of Jack Abramoff in 2005, Congress has had its fair share of deceit in spite of the stability of unlimited terms.¹

A “Rookie” Congress

Hamilton (1788) maintained that “experience is the parent of wisdom.”⁴⁶ As such, congressional term limits present as an extreme challenge to a skilled body of legislators. Without much needed political know-how, the community at large is at a severe disadvantage in terms of political tradeoffs between government institutions and the public.¹

Crisis Leadership

Another negative effect of term limits comes in the form of crisis leadership. National catastrophes are not only common, but, likewise, inevitable.⁴⁶ Thus, there is a need for capable management to handle such setbacks. The reelection of Franklin Roosevelt in 1940 drives home Hamilton's point here. Elected just after the breakout of World War II, FDR's continued presence maintained constancy during a time when the nation was set afloat by a second world war. Would it have been wise to limit his eligibility to continue

as president at such a critical time? The short answer is no, and the same rationale can, likewise, be applied to members of Congress.

Stability

The Constitution of 1788 can be summed up with one word: “stability.” The lack of congressional term limits reflects this description well.¹ According to Hamilton (1788), the near permanency of legislators not only preserves the legitimacy of law, but, likewise, acts as a defense against impetuous policy that could come as a result of frequent changes in congressional makeup.⁴⁶



[Keppler Credit Mobilier Hari-Kari](#) Joseph Ferdinand Keppler is under Public Domain.

Apportionment: Congressional Representation

The Apportionment Act of 1913 set the size of the House of Representatives at 435. Because the number of seats allocated to

each state is determined by the state's population, seats in the House of Representatives must be reapportioned following the census every 10 years: ¹

- The Constitution states that “Representatives...shall be apportioned among the several states...according to their respective Numbers” and orders an “actual enumeration” (census) every ten years. ³⁴ In light of this designation, every state is guaranteed **at least one representative** , in addition to **two senators** , regardless of population.
- The term “apportionment” refers to the allocation of House seats to the states after each ten-year census.
- “Redistricting” refers to the drawing of boundary lines of congressional districts following the census. There are a few key points to note about redistricting:
 - Malapportionment has long been an issue with the legislative process. Historically, the main cause behind malapportionment was population imbalance. Prior to *BAKER V. CARR* , wherein the Supreme Court imposed statutory requirements on redistricting, some states had not redistricted in years. This led to unequal representation, with rural communities leveraging more representation in Congress than their fast growing, city-center counterparts. Case law, such as *WESBERRY V. SANDERS* , attempts to remedy this situation by demanding that congressional districts be of equal population. ¹
 - The Fourteenth Amendment, according to the Supreme Court, enforces the concept of political equality; that is, one man, one vote. However, it, likewise, captures the notion of one person, one unit of representation meaning “districts are therefore drawn on equal population, not on equal votes.” ⁴⁷



[2010 Census Reapportionment](#) by United States Census 2010 is under Public Domain.

Descriptive Representation

The theory of descriptive representation holds that the make-up of Congress should reflect the diversity observed within the American electorate, which includes differences in race, gender, sexuality, etc. On the other hand, substantive representation counters with the belief that representation should center around ideology versus demography, or simply put, representation and/or voting should be premised upon the “issue” alone. While it could be said that Congress simultaneously embodies both models of representation—especially, when we consider that the current, 115th Congress represents the most diverse body of legislators in U.S. history—disparities in representation, however, still persist:

- Prior to the 1950s, women were grossly underrepresented in Congress. Though the number of women legislators has gradually risen, women today, while 51% of population, only makeup 20% of Congress.
- Like women, the number of African-Americans in Congress has

risen, but remains relatively low. Representing 13% of the overall population, African-Americans only make-up 9.6% of the membership of Congress.¹

- In the same way, Hispanics make-up roughly 13% of the population and only make-up 5% of Congress.⁴⁸ Though, this information could change significantly in years to come, as Hispanics are projected to become the majority race in America by the year 2044.⁴⁹
- Educational inconsistencies also play a role in weighing descriptive representation. For instance, over 40% of Congress is made up of members from the law profession.⁴⁸

To some, this data means that many members of Congress are not fit to adequately represent the interests of the average citizen, but from the **glass-half-full** perspective, this information is quite telling. In terms of gender, a 20 percent showing of women in Congress is promising when we consider that women only gained the right to vote in 1920 with the passage of the 19th Amendment, less than a century ago, in a nation that is nearly two and-a-half centuries old.

Further, after the complete marginalization of African-Americans through slavery, and their political disenfranchisement in the era of Jim Crow, a 9.6 percent standing—in terms of overall representation—is not too shabby, especially when we consider that African-Americans have only been seated at the “political” table for the last fifty years; though, like other areas of minority representation, there is still much work to be done in order to transform Congress into the image of the American electorate. Projected changes in the nation’s population, though, is encouraging in this regard.¹



[The House Democratic Women of the 115th Congress](#) by Office of Nancy Pelosi is in the Public Domain.

23. Reading: The Powers of Congress

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What are the powers of Congress as enumerated in the U.S. Constitution?
2. What powers are reserved specifically for the House of Representatives, and what powers are held by the Senate alone?
3. What is the Constitution's elastic clause, and how is it used to expand the powers of Congress?

The institution of Congress is responsible for carrying out the legislative duties of the federal government. The powers of Congress are enumerated in Article I of the Constitution. The founders established Congress in Article I, Section 1, which states, "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." By instituting Congress in the first article of the Constitution the founders asserted their belief that the legislative branch should be the chief policymaking body. They preferred a government with power vested in the legislature, which they considered most representative of the people, rather than one where the executive was preeminent. They associated the executive branch with the British monarchy, which they had fought against in the Revolutionary War, so they relegated the presidency to the second article of the Constitution. As James Madison wrote in

Federalist No. 51, “In a republican government, the legislative authority necessarily predominates.”¹

Constitutional Powers

Congress was granted tremendous political power by the founders. These powers are listed primarily in Article I, Section 8, of the Constitution, which states that Congress has broad discretion to “provide for the common defense and general welfare of the United States.” To achieve this end, Congress has the authority to make and implement laws.

The Constitution lists a number of specific powers entrusted to Congress. These include responsibility for the nation’s budget and commerce, such as the power to lay and collect taxes, to pay the debts, to regulate commerce with foreign nations and among the states, to coin money, and to establish post offices. Congress is assigned the power to declare war and to raise an army and navy. Congress has the right to propose amendments to the Constitution and to create new states.

Article 1, Section 8, reads:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense 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;

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2. ³

3. [1]

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 Offenses 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.

Article IV, Section 3, reads:

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.

Amendment XVI (Ratified February 3, 1913) reads:

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.

Certain powers are granted specifically to the House, such as the power to initiate all tax and spending bills. While the Senate cannot propose such bills, it can accept, reject, or amend them. The Senate has certain authority not vested in the House. High-level presidential nominees, such as cabinet officers, Supreme Court justices, and ambassadors, must gain Senate approval. The Senate also must concur in treaties with foreign countries.

The final paragraph of Article I, Section 8, grants to Congress the power “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.” This provision is known as the elastic clause because it is used to expand the powers of Congress, especially when national laws come into conflict with state laws. Legislation making it a federal crime to transport a kidnapped person across state lines was justified on the basis that the elastic clause allowed Congress to apply its power to regulate commerce in this situation. The reach of congressional power is explored on the website of the [University of Missouri–Kansas City Law School](#).

Key Takeaways

Article I of the Constitution establishes Congress as the legislative branch of government with broad powers to provide for the “common defense and general welfare of the United States,” along with specific powers in important areas of domestic and foreign affairs. Certain powers, such as the ability to initiate taxing and spending bills, rest exclusively with the House of Representatives. Other powers, including the approval of presidential appointments, lie solely with the Senate. The powers of Congress have been extended through the elastic clause of the Constitution, which states that Congress can make all laws that are “necessary and proper” for carrying out its duties.

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1. Clinton Rossiter, ed., “Federalist 51,” in *The Federalist*, Alexander Hamilton, James Madison, and John Jay (New York: Mentor, 1961), 322. ↴

24. Reading: A Bicameral Legislative Branch

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What is a bicameral legislative structure, and why was it established in Congress?
2. What are the different characteristics of the House and Senate?

The bicameral structure of the U.S. Congress was established by the founders to minimize the possibility of any one governmental body becoming too powerful. The House was meant to be the most democratic of the national institutions, as its members are subject to reelection every two years. The Senate was designed by the framers as an elite body that would act as a check on the House. The two bodies differ in terms of characteristics and norms as well as in the way they operate.

Bicameral Legislative Structure

The founders established Congress as a bicameral legislature as a check against tyranny. They feared having any one governmental body become too strong. This bicameral system distributes power within two houses that check and balance one another rather than concentrating authority in a single body. The House of

Representatives is the larger body with membership based on each state's population. The Senate is the smaller body with each state having two delegates. With one hundred members, the Senate is a more intimate, less formal legislative body than the House, which has 435 members elected from districts that are roughly the same size in population.

Members of Congress must reside in the district or state that elects them, although the Constitution does not specify for how long. Residency can become a campaign issue, as it did when former first lady and current secretary of state, Hillary Rodham Clinton, ran for a Senate seat from New York soon after leaving the White House, despite having never lived in the state. She was successful despite having to fend off criticism that as a carpetbagger she was not suited to represent New York's interests in Congress. The term "carpetbagger" refers to a politician who runs for office from an area where he or she has lived for only a short time and has few community ties. It derives from a derogatory term coined after the Civil War referring to Northerners who went south to profit from the Reconstruction, carrying "carpet bags" for luggage.

Members of Congress are elected locally to serve nationally. All aspects of members' jobs, whether it be making laws or providing service to people in their home districts, are influenced by this dual concern with representing local constituencies while dealing with national policy.

The Electoral Connection

The Constitution anticipated that the House would be more attentive to the people than the Senate. The House is designed to be the most democratic institutional body in the U.S. government because each member represents a particular district within a state rather than the entire state, which is the case for the Senate. House members stand for election every two years to ensure that they

keep in close touch with the opinions and interests of the people they represent or face defeat at the polls. There are no limits on the number of terms a member can serve. Consequently, many members are constantly campaigning to keep their seats in office.

Congress establishes the number of House members by enacting legislation. In 1787, there were 65 members, and the founders anticipated that House members would never represent more than 30,000 people. In 1910, the current number of 435 representatives was reached. The number of



Members of Congress engage in a permanent campaign for reelection that begins the minute they take office.

people represented by a single member has increased from 210,583 in 1910 to 646,947 in 2000 and 710,767 in 2010. The U.S. Census Bureau calculates these apportionment figures, which can be viewed on an [interactive map](#). This number of people per congressional district is projected to top 900,000 in 2050.¹ Some observers question if the democratic character of the House will be compromised if constituencies grow even larger, while others oppose enlarging an institution that is already difficult to manage.

House members are elected in districts whose lines are drawn by state legislatures after the census, which takes place every ten years. States can gain or lose representatives if there are population shifts. Redistricting can be controversial as legislators seek to draw district lines that advantage their own political parties. In 2003, the process of redrawing congressional district lines in Texas attracted national media attention. Democratic state legislators twice fled to

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neighboring states to prevent a vote on a redistricting plan that they felt favored Republicans. The media depicted the fugitive Democratic legislators hanging out on the balcony of a cheap hotel in New Mexico as the infuriated Republicans threatened to call out the Texas Rangers to forcibly return them to the state. The media attention did not stop the redistricting plan.⁴ This strategy of lawmakers fleeing to another state to stop the legislative process was used in Wisconsin in 2011, when Democratic senators left the state to prevent having a quorum to pass a budget bill supported by the Republican governor that would cut workers' benefits in order to improve the state budget.

The framers felt that the Senate should be constituted as an elite body that would act as a check on the House, the branch closest to the mass public. Senators serve six-year terms of office, and like the House, there are no limits on the number of terms they can serve. Senators, in theory, should have more time than House members to think about something besides reelection. However, as the cost of elections has grown and Senate elections have become more competitive, fundraising has become a constant concern for many senators.⁷ The founders' expectations that the House would be close to the people and the Senate would be more distant have not been realized. House members often hold safe seats and do not face serious challenges to reelection, so they often hold office for years.

House members are chosen in districts whose boundaries can

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cut across media markets and other political jurisdictions, such as county or city lines. Some parts of Maryland and Virginia receive most of their news from the District of Columbia, and their House members are given limited coverage. As a result, it can be difficult for local television news to cover House members and their reelection challengers. Senators, having won statewide races, receive more attention. Their opponents also are likely to receive significant media coverage, which often makes for hotly contested elections.

House and Senate Comparisons

The House and Senate are institutions that have decidedly different characters. Because of its large size and more frequent turnover in membership, the House is an impersonal institution. House members may not recognize their colleagues, and some have staff members assigned as “spotters,” who whisper names into their ears to avoid embarrassment. The House operates under formal rules. It is hierarchical, and seniority is important. Members serve for a long time before they become leaders. Senior members have more influence over decision making than their junior colleagues.

The Senate does not rely as heavily on hierarchy as the House. It is less rule-bound and operates more loosely and unpredictably than the House, especially as it requires unanimous consent for any bill to be taken up. This means that a lone senator has the power to stop legislative action, a power that House members do not possess. Senators serve long terms and get to know their colleagues. Seniority is less meaningful, as junior senators have considerable power to make decisions along with their senior colleagues. The smaller size of the chamber allows members to pursue a fast track to leadership and increased public visibility early in their careers.

The differences between the House and Senate are reflected in their respective chambers. The House meets in the largest

parliamentary room in the world. Members do not have assigned seats and take any available place on padded benches. Few members spend time in the chamber other than when they are speaking or voting. The Senate chamber is smaller and more ornate. Senators are assigned desks and chairs, many of which have been held by distinguished members. Since the introduction of television to the Senate chamber in 1986, senior senators have taken back-row seats, which provide favorable camera angles against a flattering blue backdrop and have space for displaying charts and graphs.

The distinctions between the chambers extend to their ability to attract media coverage. The Senate routinely garners greater press attention than the House because it is easier for journalists to cover the smaller chamber and establish long-term relationships with its members. The hierarchical structure of the House makes it easy for leaders to become national media headliners, while other members must compete for attention.¹⁰ The proliferation of digital media outlets has made it somewhat easier for media-savvy members to get their message out through websites, blogs, Twitter feeds, and online videos.

Key Takeaways

The framers provided for a bicameral legislative branch with equal representation in the Senate and proportional representation based on state population in the House. The two bodies differ in a number of important ways that influence the way that they operate. The House is a more formal institution, where hierarchy and seniority are important factors. The Senate, as a smaller, more intimate body,

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is less bound by formal rules than the House. Senators typically garner more media attention than House members because they serve statewide constituencies and serve longer terms of office.

1. Roger H. Davidson and Walter J. Oleszek, *Congress and Its Members*, 8th ed. (Washington, DC: CQ Press, 2002), 27. ↩
2. [“Texas District Fight Goes to Court,”](#) CBSNews.com, October 15, 2003, accessed February 15, 2011. ↩
3. Quoted in Roger H. Davidson and Walter J. Oleszek, *Congress and Its Members*, 8th ed. (Washington, DC: CQ Press, 2002), 25. ↩
4. Patrick J. Sellers, “Winning Media Coverage in the U.S. Congress,” in *U.S. Senate Exceptionalism*, ed. Bruce I. Oppenheimer (Columbus, OH: Ohio State University Press, 2002), 132–53. ↩

25. Reading: Congressional and Other Elections

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What are the differences between House and Senate elections?
2. What is the significance of midterm elections?
3. What is gerrymandering, and how can it influence the outcomes of campaigns?
4. What are ballot measures?

Every two years the entire House of Representatives and one-third of the Senate face election. Congressional elections command far less attention from the media and voters than do presidential campaigns. However, their outcomes can determine the partisan composition of Congress, which can influence the course of public policy for decades to come. Americans can have a direct say in state policy proposals, laws, and constitutional amendments through ballot measures. They also can remove an elected official from office through a recall election.

Congressional Elections

Congressional elections, in which all 435 House seats and one-third of Senate seats are contested, take place every two years, including years when there is a presidential election. Midterm elections occur

in years when there is no presidential contest. Frequently, midterm elections are treated as referenda on the performance of the sitting president and can determine the balance of power in Congress. National issues, such as the economy and unemployment, can become prominent factors in midterm campaigns.

Since 1926, the president's party has lost an average of thirty seats in the House and four seats in the Senate during midterm elections. The 2010 midterm election resulted in a sixty-three-seat swing and a shift in power in the House of Representatives. The Democrats lost control, as their membership dropped from 256 to 193 members, and the Republicans gained the majority, moving from 179 to 242 members. The Democrats, with fifty-three seats, maintained control of the Senate, although they lost six seats to the Republicans, who have forty-six seats. One seat is held by an Independent.¹

Link: Party Voting in Congressional Elections by State

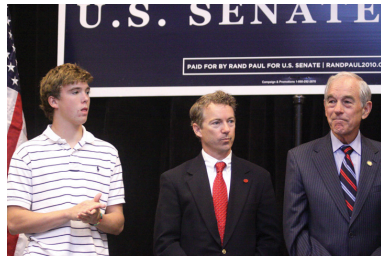
Maps depicting congressional election results from 2010 and earlier can be found at Politico.com and WashingtonPost.com.

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Local and regional media are in the best position to cover congressional elections, and they can set the agenda for national media. Typically, there is less media coverage of midterm elections compared with presidential campaigns. The 2010 midterm election received more coverage than usual, as voters expressed frustration with incumbent president Barack Obama's performance in office. The Tea Party—a grassroots, conservative-leaning movement that opposed the government's taxing and spending policies—staged protests that brought media attention to the election. Some Tea Party-backed candidates garnered significant national press attention.



Rand Paul at His Victory Celebration in 2010. Republican Rand Paul, an ophthalmologist, won the Senate race in Kentucky against Democrat Jack Conway, the state's attorney general, with the backing of the Tea Party.

The Senate

There are one hundred senators in the U.S. Congress, two elected from each state, who serve six-year terms. One-third of Senate seats are up for election every two years. Senators are constitutionally required to be at least thirty years old and to have been a U.S. citizen for at least nine years when they take office.

Many Senate elections are competitive in both the primary and the general election. Having been in office for six or more years, incumbents have records, controversial votes, and may have upset some of their constituents. Their opponents may have name recognition, ample funding, and run an effective campaign using the new media and political advertising. Especially when the election is close, challengers receive almost as much visibility as incumbents.

They are able to publicize their images, get some of their issues on the campaign agenda, and have attention paid to their attacks on their opponent.

Senate races in the 2010 midterm election were hotly contested. The majority of incumbents won, but many faced tough competition. Thirteen Democratic incumbents ran for reelection and three lost, while all eleven Republican incumbents seeking reelection won. Candidates spent record amounts of money contesting in Senate campaigns. Sharron Angle, who won the Nevada Republican Senate nomination with the backing of the grassroots Tea Party movement, spent ninety-seven dollars per vote in the general election, which she lost to Democrat Harry Reid, the majority leader of the Senate, who spent sixty-nine dollars per vote.⁴

The House of Representatives

There are 435 voting members of the House of Representatives elected in separate districts within states for two-year terms. Candidates must be at least twenty-five years old and need to have been a citizen for at least seven years.

Members of the House who are seeking reelection in districts designed to favor their party have an advantage. They usually have better organized campaigns, greater name recognition, far more funds, and more support from interest groups than their opponents. Since 1954, 93 percent of House incumbents have been elected. This

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rate dropped slightly in 2010, as 87 percent of incumbents were reelected, which is the lowest percentage since 1964.⁷

The media contribute to this incumbency advantage. Challengers often lack the funds to air political ads. News coverage of House elections favors incumbents. Local television coverage pays little attention to even to the most competitive House elections.¹⁰ Indeed, four thousand local television newscasts, in eleven major markets during the four weeks before the 2004 election, gave eight times as much air time to car crashes and other accidents than to House campaigns.¹³ The use of social media, such as Facebook and Twitter, can benefit challengers, especially if their messages are picked up by the mainstream press. However, many voters get most of the campaign information from television. Debates can sometimes improve a challenger's chances if they are televised and widely seen. But nearly 70 percent of debates held by House candidates are not televised.¹⁶

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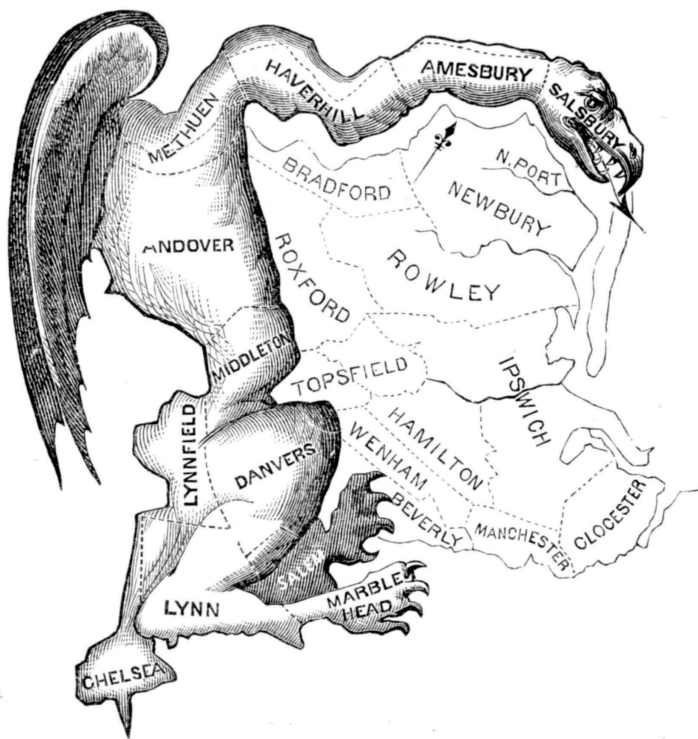
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16. Committee for the Study of the American Electorate, press release, May 16, 2001.

Redistricting

Each state is awarded a number of seats in the House of Representatives based on its population as determined by the national census, which is taken every ten years as required by the Constitution. If the census reveals shifts in the size of the population within districts, state legislators redraw the district lines to equalize the number of people within each district.



Gerrymander (Gerry-Mander). In 1812, Massachusetts governor Elbridge Gerry pushed through electoral redistricting that ensured his Republican party's majority in the township of Marblehead would outweigh the Federal majority in eleven other townships. Artist Elkanah Tisdale drew a cartoon map of the salamander-shaped district for the Boston Gazette and coined the term "Gerry-mander" (now "gerrymander") that became a staple of political language. The visual and the term are therefore both media creations.

Redistricting is often a highly partisan and contentious activity because it can change the number of House seats each party wins in a state. The party in control of the state legislature can design districts so as to protect its incumbents and increase its House seats. The party in power can obtain more seats by having small but usually safe majorities in several districts and cramming large

numbers of the other party's voters into just a few districts. This is achieved through a gerrymander, drawing congressional district lines to give one party the advantage in electing its candidates to the House of Representatives.¹⁷ Incumbents in gerrymandered districts are usually reelected.

Comparing Content: Candidates in Fiction and Documentary Films

There are two types of film about candidates: Hollywood fiction seen by millions of people and documentaries seen by far fewer.²⁰ In Hollywood films the candidates are glamorous and charismatic. They run for high office, usually the presidency or Senate. The focus is on their character. Either they are cynical and hypocritical from the start (the presidential candidate played by John Travolta in *Primary Colors*, 1998), or they become cynical and compromise their ideals and principles over the course of their campaigns (the senatorial candidate played by Robert Redford in *The Candidate*, 1972), or they are disillusioned career politicians trying but failing to change a corrupt campaign process (Warren Beatty as the senator up for reelection in *Bulworth*, 1998). Their campaign consultants use whatever tactics and techniques will win the election. The candidates have an adversarial relationship with the news media.

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Documentaries offer a wider range of candidates and circumstances. *The Perfect Candidate* (1996) covers Republican Oliver North's 1994 senatorial campaign in Virginia from the perspective of the candidate, his campaign manager, and a *Washington Post* reporter. The subject of *Taking on the Kennedys* (1996) is a Republican doctor running against Senator Edward Kennedy's son Patrick for an open House of Representatives' seat in Rhode Island. In *I'm a Candidate* (2001), two young men, one a black Republican in Georgia and the other a white Democrat in Cincinnati, challenge incumbent members of the House.

The candidates in the documentaries are idealists, even a bit naive. They have principles and policy preferences. Campaigning is an all-consuming activity requiring perseverance and the sacrifice of personal life. Money is crucial for their campaigns, and they spend a lot of time trying to raise it. They engage in retail politics: shaking hands, meeting people, visiting senior-citizen centers, and marching in parades. They struggle to break through to an indifferent electorate; yet, even after they have campaigned for several months, many people remain unaware of them. They are vulnerable to the news media, which defines and depicts them.

Hollywood movies and documentaries convey the drama and conflict of elections, the demands on the candidates, and the strategies required to have a chance of winning. But for the lived experience of a political campaign, watch the documentaries.

Ballot Measures

Many states offer people the opportunity to vote on ballot measures on proposed laws, ordinances, or constitutional amendments. Two types of ballot measures are the initiative and the referendum. In the 2010 midterm election, a total of 160 questions were considered on ballots in 37 states. Another type of ballot measure is the recall election, whereby voters can remove an elected official from office.

The Referendum

In a referendum, the state legislature refers a proposal to citizens who vote to either approve or reject the measure. In every state except Delaware, amendments to the state's constitution passed by the legislature go on the ballot automatically.²³ State legislatures put other measures on the ballot to let voters make a choice or to avoid deciding a controversial issue. Referenda also can work as an end run around decisions made by a state governor.

The Initiative

The initiative is similar to the referendum except that voters propose and pass laws and present them to the state legislature. Citizens also can propose an amendment to the state constitution. In some states, the legislature can adopt the proposal outright. In most cases, registered voters can place a proposal on the ballot, sometimes with a counterproposal from the state legislature. If the initiative wins a majority of the votes in an election, it goes into effect.

In recent years, initiatives have been passed to cap property taxes, curtail illegal immigration, and allow medicinal marijuana and euthanasia. California had sixteen initiatives on the ballot in 2004, including a proposal to spend \$3 billion for research on human embryonic stem cells, which passed with 59 percent of the vote. In six states, citizens' groups put on the ballot for a vote to an amendment to the state constitution that recognized marriage as

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between one man and one woman. In 2010, initiatives related to fiscal policy and taxes were most prevalent. The proposals differed vastly from lowering property taxes in Indiana to overturning a tax on soda in Washington.²⁶

Link: State Ballot Measures in the 2010 Elections

Voters in states considered over 160 ballot initiatives in the 2010 midterm elections, which are described on [Stateline's website](#).

The initiative was originally designed to combat powerful interests such as those controlling the railroads in the nineteenth century.²⁹ Today, initiatives are sometimes a way for wealthy individuals or interest groups to put policies into effect while bypassing the state legislature. Consulting firms specializing in initiative campaigns are paid to collect the signatures required to put a measure on the ballot.³²

Critics attack initiatives for congesting ballots and confusing voters, and for their sometimes deceptive titles and descriptions. “Keep California Green” was the slogan for a proposition to keep taxes low on private golf courses. However, research shows that

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“the initiative has a significant impact on state and local government and in doing so pushes policy in the direction a majority of people say they want to go.”³⁵

The Recall

Originally intended to root out corruption among elected officials, the recall allows voters to remove public officials from office through a direct election. A recall is initiated when a designated number of voters sign a petition requesting a special election. Fourteen state constitutions provide for recall elections for state officials, and many localities have provisions for the recall of lower-level elected officials.

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Movie action hero Arnold Schwarzenegger is elected governor of California in the recall election of 2003. This is a stellar example of how prominence in the entertainment media can be translated into visibility in the news media and victory in politics.

Until 2003, only one governor, North Dakota's Lynn J. Frazier in 1921, had been successfully recalled. In 2003, a California Republican congressman initiated and mainly funded the recall of California's Democratic governor Gray Davis for his alleged policy failings. Spurred by conservative talk-radio hosts, websites run by Republican operatives, disenchanted Democrats, and antitax organizations, and coordinated by e-mail, more than 900,000 eligible voters signed the petition to put the recall on the ballot. The ballot asked voters two questions: if the governor should be removed from office and who they would select from a list of candidates to replace him if the governor were recalled. The voters selected Republican Arnold Schwarzenegger to replace Governor Davis.

Key Takeaways

Congressional candidates run for either the Senate or the House of Representatives. There are no limits on the number of terms a member of Congress can serve. Senators are elected in states and Representatives in congressional districts in states. Congressional districts are based on the US census and are reconfigured periodically. Elections for the Senate tend to be more competitive than for the House, where incumbent officeholders have an advantage.

Ballot measures, consisting of the initiative and the referendum, are mechanisms that allow voters to have a more direct say in state laws, government proposals, and constitutional amendments. In certain states, voters can remove elected officials from office through a recall election.

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1. Post Politics, “[Election 2010: Live Results](#),” *Washington Post*, December 28, 2010. [↙](#)
 2. T. W. Famam, “Angle, McMahon Led Way Spending \$97 Per Vote—and Lost,” *Washington Post*, November 9, 2010. [↙](#)
 3. Benjamin Knoll, “[Incumbent Losses in the 2010 Midterms](#),” *Information Knoll*, November 4, 2010. [↙](#)
 4. Darrell M. West and L. Sandy Maisel, “Conclusion: Discourse and Beyond,” in *Running on Empty? Political Discourse in Congressional Elections* (Lanham, MD: Rowman & Littlefield, 2004), 237. [↙](#)
 5. “[Local TV News Largely Ignores Local Political Races, New Lear Study Finds](#),” *Lear Center Local News Archive*, USC Annenberg School for Communication, February 15, 2005. [↙](#)
 6. Mark S. Monmonier, *Bushmanders and Bullwinkles: How Politicians Manipulate Electronic Maps and Census Data to Win Elections* (Chicago: University of Chicago Press, 2001). [↙](#)

7. Relevant is Bradley Hunt, "On the Campaign Trail: Depictions of Political Campaigns in Films," paper submitted to Paletz's "Politics and Media" seminar, April 16, 2001. [↓](#)
8. Matthew Mendelsohn and Andrew Parkin, eds., *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (New York: Palgrave, 2001). [↓](#)
9. Pamela M. Prah, "[Guide to State Ballot Measures for 2010](#)," *Stateline.org*, November 12, 2010. [↓](#)
10. For its history and an evaluation of the arguments for and against the initiative, see Joseph F. Zimmerman, *The Initiative: Citizen Law-Making* (Westport, CT: Praeger, 1999). [↓](#)
11. For criticisms of the initiative see Richard J. Ellis, *Democratic Delusions: The Initiative Process in America* (Lawrence: University Press of Kansas, 2002). [↓](#)
12. John G. Matsusaka, *For the Many or the Few* (Chicago: University of Chicago Press, 2004), xi. [↓](#)

26. Reading: Parties in Congress

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. How are political parties in Congress organized?
2. What role do political party organizations play in Congress?
3. How do factional organizations function in Congress?

Maintaining order in an institution consisting of hundreds of individuals with often competing agendas is about as easy as herding cats. Political parties and the House and Senate leadership help members work together to perform their duties effectively. The Constitution says little about how Congress should be organized. Most of the functions of parties and congressional leaders have developed as members have sought to shape the institution over time.

Party Organization

Political parties provide Congress with organizational structure and discipline. The Democratic and Republican parties are a robust presence in Congress. Almost all members of Congress are either Republicans or Democrats. Party organizations have permanent offices and staffs on the Hill. Parties facilitate lawmaking and are the basis for the most stable coalitions in Congress. They unite

individuals who share ideological orientations and policy goals and help them work together to pass legislation. Congressional campaign committees help party members get elected to Congress.

Formal party organizations consist of caucuses and committees. The majority party controls the top leadership positions. The minority party forms an organized opposition to the majority party.

Party Caucuses

All members of the House and Senate belonging to a political party form that party's caucus or conference. Caucuses elect leaders, approve committee assignments, and appoint task forces to study specific issues. They provide a forum for debating policies and developing strategies for passing legislation. Party staffers serve members by supplying reports on pending legislation and assisting them with media relations by producing radio and television interviews, webcasts, and podcasts in studios on Capitol Hill.

Caucuses promote party loyalty by granting rewards to members, such as prestige committee assignments. For this reason, few members switch parties, with only twenty-seven instances in the Senate and fewer than ninety in the House since the 1880s.¹ In May 2001, Senator Jim Jeffords (I-VT) left the Republican Conference and became an Independent. His defection caused the Republicans to lose their majority position in the Senate. Jeffords was appointed to a committee chair by the Democratic Party, but his prestige was short-lived. When the Republicans became the majority party after

1. Steven S. Smith, Jason Roberts, and Ryan Vander Wielen, *The American Congress*, 3rd ed. (New York: Houghton Mifflin Company, 2003).

winning additional seats in the 2002 election, Jeffords lost his chair. Senator Arlen Specter of Pennsylvania, a Republican senator since 1980, became a Democrat in 2009 due to his support of an economic stimulus package that was opposed by Republicans. Specter faced a difficult reelection bid as a Democrat in 2010 and lost to Joe Sestak in the primary, ending over four decades in Congress.²

In the aftermath of the 2010 midterm elections, party switching in the House became an issue when Congress was considering major taxing, spending, and health-care bills. Democratic House member Parker Griffith switched to the Republican Party as votes on these issues were pending, causing great distress within the House Democratic caucus.

Party Committees

The two major parties have established party committees that perform specific tasks. In the House, steering committees consisting of party leaders recommend members to serve on legislative committees. Each party's House and Senate policy committee conducts research and advises members about legislative proposals. The campaign committees raise funds, conduct election research, organize volunteers, and develop campaign publicity to promote the election of party members to Congress. House Democrats' Organization, Study, and Review Committee recommends changes in party organization and rules.

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Party Voting

Congressional parties promote party voting on bills. Party votes occur when a majority of members of one party votes against a majority of members of the opposing party on major legislation.⁵ The percentage of party votes over the past twenty years has averaged around 50 percent, which is high considering that many votes are routine and nondivisive and therefore do not precipitate a party vote. In recent Congresses, 70 percent to 80 percent of members have voted consistently with their party.⁸

Link: Party Votes

The *Washington Post* has compiled an interactive database of party votes in the U.S. Congress from the 102nd Congress to the present. See it [here](#).

Political parties' influence on members' decisions and actions has been on the rise since the 1970s, especially in the House. One explanation for this increase in partisanship is that members come from districts where constituents are strongly affiliated with the Democratic or Republican Party.¹¹ Another explanation is that

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reforms instituted when Republicans took control of the House in 1994 have given more power to congressional leaders to handle procedural matters. When policy preferences among majority party members are consistent, members will delegate responsibility to the Speaker of the House and committee chairs to advance the party's legislative program.¹⁴ Some scholars argue that this results in the majority party promoting policy goals that are closer to the ideals of the leadership than those of rank-and-file members and the general public.¹⁷

The tension between the institution of Congress and individual members is evident in party voting. The primary source of conflict within party ranks stems from members' disagreement with a party's policy position because it deviates from their commitment to the voters back home. Party voting usually declines in election years, as members are less willing to face criticism in their districts for supporting unpopular positions.

Media reports on Congress commonly emphasize conflicts between the Republican and Democratic parties. The partisan conflict frame is prevalent when high-profile legislative issues are being debated. Journalists find it easier to focus on partisan dynamics, which are a legitimate part of the story, than to cover the often complicated details of the legislation itself.

Media coverage of the congressional debate over health care in

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recent years illustrates the use of the conflict frame, which often excludes coverage of the substance of policy issues. The media focused heavily on the strategies employed by President Barack Obama and Democratic members of Congress on the one hand and Republican members on the other to advance their positions on health care. Lawmakers on each side of the debate conducted extensive research and issued reports detailing the policy issues involved, yet news organizations focused primarily on fights between members and parties. According to the Pew Research Center, over 70 percent of the public felt that news organizations provided only fair or poor coverage of the details of various health-care proposals and their effect on people despite the health-care debate dominating the news agenda.²⁰

Members have very different legislative experiences depending on whether or not their party is in power. Majority party members profit from pork barrel spending on projects that benefit their districts. Earmarks are legislative provisions that provide funding for pork barrel projects. Pork barrel projects include federally funded parks, community centers, theaters, military bases, and building projects that benefit particular areas. These projects can help members curry favor with their constituents and help their reelection prospects. However, opponents of pork barrel spending argue that these projects should be funded by state and local budgets in the places they benefit rather than the federal treasury. A proposal calling for a moratorium on earmarks in the 112th Congress was introduced by the Republican leadership in the House.²³

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Factions and Policy Groups

Outside of parties, like-minded members can form factions or specialized coalitions to promote a particular agenda. Some factions are long-standing groups with pronounced ideological leanings. They form coalitions to support or oppose legislation.²⁶ Some factions are based on members' identification with a group. These include the Congressional Black Caucus and the Congressional Hispanic Caucus.

In addition to the major party caucuses of the Democrats and Republicans, there also are caucuses representing offshoots of the major parties. The Tea Party caucus consists of Republicans who gained office with the backing of the Tea Party grassroots movement. While more than forty Tea Party-backed candidates were elected to the House during the 2010 midterm contests, only around a dozen, or less than 10 percent of Republican members, joined the Tea Party caucus for the 112th Congress.²⁹

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Congressional causes can form around surprising issues. The Congressional Soccer Caucus encourages legislation, activities, and events that promote soccer, including improvement of fields and use of soccer for building communities.

Policy groups (factions) also unite members interested in a particular policy area and include both Republicans and Democrats. The Congressional Wine Caucus consists of 250 House and Senate members who share a concern with the wine industry's cultural and financial significance. In addition to sponsoring wine seminars and tastings, and legislative briefings, the Wine Caucus holds fundraisers for charities.

Key Takeaways

Political parties are central to the organizational structure of Congress. Parties provide a measure of discipline that helps the House and Senate to function more efficiently. Members who switch parties often lose the benefits of seniority, such as

committee chair positions, and face an uncertain future when they seek reelection.

1. Paul Kane, "[Arlen Specter's Party Switch Haunts Him in Primary Campaign](#)," *Washington Post*, May 12, 2010, accessed February 12, 2011. [↙](#)
2. Keith T. Poole and Howard Rosenthal, *Congress: A Political-Economic History of Roll Call Voting* (New York: Oxford, 2000). [↙](#)
3. Gary W. Cox and Matthew D. McCubbins, *Legislative Leviathan* (Berkeley: University of California Press, 1993). [↙](#)
4. Keith Krehbiel, *Pivotal Politics* (Chicago: University of Chicago Press, 1998). [↙](#)
5. David W. Rohde, *Parties and Leaders in the Postreform House* (Chicago: University of Chicago Press, 1991); Nicol C. Rae and Colton C. Campbell, eds., *New Majority or Old Minority?* (Lanham, MD: Rowman & Littlefield, 1999). [↙](#)
6. John H. Aldrich, David W. Rohde, and Michael W. Tofias, "[One D Is Not Enough: Measuring Conditional Party Government, 1887–2002](#)," Paper presented at the History of Congress Conference, Stanford University, Palo Alto, CA, April 9–10, 2004, accessed January 29, 2011. [↙](#)
7. Pew Research Center for the People & the Press, "[Many Faulty Media Coverage of Health Care Debate](#)," August 6, 2009, accessed June 6, 2011. [↙](#)
8. "[Tea Party's First Legislative Victory: McConnell Backs Earmark Ban](#)," *Newsweek*, November 15, 2010, accessed December 16, 2010. [↙](#)
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[Meeting](#),” *New York Times*, January 27, 2011, accessed February 18, 2011. ↵

27. Reading: The Legislative Process

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. How does a bill become law?
2. How do members of Congress develop and draft legislation?
3. How does the congressional budget process work?

The primary responsibility of Congress is making laws. Lawmaking is no easy task. Political scientists have characterized Congress as “a procedural obstacle course that favors opponents of legislation and hinders proponents.”¹ It often takes years before a bill is passed. Only a small number of bills that are introduced, formally proposed by members of the House and Senate, become law. On average, close to eleven thousand bills are introduced in the House and Senate during a two-year legislative session and fewer than four hundred become laws.⁴

The process of making laws involves complex written rules and

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procedures, some of which date back to 1797, when Vice President Thomas Jefferson prepared a rule book to help him carry out his responsibilities as president of the Senate. Jefferson's Manual was adopted by the House and remains the authoritative statement of rules except where it has been superseded by provisions passed by members. In addition, there are fifteen volumes of parliamentary procedures and supplementary manuals of notes specifying current rules that pertain to lawmaking in the House. Similar reams of codes exist in the Senate.⁷

Making Laws

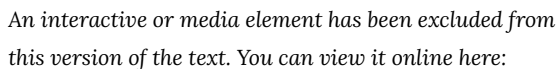
The textbook legislative process begins when a member of the House or Senate introduces a bill, which then is referred to appropriate committees within each body. Committees decide whether or not a bill is recommended for floor action, where it will be debated and voted on. The House and Senate must pass identical versions of a bill before it can be sent to the president to be signed into law.

Video Clip: Schoolhouse Rock—How a Bill Becomes a Law

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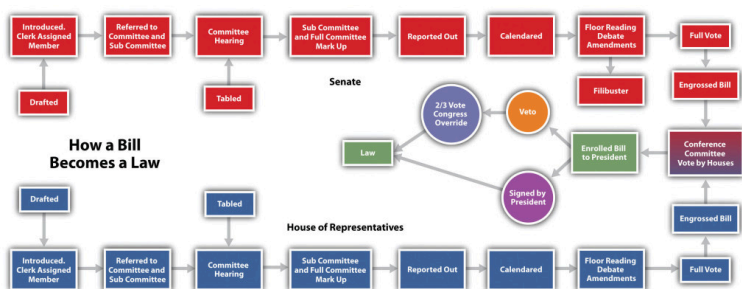
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<https://library.achievingthedream.org/fsciamericangovernment/?p=49>

Figure 1. How a Bill Becomes a Law



Source: Adapted from <http://www.cybertelecom.org/images/howlaw.gif>.

Few bills are passed via the organized, step-by-step, textbook process. Since the 1970s, “unorthodox lawmaking” has become the norm. Most bills wend their way through a circuitous path filled with political and procedural roadblocks.¹⁰¹¹ Individual members, especially those seeking reelection, weigh in on bills, resulting in an often contentious atmosphere for lawmaking.

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Developing Legislation

Members develop ideas for legislation from myriad sources. Most often, proposals stem from campaign promises and issues germane to members' districts brought to their attention by constituents and lobbying groups.¹³ Senator Warren Magnuson (D-WA) initiated a spate of legislation that led to the establishment of the Consumer Product Safety Commission in the 1970s after being shown an X ray of shrapnel embedded in a constituent's skull resulting from an accident involving a power lawn mower.¹⁶ Political parties may encourage members to develop legislative initiatives that support their agendas. Members may see a need to revise or repeal an existing law. They also can be motivated by personal experiences. The late Senator Strom Thurmond (R-SC), in an action that contradicted his fierce opposition to government regulation, sponsored a bill requiring warnings about the dangers of alcohol in all advertising after his daughter was killed by a drunk driver.¹⁹ National emergencies can prompt members to take action. Congress enacted the Homeland Security Act of 2002 in the aftermath of the 9/11 terrorist attacks on America. This act created the Department of Homeland Security, a new government agency for emergency preparedness.

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Legislation can originate as a result of executive communication, a message or letter from the president, a cabinet member, or an agency head to the Speaker of the House or president of the Senate recommending that Congress address a policy or budgetary issue. These requests often follow the president's State of the Union address. Presidents also can make their agendas known to Congress by making speeches that are publicized through the media. Executive communications are referred to appropriate congressional committees, which decide whether or not to act on them. The president uses an executive communication to submit his proposed budget to the House Committee on Appropriations, which uses it as a basis for drafting federal funding legislation.²²

Every year, the docket—the schedule outlining Congress's workload—accommodates a significant amount of legislation that is required to keep existing programs and services going. Most required legislation takes the form of authorization bills, which establish a suggested level of funding for a program, and appropriations bills, which actually provide the money for a department or agency to run the program.²⁵

Drafting Legislation

If it is to have much chance of becoming law, a bill must be drafted into a proposal that will generate support in Congress as well as

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among the public, interest groups, and the executive branch. Bills are drafted by members with the assistance of their staffs and experts in the House and Senate legislative counsel offices.

A bill's language can be instrumental in generating media publicity and subsequently support for or opposition to it. The title can position the bill in the public debate, as it captures the ideas and images proponents wish to convey. Megan's Law, which requires communities to publicize the whereabouts of convicted sex offenders, is named after Megan Kanka, a New Jersey girl who was murdered by a sex offender after his release from prison. Politically charged shorthand often is used to characterize bills. The health-care reform legislation passed by Congress and signed into law by President Barack Obama in 2010 has been labeled "Obamacare" by opponents seeking to repeal the legislation.

Introducing Legislation

Members from either the House or Senate can introduce legislation. The member who introduces a bill is its sponsor. Other members can sign on as cosponsors, or supporters, of the bill. Having a large number of cosponsors or having congressional leaders sign onto a bill can boost its chances of success.

Bills are the most typical form of legislation. They can originate in either the House or Senate, with the exception of bills for raising revenue, which must be initiated in the House.²⁸ The same bill must pass through all the formal procedural hurdles in the House and Senate before it can be sent to the president to be signed into law.

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Members of the House or Senate introduce bills and open the floor to debate.

Committee Consideration

After a bill is introduced, it is referred to the standing committee having jurisdiction over its subject matter, such as energy or homeland security, by the presiding officers in each chamber. Having a bill referred to a friendly committee is a key to its potential for success. In the House, but not the Senate, a bill may be considered by more than one committee.³¹ Committees in both

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chambers frequently pass a bill on to a subcommittee that deals with a specialized area of policy contained in the legislation. As more people work on a bill, the less likely it is they will reach consensus and that the bill will move beyond the committee stage.³⁴

Committees sometimes request input about a bill from government departments and agencies and hold public hearings where expert witnesses testify. When members seek media coverage of committee hearings, they sometimes will bring in celebrities as witnesses. In 2010, comedian Stephen Colbert testified in front of the House Judiciary Committee in order to bring attention to immigration reform and treatment of farm workers. The performance received mixed reviews from both members of Congress and political commentators.

The full committee votes to determine if the bill will be reported, meaning it will be sent to the floor for debate. If the vote is successful, the committee holds a mark-up session to revise the bill. The committee prepares a report documenting why it supports the bill. The report is sent to the whole chamber, and the bill is placed on the calendar to await floor debate.

In the House, bills must go the Rules Committee before reaching the floor. The Rules Committee assigns a bill a rule that sets the procedures under which the bill will be considered on the floor. The rule establishes the parameters of debate and specifies if amendments, proposed changes to the bill, will be permitted or not. A bill can become stalled if the Rules Committee does not assign it a rule at all or in a timely manner. Rules must be approved by a majority of the members of the House before floor action can begin.

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There is no Rules Committee in the Senate, where the process of bringing a bill to the floor is simpler and less formal. The Senate majority leader makes a motion to proceed with floor debate.

Floor Action

Once a bill reaches the House or Senate floor, it is debated, amended, and voted on. Many of the bills that make it to the floor are minor bills—noncontroversial measures that have symbolic value, such as naming a post office.³⁷ Floor consideration of most minor bills is brief, and they are approved by voice vote. Major bills focusing on divisive issues, such as budgetary proposals, health care, and national security, will prompt lengthy debate and amendment proposals before coming to a vote. A bill dies if either chamber fails to pass it.

In the House, bills are considered by the full House meeting in the chamber, which is referred to as the Committee of the Whole. The Speaker of the House chooses a chairperson to oversee floor action. Speakers for and against the bill have an equal amount of time. A general debate of the bill is followed by debate of amendments. A quorum of 218 members is required for a vote on the bill. Yeas and nays are recorded using a computerized system.

Senate floor action is less structured and more unpredictable than the House procedure. Senators are free to speak as long as they like. The filibuster can be used by skillful senators to defeat a bill by “talking it to death.” To avoid lengthy and unproductive floor sessions, the Senate can employ unanimous consent agreements,

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negotiated agreements that set time limitations on debate.⁴⁰ Debate also can be restricted if three-fifths of the senators vote to invoke cloture, a motion to limit consideration of a bill. Getting sixty senators to agree to close debate is not easy, especially on controversial issues. Senators vote on the bill using a traditional call of the roll, with each voice vote recorded manually.

Conference Committee

If House and Senate versions of a bill are not the same, a conference committee is formed to work out the differences. Conference committees consist of members of both houses. In 1934, Senator George Norris (R-NE) characterized conference committees as the “third house of Congress” because of the power they wield in the legislative process.⁴³ They are the last places in which big changes in legislation can be made. Major changes in the provisions and language of bills are negotiated in conference committees. Up to 80 percent of important bills during a session of Congress end up in conference committees.⁴⁶

During conference committee negotiations, conferees meet

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informally with party leaders and members who have an interest in the bill. Representatives of the executive branch work with conferees to devise a final bill that the president will be likely to sign. Once an agreement has been reached, the conference committee issues a report that must be passed by the House and Senate before the bill moves forward to be signed into law by the president.⁴⁹

Presidential Approval



After passing through both houses of Congress, a bill does not become a law until it is signed by the president.

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A bill becomes law when it is signed by the president. A president can veto, or reject, a bill by sending it back to Congress with a memorandum indicating his objections. Congress can override a veto with a two-thirds vote in each chamber, enabling the bill to become a law over the president's objections.⁵²

The Budget Process

One of the most arduous tasks faced by Congress is passing legislation authorizing the nation's annual budget. House and Senate members, their staffs, and congressional committees in conjunction with the president and the executive branch are responsible for preparing the budget. The president submits a detailed budget proposal to Congress, which serves as a starting point. The House and Senate Budget Committees hold hearings on the budget to get advice about how funds should be spent.

The nonpartisan Congressional Budget Office (CBO) with a staff of over 230 economists and policy analysts, provides expert budgetary advice to Congress. It reviews the president's budget plan, projects the actual costs of budget items, and develops options for changes in taxing and spending. CBO staffers prepare detailed reports on the budget and testify before Congress.⁵⁵

A two-step authorization and appropriations process is required to establish and fund specific programs within the guidelines set

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by the annual budget. Congress must first pass laws authorizing or recommending that federal programs receive funding at a particular level. The appropriations process, where funds are actually allocated to programs for spending, is the second step. The House Appropriations Committee initiates all bills to fund programs, and its counterpart in the Senate must approve funding bills. The budget resolution that ultimately passes the House and Senate Budget Committees is usually markedly different from the president's budget proposal.

The budget process rarely goes smoothly. The process can stall, as was the case in 2011 when the inability of Congress to reach an agreement on the budget threatened to result in a government shutdown. Media coverage highlighting partisan bickering over what to fund and what to cut from the budget added to the drama surrounding the budget process.

C-SPAN

Members of the public can follow congressional action live on television. After much debate, televised coverage of floor proceedings via the Cable Satellite Public Affairs Network (C-SPAN) was established in the House in 1979 and in the Senate in 1986. C-SPAN transmits gavel-to-gavel coverage of floor action. It covers committee hearings and broadcasts educational panels and events.

C-SPAN affirmed Congress as a media-conscious institution.⁵⁸ A top Rules Committee staffer explained that Congress had tired of losing the battle with the president for media attention: "President Richard Nixon was dominating the airwaves with defenses of his

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Vietnam War policies, while Congressional opponents were not being given equal access by the networks.”⁶¹

C-SPAN’s cameras show Congress at its best and worst, at its most dramatic and most mundane. They showcase members’ elegant floor speeches and capture them joking and looking bored during hearings. C-SPAN is monitored continuously in most congressional offices and is a source of information and images for other mass media.

C-SPAN has expanded its operation beyond cable television and provides extensive radio and online coverage of Congress, the White House, and national politics. In addition to live streams of television and radio feeds from Capitol Hill, the [C-SPAN website](#) includes news stories, opinion pieces, history, educational materials, and event coverage.

Link: C-SPAN’s Channel on YouTube

People can follow C-SPAN via Twitter, Facebook, and Foursquare. C-SPAN has its own YouTube channel [here](#) that hosts an extensive political video library.

Link: C-SPAN Bus

The [C-SPAN bus](#) travels the country, providing information about public affairs to communities and gathering local stories that they publicize online.

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C-SPAN has expanded beyond its original television coverage of Congress to provide information about government and politics through a range of media.

Key Takeaways

Making laws is a complex process guided by volumes of rules and influenced by politics. While many bills are proposed each congressional session, few make it all the way through the process to be signed by the president and made law. Congress is responsible for passing legislation enacting the nation's annual budget, which is frequently a difficult task. The activities of Congress are reported by C-SPAN, which began as a cable network providing gavel-to-gavel coverage of floor proceedings and has expanded to become an extensive resource for information about government and politics.

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2. John V. Sullivan, [How Our Laws Are Made](#), research report (Washington, DC: Thomas Online, 2008), accessed May 21, 2011. ↵
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 4. 64 ↵
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 6. Eric Redman, *The Dance of Legislation* (Seattle, WA: University of Washington Press, 2001). ↵
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 12. Barbara Sinclair, *Unorthodox Lawmaking* (Washington, DC: Congressional Quarterly Press, 1997). ↵
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15. David J. Vogler, *The Third House* (Evanston, IL: Northwestern University Press, 1971). [↵](#)
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 18. Roger H. Davidson and Walter J. Oleszek, *Congress and Its Members*, 8th ed. (Washington, DC: CQ Press, 2002). [↵](#)
 19. “[CBO's Role in the Budget Office](#)” (Washington, DC: Congressional Budget Office, 2005), accessed February 16. [↵](#)
 20. Timothy E. Cook, *Making Laws & Making News* (Washington, DC: Brookings, 1989). [↵](#)
 21. Walter J. Oleszek, “The Internet and Congressional Decisionmaking,” report prepared for the Chairman of the House Rules Committee, September 19, 2001. [↵](#)

28. Reading: Congress in the Information Age

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. How has Congress's relationship to the media differed from that of the president?
2. How do members communicate with their constituents and the press?
3. How are members depicted by news media and popular media?
4. What are the effects of media coverage of Congress on public perceptions of the institution?

Congressional media relations in the information age are as complex as the 535 members of the House and Senate are unique. The size, convoluted organization, and many rules governing Congress do not make for a media-friendly institution. The media environment has become more complicated to negotiate, as members must contend with both traditional news media and new media, which provide a two-way flow of information between legislators and their constituents.

Media Interactions

When asked by a *Time* magazine reporter to identify the most underplayed story of our times, former news anchor Walter

Cronkite replied, “Congress. This is where our laws are made, where our laws are debated, and we don’t cover Congress the way it ought to be.”¹

Cronkite’s observation speaks to the changing relations between the national press and Congress over time. For the first century of the republic, Congress and its members were far more visible in newspapers than presidents, who felt it was beneath the dignity of the office to speak on public issues. Debates on Capitol Hill were widely reprinted in partisan papers. The profit-minded penny press of the 1830s found Washington news attractive but often focused on members’ personal escapades, which raised the ire and suspicion of congressmen. Congress adopted the practice of reviewing reporters’ credentials, granting them permission to sit in the drafty public gallery on a case-by-case basis. When the Capitol was rebuilt in the 1850s, the construction included press galleries, separate areas to which reporters were automatically admitted on the recommendation of their editors.

By the 1920s, the president made most of the news; Congress was relegated to a distant second place, and the Supreme Court received the least press.⁴ The modern relationship between the media and Congress took shape in the 1970s, when *Washington Post* reporters Bob Woodward and Carl Bernstein broke the story about the break-in at the Democratic National Committee headquarters at the behest of the Nixon White House to uncover Democrats’ campaign strategies. Hundreds of reporters were sent to Washington to cover the Watergate scandal, and many stayed after discovering that the

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town was ripe with stories. The Watergate scandal prompted Congress to pass sunshine laws, which opened most hearings to the public and the press. Many members welcomed the opportunity offered by the invigorated Washington press corps to promote themselves to their constituents.

Congress vs. the President

There are a number of reasons why the president is the newsmaker-in-chief while Congress remains in his shadow. The president is a media magnet because he is a single individual at the hub of the executive branch. It is more difficult for reporters to cover Capitol Hill. Congress has many potential newsmakers and story lines that take journalists time and energy to track down. Congress also has been resistant to new communications technologies that might elevate its profile but at the same time subject members to greater public criticism. Radio journalists were not admitted to the press gallery until 1939. Television cameras filmed the opening session of the House in 1947; they would not be allowed back for almost thirty-five years. The institution did not begin to embrace the Internet until 1995, when websites for the House and Senate were established but used by only a handful of members. Only recently have members begun to embrace social media.

Congress Online

The tradition-bound Congress embraced the Internet slowly. Political scientist Stephen Frantzich describes the situation:

One can almost hear the crunch of metal as one ancient institution and one new technology collide. For all the promises of cyberdemocracy and enhanced political

linkages, in some ways the interface of Congress and the Internet is a match made in Hell. Divorce is not possible, but tensions are inevitable.⁷

Members were reluctant to change the way they conducted business and were wary of receiving a barrage of e-mail messages that would create more work for their overtaxed staffs. This attitude changed as members used the Internet to get elected, staff members became tech savvy, and constituents became Internet users. Today, all members communicate through online media, although some members are more sophisticated in their digital communication strategies than others.

Websites are an important resource for members' public relations efforts. They provide a platform for publicizing members' views and accomplishments that can be readily accessed by reporters. Members use websites to present their image to the public without journalistic filters. Websites can promote grassroots support for members through tools, such as printable brochures and buttons. Websites have improved constituent service. They are "virtual offices" open twenty-four hours a day, providing information and opportunities for interaction. Members can solicit opinions from constituents quickly through online polls, message boards, and social media.¹⁰

The websites for the [House](#), [Senate](#), and [committees](#) provide the public with a wealth of information about hearings and legislative action. The complete text of bills, the *Congressional Record*, which

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provides transcripts of floor debate, committee action, and institutional history, is available through the [THOMAS website](#).

Media Depictions

Media depictions of Congress are a mixed bag. National news coverage focuses on the institution of Congress and tends to highlight conflict and partisan bickering. Local news covers individual members and is more positive. Depictions of Congress in television and film often exaggerate stereotypes, such as the corrupt senator or the crusading House representative.

News Coverage

The distinction between the institution of Congress and individual members is evident in media coverage. There are distinct differences in the tone, content, and scope of news reports on Congress in the national compared to local press. National news reports focus more on the institution than individual members. Stories emphasize the investigative side of reporting in that they seek the “smoking gun,” a problem, or a scandal. Reports convey the impression that Congress is populated by power brokers who are in the pocket of political insiders such as interest groups; reports often portray members of Congress as being ignorant of public concerns.

Local media coverage focuses on members more than the institution. Journalists value the access they have to members when they come home to their districts. Few local media organizations have Washington bureaus, so they rely heavily on press releases, wire feeds, canned video, members’ websites, blogs, and social media. Members spend much more time courting the local press than national media. The local press serves as an intermediary

between members and their constituents by focusing on the congressional stories most relevant to the district.

Local stories generally are more positive than national news reports. Journalists even may become unofficial cheerleaders for members. This does not mean that members never receive bad press from local news sources. During reelection bids, especially, local journalists emphasize their watchdog role, and reporting can become more critical of members.¹³

When the media uncover evidence of a member of Congress misbehaving, the result is frenzied scandal coverage. In 2001, the press revealed that Rep. Gary Condit (D-CA) had been having an affair with Chandra Levy, an intern who had disappeared and whose remains were later found in Washington, DC. Representative Condit was dogged by journalists from both respectable and tabloid organizations, whose stories implied that he had something to do with Levy's fate. Representative Condit lost his reelection bid. The story was headline news for months until the 9/11 terrorist attacks put it on the back burner. In 2011, a jury convicted another man in Levy's murder.

Congress on Television and in Film

Congress has been the subject of numerous television programs and movies. Like media coverage in general, television and film treatment of Congress pales in comparison to that of the presidency.

There has been a stream of television sitcoms and dramas set in Congress, most of which have been short-lived. Programs

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exaggerate images of the institution that are predicated in reality. Others reinforce unflattering stereotypes of members as criminals or buffoons.¹⁶ The television version of Congress is even more of a male bastion than the institution itself. Women primarily serve as support staff or love interests of male members. *Mister Sterling*, the congressional counterpart to *The West Wing* that survived one season, is typical. It featured an idealistic but all-too-serious young congressman who uses his intelligence to outsmart his older, white, male colleagues. Women members on the show were few, and none held leadership positions. Sterling used talk radio, which is dominated by male hosts and listeners, as his primary means of communicating to the public.¹⁹ Another quickly cancelled program was *Women of the House*, in which a scatterbrained Southern belle inherits the Senate seat of her deceased fifth husband and schemes her way through her congressional duties.

Congress has been depicted in more than a dozen feature films since the 1930s, far fewer than the more than one hundred films that have focused on the presidency. Many of them overdramatize legislative processes and committee actions and oversimplify the workings of the institution. Floor action and committee hearings are ridden with conflict and full of surprises. In reality, floor action almost invariably proceeds by the rules with great decorum. The work of congressional committees is deliberate and complicated. On film, members of Congress are often pitted against one another. In fact, members rarely engage in direct confrontation.²²

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In *Legally Blonde 2: Red, White & Blonde* (2003), pink-clad Harvard Law School graduate Elle Woods goes to Washington with the aim of passing an animal rights bill to save the mother of her pet Chihuahua, Bruiser. To promote “Bruiser’s Bill,” Elle barges into a congressional hearing, interrupting the proceedings in a way that, in real life, would have guaranteed her an escort out by security. Instead, she gains enough support to get the bill passed. A clip of *Mr. Smith Goes to Washington* (1939) is cleverly inserted into the film to position it in the tradition of films in which the young, idealistic underdog takes on the corrupt lifelong politician.

Films depict members of Congress as politically and morally flawed. Blinded by ambition, they compromise their beliefs and values to achieve position and power.²⁵ In *The Seduction of Joe Tynan* (1979), a well-intentioned senator has an extramarital affair, even as he considers but ultimately resists caving in to powerful members to advance his career.

Media Consequences

The media can influence the behavior of members of Congress, the public’s perception of the institution, and constituents’ feelings about their members.

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Legislative Behavior

Perspectives on the influence on the news media on Congress' legislative activities differ. Some scholars contend that because the media do not cover much of what goes on in Congress, members are largely able to do their jobs without interference. Members with high public visibility can get into trouble as they are subject to scrutiny and criticism. Therefore, members who pursue insider strategies—working behind the scenes to forge coalitions—can avoid press interference.²⁸

Another perspective argues that the media have dramatically changed Congress by promoting outsider strategies for governing. To be successful, members must court media publicity rather than forge congressional relationships that are essential for building consensus. The result is that legislative actions can be held up as members seek to influence public opinion.³¹

A third, more realistic perspective posits that both the insider and outsider strategies are essential for lawmaking. It is important for members to publicize their views via the media in order to rally public opinion and at the same time work to build cooperation within the institution.³⁴

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Public Trust

Public confidence in Congress has declined over the past three decades. Congress has the lowest approval ratings of the three national institutions. In 2010, Congress received its lowest approval rating in the history of the Gallup poll, with 83 percent of the public disapproving of the way the institution is handling its job.

Link: Congressional Approval over Time

A graph and explanation of congressional approval over time is available on the [Gallup website](#).

Scholars offer competing views about whether or not the media contribute to this trend of declining approval of Congress. Some suggest that the image of an institution characterized by conflict and deal making that pervades media coverage has a negative impact on public perceptions. Most Americans abhor the squabbling between members and acrimonious interactions between Congress and the presidency that they see in the media. They feel that congressional leaders have lost touch with average people and that the institution is dominated by special interests.³⁷ Other researchers disagree and believe that evidence of a direct connection between media coverage and declining public opinion about Congress is lacking. People's low opinion of Congress is based

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on the public's holding the institution accountable for negative societal conditions, such as a bad economy.⁴⁰

National vs. Local Coverage

The more critical national coverage of the institution compared to the more favorable local press accorded to members may account for differences in public opinion. People dislike the institution even as they hold favorable views of their own congressmen. Citizens claim to be unhappy with the “pork barrel” politics of the institution but are pleased when the media report that their own member has brought home the bacon.⁴³

There may be a connection between positive local coverage of members and the large number of incumbents who win reelection. The public does not think that most members of the



The close connection that many members of Congress have with constituents in their home districts is reflected in positive media coverage.

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House should be reelected but are more supportive of returning their own member to Congress.⁴⁶

Internet Effects

Online communication has influenced how citizens view Congress. On the one hand, Congress's online presence fosters positive attitudes toward the institution and its members. Congressional websites have been successful in facilitating the flow of information to the public. People feel that members' websites convey a sense of accountability and transparency when they report voting records, rationales for policy decisions, schedules, and issue information. Websites create trust, as people feel that members are not "hiding something."⁴⁹

At the same time, blogs, discussion boards, and video-sharing sites have placed Congress and its members under a microscope. While mainstream media coverage of Congress is less prevalent than it is for the presidency, bloggers generate a continual barrage of commentary and criticism of congressional action, often taking aim at particular members. Citizens armed with cell phones and flip cameras can capture a member at her or his worst moment, post an embarrassing photo or video online, and have it go viral within a short period of time. These negative depictions can play

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into the unpopular view of Congress that citizens frequently hold and contribute to declining trust in the institution.

Key Takeaways

Congress historically has been slow to adapt to new media technologies such as radio, television, and the Internet. More recently, members have integrated new media into their communications strategies. Members use websites, social media, and e-mail to communicate efficiently with constituents.

Media reports may have a negative influence on the public's perceptions of the institution and a favorable impact on feelings about individual members. Online media, including blogs and video-sharing sites, place the institution and its members under increased scrutiny.

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 2. Timothy E. Cook, *Making Laws & Making News* (Washington, DC: Brookings, 1989). [↴](#)
 3. Stephen E. Frantzich, "RepresNETation: Congress and the Internet," paper presented at the American University Center on Congress and the Presidency conference on "Congress, the Internet, and Deliberative Democracy," May 4, 2001. [↴](#)
 4. Congress Online Project, *Nine Benefits of a Good Website*, research report (Washington, DC: George Washington University, 2003). [↴](#)
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 6. Tracey L. Gladstone-Sovell, "Criminals and Buffoons: The Portrayal of Elected Officials on Entertainment Television,"

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7. Garrett Epps, “Sterling Character,” *The American Prospect*, January 17, 2003. [↵](#)
 8. David L. Paletz and Daniel Lapinski, “Movies on Congress,” in *The Encyclopedia of the United States Congress*, ed. Donald C. Bacon, Roger H. Davidson, and Morton Keller (New York: Simon and Schuster, 1995). [↵](#)
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 10. Stephen Hess, *The Ultimate Insiders* (Washington, DC: Brookings, 1986). [↵](#)
 11. Todd Gitlin, *Media Unlimited* (New York: Metropolitan Books, 2002). [↵](#)
 12. Timothy E. Cook, *Governing with the News* (Chicago: University of Chicago Press, 1998). [↵](#)
 13. John Hibbing and Elizabeth Theiss-Morse, *Congress as Public Enemy* (New York: Cambridge, 1995). [↵](#)
 14. Pippa Norris, “The News Media and Democracy,” in *Political Communication Transformed*, ed. John Bartle and Dylan Griffiths (Basingstoke: Palgrave Macmillan, 2001), 163–80. [↵](#)
 15. John Hibbing and Elizabeth Theiss-Morse, *Congress as Public Enemy* (New York: Cambridge, 1995). [↵](#)
 16. [CNN/USA Today/Gallup Poll](#), October 10–12, 2003. [↵](#)
 17. Congress Online Project, *Nine Benefits of a Good Website*, research report (Washington, DC: George Washington University, 2003). [↵](#)

29. Putting It Together

Summary

Article I of the Constitution establishes Congress as the legislative branch of government with broad powers to provide for the “common defense and general welfare of the United States,” along with specific powers in important areas of domestic and foreign affairs.

The framers provided for a bicameral legislative branch with equal representation in the Senate and proportional representation based on state population in the House. The two bodies differ in a number of important ways that influence the way that they operate. The House is a more formal institution, where hierarchy and seniority are important factors. The Senate, as a smaller, more intimate body, is less bound by formal rules than the House. Senators typically garner more media attention than House members because they serve statewide constituencies and serve longer terms of office.

Political parties are central to the organizational structure of Congress. Parties provide a measure of discipline that helps the House and Senate to function more efficiently. Members who switch parties often lose the benefits of seniority, such as committee chair positions, and face an uncertain future when they seek reelection.

An extensive leadership structure provides an organizational framework that helps House members work effectively if not efficiently. At the top of the leadership hierarchy is the Speaker of the House, who is the body’s presiding officer. Majority and minority leaders help set their party’s agenda on issues. The whips encourage party unity on House votes.

The Senate leadership consists of the presiding officer, majority leader, minority leader, and whips. Unlike in the House, where the

Speaker wields considerable power, the presiding officer is not the most visible member of the Senate and can only vote in case of a tie. The majority and minority leaders work together to schedule and manage Senate business. Whips are less important in the Senate than in the House because the closer personal relationships that develop in the smaller body make it easier to know how members will vote without a formal whip count.

Much of the important work in Congress is accomplished through committees. The fate of legislation—which bills will make it to the floor of the House and Senate—is determined in committees. Members seek committee assignments based on their desire to influence policy, exert influence, and get reelected. Most committee work receives little, if any, media coverage. Investigative committees are the exception when they are covering hearings on high-profile matters.

Making laws is a complex process guided by volumes of rules and influenced by politics. While many bills are proposed each congressional session, few make it all the way through the process to be signed by the president and become law. Congress is responsible for passing legislation enacting the nation's annual budget, which is frequently a difficult task.

In recent years, the membership of Congress has become increasingly diverse, as more women and minority group members have been elected. Still, the dominant profile of the member of Congress is an older, white male. In addition to their constitutional duties, members of Congress engage in a host of other activities, many of which are related to getting reelected. Members strive to maintain close connections with their constituents while serving in Washington. They seek to publicize their activities through the mainstream press as well as social media. Congressional staffers aid members in keeping abreast of policy issues, performing constituent service, and dealing with the press.

PART V

MODULE 5: THE PRESIDENCY: DESIGN AND EVOLUTION

30. Module Introduction

The Presidency: Design and Evolution

Module Introduction

Topic Covered

- The constitutional origins of the presidency
- The scope and evolution of presidential power
- The work of the presidency

Today, the American presidency is central to the idea of American democracy. It is, without a doubt, the most visible—and, perhaps, the most powerful aspect of our nation's system of governance. In this way, the office of the presidency overwhelmingly defies the original intent of the Framers.

The Framers were deeply suspicious of presidential power. Generally speaking, they believed that the role of the presidency should be confined to exercising those powers specifically outlined in the U.S. Constitution; thus, the vagueness of the presidential powers detailed in Article II. However, the problem with such ambiguity is that it ironically undercut the initial skepticism presented by the Founders. In particular, this lack of clarity has led to a model of interpretation that has greatly expanded the power of the presidency.

Such expansion of power has largely been on display since the early twentieth century and beyond. Beginning with Franklin Roosevelt, the power of the presidency has increased significantly.

From the onslaught of executive orders to the proliferation of presidential war powers, one thing is certain, no president, since this time, shrinks the power of the presidency; they elevate it, in turn.

Notwithstanding, it should be noted that the increase in presidential power is not attributable to personal ambition alone. While the personal and political agenda of the presidency is necessary to explain the expansion of presidential power; it is by itself not sufficient to explain the evolution of presidential powers through the years. There are a number of accompanying variables related to this phenomenon. For instance, both foreign and domestic developments have helped to shape the power of the presidency. In particular, world wars and economic crises are just a few illustrations of the internal and outward effects on the progression of the American presidency.⁽¹⁾

Learning Outcomes

1. Students will be able to articulate an understanding of the individual in society.
2. Students will be able to think critically about institutions, cultures, and behaviors in their local and/or national environment.
3. Students will be able to think critically about institutions, cultures, and behaviors of the peoples of the world.
4. Students will develop a historical context for understanding current issues and events
5. Students will develop a greater understanding of world events

Objectives

Upon completion of this module, the student will be able to:

- Identify the constitutional origins of the presidency.
- Describe the scope of presidential power.
- Describe the organization and function of the executive branch. ⁽¹⁾

Readings & Resources:

(Note: Some reading materials contain the media form of online videos, are considered supplemental and thus are not used for assessment purposes.)

- [The Powers of the Presidency](#) from Lumen Learning
- [Presidential Elections](#) from Lumen Learning
- [How Presidents Get Things Done](#) from Lumen Learning
- [Presidents in the Information Age](#) from Lumen Learning
- [Putting it Together](#) from Lumen Learning

Supplemental Material/Resources

(Note: This material, in the media form of online videos, is considered supplemental and thus is not used for assessment purposes.)

- Video: [Primary Elections Explained](#) from Lumen Learning
- Video: [How the Electoral College Works](#) from Lumen Learning
- Video: [The Trouble With the Electoral College](#) from Lumen Learning

- Video: [What if the Electoral College is Tied?](#) from Lumen Learning

Assignments & Learning Activities

- Review Readings & Resources
- Review Module 5 Learning Unit
- Participate in Discussion
- Submit Final Project Outline
- Take Quiz 5

3I. Lecture Content

Executive Power

Article II, Section 1 of the Constitution states “The executive Power shall be vested in a President of the United States of America.”⁽⁵⁵⁾ With such vague phrasing, the term “executive power” can take on a number of meanings. Let’s discuss a few here.⁽¹⁾

The Descriptive Model of Executive Powers

The traditional interpretation of executive power holds that it is a descriptive term at best, used only to summarize those enumerated powers listed in Article II. According to this view, all presidential power is defined in Article II and the executive or vesting clause does not add any power to the list.

Presidential examples of this model of governance come in the form of Dwight Eisenhower. Eisenhower’s nationalization of the Arkansas National Guard in 1957 came not from his proactive approach to desegregation in the South. Rather, Eisenhower’s leadership in this area stemmed from his literalist view of the Constitution that he “take Care that the Laws be faithfully executed,”⁽⁵⁵⁾ with the law in this case being the Supreme Court’s ruling in ⁽¹⁾ [BROWN V. BOARD OF EDUCATION](#).⁽⁵⁶⁾

The Conferral Model of Executive Power



[President Richard Nixon, July 09, 1972](#) by United States Federal Government is in the [Public Domain](#)

The modern view of executive power is simply this: it confers power. Beyond descriptive measures, the conferral model of executive power not only embraces those enumerated powers outlined in Article II, but it likewise grants additional ones, also referred to as

inherent powers. For instance, the Constitution makes no mention of executive privilege, executive agreements, or executive powers. However, the absence of such language has not prevented presidents from exercising such means, which have all been sanctioned by the U.S. Supreme Court. For instance, the Supreme Court's ruling in ⁽¹⁾ [UNITED STATES V. NIXON \(1974\)](#) ⁽⁵⁸⁾ sanctioned the president's right to executive privilege; that is, the right of the president to protect confidential communications in the White House in the interest of national security. ⁽¹⁾

Models of Presidential Power

Historically speaking, the American presidency captures three models of presidential power: the Hamiltonian model, the Madisonian model, and the Jeffersonian ideology. As a general rule of thumb, nearly all presidents fall into one these models or perhaps, a combination. Thus, comprehension of all three models will prove to be quite useful in both assessing presidential leadership of a particular president, and identifying trends in the office of the presidency.

The Hamiltonian Model

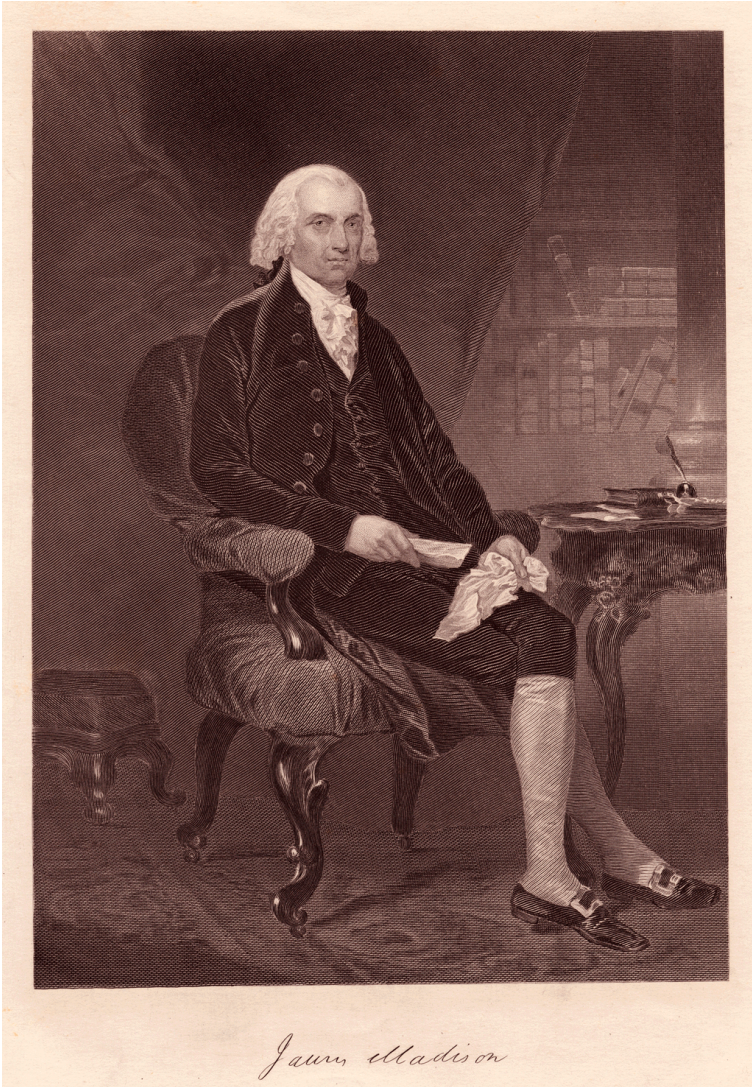
American politics dictates that the President of the United States is both head of state and head of government. Such designation serves as a marked distinction between the U.S. and other democracies abroad wherein these roles are divided between two separate individuals. Thus, with such vast responsibility, the Hamiltonian model holds that presidents must be resourceful in accomplishing his agenda vis-à-vis national interests. ⁽⁵⁷⁾ This theory includes the promotion of inherent, executive powers to accomplish such goals.

A contemporary example of this ideal can be summed up in President Trump's delivery of Executive Order 13769 as an attempt to curtail illegal immigration in the U.S. Doing so served to fulfill a critical promise made on the campaign trail.



[U.S. President Donald Trump signing the “Protecting the Nation from Foreign Terrorist Entry into the United States” order is in the Public Domain](#)

The Madisonian Model



[Sitting portrait of James Madison, President of the United States.](#)
is in the [Public Domain](#)

A less creative model of the presidency can be found in the Madisonian model of leadership. Simply put, this standard rests on the principle of checks and balances, and, is, unarguably, the most traditional model of the presidency.⁽¹⁴⁾ It emphasizes balanced powers and competing interests as checks against tyranny rule. George Washington, our first president, embodied this style of governance.

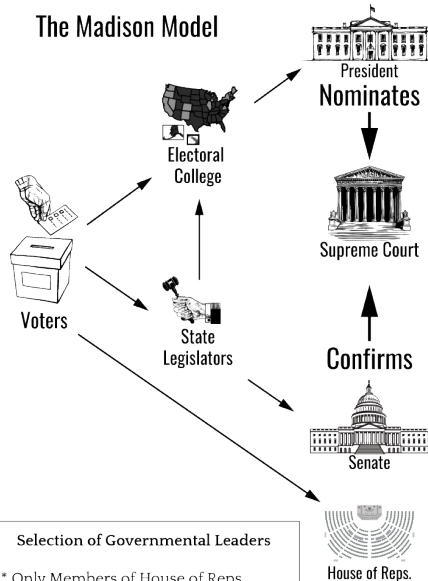
- The Framers believed that human nature was based on self-interest, and that inequalities of wealth was the principal source of political conflict.

- With these ideas in mind the framers feared that any group (primarily the non-wealthy majority) could gain majority control of the government and tyrannize the minority (the wealthy) **TYRANNY OF THE MAJORITY**

- To deal with these issues the framers came up with a conceptual design of government that came to be known as the **MADISONIAN MODEL**. According to this model the best way to prevent the "TYRANNY OF THE MAJORITY" was to ensure the following things were done when creating the new government:

1. Place as much of the government as possible beyond the control of the majority
2. Separate the powers of the different governmental institutions
3. Construct a system of **CHECKS AND BALANCES**.

The Madison Model



Selection of Governmental Leaders

** Only Members of House of Reps. were directly elected by the masses.

** Other leaders were indirectly elected.

- o President - Electoral College
- o Senate - State Legislatures
- o Supreme Court - President & Senate

The Madisonian Model by FSCJ is licensed under [CC-BY 4.0](https://creativecommons.org/licenses/by/4.0/)

The Jeffersonian Model



[Trump is making a speech on the final day of the Republican National Committee](#), July 2016 is in the [Public Domain](#)

The Jeffersonian Model of the presidency gives way to increased democracy via the “will of the people, expressed through elections;” thus, advocating the benefit of political parties in American politics.⁽⁶⁷⁾ Now, while the Constitution is clear on the establishment of institutions and the election of public officials to government bodies, it is silent on how this process should come to fruition. Therefore, political parties aid in the development of such. Political parties, in particular America’s prevailing two-party system, delivers individuals to candidacy who, in turn, represent a segment of the American electorate who identify with the ideology behind the party label. In this way, political parties and the competition they spawn serve as an egalitarian impetus for deepening democracy. The president, as party leader of his

respective coalition, aids in this process as parties seek to bring party platforms to national awareness. The 2016 Republican and Democratic National Conventions are demonstrative of the role political parties play in advancing the power of the presidency. ⁽¹⁾

Theories of Presidential Power at Work

With executive power and presidential models of leadership defined, let's attempt to put these theories into practice by evaluating the historical executive orders below. While reviewing these orders, try to determine which model of the presidency (Hamiltonian, Madisonian, and Jeffersonian) is being exercised.

- Executive Order 9066, issued February 19, 1942 by President Franklin Roosevelt, which authorized the internment of Japanese Americans during World War II.
- Executive Order 9981, issued July 26, 1948 by President Harry Truman, which ended segregation in the U.S. Armed Forces.
- Executive Order 10925, issued by President John F. Kennedy, which mandated the use of affirmative action and nondiscriminatory hiring practices by governmental agencies and contractors.
- Executive Order 13379, issued by President George W. Bush, which established the Office of Faith Based Initiatives and increased participation of religious organizations in federal social programs. ⁽¹⁾



[Japanese Americans in front of poster with internment orders](#) by War Relocation Authority is in the [Public Domain](#)

32. Reading: The Powers of the Presidency

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. How is the presidency personalized?
2. What powers does the Constitution grant to the president?
3. How can Congress and the judiciary limit the president's powers?
4. How is the presidency organized?
5. What is the bureaucratizing of the presidency?

The presidency is seen as the heart of the political system. It is personalized in the president as advocate of the national interest, chief agenda-setter, and chief legislator.¹ Scholars evaluate presidents according to such abilities as “public communication,” “organizational capacity,” “political skill,” “policy vision,” and “cognitive skill.”⁴ The media too personalize the office and push

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3. [1]

4. ⁵

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6. [2]

the ideal of the bold, decisive, active, public-minded president who altruistically governs the country.⁷

Two big summer movie hits, [*Independence Day*](#) (1996) and [*Air Force One*](#) (1997) are typical: ex-soldier presidents use physical rather than legal powers against (respectively) aliens and Russian terrorists. The president's tie comes off and heroism comes out, aided by fighter planes and machine guns. The television hit series *The West Wing* recycled, with a bit more realism, the image of a patriarchal president boldly putting principle ahead of expedience.¹⁰

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11. ¹²

12. [4]

Presidents are even presented as redeemers.¹³ There are exceptions: presidents depicted as “sleaze balls” or “simpletons.”¹⁶

Enduring Image: Mount Rushmore

Carved into the granite rock of South Dakota's [Mount Rushmore](#), seven thousand feet above sea level, are the faces of Presidents George Washington, Thomas Jefferson, Abraham Lincoln, and Theodore Roosevelt. Sculpted between 1927 and 1941, this awe-inspiring monument achieved even greater worldwide celebrity as the setting for the hero and heroine to overcome the bad guys at the climax of Alfred Hitchcock's classic and ever-popular film [North by Northwest](#) (1959).



*Whether swaggering protagonists of hit movies *Independence Day* and *Air Force One* in the 1990s or more down-to-earth heroes of the hit television series *The West Wing*, presidents are commonly portrayed in the media as bold, decisive, and principled.*

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This national monument did not start out devoted to American presidents. It was initially proposed to acknowledge regional heroes: General Custer, Buffalo Bill, the explorers Lewis and Clark. The sculptor, Gutzon Borglum, successfully argued that “a nation’s memorial should . . . have a serenity, a nobility, a power that reflects the gods who inspired them and suggests the gods they have become.”¹⁹

The Mount Rushmore monument is an enduring image of the American presidency by celebrating the greatness of four American presidents. The successors to Washington, Jefferson, Lincoln, and Roosevelt do their part by trying to associate themselves with the office’s magnificence and project an image of consensus rather than conflict, sometimes by giving speeches at the monument itself. A George W. Bush event placed the presidential podium at such an angle that the television camera could not help but put the incumbent in the same frame as his glorious predecessors.

The enduring image of Mount Rushmore highlights and exaggerates the importance of presidents as the decision makers in the American political system. It elevates the president over the presidency, the occupant over the office. All depends on the greatness of the individual president—which means that the enduring image often contrasts the divinity of past presidents against the fallibility of the current incumbent.



George W. Bush speaking in front of Mt. Rushmore

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News depictions of the White House also focus on the person of the president. They portray a “single executive image” with visibility no other political participant can boast. Presidents usually get positive coverage during crises foreign or domestic. The news media depict them speaking for and symbolically embodying the nation: giving a State of the Union address, welcoming foreign leaders, traveling abroad, representing the United States at an international conference. Ceremonial events produce laudatory coverage even during intense political controversy.

The media are fascinated with the personality and style of individual presidents. They attempt to pin them down. Sometimes, the analyses are contradictory. In one best-selling book, Bob Woodward depicted President George W. Bush as, in the words of reviewer Michiko Kakutani, “a judicious, resolute leader . . . firmly in control of the ship of state.” In a subsequent book, Woodward described Bush as “passive, impatient, sophomoric, and intellectual incurious . . . given to an almost religious certainty that makes him disinclined to rethink or re-evaluate decisions.”²²

This media focus tells only part of the story.²⁵ The president’s independence and ability to act are constrained in several ways, most notably by the Constitution.

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The Presidency in the Constitution

Article II of the Constitution outlines the office of president. Specific powers are few; almost all are exercised in conjunction with other branches of the federal government.

Table 1. Bases for Presidential Powers in the Constitution

Article I, Section 7, Paragraph 2	Veto Pocket veto
Article II, Section 1, Paragraph 1	“The Executive Power shall be vested in a President...”
Article II, Section 1, Paragraph 7	Specific presidential oath of office stated explicitly (as is not the case with other offices)
Article II, Section 2, Paragraph 1	Commander in chief of armed forces and state militias
Article II, Section 2, Paragraph 1	Can require opinions of departmental secretaries
Article II, Section 2, Paragraph 1	Reprieves and pardons for offences against the United States
Article II, Section 2, Paragraph 2	Make treaties appoint ambassadors, executive officers, judges
Article II, Section 2, Paragraph 3	Recess appointments State of the Union message and recommendation of legislative measures to Congress
Article II, Section 3	Convene special sessions of Congress Receive ambassadors and other ministers “He shall take Care that the Laws be faithfully executed”

Presidents exercise only one power that cannot be limited by other branches: the pardon. So controversial decisions like President Gerald Ford’s pardon of his predecessor Richard Nixon for “crimes he committed or may have committed” or President Jimmy Carter’s

blanket amnesty to all who avoided the draft during the Vietnam War could not have been overturned.

Presidents have more powers and responsibilities in foreign and defense policy than in domestic affairs. They are the commanders in chief of the armed forces; they decide how (and increasingly when) to wage war. Presidents have the power to make treaties to be approved by the Senate; the president is America's chief diplomat. As head of state, the president speaks for the nation to other world leaders and receives ambassadors.

Link: The Constitution

Read the entire Constitution [here](#).

The Constitution directs presidents to be part of the legislative process. In the annual State of the Union address, presidents point out problems and recommend legislation to Congress. Presidents can convene special sessions of Congress, possibly to “jump-start” discussion of their proposals. Presidents can veto a bill passed by Congress, returning it with written objections. Congress can then override the veto. Finally, the Constitution instructs presidents to be in charge of the executive branch. Along with naming judges, presidents appoint ambassadors and executive officers. These appointments require Senate confirmation. If Congress is not in session, presidents can make temporary appointments known as recess appointments without Senate confirmation, good until the end of the next session of Congress.

The Constitution's phrase “he shall take Care that the Laws be faithfully executed” gives the president the job to oversee the implementation of laws. Thus presidents are empowered to issue executive orders to interpret and carry out legislation. They supervise other officers of the executive branch and can require them to justify their actions.

Congressional Limitations on Presidential Power

Almost all presidential powers rely on what Congress does (or does not do). Presidential executive orders implement the law but Congress can overrule such orders by changing the law. And many presidential powers are delegated powers that Congress has accorded presidents to exercise on its behalf—and that it can cut back or rescind.

Congress can challenge presidential powers single-handedly. One way is to amend the Constitution. The [Twenty-Second Amendment](#) was enacted in the wake of the only president to serve more than two terms, the powerful Franklin D. Roosevelt (FDR). Presidents now may serve no more than two terms. The last presidents to serve eight years, Ronald Reagan, Bill Clinton, and George W. Bush, quickly became “lame ducks” after their reelection and lost momentum toward the ends of their second terms, when attention switched to contests over their successors.

Impeachment gives Congress “sole power” to remove presidents (among others) from office.²⁸ It works in two stages. The House decides whether or not to accuse the president of wrongdoing. If a simple majority in the House votes to impeach the president, the Senate acts as jury, House members are prosecutors, and the chief justice presides. A two-thirds vote by the Senate is necessary for conviction, the punishment for which is removal and disqualification from office.

Prior to the 1970s, presidential impeachment was deemed the founders’ “rusty blunderbuss that will probably never be taken in hand again.”³¹ Only one president (Andrew Johnson in 1868) had

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been impeached—over policy disagreements with Congress on the Reconstruction of the South after the Civil War. Johnson avoided removal by a single senator's vote.

Links: Presidential Impeachment

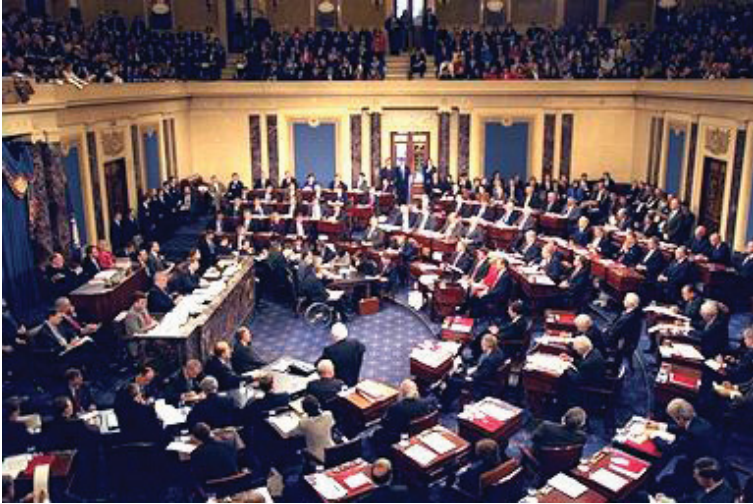
Read about the impeachment trial of President Johnson [here](#).

Read about the impeachment trial of President Clinton [here](#).

Since the 1970s, the blunderbuss has been dusted off. A bipartisan majority of the House Judiciary Committee recommended the impeachment of President Nixon in 1974. Nixon surely would have been impeached and convicted had he not resigned first. President Clinton was impeached by the House in 1998, though acquitted by the Senate in 1999, for perjury and obstruction of justice in the Monica Lewinsky scandal.

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Bill Clinton was only the second US president to be impeached for “high crimes and misdemeanors” and stand trial in the Senate. Not surprisingly, in this day of huge media attention to court proceedings, the presidential impeachment trial was covered live by television and became endless fodder for twenty-four-hour-news channels. Chief Justice William Rehnquist presided over the trial. The House “managers” (i.e., prosecutors) of the case are on the left, the president’s lawyers on the right.

Much of the public finds impeachment a standard part of the political system. For example, a June 2005 Zogby poll found that 42 percent of the public agreed with the statement “If President Bush did not tell the truth about his reasons for going to war with Iraq, Congress should consider holding him accountable through impeachment.”³⁴

Impeachment can be a threat to presidents who chafe at

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congressional opposition or restrictions. All three impeached presidents had been accused by members of Congress of abuse of power well before allegations of law-breaking. Impeachment is handy because it refers only vaguely to official misconduct: “treason, bribery, or other high crimes and misdemeanors.”

From Congress’s perspective, impeachment can work. Nixon resigned because he knew he would be removed from office. Even presidential acquittals help Congress out. Impeachment forced Johnson to pledge good behavior and thus “succeeded in its primary goal: to safeguard Reconstruction from presidential obstruction.”³⁷ Clinton had to go out of his way to assuage congressional Democrats, who had been far from content with a number of his initiatives; by the time the impeachment trial was concluded, the president was an all-but-lame duck.

Judicial Limitations on Presidential Power

Presidents claim inherent powers not explicitly stated but that are intrinsic to the office or implied by the language of the Constitution. They rely on three key phrases. First, in contrast to Article I’s detailed powers of Congress, Article II states that “The Executive Power shall be vested in a President.” Second, the presidential oath of office is spelled out, implying a special guardianship of the Constitution. Third, the job of ensuring that “the Laws be faithfully executed” can denote a duty to protect the country and political system as a whole.

Ultimately, the Supreme Court can and does rule on whether presidents have inherent powers. Its rulings have both expanded

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and limited presidential power. For instance, the justices concluded in 1936 that the president, the embodiment of the United States outside its borders, can act on its behalf in foreign policy.

But the court usually looks to congressional action (or inaction) to define when a president can invoke inherent powers. In 1952, President Harry Truman claimed inherent emergency powers during the Korean War. Facing a steel strike he said would interrupt defense production, Truman ordered his secretary of commerce to seize the major steel mills and keep production going. The Supreme Court rejected this move: “the President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”⁴⁰

The Vice Presidency

Only two positions in the presidency are elected: the president and vice president. With ratification of the Twenty-Fifth Amendment in 1967, a vacancy in the latter office may be filled by the president, who appoints a vice president subject to majority votes in both the House and the Senate. This process was used twice in the 1970s. Vice President Spiro Agnew resigned amid allegations of corruption; President Nixon named House Minority Leader Gerald Ford to the post. When Nixon resigned during the Watergate scandal, Ford became president—the only person to hold the office without an election—and named former New York Governor Nelson Rockefeller vice president.

The vice president’s sole duties in the Constitution are to preside over the Senate and cast tie-breaking votes, and to be ready to

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assume the presidency in the event of a vacancy or disability. Eight of the forty-three presidents had been vice presidents who succeeded a dead president (four times from assassinations). Otherwise, vice presidents have few official tasks. The first vice president, John Adams, told the Senate, “I am Vice President. In this I am nothing, but I may be everything.” More earthily, FDR’s first vice president, John Nance Garner, called the office “not worth a bucket of warm piss.”

In recent years, vice presidents are more publicly visible and have taken on more tasks and responsibilities. Ford and Rockefeller began this trend in the 1970s, demanding enhanced day-to-day responsibilities and staff as conditions for taking the job. Vice presidents now have a West Wing office, are given prominent assignments, and receive distinct funds for a staff under their control parallel to the president’s staff.⁴³

Arguably the most powerful occupant of the office ever was Dick Cheney. This former doctoral candidate in political science (at the University of Wisconsin) had been a White House chief of staff, member of Congress, and cabinet secretary. He possessed an unrivaled knowledge of the power relations within government and of how to accumulate and exercise power. As George W. Bush’s vice president, he had access to every cabinet and subcabinet meeting he wanted to attend, chaired the board charged with reviewing the budget, took on important issues (security, energy, economy), ran task forces, was involved in nominations and appointments, and lobbied Congress.⁴⁶

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Organizing the Presidency

The presidency is organized around two offices. They enhance but also constrain the president's power.

The Executive Office of the President

The Executive Office of the President (EOP) is an umbrella organization encompassing all presidential staff agencies. Most offices in the EOP, such as the Office of the Vice President, the National Security Council, and the Office of Management and Budget, are established by law; some positions require Senate confirmation.

Link: The EOP

Learn about the EOP [here](#).

Inside the EOP is the White House Office (WHO). It contains the president's personal staff of assistants and advisors; most are exempt from Congress's purview. Though presidents have a free hand with the personnel and structure of the WHO, its organization has been the same for decades. Starting with Nixon in 1969, each president has named a chief of staff to head and supervise the White House staff, a press secretary to interact with the news media, and a director of communication to oversee the White House message. The national security advisor is well placed to become the most powerful architect of foreign policy, rivaling or surpassing the secretary of state. New offices, such as President Bush's creation of an office for faith-based initiatives, are rare; such positions get placed on top of or alongside old arrangements.

Even activities of a highly informal role such as the [first lady](#), the president's spouse, are standardized. It is no longer enough for them to host White House social events. They are brought out to travel and campaign. They are presidents' intimate confidantes, have staffers of their own, and advocate popular policies (e.g., Lady Bird Johnson's highway beautification, Nancy Reagan's antidrug crusade, and Barbara Bush's literacy programs). Hillary Rodham Clinton faced controversy as first lady by defying expectations of being above the policy fray; she was appointed by her husband to head the task force to draft a legislative bill for a national health-care system. Clinton's successor, Laura Bush, returned the first ladyship to a more social, less policy-minded role. Michelle Obama's cause is healthy eating. She has gone beyond advocacy to having Walmart lower prices on the fruit and vegetables it sells and reducing the amount of fat, sugar, and salt in its foods.

Bureaucratizing the Presidency

The media and the public expect presidents to put their marks on the office and on history. But "the institution makes presidents as much if not more than presidents make the institution."⁴⁹

The presidency became a complex institution starting with FDR, who was elected to four terms during the Great Depression and World War II. Prior to FDR, presidents' staffs were small. As presidents took on responsibilities and jobs, often at Congress's initiative, the presidency grew and expanded.

Not only is the presidency bigger since FDR, but the division of labor within an administration is far more complex. Fiction and

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nonfiction media depict generalist staffers reporting to the president, who makes the real decisions. But the WHO is now a miniature bureaucracy. The WHO's first staff in 1939 consisted of eight generalists: three secretaries to the president, three administrative assistants, a personal secretary, an executive clerk. Since the 1980s, the WHO has consisted of around eighty staffers; almost all either have a substantive specialty (e.g., national security, women's initiatives, environment, health policy) or emphasize specific activities (e.g., White House legal counsel, director of press advance, public liaison, legislative liaison, chief speechwriter, director of scheduling). The White House Office adds another organization for presidents to direct—or lose track of.

The large staff in the White House, and the Old Executive Office Building next door, is no guarantee of a president's power. These staffers “make a great many decisions themselves, acting in the name of the president. In fact, the majority of White House decisions—all but the most crucial—are made by presidential assistants.”⁵²

Most of these labor in anonymity unless they make impolitic remarks. For example, two of President Bush's otherwise obscure chief economic advisors got into hot water, one for (accurately) predicting that the cost of war in Iraq might top \$200 billion, another for praising the outsourcing of jobs.⁵⁵ Relatively few White House staffers—the chief of staff, the national security advisor, the press secretary—become household names in the news, and even they are quick to be quoted saying, “as the president has said” or

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“the president decided.” But often what presidents say or do is what staffers told or wrote for them to say or do.

Comparing Content: Days in the Life of the White House

On April 25, 2001, President George W. Bush was celebrating his first one hundred days in office. He sought to avoid the misstep of his father who ignored the media frame of the first one hundred days as the make-or-break period for a presidency and who thus seemed confused and aimless.

As part of this campaign, Bush invited Stephen Crowley, a *New York Times* photographer, to follow him and present, as Crowley wrote in his accompanying text, “an unusual behind-the-scenes view of how he conducts business.”⁵⁸ Naturally, the photos implied that the White House revolves completely around the president. At 6:45 a.m., “the White House came to life”—when a light came on in the president’s upstairs residence. The sole task shown for Bush’s personal assistant was peering through a peephole to monitor the president’s national security briefing. Crowley wrote “the workday ended 15 hours after it began,” after meetings, interviews, a stadium speech, and a fundraiser.

We get a different understanding of how the White House works from following not the president but some other denizen of the West Wing around for a day or so. That is what filmmaker Theodore Bogosian did: he shadowed Clinton’s then press secretary Joe Lockhart for a few days in mid-2000 with a high-definition

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television camera. In the revealing one-hour video, *The Press Secretary*, activities of the White House are shown to revolve around Lockhart as much as Crowley's photographic essay showed they did around Bush. Even with the hands-on Bill Clinton, the video raises questions about who works for whom. Lockhart is shown devising tag lines, even policy with his associates in the press office. He instructs the president what to say as much as the other way around. He confides to the camera he is nervous about letting Clinton speak off-the-cuff.

Of course, the White House does not revolve around the person of the press secretary. Neither does it revolve entirely around the person of the president. Both are lone individuals out of many who collectively make up the institution known as the presidency.

Key Takeaways

The entertainment and news media personalize the presidency, depicting the president as the dynamic center of the political system. The Constitution foresaw the presidency as an energetic office with one person in charge. Yet the Constitution gave the office and its incumbent few powers, most of which can be countered by other branches of government. The presidency is bureaucratically organized and includes agencies, offices, and staff. They are often beyond a president's direct control.

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1. Jeffrey K. Tulis, *The Rhetorical Presidency* (Princeton, NJ: Princeton University Press, 1988). ↩
 2. Fred I. Greenstein, *The Presidential Difference: Leadership Style from FDR to Barack Obama*, 3rd ed. (Princeton, NJ: Princeton University Press, 2009). ↩
 3. For presidential depictions in the media, see Jeff Smith, *The*

Presidents We Imagine (Madison: University of Wisconsin Press, 2009). [↓](#)

4. Trevor Parry-Giles and Shawn J. Parry-Giles, *The Prime-Time Presidency: The West Wing and U.S. Nationalism* (Champaign: University of Illinois Press, 2006). [↓](#)
5. Mark Sachleben and Kevan M. Yenerall, *Seeing the Bigger Picture: Understanding Politics through Film and Television* (New York: Peter Lang, 2004), chap. 4; and for a detailed survey, see Jeff Smith, *The Presidents We Imagine* (Madison: University of Wisconsin Press, 2009). [↓](#)
6. Stephanie Greco Larson, “Political Cynicism and Its Contradictions in the Public, News, and Entertainment,” in *It’s Show Time! Media, Politics, and Popular Culture*, ed. David A. Schultz (New York: Peter Lang, 2000), 101–116. [↓](#)
7. Cited in Robert J. Dean, *Living Granite* (New York: Viking Press, 1949), 18. [↓](#)
8. Michiko Kakutani, “A Portrait of the President as the Victim of His Own Certitude,” review of *State of Denial: Bush at War, Part III*, by Bob Woodward, *New York Times*, September 30, 2006, A15; the earlier book is *Bush at War* (New York: Simon & Schuster, 2002). [↓](#)
9. On the contrast of “single executive image” and the “plural executive reality,” see Lyn Ragsdale, *Presidential Politics* (Boston: Houghton Mifflin Harcourt, 1993). [↓](#)
10. The language in the Constitution comes from Article I, Section 2, Clause 5, and Article I, Section 3, Clause 7. This section draws from Michael Les Benedict, *The Impeachment and Trial of Andrew Johnson* (New York: Norton, 1973); John R. Labowitz, *Presidential Impeachment* (New Haven, CT: Yale University Press, 1978); and Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis*, 2nd ed. (Chicago: University of Chicago Press, 2000). [↓](#)
11. The early twentieth-century political scientist Henry Jones Ford quoted in John R. Labowitz, *Presidential*

- Impeachment* (New Haven, CT: Yale University Press, 1978), 91. [↗](#)
12. [Polling Report](#), accessed July 7, 2005. [↗](#)
 13. Michael Les Benedict, *The Impeachment and Trial of Andrew Johnson* (New York: Norton, 1973), 139. [↗](#)
 14. Respectively, *United States v. Curtiss-Wright Export Corp*, 299 US 304 (1936); *Youngstown Sheet & Tube Company v. Sawyer*, 343 US 579 (1952). [↗](#)
 15. Paul C. Light, *Vice-Presidential Power: Advice and Influence in the White House* (Baltimore: Johns Hopkins University Press, 1984). [↗](#)
 16. Barton Gellman and Jo Becker, “Angler: The Cheney Vice Presidency,” *Washington Post*, June 24, 2007, A1. [↗](#)
 17. Lyn Ragsdale and John J. Theis III, “The Institutionalization of the American Presidency, 1924–92,” *American Journal of Political Science* 41, no. 4 (October 1997): 1280–1318 at 1316. See also John P. Burke, *The Institutional Presidency*, 2nd ed. (Baltimore: Johns Hopkins University Press, 2000). [↗](#)
 18. John H. Kessel, *Presidents, the Presidency, and the Political Environment* (Washington, DC: CQ Press, 2001), 2. [↗](#)
 19. Edmund L. Andrews, “Economics Adviser Learns the Principles of Politics,” *New York Times*, February 26, 2004, C4. [↗](#)
 20. Stephen Crowley, “And on the 96th Day...,” *New York Times*, April 29, 2001, Week in Review, 3. [↗](#)

33. Reading: Presidential Elections

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. How are political party nominees for president selected?
2. What is the purpose of presidential nominating conventions?
3. What is the Electoral College, and how does it work?

The presidential election gets the most prominent American campaign. It lasts the longest and receives far more attention from the media than any other election. The Constitution requires the president to be a natural-born U.S. citizen, at least thirty-five years old when taking office, and a resident of the United States for at least fourteen years. It imposed no limits on the number of presidential terms, but the first president, George Washington, established a precedent by leaving office after two terms. This stood until President Franklin D. Roosevelt won a third term in 1940 and a fourth in 1944. Congress then proposed, and the states ratified, the Twenty-Second Amendment to the Constitution, which limited the president's term of office to two terms.

Caucuses and Primaries

Becoming a political party's presidential nominee requires obtaining a majority of the delegates at the party's national nominating

convention. Delegates are party regulars, both average citizens who are active in party organizations and officeholders, who attend the national nominating conventions and choose the presidential nominee. The parties allocate convention delegates to the states, the District of Columbia, and to U.S. foreign territories based mainly on their total populations and past records of electing the party's candidates. The Republican and Democratic nominating conventions are the most important, as third-party candidates rarely are serious contenders in presidential elections.

Most candidates begin building a campaign organization, raising money, soliciting support, and courting the media months, even years, before the first vote is cast. Soon after the president is inaugurated, the press begins speculating about who might run in the next presidential election. Potential candidates test the waters to see if their campaign is viable and if they have a chance to make a serious bid for the presidency.

Delegates to the party nominating conventions are selected through caucuses and primaries. Some states hold caucuses, often lengthy meetings of the party faithful who choose delegates to the party's nominating convention. The first delegates are selected in the Iowa caucuses in January. Most convention delegates are chosen in primary elections in states. Delegates are allocated proportionally to the candidates who receive the most votes in the state. New Hampshire holds the first primary in January, ten months before the general election. More and more states front-load primaries—hold them early in the process—to increase their influence on the presidential nomination. Candidates and the media focus on the early primaries because winning them gives a campaign momentum.

The Democrats also have super delegates who attend their nominating convention. Super delegates are party luminaries, members of the National Committee, governors, and members of Congress. At the 2008 Democratic convention they made up approximately 18 percent of the delegates.

The National Party Conventions

The Democratic and Republican parties hold their national nominating conventions toward the end of the summer of every presidential election year to formally select the presidential and vice presidential candidates. The party of the incumbent president holds its convention last. Conventions are designed to inspire, unify, and mobilize the party faithful as well as to encourage people who are undecided, independent, or supporting the other party to vote for its candidates.¹ Conventions also approve the party's platform containing its policy positions, proposals, and promises.

Selecting the party's nominees for president and vice president is potentially the most important and exciting function of national conventions. But today, conventions are coronations as the results are already determined by the caucuses and primaries. The last presidential candidate not victorious on the first ballot was Democrat Adlai Stevenson in 1952. The last nominee who almost lacked enough delegates to win on the first ballot was President Gerald Ford at the 1976 Republican National Convention.

Presidential candidates choose the vice presidential candidate, who is approved by the convention. The vice presidential candidate is selected based on a number of criteria. He or she might have experience that compliments that of the presidential nominee, such as being an expert on foreign affairs while the presidential nominee concentrates on domestic issues. The vice presidential nominee might balance the ticket ideologically or come from a battleground state with many electoral votes. The choice for a vice presidential candidate can sometimes be met with dissent from party members.

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Modern-day conventions are carefully orchestrated by the parties to display the candidates at their best and to demonstrate enthusiasm for the nominee. The media provide gavel-to-gavel coverage of conventions and replay highlights. As a result, candidates receive a postconvention “bounce” as their standing in the polls goes up temporarily just as the general election begins.

The Electoral College

The president and vice president are chosen by the Electoral College as specified in the Constitution. Voters do not directly elect the president but choose electors—representatives from their state who meet in December to select the president and vice president. To win the presidency, a candidate must obtain a majority of the electors, at least 270 out of the 538 total. The statewide winner-take-all by state system obliges them to put much of their time and money into swing states where the contest is close. Except for Maine and Nebraska, states operate under a winner-take-all system: the candidate with the most votes cast in the state, even if fewer than a majority, receives all its electoral votes.

Link: Electoral College Information

The U.S. National Archives and Records Administration has a resource for the Electoral College [here](#).

It is possible to win the election without winning the popular vote, as George W. Bush did in 2000 with about half a million fewer votes than Democrat Al Gore. The Electoral College decision depended on who won the popular vote in Florida, where voting was contested due to problems with ballots and voting machines. The voting in Florida was so close that the almost two hundred thousand ballots

thrown out far exceeded Bush's margin of victory of a few hundred votes.

Key Takeaways

Presidential elections involve caucuses, primaries, the national party convention, the general election, and the Electoral College. Presidential hopefuls vie to be their party's nominee by collecting delegates through state caucuses and primaries. Delegates attend their party's national nominating convention to select the presidential nominee. The presidential candidate selects his vice presidential running mate who is approved at the convention. Voters in the general election select electors to the Electoral College who select the president and vice president. It is possible for a candidate to win the popular vote and lose the general election.

1. Costas Panagopoulos, ed., *Rewiring Politics: Presidential Nominating Conventions in the Media Age* (Baton Rouge: Louisiana State University Press, 2007). [↩](#)

34. Reading: How Presidents Get Things Done

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. How does the president try to set the agenda for the political system, especially Congress?
2. What challenges does the president face in achieving his agenda?
3. What are the strengths and weaknesses of the presidential veto?
4. Can and do presidents lead Congress?
5. What are the president's powers as chief executive?
6. Why do presidents give so many speeches?
7. How do presidents seek public approval?

The political system was designed by the framers to be infrequently innovative, to act with neither efficiency nor dispatch. Authority is decentralized. Political parties are usually in conflict. Interests are diverse.¹

Yet, as we have explained, presidents face high expectations for action. Adding to these expectations is the soaring rhetoric of their election campaigns. For example, candidate Obama promised to

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deal with the problems of the economy, unemployment, housing, health care, Iraq, Afghanistan, and much more.

As we have also explained, presidents do not invariably or even often have the power to meet these expectations. Consider the economy. Because the government and media report the inflation and unemployment rates and the number of new jobs created (or not created), the public is consistently reminded of these measures when judging the president's handling of the economy. And certainly the president does claim credit when the economy is doing well. Yet the president has far less control over the economy and these economic indicators than the media convey and many people believe.

A president's opportunities to influence public policies depend in part on the preceding administration and the political circumstances under which the new president takes office.⁴ Presidents often face intractable issues, encounter unpredictable events, have to make complex policy decisions, and are beset by scandals (policy, financial, sexual).

Once in office, reality sinks in. Interviewing [President Obama on The Daily Show](#), Jon Stewart wondered whether the president's campaign slogan of "Yes we can" should be changed to "Yes we can, given certain conditions." President Obama replied, "I think I would say 'yes we can, but . . . it's not going to happen overnight.'"⁷

So how do presidents get things done? Presidential powers and prerogatives do offer opportunities for leadership.

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Link: Presidential Recordings

Between 1940 and 1973, six American presidents from both political parties secretly recorded just less than five thousand hours of their meetings and telephone conversations. Listen to some of them [here](#).

Presidents indicate what issues should garner most attention and action; they help set the policy agenda. They lobby Congress to pass their programs, often by campaign-like swings around the country. Their position as head of their political party enables them to keep or gain allies (and win reelection). Inside the executive branch, presidents make policies by well-publicized appointments and executive orders. They use their ceremonial position as head of state to get into the news and gain public approval, making it easier to persuade others to follow their lead.

Agenda-Setter for the Political System

Presidents try to set the political agenda. They call attention to issues and solutions, using constitutional powers such as calling Congress into session, recommending bills, and informing its members about the state of the union, as well as giving speeches and making news.¹⁰

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Congress does not always defer to and sometimes spurns the president's agenda. Its members serve smaller, more distinct constituencies for different terms. When presidents hail from the same party as the majority of Congress members, they have more influence to ensure that their ideas receive serious attention on Capitol Hill. So presidents work hard to keep or increase the number of members of their party in



The president's constitutional responsibility to inform Congress on "the state of the union" has been elevated into a performance, nationally broadcast on all major networks and before a joint session on Capitol Hill, that summarizes the key items on his policy agenda.

Congress: raising funds for the party (and their own campaign), campaigning for candidates, and throwing weight (and money) in a primary election behind the strongest or their preferred candidate. Presidential coattails—where members of Congress are carried to victory by the winning presidential candidates—are increasingly short. Most legislators win by larger margins in their district than does the president. In the elections midway through the president's term, the president's party generally loses seats in Congress. In 2010, despite President Obama's efforts, the Republicans gained a whopping sixty-three seats and took control of the House of Representatives.

Since presidents usually have less party support in Congress in the second halves of their terms, they most often expect that Congress will be more amenable to their initiatives in their first two years. But even then, divided government, where one party controls the presidency and another party controls one or both chambers of Congress, has been common over the last fifty years. For presidents, the prospect of both a friendly House and Senate has become the exception.

Even when the White House and Congress are controlled by the same party, as with President Obama and the 2009 and 2010 Congress, presidents do not monopolize the legislative agenda. Congressional leaders, especially of the opposing party, push other issues—if only to pressure or embarrass the president. Members of Congress have made campaign promises they want to keep despite the president's policy preferences. Interest groups with pet projects crowd in.

Nonetheless, presidents are better placed than any other individual to influence the legislative process. In particular, their high prominence in the news means that they have a powerful impact on what issues will—and will not—be considered in the political system as a whole.

What about the contents of “the president's agenda”? The president is but one player among many shaping it. The transition from election to inauguration is just over two months (Bush had less time because of the disputed 2000 Florida vote). Presidents are preoccupied first with naming a cabinet and White House staff. To build an agenda, presidents “borrow, steal, co-opt, redraft, rename, and modify any proposal that fits their policy goals.”¹³ Ideas largely come from fellow partisans outside the White House. Bills already introduced in Congress or programs proposed by the bureaucracy are handy. They have received discussion, study, and compromise that have built support. And presidents have more success getting borrowed legislation through Congress than policy proposals devised inside the White House.¹⁶

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Crises and unexpected events affect presidents' agenda choices. Issues pursue presidents, especially through questions and stories of White House reporters, as much as presidents pursue issues. A hugely destructive hurricane on the Gulf Coast propels issues of emergency management, poverty, and reconstruction onto the policy agenda whether a president wants them there or not.

Finally, many agenda items cannot be avoided. Presidents are charged by Congress with proposing an annual budget. Raw budget numbers represent serious policy choices. And there are ever more agenda items that never seem to get solved (e.g., energy, among many others).

Chief Lobbyist in Congress

After suggesting what Congress should do, presidents try to persuade legislators to follow through. But without a formal role, presidents are outsiders to the legislative process. They cannot introduce bills in Congress and must rely on members to do so.

Legislative Liaison

Presidents aim at legislative accomplishments by negotiating with legislators directly or through their legislative liaison officers: White House staffers assigned to deal with Congress who provide a conduit from president to Congress and back again. These staffers convey presidential preferences and pressure members of Congress; they also pass along members' concerns to the White House. They count votes, line up coalitions, and suggest times for presidents to rally fellow party members. And they try to cut deals.

Legislative liaison focuses less on twisting arms than on maintaining “an era of good feelings” with Congress. Some favors

are large: supporting an appropriation that benefits members' constituencies; traveling to members' home turf to help them raise funds for reelection; and appointing members' cronies to high office. Others are small: inviting them up to the White House, where they can talk with reporters; sending them autographed photos or extra tickets for White House tours; and allowing them to announce grants. Presidents hope the cordiality will encourage legislators to return the favor when necessary.¹⁹

Such good feelings are tough to maintain when presidents and the opposition party espouse conflicting policies, especially when that party has a majority in one or both chambers of Congress or both sides adopt take-it-or-leave-it stances.

The Veto

When Congress sends a bill to the White House, a president can return it with objections.²² This veto—Latin for “I forbid”—heightens the stakes. Congress can get its way only if it overrides the veto with two-thirds majorities in each chamber. Presidents who use the veto can block almost any bill they dislike; only around 4 percent of all vetoes have ever been successfully overridden.²⁵ The threat

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of a veto can be enough to get Congress to enact legislation that presidents prefer.

The veto does have drawbacks for presidents. Consider the following:

- Vetoes alienate members of Congress who worked hard crafting a bill. So vetoes are most used as a last resort. After the 1974 elections, Republican President Ford faced an overwhelmingly Democratic Congress. A Ford legislative liaison officer recalled, “We never deliberately sat down and made the decision that we would veto sixty bills in two years. . . . It was the only alternative.”²⁸
- The veto is a blunt instrument. It is useless if Congress does not act on legislation in the first place. In his 1993 speech proposing health-care reform, President Clinton waved a pen and vowed to veto any bill that did not provide universal coverage. Such a threat meant nothing when Congress did not pass any reform. And unlike governors of most states, presidents lack a line-item veto, which allows a chief executive to reject parts of a bill. Congress sought to give the president this power in the late 1990s, but the Supreme Court declared the law unconstitutional.³¹ Presidents must take or leave bills in their totality.
- Congress can turn the veto against presidents. For example, it can pass a popular bill—especially in an election year—and dare

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the president to reject it. President Clinton faced such “veto bait” from the Republican Congress when he was up for reelection in 1996. The [Defense of Marriage Act](#), which would have restricted federal recognition of marriage to opposite-sex couples, was deeply distasteful to lesbians and gay men (a key Democratic constituency) but strongly backed in public opinion polls. A Clinton veto could bring blame for killing the bill or provoke a humiliating override. Signing it ran the risk of infuriating lesbian and gay voters. Clinton ultimately signed the legislation—in the middle of the night with no cameras present.

- Veto threats can backfire. After the Democrats took over the Senate in mid-2001, they moved the “patients’ bill of rights” authorizing lawsuits against health maintenance organizations to the top of the Senate agenda. President Bush said he would veto the bill unless it incorporated strict limits on rights to sue and low caps on damages won in lawsuits. Such a visible threat encouraged a public perception that Bush was opposed to any patients’ bill of rights, or even to patients’ rights at all.³⁴ Veto threats thus can be ineffective or create political damage (or, as in this case, both).

Savvy presidents use “vetoes not only to block legislation but to shape it. . . . Vetoes are not fatal bullets but bargaining ploys.”³⁷ Veto threats and vetoing ceremonies become key to presidential communications in the news, which welcomes the story of Capitol

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Hill-versus-White House disputes, particularly under divided government. In 1996, President Clinton faced a tough welfare reform bill from a Republican Congress whose leaders dared him to veto the bill so they could claim he broke his 1992 promise to “end welfare as we know it.” Clinton vetoed the first bill; Republicans reduced the cuts but kept tough provisions denying benefits to children born to welfare recipients. Clinton vetoed this second version; Republicans shrank the cuts again and reduced the impact on children. Finally, Clinton signed the bill—and ran ads during his reelection campaign proclaiming how he had “ended welfare as we know it.”

Signing Statements

In a signing statement, the president claims the right to ignore or refuse to enforce laws, parts of laws, or provisions of appropriations bills even though Congress has enacted them and he has signed them into law. This practice was uncommon until developed during President Ronald Reagan’s second term. It escalated under President George W. Bush, who rarely exercised the veto but instead issued almost 1,200 signing statements in eight years—about twice as many as all his predecessors combined. As one example, he rejected the requirement that he report to Congress on how he had provided safeguards against political interference in federally funded research. He justified his statements on the “inherent” power of the commander in chief and on a hitherto obscure doctrine called the unitary executive, which holds that the executive branch can overrule Congress and the courts on the basis of the president’s interpretation of the Constitution.

President Obama ordered executive officials to consult with the attorney general before relying on any of President Bush’s signing statements to bypass a law. Yet he initially issued some signing statements himself. Then, to avoid clashing with Congress, he

refrained from doing so. He did claim that the executive branch could bypass what he deemed to be unconstitutional restraints on executive power. But he did not invoke the unitary executive theory.⁴⁰

Presidential Scorecards in Congress

How often do presidents get their way on Capitol Hill? On congressional roll call votes, Congress goes along with about three-fourths of presidential recommendations; the success rate is highest earlier in the term.⁴³ Even on controversial, important legislation for which they expressed a preference well in advance of congressional action, presidents still do well. Congress seldom ignores presidential agenda items entirely. One study estimates that over half of presidential recommendations are substantially reflected in legislative action.⁴⁶

Can and do presidents lead Congress, then? Not quite. Most presidential success is determined by Congress's partisan and ideological makeup. Divided government and party polarization on Capitol Hill have made Congress more willing to disagree with the

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president. So recent presidents are less successful even while being choosier about bills to endorse. Eisenhower, Kennedy, and Johnson staked out positions on well over half of congressional roll call votes. Their successors have taken positions on fewer than one-fourth of them—especially when their party did not control Congress. “Presidents, wary of an increasingly independent-minded congressional membership, have come to actively support legislation only when it is of particular importance to them, in an attempt to minimize defeat.”⁴⁹

Chief Executive

As chief executive, the president can move first and quickly, daring others to respond. Presidents like both the feeling of power and favorable news stories of them acting decisively. Though Congress and courts can respond, they often react slowly; many if not most presidential actions are never challenged.⁵² Such direct presidential action is based in several powers: to appoint officials, to issue executive orders, to “take care that the laws be faithfully executed,” and to wage war.

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Appointment Powers

Presidents both hire and (with the exception of regulatory commissions) fire executive officers. They also appoint ambassadors, the members of independent agencies, and the judiciary.⁵⁵

The months between election and inauguration are consumed by the need to rapidly assemble a cabinet, a group that reports to and advises the president, made up of the heads of the fourteen executive departments and whatever other positions the president accords cabinet-level rank. Finding “the right person for the job” is but one criterion. Cabinet appointees overwhelmingly hail from the president’s party; choosing fellow partisans rewards the winning coalition and helps achieve policy.⁵⁸ Presidents also try to create a team that, in Clinton’s phrase, “looks like America.” In 1953, President Dwight Eisenhower was stung by the news media’s joke that his first cabinet—all male, all white—consisted of “nine millionaires and a plumber” (the latter was a union official, a short-lived labor secretary). By contrast, George W. Bush’s and Barack Obama’s cabinets had a generous complement of persons of color and women—and at least one member of the other party.

These presidential appointees must be confirmed by the Senate. If the Senate rarely votes down a nominee on the floor, it no longer rubber-stamps scandal-free nominees. A nominee may be stopped in a committee. About one out of every twenty key nominations is

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never confirmed, usually when a committee does not schedule it for a vote.⁶¹

Confirmation hearings are opportunities for senators to quiz nominees about pet projects of interest to their states, to elicit pledges to testify or provide information, and to extract promises of policy actions.⁶⁴ To win confirmation, cabinet officers pledge to be responsive and accountable to Congress. Subcabinet officials and federal judges, lacking the prominence of cabinet and Supreme Court nominees, are even more belatedly nominated and more slowly confirmed. Even senators in the president's party routinely block nominees to protest poor treatment or win concessions.

As a result, presidents have to wait a long time before their appointees take office. Five months into President George W. Bush's first term, one study showed that of the 494 cabinet and subcabinet positions to fill, under half had received nominations; under one-fourth had been confirmed.⁶⁷ One scholar observed, "In America today, you can get a master's degree, build a house, bicycle across country, or make a baby in less time than it takes to put the average appointee on the job."⁷⁰ With presidential appointments unfilled,

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initiatives are delayed and day-to-day running of the departments is left by default to career civil servants.

No wonder presidents can, and increasingly do, install an acting appointee or use their power to make recess appointments.⁷³ But such unilateral action can produce a backlash. In 2004, two nominees for federal court had been held up by Democratic senators; when Congress was out of session for a week, President Bush named them to judgeships in recess appointments. Furious Democrats threatened to filibuster or otherwise block all Bush's judicial nominees. Bush had no choice but to make a deal that he would not make any more judicial recess appointments for the rest of the year.⁷⁶

Executive Orders

Presidents make policies by executive orders.⁷⁹ This power comes from the constitutional mandate that they “take care that the laws be faithfully executed.”

Executive orders are directives to administrators in the executive branch on how to implement legislation. Courts treat them as

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equivalent to laws. Dramatic events have resulted from executive orders. Some famous executive orders include Lincoln's Emancipation Proclamation, Franklin D. Roosevelt's closing the banks to avoid runs on deposits and his authorizing internment of Japanese Americans during World War II, Truman's desegregation of the armed forces, Kennedy's establishment of the Peace Corps, and Nixon's creation of the Environmental Protection Agency. More typically, executive orders reorganize the executive branch and impose restrictions or directives on what bureaucrats may or may not do. The attraction of executive orders was captured by one aide to President Clinton: "Stroke of the pen. Law of the land. Kind of cool."⁸² Related ways for presidents to try to get things done are by memoranda to cabinet officers, proclamations authorized by legislation, and (usually secret) national security directives.⁸⁵

Executive orders are imperfect for presidents; they can be easily overturned. One president can do something "with the stroke of a pen"; the next can easily undo it. President Reagan's executive order withholding American aid to international population control agencies that provide abortion counseling was rescinded by an executive order by President Clinton in 1993, then reinstated by another executive order by President Bush in 2001—and rescinded once more by President Obama in 2009. Moreover, since executive orders are supposed to be a mere execution of what Congress has already decided, they can be superseded by congressional action.

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War Powers

Opportunities to act on behalf of the entire nation in international affairs are irresistible to presidents. Presidents almost always gravitate toward foreign policy as their terms progress. Domestic policy wonk Bill Clinton metamorphosed into a foreign policy enthusiast from 1993 to 2001. Even prior to 9/11 the notoriously untraveled George W. Bush was undergoing the same transformation. President Obama has been just as if not more involved in foreign policy than his predecessors.

Congress—as long as it is consulted—is less inclined to challenge presidential initiatives in foreign policy than in domestic policy. This idea that the president has greater autonomy in foreign than domestic policy is known as the “Two Presidencies Thesis.”⁸⁸

War powers provide another key avenue for presidents to act unilaterally. After the 9/11 attacks, President Bush’s Office of Legal Counsel to the US Department of Justice argued that as commander in chief President Bush could do what was necessary to protect the American people.⁹³

Since World War II, presidents have never asked Congress for (or received) a declaration of war. Instead, they rely on open-ended congressional authorizations to use force (such as for wars in

88. ⁸⁹ Such deference seems largely limited to presidents’ own initiatives.⁹⁰

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Vietnam and “against terrorism”), United Nations resolutions (wars in Korea and the Persian Gulf), North American Treaty Organization (NATO) actions (peacekeeping operations and war in the former Yugoslavia), and orchestrated requests from tiny international organizations like the Organization of Eastern Caribbean States (invasion of Grenada). Sometimes, presidents amass all these: in his last press conference before the start of the invasion of Iraq in 2003, President Bush invoked the congressional authorization of force, UN resolutions, *and* the inherent power of the president to protect the United States derived from his oath of office.

Congress can react against undeclared wars by cutting funds for military interventions. Such efforts are time consuming and not in place until long after the initial incursion. But congressional action, or its threat, did prevent military intervention in Southeast Asia during the collapse of South Vietnam in 1975 and sped up the withdrawal of American troops from Lebanon in the mid-1980s and Somalia in 1993.⁹⁶

Congress’s most concerted effort to restrict presidential war powers, the [War Powers Act](#), which passed over President Nixon’s veto in 1973, may have backfired. It established that presidents must consult with Congress prior to a foreign commitment of troops, must report to Congress within forty-eight hours of the introduction of armed forces, and must withdraw such troops after sixty days if Congress does not approve. All presidents denounce this legislation. But it gives them the right to commit troops for sixty days with little more than requirements to consult and report—conditions presidents often feel free to ignore. And the presidential prerogative under the War Powers Act to commit troops on a short-term basis means that Congress often reacts after

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the fact. Since Vietnam, the act has done little to prevent presidents from unilaterally launching invasions.⁹⁹

President Obama did not seek Congressional authorization before ordering the US military to join attacks on the Libyan air defenses and government forces in March 2011. After the bombing campaign started, Obama sent Congress a letter contending that as commander in chief he had constitutional authority for the attacks. The White House lawyers distinguished between this limited military operation and a war.

Presidents and the People

Public approval helps the president assure agreement, attract support, and discourage opposition. Presidents with high popularity win more victories in Congress on high-priority bills.¹⁰² But obtaining public approval can be complicated. Presidents face contradictory expectations, even demands, from the public: to be an ordinary person yet display heroic qualities, to be nonpolitical yet excel (unobtrusively) at the politics required to get things done, to be a visionary leader yet respond to public opinion.¹⁰⁵

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Public Approval

For over fifty years, pollsters have asked survey respondents, “Do you approve or disapprove of the way that the president is handling his job?” Over time there has been variation from one president to the next, but the general pattern is unmistakable.¹⁰⁸ Approval starts out fairly high (near the percentage of the popular vote), increases slightly during the honeymoon, fades over the term, and then levels off. Presidents differ largely in the rate at which their approval rating declines. President Kennedy’s support eroded only slightly, as opposed to the devastating drops experienced by Ford and Carter. Presidents in their first terms are well aware that, if they fall below 50 percent, they are in danger of losing reelection or of losing allies in Congress in the midterm elections.

Events during a president’s term—and how the news media frame them—drive approval ratings up or down. Depictions of economic hard times, drawn-out military engagements (e.g., Korea, Vietnam, and Iraq), unpopular decisions (e.g., Ford’s pardon of Nixon), and other bad news drag approval ratings lower. The main upward push comes from quick international interventions, as for President Obama after the killing of Osama bin Laden in 2011, or successfully addressing national emergencies, which boost a president’s approval for several months. Under such conditions, official Washington speaks more in one voice than usual, the media drop their criticism as a result, and presidents depict themselves as embodiments of a united America. The successful war against Iraq in 1991 pushed approval ratings for the elder Bush to 90 percent, exceeded only by the ratings of his son after 9/11. It may be beside the point whether the president’s decision was smart or a blunder.

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Kennedy's press secretary, Pierre Salinger, later recalled how the president's approval ratings actually climbed after Kennedy backed a failed invasion by Cuban exiles at the Bay of Pigs: "He called me into his office and he said, 'Did you see that Gallup poll today?' I said, 'Yes.' He said, 'Do you think I have to continue doing stupid things like that to remain popular with the American people?'"¹¹¹

But as a crisis subsides, so too do official unity, tributes in the press, and the president's lofty approval ratings. Short-term effects wane over the course of time. Bush's huge boost from 9/11 lasted well into early 2003; he got a smaller, shorter lift from the invasion of Iraq in April 2003 and another from the capture of Saddam Hussein in December before dropping to levels perilously near, then below, 50 percent. Narrowly reelected in 2008, Bush saw his approval sink to new lows (around 30 percent) over the course of his second term.

Polls

Naturally and inevitably, presidents employ pollsters to measure public opinion. Poll data can influence presidents' behavior, the calculation and presentation of their decisions and policies, and their rhetoric.¹¹⁴

After the devastating loss of Congress to the Republicans midway through his first term, President Clinton hired public relations

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consultant Dick Morris to find widely popular issues on which he could take a stand. Morris used a “60 percent rule”: if six out of ten Americans were in favor of something, Clinton had to be too. Thus the Clinton White House crafted and adopted some policies knowing that they had broad popular support, such as balancing the budget and “reforming” welfare.

Even when public opinion data have no effects on a presidential decision, they can still be used to ascertain the best way to justify the policy or to find out how to present (i.e., spin) unpopular policies so that they become more acceptable to the public. Polls can identify the words and phrases that best sell policies to people. President George W. Bush referred to “school choice” instead of “school voucher programs,” to the “death tax” instead of “inheritance taxes,” and to “wealth-generating private accounts” rather than “the privatization of Social Security.” He presented reducing taxes for wealthy Americans as a “jobs” package.¹¹⁷

Polls can even be used to adjust a president’s personal behavior. After a poll showed that some people did not believe that President Obama was a Christian, he attended services, with photographers in tow, at a prominent church in Washington, DC.

Speechmaker-in-Chief

Presidents speak for various reasons: to represent the country, address issues, promote policies, and seek legislative accomplishments; to raise funds for their campaign, their party, and its candidates; and to berate the opposition. They also speak to control the executive branch by publicizing their thematic focus,

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ushering along appointments, and issuing executive orders.¹²⁰ They aim their speeches at those physically present and, often, at the far larger audience reached through the media.

In their speeches, presidents celebrate, express national emotion, educate, advocate, persuade, and attack. Their speeches vary in importance, subject, and venue. They give major ones, such as the inauguration and State of the Union. They memorialize events such as 9/11 and speak at the site of tragedies (as President Obama did on January 12, 2011, in Tucson, Arizona, after the shootings of Rep. Gabrielle Giffords and bystanders by a crazed gunman). They give commencement addresses. They speak at party rallies. And they make numerous routine remarks and brief statements.

Video Clip: President Obama's Speech

President Obama traveled to Tucson on January 12, 2011, to help memorialize those who died in the shooting rampage there. Watch the entire speech below:



An interactive or media element has been excluded from this version of the text. You can view it online here:

<https://library.achievingthedream.org/fscjamericangovernment/?p=58>

Presidents are more or less engaged in composing and editing their

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speeches. For speeches that articulate policies, the contents will usually be considered in advance by the people in the relevant executive branch departments and agencies who make suggestions and try to resolve or meld conflicting views, for example, on foreign policy by the State and Defense departments, the CIA, and National Security Council. It will be up to the president, to buy in on, modify, or reject themes, arguments, and language.

The president's speechwriters are involved in the organization and contents of the speech.¹²³ They contribute memorable phrases, jokes, applause lines, transitions, repetition, rhythm, emphases, and places to pause. They write for ease of delivery, the cadence of the president's voice, mannerisms of expression, idioms, pace, and timing.

In search of friendly audiences, congenial news media and vivid backdrops, presidents often travel outside Washington to give their speeches.¹²⁶ In his first one hundred days in office in 2001, George W. Bush visited twenty-six states to give speeches; this was a new record even though he refused to spend a night anywhere other than in his own beds at the White House, at Camp David (the presidential retreat), or on his Texas ranch.¹²⁹

Memorable settings may be chosen as backdrops for speeches, but they can backfire. On May 1, 2003, President Bush emerged

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in a flight suit from a plane just landed on the aircraft carrier USS *Abraham Lincoln* and spoke in front of a huge banner that proclaimed “Mission Accomplished,” implying the end of major combat operations in Iraq. The banner was positioned for the television cameras to ensure that the open sea, not San Diego, appeared in the background. The slogan may have originated with the ship’s commander or sailors, but the Bush people designed and placed it perfectly for the cameras and choreographed the scene.



As violence in Iraq continued and worsened, the banner would be framed by critics of the war as a publicity stunt, a symbol of the administration’s arrogance and failure.

Speechmaking can entail going public: presidents give a major address to promote public approval of their decisions, to advance their policy objectives and solutions in Congress and the bureaucracy, or to defend themselves against accusations of

illegality and immorality. Going public is “a strategic adaptation to the information age.”¹³²

According to a study of presidents’ television addresses, they fail to increase public approval of the president and rarely increase public support for the policy action the president advocates.¹³⁵ There can, however, be a rally phenomenon. The president’s approval rating rises during periods of international tension and likely use of American force. Even at a time of policy failure, the president can frame the issue and lead public opinion. Crisis news coverage likely supports the president.

Moreover, nowadays, presidents, while still going public—that is, appealing to national audiences—increasingly go local: they take a targeted approach to influencing public opinion. They go for audiences who might be persuadable, such as their party base and interest groups, and to strategically chosen locations.¹³⁸

Key Takeaways

The president gets things done as an agenda-setter and the chief lobbyist and via his veto power and signing statements. To what

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extent he can lead Congress depends on its party composition and ideological makeup. As the chief executive, the president gets things done through the appointment powers, executive orders, and war powers. The president seeks power and public approval through speeches and by heeding public response to polls.

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35. Reading: The Presidency in the Information Age

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What are the basic purposes of the White House communications operation?
2. How do presidents interact with the media?
3. How does the White House press corps interact with the president?
4. What challenges did President Obama face from the media, and how did he deal with them?
5. What are the consequences of media coverage for the presidency?

The White House communications operation has four basic purposes.

- **Advocating.** Promoting the president's policies and goals.
- **Explaining.** Providing information, details, answering questions.
- **Defending.** Responding to criticism, unanticipated events, cleaning up after mistakes, and challenging unfair news stories.
- **Coordinating.** Bringing together White House units, governmental agencies (bureaucracies), allies in Congress, and outside supporters (interest groups) to publicize and promote presidential actions.¹

How is the White House organized to go about achieving these purposes?

Media Interactions: White House Press Operations

Presidents decide whether, when, where, at what length, and under what conditions they will talk to reporters. Most presidential interactions with the media are highly restricted and stage-managed.

Press Conferences

In the best-known form of press conference, the president appears alone, usually before television cameras, to answer questions on the record from the assembled reporters who can ask anything on their minds for a given period of time (usually up to an hour). Presidents generally hold such press conferences when they need to respond to important issues or mounting criticism—or if they have been accused of avoiding direct questions from the press.

Press conferences allow presidents to dominate the news, pay obeisance to or at least acknowledge the importance of a free press, galvanize supporters, and try to placate opponents. Presidents, as much as reporters, control press conferences. They make opening statements. They choose who asks questions—at his first press

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conference President Obama recognized the presence of the new media by taking a question from a writer for the influential online-only news outlet the [Huffington Post](#). They can recover from a tough question by finding someone to toss them a softball. Follow-up questions are not guaranteed. Presidents can run out the clock, blather on in evasive or convoluted language, and refuse to take or answer questions on a subject.⁴

Nonetheless, press conferences have risks for presidents. Since reporters' questions have become more challenging over time, presidents shy away from press conferences more and more.⁷ Increasingly, they rely on joint press conferences, most often with foreign leaders. Such press conferences add questioners from another press corps, limit the number of questions to a handful, and reduce the amount of time for the president to answer questions.

Presidents favor ever more controlled interactions with reporters. Most typically, they make a brief statement or give a speech without answering questions, or pose in a photo opportunity, where they are seen but not heard. Controversial announcements may be made in writing so that television news has no damaging footage to air.

It is a rare day when the president is not seen by reporters. But it is also a rare day when his appearance is not a scripted one. The White House goal is to have the president publicly

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available, but to do so with his having as little vulnerability to error as the staff can fashion.¹⁰

Press Secretary

The most visible member of a White House publicity apparatus—and the key person for reporters—is the presidential press secretary.¹³ The press secretary is “responsible for creating and disseminating the official record of the president’s statements, announcements, reactions, and explanations.”¹⁶ The press secretary has three constituencies with different expectations of him: “the president, White House staff, reporters and their news organizations.”¹⁹

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Link: White House Press Briefings

Search the archives of [press briefings](#).

In every presidency starting with Ronald Reagan's, press secretaries begin their day with meetings with the central coordinator of policy and message, the White House chief of staff, and other senior staffers to study overnight news developments (a news summary is circulated each day to senior staff), forecast where stories are going, and review the president's schedule. Press secretaries next prepare for their first interaction with reporters, the morning's daily, less formal discussion known as the *gaggle*.²² Cameras are not allowed into the gaggle. Reporters use tape recorders only to gather information, not for sound bites.

The press secretary begins the gaggle by reviewing the president's schedule before entering into a fast-moving question-and-answer session. The gaggle benefits reporters: it provides responses to overnight news, gives guidance for the workday ahead, reveals the line the White House is pushing and allows them to lobby for access to the president. The gaggle helps press secretaries too by enabling them to float ideas and slogans and, by hearing what's on reporters' minds, prepare for the afternoon briefing.

The press secretary leads this more official 12:30 p.m. briefing, which is as close as anything to a daily enunciation of White House policy. Here, cameras are allowed; the briefing is broadcast live on cable television if news is brewing. The session is transcribed and disseminated (electronically and on paper) to reporters at the White House and beyond. The press secretary spends the hours between the gaggle and the briefing looking for answers to questions raised

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(or anticipated) and checking with other spokespersons elsewhere in the administration, such as at the Departments of State and Defense.

Briefings do not always benefit the White House. The presence of television cameras sometimes pushes reporters to be—or act—tough and combative for viewers. Reporters try to throw the press secretary off balance or to elicit a juicy or embarrassing admission. Briefings offer reporters a rare chance to quiz officials on matters the White House would prefer not to discuss. Press secretaries are often unresponsive to reporters' questions, stonewall, and repeat set phrases. During a single briefing when he was peppered by questions about President George W. Bush's National Guard service, press secretary Scott McClellan dutifully uttered the phrase "The president met all his responsibilities" some thirty-eight times.

Office of Communications

The press secretary on the front line is not always the key public relations strategist. Richard Nixon was the first president to craft long-range communication strategies. A bevy of public relations veterans defined a White House priority or storyline, coordinated who said what, and planned public schedules of administration officials. They brought local reporters from outside Washington to the capital. The aim was to emphasize a single White House position, woo softer local news, and silence contrary messages in the administration.

Such tasks were given to the newly established Office of Communications—retained by all subsequent presidents. Directors of communications rarely interact with reporters on a regular basis; their job is to stress the big picture. Even when Nixon's first successors, Gerald Ford and Jimmy Carter, pledged open and free

interactions with reporters, they found they had to reopen the Office of Communications for central control of the all-important message.

Another lasting innovation of the Nixon presidency is the line of the day. Specific topics and storylines are repeated throughout the administration as the focus for all discussion on that day. Presidents use the Office of Communications to centralize a marketing strategy on issues. They are often open about this. In 2002, White House Chief of Staff Andrew Card said the Bush administration waited until after Labor Day to lobby Congress to authorize war against Iraq because, in his words, “From a marketing point of view . . . you don’t introduce new products in August.”²⁵

“Manipulation by Inundation”

The public must be reached *through* the news media. Reagan’s election took such efforts to new heights. Like Nixon, Reagan downgraded the news conference in favor of stage-managed appearances. A press officer who worked for both presidents noted a crucial distinction. The Nixon administration was restrictive, but he said:

The Reagan White House came to the totally opposite conclusion that the media will take what we feed them. They’ve got to write their story every day. . . . Hand them a well-packaged, premasticated story in the format they want, they’ll go away. The phrase is ‘manipulation by inundation.’²⁸

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Reagan's lesson has been learned by subsequent presidents and media advisors. Presidents rarely have to "freeze out" given reporters (when officials do not return their calls). Staff do sometimes cajole and berate reporters, but frontal assaults against the press usually only occur in clear cases of journalistic bungling.

More typically, presidents and their staffs try to manage the news. Presidents cultivate reporters, columnists, and pundits: they host lunches, dine with them, and hold off-the-record sessions. The staff members anticipate what reporters will ask in briefings and prepare the president accordingly. They design events to meet news values of drama, color, and terseness. And they provide a wealth of daily, even hourly, information and images.

The End Run around White House Reporters

Inundation is not sufficient. George W. Bush was typical of all presidents when he groused in 2003 to a regional reporter:

There's a sense that people in America aren't getting the truth. I'm mindful of the filter through which some news travels, and sometimes you have to go over the heads of the filter and speak directly to the people.³¹

All new presidents try novel strategies to do an end run around what they always perceive to be a biased press. President Franklin D. Roosevelt relished behind-the-scenes Oval Office conferences to

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woo Democratic-leaning reporters (and bypass Republican-leaning editorial pages).

President Richard Nixon shunned press conferences and sought other ways to get his messages out, such as through star-struck local news. President Bill Clinton instituted cozy miniconferences with other world leaders and brought in local television weather reporters for a confab on global warming. Nowadays, the White House deals directly with the regional and local press, special-interest media, and ethnic news organizations.

Media Interactions: The White House Press Corps

Presidents head the state, government, and their political party. So almost anything they do or that happens to them is newsworthy.³⁴ They are the sole political figures whose activities are followed around the clock. Presidents fit news values perfectly. The ongoing saga of a familiar hero engaged in myriad controversies and conflicts, international and domestic, is far simpler to explain and present than complex scenarios of coalition-building in Congress.

About seventeen hundred reporters are granted White House press passes. But the key members of the White House press corps are the few dozen regulars assigned to go there day in and day out and who spend their work days there.

A White House press pass provides merely the privilege to wait—wait for a briefing; wait to see the president; wait until

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a press conference is called; wait to see the press secretary; wait to see senior officials; wait to have phone calls returned. There may be propinquity to power, but there is little control over when and how the news is gathered.³⁷

The regulars make up an intimate society with its own culture, norms, manners, friendship networks, and modes of interaction. The White House layout reinforces this in-group mentality. The briefing room, where press secretaries and reporters meet daily, is a claustrophobic, cluttered space with forty-eight scuffed and battered seats. Beyond the dais at one end, reporters can wander down the hall to buttonhole press officers, though they cannot go much farther (the Oval Office, just fifty feet away, is inaccessible). Hallways leading to two floors of press rooms are in the back; the rooms are crammed with desks and broadcasting equipment for the use of reporters. Along the corridor are bins that contain press releases, official statements, and daily schedules (which are also available electronically). Outside, on a once graveled-over and now paved section of the lawn named “Pebble Beach,” rows of television cameras await television reporters.

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Rather than foster enterprise, the White House herds reporters together, gives them all the same information, and breeds anxiety by leading them to believe they may be missing the big story everyone else is chasing.



The White House accommodates television reporters to allow them to do their “stand-ups” with the august background of the White House portico. This area can become packed with reporters when big stories are developing.

Media Interactions: Negotiating News at the White House

Reporters submit to the conditions established by presidents and their staffers in receiving information. But they are less docile when they actually assemble that information in White House news.

Cooperation and Conflict

The relationship between the White House and its press corps is ongoing. The “village” feel to the newsbeat includes presidents and their staffers. But while this day-to-day continuity favors cooperation, the divergent interests and notions of the White House and reporters makes for a constant tension. Reporters do not like appearing as “mouthpieces” for presidents. They embrace the notion of acting as watchdogs and seek ways to present an independent and critical account whenever possible in their White House stories.

What reporters consider news and what presidents consider news are often at odds. Presidents love to speak at length, be alone at center stage, favor nuance if not ambiguity, and focus on

questions of policy. Reporters like terse sound bites, dramatic conflict, clear-cut comments, and a new installment on how the president is doing politically.

Assembling the Story

Reagan's first White House spokesperson, Larry Speakes, had a plaque on his desk that read: "You don't tell us how to stage the news, and we won't tell you how to cover it." Though he was being playful, Speakes revealed how the White House and the press corps each control one part of the news.

The White House controls whether, when, how, and where White House officials will meet reporters and what information to release. Pictures and video of the president are packaged along with slogans that make a visual case regardless of the angle the reporter advances. Clinton's aides affixed captions to the presidential podium during ceremonies to underscore the theme they wished to communicate. George W. Bush's assistants went one better, crafting twenty different canvasses that could be placed behind him, each emblazoned with a motto of the day, such as "Protecting the Homeland" or "Corporate Responsibility." Dan Bartlett, then Bush's director of communication, defended such branding: "The message should be seen and read and understood on TV. It's a good reinforcement."⁴⁰

But reporters take the raw material provided by presidential news operations and craft it into a coherent and dramatic story. In a typical television news story, the president's words and images make up a tiny fraction of the allotted time. Television reporters

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add old video, interview critics in Congress, cite poll numbers, and give their own interpretations. Even on cable television news, which often airs presidential remarks live during the day, reporters and commentators will hash over and contest the White House “angle.” Presidential statements have a different effect once placed into the news media’s sometimes dramatically divergent context.

The dilemma for presidents, as Clinton’s press secretary Mike McCurry noted, is that “ninety percent of what happens at the White House is pure boredom.”⁴³ Reporters need drama. If presidents do not fit the heroic roles of “decisive problem solver” and “representative of the nation,” they can be slotted into a less positive frame. Politics will displace policy; criticism and conflict overwhelm praise and unity. Even in presidents’ supposed “honeymoon” periods, critical coverage is not unknown. Presidents are, then, in the unenviable position of needing the news and being routinely in its spotlight without being able consistently to control the images of themselves and their policies in that news.

President Obama and the Media

During his first term in office, President Obama could claim several significant accomplishments. They included health-care reform, an economic stimulus program, financial regulation, educational innovations, consumer protections, the withdrawal of combat troops from Iraq, banning torture of prisoners in US custody, ratification of a new strategic arms reduction treaty with Russia, and repeal of the “Don’t ask, don’t tell” law.

These accomplishments, except for the killing of Osama bin

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Laden, were not as widely recognized as they could have been. One reason was, as the president told a reporter,

we probably spent much more time trying to get the policy right than trying to get the politics right. . . . And I think anybody who's occupied this office has to remember that success is determined by an intersection in policy and politics and that you can't be neglecting of marketing and P.R. and public opinion.⁴⁶

His media operation was accused of being reactive instead of proactive in responding to reporters and of lacking the skill to promote and the language to sell the president, his policies, and his party.

Compounding this neglect, the media environment imposed four challenges to any attempts by President Obama to communicate effectively with the American public.

First, presidents' prime-time addresses, even when carried by all networks, reach a smaller portion of the audience than they did in years past.⁴⁷ The profit-minded media discourage presidents from taking too often to the airwaves. When presidents request air time, broadcast television networks can conclude the subject is not adequately newsworthy and turn them down.

Second, the news media are more than ever obsessed with conflict. As President Obama observed to Bob Schieffer, "the twenty-four-hour news cycle and cable television and blogs and all

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this, they focus on the most extreme elements on both sides. They can't get enough of conflict."⁵²

Third, the media are more and more partisan—intensely so. For President Obama, this means virulent attacks and relentless denunciations by [Fox News](#), America's most watched cable news channel; the editorial page of the [Wall Street Journal](#), America's most widely circulated newspaper; and a conservative chorus led by [Rush Limbaugh](#) on talk radio. In addition, a bevy of more or less partisan commentators and pundits subject presidential speeches, press conferences, and statements to constant analysis and dissection.

Fourth, the media audience is increasingly dispersed, fragmented, and sometimes separated into mutually exclusive segments. People are divided by whether they read newspapers (and which ones), the kinds of movies and television programs they watch, their level of involvement with social media, the websites they follow, and much more.

Given this media environment, President Obama faced two daunting problems: (1) to reach as many of the various audiences as possible and (2) to do so with messages in support of his personal, political, and policy objectives.⁵⁵

One approach was to take advantage of new technologies through an Office of New Media. The president's inauguration was the first to be put on YouTube, as are his weekly radio addresses. The [White House website](#) contains the president's activities and agenda and features videos. Text messages and Twitter alerts are sent out to the

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president's followers under his name. He also conducted the first Internet video news conference by an American president.

Video Clip: President Barack Obama's Inaugural Address



An interactive or media element has been excluded from this version of the text. You can view it online here:

<https://library.achievingthedream.org/fscjamericangovernment/?p=59>

A second approach is to appear in many media venues. On September 20, 2009, President Obama gave separate back-to-back interviews advocating his health-care proposal to each of the hosts of the Sunday morning talk shows. (The interviews had been taped the previous Friday in the Roosevelt Room in the White House).

Video Clip: Sunday with Obama—September 20, 2009



An interactive or media element has been excluded from this version of the text. You can view it online here:

<https://library.achievingthedream.org/fscjamericangovernment/?p=59>

In seeking and finding audiences, the president has ranged far beyond Sunday morning interview programs. He has appeared on the late-night television talk shows of [Jay Leno](#) and [David Letterman](#), [The Daily Show with Jon Stewart](#), Oprah, and the morning talk show [The View](#), and gave an interview on [America's Most Wanted](#).

The president reached new audiences, appeared in comfortable settings, and was usually treated with deference and respect. Conversation took place in a relaxed atmosphere. He discussed his accomplishments and displayed mastery of policies yet at the same time was humanized as a family man with a sense of humor.

There are risks. Appearances on entertainment shows and casual familiarity with hosts can undermine the majesty of the office. Commercial interruptions can diminish presidential dignity. Some interviewers may question the president's policies and competence, as Jon Stewart has done. Others may even challenge the president's authority, as Bill O'Reilly did in a fifteen-minute interview conducted just before Fox televised the 2011 Super Bowl.



President Obama has ventured far and wide in the media landscape to find audiences—including to The Daily Show and The View.

Media Consequences

The president's visibility in the news is a double-edged sword. The news personalizes the presidency and presents the office through the individual president. There is high pressure for dramatic action and quick results. The constant presence of the White House press corps means that reporters clamor for presidential reaction to and

action about any breaking news—which can easily overwhelm the president’s agenda.

The media encourage presidents to find policy areas that enable them to play the role of bold, public-minded leader. But because reporters seek conflict and drama at the White House news beat, stories are subject to what columnist Jonathan Alter has termed “the manic-depressive media.”⁵⁸ In the way the media frame stories, each event is a make-or-break moment for the president, suitable for triumph or humiliation. Highs are higher; lows are lower. New issues that emerge can change the president’s depiction in the news.

Success in news coverage should not be equated with policy success. Consider the news image of the elder George Bush in the fall of 1990. The news contrasted his glory in the Gulf War against his bungle on the budget. From the start, Bush laid out a straightforward line in the 1990 crisis leading up to the war—push Iraq out of Kuwait—with such clarity and intransigence that it perfectly fit the media frame of decisive action. But when Bush engaged in complex budget negotiations with key members of Congress, the news media found him looking confused and waffling. The war was a media success; the budget was a media failure. But was the war a policy success and the budget a policy failure? Not necessarily. The war solved few of the problems that provoked Iraq’s invasion of Kuwait and almost led to civil war in Iraq. The budget agreement stanching the growth of the budget deficit led to its later erasure.

It is hard for presidents to resist the temptation to appear in the news constantly, even though chasing after the readily available publicity might push them in policy directions that are far from

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desirable. If they want media attention, they must either opt for charged, straightforward issues and clear-cut commitments or make complex issues seem simpler than they are. They and their staffers try to package actions to balance the complexity of policies against the simplicity of news (and commentary), the need to keep options open as long as possible against the news media's desire for drama, conflict, and closure.

Key Takeaways

Presidents interact with the media through press conferences, the press secretary, the Office of Communications, manipulation by inundation, and end runs around White House reporters. The White House press corps, in search of dramatic stories, is engaged in ongoing conflict and cooperation with the White House. President Obama encountered several problems with the media that he tried to resolve through new technologies and appearing in many media venues. It can be difficult for presidents to balance their policy interests with the media's criteria of news and expectations of dramatic action and quick results.

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5. Woody Klein, *All the President’s Spokesmen* (Westport, CT: Praeger, 2008). [↩](#)
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7. Martha Joynt Kumar, *Managing the President’s Message: The White House Communications Operation* (Baltimore: Johns Hopkins University Press, 2007), 180. [↩](#)
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36. Putting It Together

Summary

The president is the dynamic center of the political system, yet to perhaps a surprising degree, the executive branch is dependent on the other two branches, the federal bureaucracy, as well as state and local governments for its success.

Aside from formal powers listed in the Constitution, the president is an agenda setter, the nation's chief lobbyist. His ability to lead Congress depends on its party composition and ideological makeup. As the chief executive, the president gets things done through the appointment powers, executive orders, and war powers. The president seeks power and public approval through speeches and by heeding public response to polls.

Presidents interact with the media through press conferences, the press secretary, the Office of Communications, manipulation by inundation, and end runs around White House reporters. The White House press corps, in search of dramatic stories, is engaged in ongoing conflict and cooperation with the White House.

President Obama encountered several problems with the media that he tried to resolve through new technologies and appearing in many media venues. It can be difficult for presidents to balance their policy interests with the media's criteria of news and expectations of dramatic action and quick results.

PART VI

MODULE 6: THE BUREAUCRACY: OUTPUTS OF GOVERNMENT

37. Module Introduction

The Bureaucracy: Outputs of Government

Module Introduction

Topic Covered

- The role of the bureaucracy
- The structure of the federal bureaucracy
- The function and output of the federal bureaucracy

The federal government is tasked with an enormous responsibility. The U.S. Constitution dictates that:

1. Congress makes the law;
2. the President executes the law; and
3. the federal judiciary interprets the law

This is no easy feat. With a diverse populace,⁽¹⁾ estimated at some 326 million-persons,⁽³³⁾ spread out over expansive, geographical bounds, policymaking for the United States can be complex to say the least. The federal bureaucracy exists to remedy such complexity.

Housed as an arm of the executive branch, the federal bureaucracy exists to implement the policies of the federal government. In this sense, the federal bureaucracy touches every aspect of American lives. The most visible feature of this overwhelming presence can be found in the fifteen cabinet

departments. Nearly four times the size of George Washington's original group of advisors, today's presidential cabinet denotes the fact that Americans are, in fact, demanding citizens. Americans have high expectations of the federal government and insist that the government spare no expense in providing vital, public goods. This demanding nature can also be captured in the existence of the more than 200 independent executive branch agencies, which, likewise, carry out very important functions. For instance, the Environmental Protection Agency (EPA), serves to regulate air and water quality, among other critical environmental needs, while the National Aeronautics and Space Administration (NASA) runs the civilian space program. Like cabinet leadership, administrators of these agencies are direct reports to the president himself.

Contrary to cabinet departments and independent agencies, regulatory commissions, like that of the Securities and Exchange Commission (SEC), are independent of the White House, as they possess a special legal status from Congress, backed by the legal weight and interpretation of the Supreme Court. This means that while presidents may nominate individuals to commission leadership, they may not, however, dismiss them for political reasons. Concerning the latter, this is a very important piece of the bureaucratic puzzle, as regulatory commissions are imbued with quasi-legislative and judicial power, making and adjudicating laws within their realm of influence.⁽¹⁾ For example, in 1972 the Federal Trade Commission (FTC) issued regulations requiring that all billboard and magazine advertisements for cigarettes contain a warning from the surgeon general's office about the health and hazards of smoking."⁽⁸⁴⁾ Violators of commission rules, like such, are subject to judgement in court-like hearings before commission officials; thus, yielding to the bureaucracy a significant degree of power, perhaps, too much power in the opinion of some. To this end, President William Howard Taft's supposed saying that "*presidents come and go, but the Supreme Court goes on forever*," may be fitting and even transposed to read "*presidents come and go, but the Bureaucracy goes on forever* ." ^(85, 1)

Learning Outcomes

1. Students will be able to articulate an understanding of the individual in society.
2. Students will be able to think critically about institutions, cultures, and behaviors in their local and/or national environment.
3. Students will be able to think critically about institutions, cultures, and behaviors of the peoples of the world.
4. Students will develop a historical context for understanding current issues and events
5. Students will develop a greater understanding of world events.⁽¹⁾

Objectives

Upon completion of this module, the student will be able to:

- Identify the role of the federal bureaucracy.
- Describe the structure and function of the federal bureaucracy.
- Describe the scope and power of the federal bureaucracy.

Readings & Resources:

- [Introduction](#) from Lumen Learning
- [Bureaucracy and the Evolution of Public Administration](#) from Lumen Learning
- [Understanding Bureaucracies and their Types](#) from Lumen Learning
- [Controlling the Bureaucracy](#) from Lumen Learning

Supplemental Material/Resources

(Note: This material, in the media form of online videos, is considered supplemental and thus is not used for assessment purposes.)

- [Toward a Merit-Based Civil Service](#) from Lumen Learning
- [The Role of Congress in Monitoring Administrative Rulemaking](#) from Cato Institute.

Assignments & Learning Activities

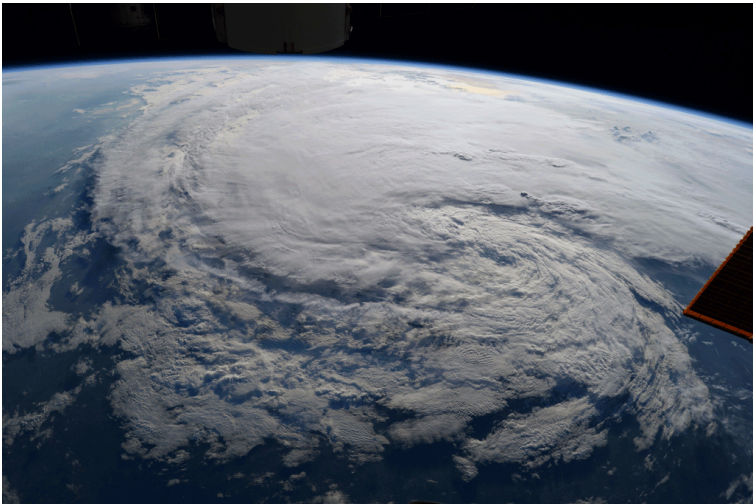
- Review Readings & Resources
- Review Module 6 Learning Unit
- Participate in Discussion
- Submit Final Project Outline
- Take Quiz 6

38. Lecture Content

Bureaucratic Pathology

The year 2017 is slated to go down as having had one of the most active hurricane seasons in American, meteorological history. With “17 named storms, 10 of which became hurricanes, including six major hurricanes (Category 3, 4 or 5),” inclement weather, and the government action it commands, is one of many ways to identify the federal bureaucracy at work in American polity.⁽⁶⁴⁾

Formed in 1978 under the administration of Jimmy Carter, the Federal Emergency Management Agency (FEMA) was conceived as a cooperative plan between the federal government and state and local agencies to provide both, effective, disaster preparedness, as well as a broad range of relief efforts to American citizens in the wake of natural disasters. How well the government performs in this area is a matter of debate.⁽¹⁾



[Tropical Storm Harvey, August 28, 2017](#) by NASA/Randy Bresnik is

in the [Public Domain](#)

For instance, FEMA praises itself for what it believes to be its “historic response” to Hurricane Harvey in Houston, TX in the late summer of 2017, while the impact of Hurricane Maria in Puerto Rico in the very same season has left many questioning the efficacy of FEMA in handling catastrophic weather.⁽⁶⁵⁾ Altogether, the uncertainty in this area comes down to one factor alone; that is, expectations. The demand on government is high, especially in circumstances that involve massive loss. As such, citizens expect government officials – to include the bureaucracy – to act quickly and decisively in remedying the effects of such damages.⁽¹⁾

On the other side of the spectrum, bureaucratic agencies, likewise, operate with high expectations. In the case of FEMA, it goes without saying that civil servants in this agency **expect** the government to provide them with the necessary tools – appropriate funding and logistics – to do the best, possible job in serving the American electorate. Because the two entities operate with such high expectations, there is always room for disappointment, as expectations shift to reality. Notwithstanding, in light of this gap, the federal bureaucracy exists to affect change in nearly every facet of American society. From protecting the water we drink, to the roads we drive, or the food we eat, the bureaucracy is the government’s conduit for getting things done.⁽¹⁾

Bureaucratic Checks and Balances

Checks and balances are the hallmark of American democracy. As such, Americans reject any variation from this constitutional principle as a direct affront to our republican form of government. Still, in possessing quasi-legislative and judicial powers, the federal bureaucracy has often been deemed an unaccountable, fourth

branch of government. Checks and balances can be discerned by observing the bureaucracies of other developed democracies.

In parliamentary democracies, like that of Israel, Germany, and Japan, bureaucratic leadership is markedly distinct from that in the U.S. In particular, senior members of the legislature go on to become ministers, the equivalent of cabinet secretaries in the U.S. This means these members of the legislature, in addition to drafting laws, likewise carry out the law, a practice reserved for unelected impartial members of the civil service in the U.S.



[Secretary of State, Rex Tillerson, at his confirmation hearing](#) by Office of the President-elect is licensed under [CC BY-SA 4.0](#)

In addition to blurring institutional lines, the simplicity of these systems also bars the scrutiny of the public over such ascendancies to power. There is no long, grueling confirmation process before a hostile Congress to ensure “fitness” for duty, so to speak. Instead, all one has to do is to win an election and work his or her way up the party hierarchy to become a minister.

With this in mind, it is important to revisit the original — assertion here; that is, the federal bureaucracy represents an unaccountable fourth branch of the federal government. The aforementioned should aid us all in countering this theory with a

resounding **no**.⁽¹⁾ The premise behind this rebuff is found in the Constitution itself wherein members of Congress are barred from taking “any civil office.”^(1, 34) This means that members of Congress may not take posts in the bureaucracy or the judiciary. Thus, in this way, the doctrine of separation of powers does, in fact, remain intact, a reality that would bode well with the Founders.⁽¹⁾

Bureaucratic Power

In a democracy, power must ultimately rest with the people, which mean that public policy should be indicative of such an arrangement. So, who controls the bureaucracy?

The People

All bureaucratic agencies exist to serve the people, as evidenced by the seal of most executive departments, indicating their goal **to serve the people**. Even so, how much control do the people actually wield over the bureaucracy? Surprisingly, the American electorate exercises very little control over bureaucrats. Such absence of power is due largely in part to the technical nature of bureaucratic functions of which the vast majority of Americans are unfamiliar with. For instance, how many Americans are acquainted with the notion of tax penalties for corporations? The answer is very few of us. As such, we the people require someone else to act on our behalf.

The President

Constitutionally speaking, the president controls the bureaucracy as specified in Article II, Section I: “The executive Power shall be vested in a President of the United States of America.”⁽⁵⁵⁾ As such, the president is the bureaucrat-in-chief, essentially controlling the bureaucracy from the top through his appointees. The people make this possible by electing presidents to exercise such discretion.⁽¹⁾

However, controlling the bureaucracy is no easy feat. With over 2 million men and women under his command, the president, like the people, requires an additional entity to work jointly with him in this regard.^(1, 66)

Congress

While the bureaucracy belongs to the executive branch; Congress exerts a significant degree of power over the bureaucracy, perhaps more so than the people or the president. Congress employs this power in three critical areas:

Funding

With **the power of the purse**, Congress may seek to hack the budgets of bureaucratic agencies whose objectives members of Congress deem to be unnecessary and/or unconstitutional.

Authorizations

Constitutionally empowered to make laws, Congress, in terms of the bureaucracy, may be poised to amend programs or deny their reauthorizations.

Oversight

With power to oversee the executive branch, Congress may utilize their police power to investigate activities of the White House, to include bureaucratic functions. In fact, so powerful

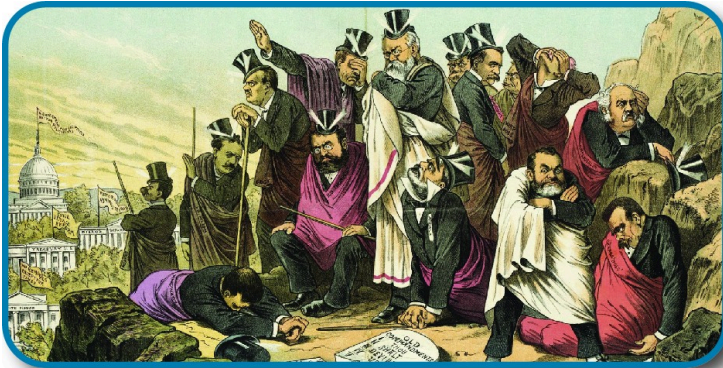
is the right to oversight, that even the mention of such activity poses a threat to bureaucratic abuse, overreach, and incompetency.



[Defense Secretary Leon E. Panetta and Army Gen. Martin E. Dempsey, chairman of the Joint Chiefs of Staff](#), testify during a hearing of the Senate Armed Services Committee on the Defense Department's response to the attack on U.S. facilities in Benghazi, Libya by Secretary of Defense is in the [Public Domain](#)

Generally speaking, the bureaucracy is not a run-away horse, with no one at the reigns. Subject to the president and Congress, who are in turn subject to the people. The federal bureaucracy belongs to the people as it should. ⁽¹⁾

39. Reading: Introduction to Bureaucracy



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 primarily in use today.

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.

What roles do professional government employees carry out?

Who are they, and how and why do they acquire their jobs? How do they run the programs of government enacted by elected leaders? Who makes the rules of a bureaucracy? This chapter uncovers the answers to these questions and many more.

40. Reading: Bureaucracy and the Evolution of Public Administration

LEARNING OBJECTIVES

By the end of this section, you will be able to:

- Define bureaucracy and bureaucrat
- Describe the evolution and growth of public administration in the United States
- 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.

To learn more about the practice of public administration and opportunities to get involved in your local community, explore the [American Society for Public Administration](#) website.

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.³

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

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2. [1]

3. ⁴

4. [2]

mid-1800s that the German scholar Lorenz von Stein argued for public administration as both a theory and a practice since its 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.⁵ 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)

5.⁶

6. [3]

The first development was the rise of centralized party politics in the 1820s. Under 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.⁷

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 second development was industrialization, which in the late nineteenth century significantly increased both the population and economic size of the United States. These changes in turn brought about urban growth in a number of places across the East and Midwest. Railroads and telegraph lines drew the country together and increased the potential for federal centralization. The government and its bureaucracy were closely involved in creating concessions for and providing land to the western railways stretching across the plains and beyond the Rocky Mountains. These changes set the groundwork for the regulatory framework that emerged in the early twentieth century.

^{7.}

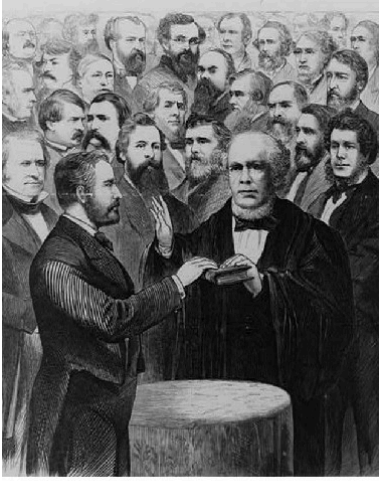
8. [4]

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 merit.⁹ Criticism of the spoils system grew, especially in the mid-1870s, after numerous scandals rocked the administration of President Ulysses S. Grant.

9.¹⁰

10. [5]



(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)

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 Act** of 1883. The act established



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)

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**.¹¹ The passage of this law sparked a period of social activism and political reform that continued well into the twentieth century.

As an active member and leader of the Progressive movement, President Woodrow **Wilson** is often considered the father of U.S. public administration. Born in Virginia and educated in history and political science at Johns Hopkins University, Wilson became a respected intellectual in his fields with an interest in public service

^{11.}¹²

12. [6]

and a profound sense of moralism. He was named president of Princeton University, became president of the American Political Science Association, was elected governor of New Jersey, and finally was elected the twenty-eighth president of the United States in 1912.

It was through his educational training and vocational experiences that Wilson began to identify the need for a public administration discipline. He felt it was getting harder to run a constitutional government than to actually frame one. His stance was that "It is the object of administrative study to discover, first, what government can properly and successfully do, and, secondly, how it can do these proper things with the utmost efficiency. .¹³ Wilson declared that while politics does set tasks for administration, public administration should be built on a science of management, and political science should be concerned with the way governments are administered. Therefore, administrative activities should be devoid of political manipulations.¹⁵

Wilson advocated separating politics from administration by three key means: making comparative analyses of public and private organizations, improving efficiency with business-like practices, and increasing effectiveness through management and training. Wilson's point was that while politics should be kept separate from administration, administration should not be insensitive to public opinion. Rather, the bureaucracy should act with a sense of vigor to understand and appreciate public opinion. Still, Wilson acknowledged that the separation of politics from administration was an ideal and not necessarily an achievable reality.

13.¹⁴

14. [7]

15.¹⁶

16. [8]

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.

With the onset of the **Great Depression** in 1929, the United States faced record levels of unemployment and the associated fall into poverty, food shortages, and general desperation. When the Republican president and Congress were not seen as moving aggressively enough to fix the situation, the Democrats won the 1932 election in overwhelming fashion. President Franklin D. **Roosevelt** and the U.S. Congress rapidly reorganized the government's problem-solving efforts into a series of programs designed to revive the economy, stimulate economic development, and generate employment opportunities. In the 1930s, the federal bureaucracy grew with the addition of the Federal Deposit Insurance Corporation to protect and regulate U.S. banking, the National Labor Relations Board to regulate the way companies could treat their workers, the Securities and Exchange Commission to regulate the stock market, and the Civil Aeronautics Board to regulate air travel. Additional programs and institutions emerged with the Social Security Administration in 1935 and then, during World War II, various wartime boards and agencies. By 1940, approximately 700,000 U.S. workers were employed in the federal bureaucracy.¹⁷ Under President Lyndon B. **Johnson** in the 1960s, that number reached 2.2 million, and the federal budget increased to \$332 billion.¹⁹ This growth came as a result of what Johnson

¹⁷.¹⁸

18. [9]

¹⁹.²⁰

called his Great Society program, intended to use the power of government to relieve suffering and accomplish social good. The **Economic Opportunity Act** of 1964 was designed to help end poverty by creating a Job Corps and a Neighborhood Youth Corps. Volunteers in Service to America was a type of domestic Peace Corps intended to relieve the effects of poverty. Johnson also directed more funding to public education, created Medicare as a national insurance program for the elderly, and raised standards for consumer products.

All of these new programs required bureaucrats to run them, and the national bureaucracy naturally ballooned. Its size became a rallying cry for conservatives, who eventually elected Ronald **Reagan** president for the express purpose of reducing the bureaucracy. While Reagan was able to work with Congress to reduce some aspects of the federal bureaucracy, he contributed to its expansion in other ways, particularly in his efforts to fight the Cold War.²¹ For example, Reagan and Congress increased the defense budget dramatically over the course of the 1980s.²³

“THE NINE MOST TERRIFYING

20. [10]

21.²²

22. [11]

23.²⁴

24. [12]

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.

In his first and unsuccessful presidential bid in 1976, Ronald Reagan, a skilled politician and governor of California, stoked working-class anxieties by directing voters' discontent at the bureaucratic dragon he proposed to slay. When he ran again four years later, his criticism of bureaucratic waste in Washington carried him to a landslide victory. While it is debatable whether



As seen in this 1976 photograph, President Ronald Reagan frequently and intentionally dressed in casual clothing to symbolize his distance from the government machinery he loved to criticize. (credit: Ronald Reagan Library)

Reagan actually reduced the size of government, he continued to wield rhetoric about bureaucratic waste to great political advantage. 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.”

Why might people be more sympathetic to bureaucratic growth during periods of prosperity? In what way do modern politicians continue to stir up popular animosity against bureaucracy to political advantage? Is it effective? Why or why not?

Summary

During the post-Jacksonian era of the nineteenth century, the common charge against the bureaucracy was that it was overly political and corrupt. This changed in the 1880s as the United States began to create a modern civil service. The civil service grew once again in Franklin D. Roosevelt’s administration as he expanded government programs to combat the effects of the Great Depression. The most recent criticisms of the federal bureaucracy, notably under Ronald Reagan, emerged following the second great expansion of the federal government under Lyndon B Johnson in the 1960s.

PRACTICE QUESTIONS

1. Briefly explain the underlying reason for the emergence of the spoils system.



An interactive or media element has been excluded from this version of the text. You can view it online here:

<https://library.achievingthedream.org/fscjamericangovernment/?p=66>

Show Glossary

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4I. Reading: Understanding Bureaucracies and their Types

LEARNING OBJECTIVES

By the end of this section, you will be able to:

- Explain the three different models sociologists and others use to understand bureaucracies
- Identify the different types of federal bureaucracies and their functional differences

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.

Models of Bureaucracy

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. Sociologists, however, have developed a number of models for understanding the process. Each model highlights specific traits that help explain the organizational behavior of governing bodies and associated functions.

The Weberian Model

The classic model of bureaucracy is typically called the ideal **Weberian model**, and it was developed by Max Weber, an early German sociologist. Weber argued that the increasing complexity of life would simultaneously increase the demands of citizens for government services. Therefore, the ideal type of bureaucracy, the Weberian model, was one in which agencies are apolitical, hierarchically organized, and governed by formal procedures. Furthermore, specialized bureaucrats would be better able to solve problems through logical reasoning. Such efforts would eliminate entrenched patronage, stop problematic decision-making by those in charge, provide a system for managing and performing repetitive tasks that required little or no discretion, impose order and efficiency, create a clear understanding of the service provided, reduce arbitrariness, ensure accountability, and limit discretion.¹

The Acquisitive Model

For Weber, as his ideal type suggests, the bureaucracy was not only necessary but also a positive human development. Later sociologists have not always looked so favorably upon bureaucracies, and they have developed alternate models to explain how and why bureaucracies function. One such model is called the **acquisitive model** of bureaucracy. The acquisitive model proposes that bureaucracies are naturally competitive and power-hungry. This means bureaucrats, especially at the highest levels, recognize that limited resources are available to feed bureaucracies,

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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.

The Monopolistic Model

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. The model that emerged from this observation is the *monopolistic model*.

Proponents of the **monopolistic model** recognize the similarities 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.

There are rare bureaucratic exceptions that typically compete for presidential favor, most notably organizations such as the Central

Intelligence Agency, the National Security Agency, and the intelligence agencies in the Department of Defense. Apart from these, bureaucracies have little reason to become more efficient or responsive, nor are they often penalized for chronic inefficiency or ineffectiveness. Therefore, there is little reason for them to adopt cost-saving or performance measurement systems. While some economists argue that the problems of government could be easily solved if certain functions are privatized to reduce this prevailing incompetence, bureaucrats are not as easily swayed.

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 2015.³ 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.⁵ Yet, not all bureaucracies are alike. In the U.S. government, there are four general types: cabinet

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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 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.

This table outlines all the current cabinet departments, along with the year they were created, their current top administrator, and other special details related to their purpose and functions.

Members of the Cabinet			
Department	Year Created	Secretary as of 2016	Purpose
State	1789	John Kerry	Oversees matters related to foreign policy and international issues relevant to the country
Treasury	1789	Jack Lew	Oversees the printing of U.S. currency, collects taxes, and manages government debt
Justice	1870	Loretta Lynch(attorney general)	Oversees the enforcement of U.S. laws, matters related to public safety, and crime prevention
Interior	1849	Sally Jewell	Oversees the conservation and management of U.S. lands, water, wildlife, and energy resources
Agriculture	1862	Tom Vilsack	Oversees the U.S. farming industry, provides agricultural subsidies, and conducts food inspections
Commerce	1903	Penny Pritzker	Oversees the promotion of economic growth, job creation, and the issuing of patents
Labor	1913	Thomas Perez	Oversees issues related to wages, unemployment insurance, and occupational safety
Defense	1947	Ashton Carter	Oversees the many elements of the U.S. armed forces, including the Army, Navy, Marine Corps, and Air Force
Health and Human Services	1953	Sylvia Mathews Burwell	Oversees the promotion of public health by providing essential human services and enforcing food and drug laws

Housing and Urban Development	1965	Julián Castro	Oversees matters related to U.S. housing needs, works to increase homeownership, and increases access to affordable housing
Transportation	1966	Anthony Foxx	Oversees the country's many networks of national transportation
Energy	1977	Ernest Moniz	Oversees matters related to the country's energy needs, including energy security and technological innovation
Education	1980	John King	Oversees public education, education policy, and relevant education research
Veterans Affairs	1989	Robert McDonald	Oversees the services provided to U.S. veterans, including health care services and benefits programs
Homeland Security	2002	Jeh Johnson	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

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. Some prominent independent agencies are the Central Intelligence Agency (CIA), which collects and manages intelligence vital to national interests, the National Aeronautics and Space Administration (NASA), charged with developing technological innovation for the purposes of space exploration, and the Environmental Protection Agency (EPA), which enforces laws aimed at protecting environmental sustainability.



While the category “independent executive agency” may seem very ordinary, the actions of some of these agencies, like NASA, are anything but. (credit: NASA)

An important subset of the independent agency category is the regulatory agency. Regulatory agencies emerged in the late nineteenth century as a product of the progressive 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 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. These independent regulatory agencies cannot be influenced as readily by partisan politics as typical agencies and can therefore develop a good deal of power and authority. 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.⁹



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)

The Face of Democracy

Those who work for the public bureaucracy are nearly always citizens, much like those they serve. As such they typically seek similar long-term goals from their employment, namely to be able to pay their bills and save for retirement. However, unlike those who

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seek employment in the private sector, public bureaucrats tend to have an additional motivator, the desire to accomplish something worthwhile on behalf of their country. In general, individuals attracted to public service display higher levels of public service motivation (PSM). This is a desire most people possess in varying degrees that drives us to seek fulfillment through doing good and contributing in an altruistic manner.¹¹

DOGS AND FIREPLUGS

In *Caught between the Dog and the Fireplug, or How to Survive Public Service* (2001), author

Kenneth **Ashworth** provides practical advice for individuals pursuing a career in civil service.¹³ Through a series of letters, Ashworth shares his personal experience and professional expertise on a variety of issues with a relative named Kim who is about to embark upon an occupation in the public sector. By discussing what life is like in the civil service, Ashworth provides an “in the trenches” vantage point on public affairs. He goes on to discuss hot topics centering on bureaucratic behaviors, such as (1) having sound

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etiquette, ethics, and risk aversion when working with press, politicians, and unpleasant people; (2) being a subordinate while also delegating; (3) managing relationships, pressures, and influence; (4) becoming a functional leader; and (5) taking a multidimensional approach to addressing or solving complex problems.

Ashworth says that politicians and civil servants differ in their missions, needs, and motivations, which will eventually reveal differences in their respective characters and, consequently, present a variety of challenges. He maintains that a good civil servant must realize he or she will need to be in the thick of things to provide preeminent service without actually being seen as merely a bureaucrat. Put differently, a bureaucrat walks a fine line between standing up for elected officials and their respective policies—the dog—and at the same time acting in the best interest of the public—the fireplug.

In what ways is the problem identified by author Kenneth Ashworth a consequence of the merit-based civil service?

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 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.

Summary

To understand why some bureaucracies act the way they do, sociologists have developed a handful of models. With the exception of the ideal bureaucracy described by Max Weber, these models see bureaucracies as self-serving. Harnessing self-serving instincts to make the bureaucracy work the way it was intended is a constant task for elected officials. One of the ways elected officials have tried to grapple with this problem is by designing different types of bureaucracies with different functions. These types include cabinet

departments, independent regulatory agencies, independent executive agencies, and government corporations.

PRACTICE QUESTIONS

1. Briefly explain why government might create a government corporation.

Show Answer



An interactive or media element has been excluded from this version of the text. You can view it online here:

<https://library.achievingthedream.org/fscjamericangovernment/?p=67>

Show Glossary

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42. Reading: Controlling the Bureaucracy

LEARNING OBJECTIVES

By the end of this section, you will be able to:

- 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. Historically, at least since the end of the spoils system, elected leaders have struggled to maintain control over their bureaucracies. This challenge arises partly due to the fact that elected leaders tend to have partisan motivations, while bureaucracies are designed to avoid partisanship. While that is not the only explanation, elected leaders and citizens have developed laws and institutions to help rein in bureaucracies that become either too independent, corrupt, or both.

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.

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

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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 committees 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.*

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.³ 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).⁵ 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 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

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management.⁷ 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).⁹ 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.

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CONTROVERSY AND THE CFPB: OVERSEEING A BUREAU WHOSE JOB IS OVERSIGHT

During the 1990s, the two political parties in the United States had largely come together over the issue of the federal bureaucracy. While differences remained, a great number of bipartisan attempts to roll back the size of government took place during the Clinton administration. This shared effort began to fall apart during the presidency of Republican George W. Bush, who made repeated attempts to use contracting and privatization to reduce the size of the federal bureaucracy more than Democrats were willing to accept.

This growing division was further compounded by Great Recession that began in 2007. For many on the left side of the political spectrum, the onset of the recession reflected a failure of weakened federal bureaucracies to properly regulate the financial markets. To those on the right, it merely reinforced the belief that government bureaucracies are inherently inefficient. Over the next few years, as the government attempted to grapple with the consequences of the recession, these divisions only grew.

The debate over one particular bureaucratic response to the recession provides important insight into these

divisions. The bureau in question is the **Consumer Financial Protection Bureau** (CFPB), an agency created in 2011 specifically to oversee certain financial industries that had proven themselves to be especially prone to abusive practices, such as sub-prime mortgage lenders and payday lenders. To many in the Republican Party, this new bureau was merely another instance of growing the federal bureaucracy to take care of problems caused by an inefficient government. To many in the Democratic Party, the new agency was an important cop on a notably chaotic street.

Divisions over this agency were so bitter that Republicans refused for a time to allow the Senate to consider confirming anyone to head the new bureau. Many wanted the bureau either scrapped or headed by a committee that would have to generate consensus in order to act. They attempted to cut the bureau's budget and erected mountains of red tape designed to slow the CFPB's achievement of its goals. During the height of the recession, many Democrats saw these tactics as a particularly destructive form of obstruction while the country reeled from the financial collapse.



In this photograph, Elizabeth Warren, then a law school professor who proposed the CFPB, stands with President Obama and Richard Cordray, the president's pick to serve as director of the new agency. Warren is currently a U.S. senator from Massachusetts.

As the recession recedes into the past, however, the political heat the CFPB once generated has steadily declined. Republicans still push to reduce the power of the bureau and Democrats in general still support it, but lack of urgency has pushed these differences into the background. Indeed, there may be a growing consensus between the two parties that the bureau should be more tightly controlled. In the spring of 2016, as the agency was announcing new rules to help further restrict the predatory practices of payday lenders, a handful of Democratic members of Congress, including the party chair, joined Republicans to draft legislation to prevent the CFPB from further regulating lenders. This joint effort may be an anomaly. But it may also indicate the

start of a return to more bipartisan interpretation of bureaucratic institutions.

What do these divisions suggest about the way Congress exercises oversight over the federal bureaucracy? Do you think this oversight is an effective way to control a bureaucracy as large and complex as the U.S. federal bureaucracy? Why or why not?

Citizen Bureaucratic Oversight

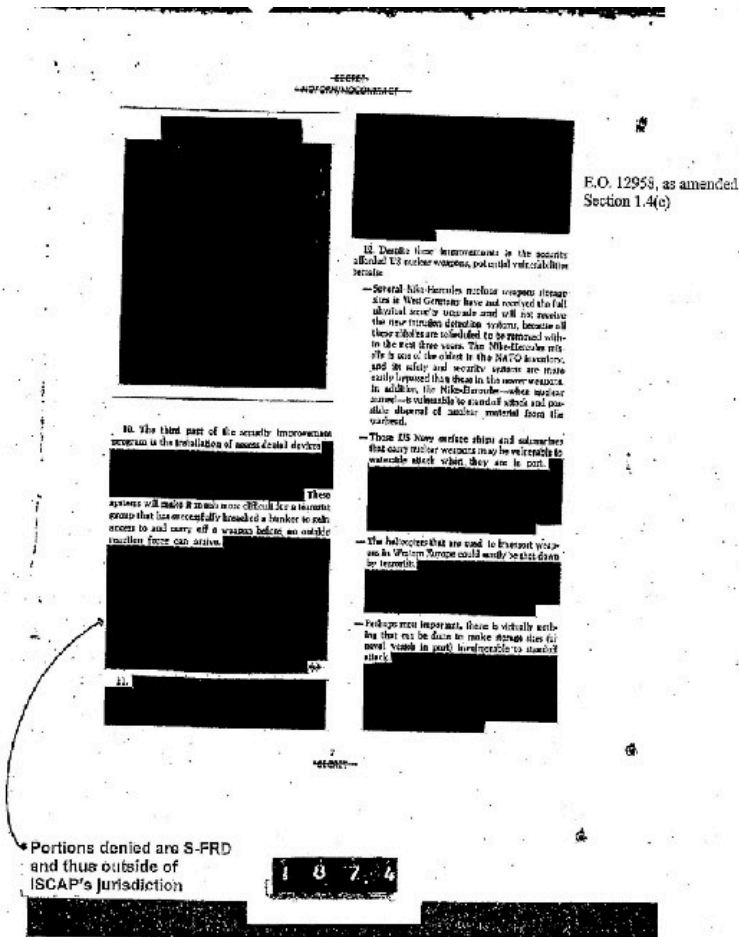
A number of laws passed in the decades between the end of the Second World War and the late 1970s have created a framework through which citizens can exercise their own bureaucratic oversight. The two most important laws are the **Freedom of Information Act** of 1966 and the Government in **Sunshine Act** of 1976.¹¹ 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

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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.



As this CIA document shows, even information released under FOIA can be greatly restricted by the agencies releasing it. The black marks 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.¹³ 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.¹⁵

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 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.

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Government Privatization

A more extreme, and in many instances, more controversial solution to the perceived and real inefficiencies in the bureaucracy is **privatization**. In the United States, largely because it was born during the Enlightenment and has a long history of championing free-market principles, the urge to privatize government services has never been as strong as it is in many other countries. There are simply far fewer government-run services. Nevertheless, the federal government has used forms of privatization and contracting throughout its history. But following the growth of bureaucracy and government services during President Johnson's Great Society in the mid-1960s, a particularly vocal movement began calling for a rollback of government services.

This movement grew stronger in the 1970s and 1980s as politicians, particularly on the right, declared that air needed to be let out of the bloated federal government. In the 1990s, as President Bill Clinton and especially his vice president, Al Gore, worked to aggressively shrink the federal bureaucracy, privatization came to be embraced across the political spectrum.¹⁷ The rhetoric of privatization—that market competition would stimulate innovation and efficiency—sounded like the proper remedy to many people and still does. But to many others, talk of privatization is worrying. They contend that certain government functions are simply not possible to replicate in a private context.

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.¹⁹ These include using contractors to supply

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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 directly giving it to the private sector. We will look at three of these types of privatization shortly.



Following his reelection in 2004, President George W. Bush attempted to push a proposal to partially privatize Social Security. The proposal did not make it to either the House or Senate floor for a vote.

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 2004.²¹ 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.

Possibly the best-known form of privatization is the process of issuing government contracts to private companies in order for them to provide necessary services. This process grew to prominence during President Bill Clinton's National Partnership for Reinventing Government initiative, intended to streamline the government bureaucracy. Under President George W. Bush, the use of contracting out federal services reached new heights. During the Iraq War, for example, large corporations like Kellogg Brown & Root, owned by Haliburton at the time, signed government contracts to perform a number of services once done by the military, such as military base construction, food preparation, and even laundry services. By 2006, reliance on contracting to run the war was so great that contractors outnumbered soldiers. Such contracting has faced quite a bit of criticism for both its high cost and its potential for corruption and inefficiencies.²³ However, it has become so routine that it is unlikely to slow any time soon.

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24. [12]

Third-party financing is a far more complex form of privatization than divestiture or contracting. Here the federal government signs an agreement with a private entity so the two can form a *special-purpose vehicle* to take ownership of the object being financed. The special-purpose vehicle is empowered to reach out to private financial markets to borrow money. This type of privatization is typically used to finance government office space, military base housing, and other large infrastructure projects. Departments like the Congressional Budget Office have frequently criticized this form of privatization as particularly inefficient and costly for the 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.²⁵ For a typical 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,

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26. [13]

conducts investigations into possible abuses, and institutes protections for bureaucrats who speak out.²⁷ 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.

27.²⁸

28. [14]



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)

Summary

To reduce the intra-institutional disagreements the traditional rulemaking process seemed to bring, the negotiated rulemaking process was designed to encourage consensus. Both Congress and the president exercise direct oversight over the bureaucracy by holding hearings, making appointments, and setting budget allowances. Citizens exercise their oversight powers through their use of the Freedom of Information Act (FOIA) and by voting. Finally,

bureaucrats also exercise oversight over their own institutions by using the channels carved out for whistleblowers to call attention to bureaucratic abuses.

PRACTICE QUESTIONS

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?



An interactive or media element has been excluded from this version of the text. You can view it online here:

<https://library.achievingthedream.org/fscjamericangovernment/?p=68>

Show References

Show Glossary

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PART VII

MODULE 7: THE COURTS: GUARDIANS OF THE CONSTITUTION

43. Module Introduction

The Courts: Guardians of the Constitution

Module Introduction

Topic Covered:

- The constitutional foundations of the Supreme Court
- The organization of the federal judiciary
- The role of the Courts

Many are of the opinion that if the Framers were alive today, they would not recognize the national government they created. Nowhere does this statement rang truer than in the federal judiciary itself. Fashioned to be the “least dangerous” among the three branches, the federal judiciary, in particular, the United States Supreme Court, has morphed into a powerful, legal instrument hardly discernible against its original intent. ⁽¹⁾

With “no influence over either the sword (Executive Branch) or the purse (Congress),” the judiciary branch was proposed as the weakest of the three branches; though this presupposition of the judiciary, by Alexander Hamilton, would not last long ⁽¹⁶⁾ Following the Court’s establishment in 1788, the Supreme Court proved its equal footing with the other branches of government. Indeed, in its adjudication of ⁽¹⁾ [*Marbury v. Madison* \(1803\)](#), ⁽⁶⁹⁾ the Court exercise its right to judicial review, that is, its right to review the acts of the executive and legislative branches of government for constitutional compliance. This right to review would later be applied to the states

in the landmark case ⁽¹⁾ [*Fletcher v. Peck \(1810\)*](#) ⁽⁶⁸⁾ wherein the High Court ruled its first state law unconstitutional. In this way, with command over national and state laws, the actions of the Court through the years have raised eyebrows over its role in what some have deemed the weakening of American democracy. How so?

Judicial activism and judicial restraint play a significant role in the Court's decision-making protocol. Both concepts involve the notion of judicial review; though, it is the frequency of such that remains controversial in American politics. For instance, the concept of judicial activism holds that the Court has both, the right and an obligation, to engage in judicial review, particularly as it relates to the defense of political minorities. On the other hand, judicial restraint advocates for the limited and infrequent use of judicial review, owing this line of thought to the elected status of federal judges, or the lack thereof. Because federal judges are appointed and confirmed to lifetime tenure, it is the position of some that unelected judges, via judicial review, should not be able to overrule laws passed by elected representatives. The reasoning, here, is, perhaps, the most undemocratic aspect of the Supreme Court's existence.

Still, the historicity of American politics points to the deepening of democracy via the Courts and its right to judicial review. Indeed, the Supreme Court's willingness to engage in judicial review, and often, has paved the way for advances in individual rights in liberties. From the selective incorporation of the Bill of Rights to the individual mandate for healthcare, the Supreme Court, at present, remains the possession of **we the people**. ⁽¹⁾

Learning Outcomes

1. Students will be able to articulate an understanding of the individual in society.
2. Students will be able to think critically about institutions,

- cultures, and behaviors in their local and/or national environment.
3. Students will be able to think critically about institutions, cultures, and behaviors of the peoples of the world.
 4. Students will develop a historical context for understanding current issues and events
 5. Students will develop a greater understanding of world events

Objectives

Upon completion of this module, the student will be able to:

- Identify the constitutional foundations of the Supreme Court.
- Describe the structure and function of the federal judiciary.
- Assess the role of the Courts in American polity. ⁽¹⁾

Readings & Resources

- [The U.S. Legal System](#) from Lumen Learning
- [Power of the U.S. Supreme Court](#) from Lumen Learning
- [Selecting Federal Judges](#) from Lumen Learning
- [The Courts in the Information Age](#) from Lumen Learning
- [Putting It Together](#) from Lumen Learning

Supplemental Material/Resources

(Note: This material, in the media form of online videos, is considered supplemental and thus is not used for assessment purposes.)

- Video: [The Surprising Wretched History of the Supreme Court](#) from Lumen Learning
- Video: [Dean Chemerinsky Discusses His New Book: The Case Against the Supreme Court](#) from Lumen Learning

Assignments & Learning Activities

- Review Readings & Resources
- Review Module 7 Learning Unit
- Submit Reflection Paper
- Take Quiz 7

44. Lecture Content

Executing Court Decisions

American polity is subject to a number of myths. In the case of the judiciary, political inventions hold that all Supreme Court decisions are final, but is this really the case? The short answer to this question is no, while the long answer involves a bit more complexity as it relates to other variables immersed in implementing court decisions.⁽¹⁾

Rather than providing closure, Supreme Court decisions open the floodgates for increased, political debate. The chief reason behind such discourse lies in the fact that court orders are not self-executing.⁽¹⁾ Indeed, the Court possesses neither the⁽¹⁾ “sword nor the purse”⁽¹⁶⁾ to force compliance with its rulings. Thus, the Court’s rulings necessitates not only added legal dialogue, but also the cooperation of other branches of government to carry out its decisions.⁽¹⁾



[U.S. Supreme Court building, Washington, D.C](#) by Carol M.

Highsmith is in the [Public Domain](#)

In terms of legal exchange, consider the Court's ruling in ⁽¹⁾ [DISTRICT OF COLUMBIA V. HELLER \(2008\)](#), ⁽⁷⁵⁾ where the Supreme Court rejected the view that the Second Amendment guarantees the right to keep and bear arms. The pronouncement here was not the concluding verdict on the issue at hand. In fact, two years to the date of Heller, The Court, in ⁽¹⁾ [MCDONALD V. CHICAGO \(2010\)](#), ⁽⁷⁶⁾ in one of many instances of judicial review, ruled that the Second Amendment actually applied to citizens at the state level, which has had profound impacts on America's gun law debate. Thus, the essence of both cases is this: the Supreme Court is not the final arbiter of American law nor should they be. In a republic, power rests with the people. ⁽¹⁾

Congress and the Courts

The United States Congress plays a significant role in ensuring the compliance of Supreme Court decisions. With its power of the purse, Congress possesses the power to aid or hinder the implementation of Supreme Court decisions. America's process of desegregation amplifies this illustration well. ⁽¹⁾ In an effort to enforce the Court's decision in [BROWN V. BOARD OF EDUCATION \(1954\)](#), ⁽⁵⁶⁾ as well as to compel compliance with the Civil Rights Act of 1964, President Lyndon Johnson authorized the U.S. Department of Health, Education, and Welfare to withhold funds from school systems that refused to desegregate. In this way, Johnson not only saw to it that the law of the land be executed as his job demands, but he likewise, provided staunch segregationists in the South incentive to comply with the Court and congressional orders.

In addition to funding, members of Congress may also advance or impede the Court's decisions. In 1956, following the Brown (1954) opinion, ninety-six members of Congress signed the Southern Manifesto, a document attacking the Brown decision. ⁽⁷⁷⁾ While their efforts did not — and could not — overturn the Court's original ruling, their collective disagreement worked to stall the Court's opinion in [BROWN II \(1955\)](#) ⁽⁷⁷⁾, that segregation should happen with “all deliberate speed.”



[Howard W. Smith, member of the United States House of Representatives](#), introduced the Southern Manifesto on the House Floor on March 21, 1956. by U.S. Congress is in the [Public Domain](#)

The President & the Courts

The President of the United States is by far, the most public official in the nation, and thus has great effect on public opinion. To this end, his willingness to accept a Court decision weighs heavily on the willingness of the American electorate to comply with such. However, his silence may encourage disobedience or delay implementation of federal law. Again, the Brown decision likewise illustrates the President's influence in this respect.⁽¹⁾

Early on, President Dwight Eisenhower refused to endorse the Brown decision, which in turn fueled the support of those who opposed the Court in this respect. While Eisenhower would later go on to nationalize the Arkansas National Guard in 1957 to enforce court-ordered desegregation in Little Rock, Arkansas, his initial reluctance encouraged the circumvention of court orders and led to further violence and protesting.

Thus, taken together, Congress and the President, play a significant role in advancing Supreme Court directives. Their ability to sway, either by force or by funds, severely thwarts the notion that the Supreme Court is an undemocratic feature of American democracy. The lack of finality on behalf of the Court, alongside its inability to seek out new cases, sees to it that laws as a general rule of thumb, are not permanent and can in fact, be challenged by those with a legal standing before the Court. So, then it is not the authority and power vested in the High Court, which makes it so unique among judicial branches worldwide. No. It is the willingness of Americans to entrust their fate to our system's courts, judges, and, hence, the rule of law, which speaks well to the durability of America democracy.⁽¹⁾



[Soldiers from the 101st Airborne Division escort African-American students to Central High School in Little Rock in Sept. 1957, after the governor of Arkansas tried to enforce segregation. Photo courtesy National Archives is licensed under \[CC BY 2.0\]\(#\)](#)

45. Reading: The U.S. Legal System

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What are the differences between civil and criminal cases, and how are these cases usually resolved?
2. How do the news and entertainment media depict trials?
3. How are the federal courts organized?
4. How does the Supreme Court work?

The American legal system handles a vast number of disputes and controversies. Our concern in this text is with civil and criminal cases, the main ways by which courts wield power and influence and make policy.¹

Civil Cases

In civil cases, plaintiffs (people or organizations) initiate lawsuits against defendants; courts resolve disputes by deciding or mediating between the two sides. Civil cases can involve money,

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contracts, property, personal injury, divorce, or child custody. “I’ll sue you” is a threat to instigate a civil action.

The vast majority of civil cases, some seventeen million annually, are filed in state courts, compared to around four hundred thousand in federal courts. State and federal laws establish the type of civil cases their courts can hear. For example, because there is no federal divorce law, all divorce cases are heard in state courts; because Social Security is a federal program, all civil disputes involving it are heard in federal courts.

Because of their costs and the often lengthy delays until they are heard in court, only about 1.3 percent of civil suits filed go to trial. Most civil cases are resolved by other means, such as settlements, plea deals, mediation, or arbitration.

Criminal Cases

Criminal cases are initiated by the government. They run the gamut from misdemeanors, such as trespassing and disorderly conduct, to felonies, such as armed robbery, rape, and murder. Unlike civil cases, criminal cases can result in the loss of liberty: a jail sentence. Around seven million people in the United States are either in prison, on probation, or on parole for crimes committed.

Most criminal laws are passed by states, and the vast majority of criminal cases originate in state courts: roughly twenty-one million criminal cases annually, compared to about seventy-six thousand in federal courts.

Around 27 percent of the criminal cases heard in federal courts involve alleged violations of federal drug laws. Often requiring mandatory sentences without parole, these federal laws are much tougher than state laws, so it makes an enormous difference whether a drug offense case is tried in a federal or state court.

Only about 4 percent of criminal cases are decided by trial. Prosecutors drop, or do not continue with charges, on another 25

percent. Most of the rest are resolved by guilty pleas without going to trial. Even for murder or manslaughter, a majority of defendants plead guilty. This often entails a plea bargain, in which defendants plead guilty in exchange for a reduced charge. The judge must approve the plea bargain.

Except for affluent defendants with high-powered and well-paid attorneys, people involved in criminal cases have an incentive to plea bargain. Defendants who insist on going to trial face sentences that can be far longer than those received by defendants who plead guilty and cooperate with the government. For lawyers and judges, plea bargains save both time and trial costs and also lighten their workloads. Because so many plead guilty, forty-seven million Americans have criminal records.⁴

Media Depictions of Trials

Dubbed “tabloid justice,” news depictions of the criminal justice system, especially on cable television, focus on dramatic, sensational, and lurid cases.⁷ A notorious instance was the Duke University lacrosse team rape story, which provoked a prodigious amount of often erroneous news coverage as well as outrageous opinions and judgments (notoriously from television commentator Nancy Grace) from March 2006 until April 2007, when all charges against the students were dropped and the case dismissed.

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The types of cases receiving excessive and inflammatory coverage include those of a basketball star (Kobe Bryant) charged with rape; an actor (Robert Blake) accused of killing his wife; a decorating diva (Martha Stewart) charged with lying to the FBI; a pop star (Michael Jackson) accused of molesting children; and a mother (Casey Anthony) accused of killing her daughter. The media want, as the chief executive of truTV (formerly Court TV) put it, “the type of trials that have all the melodrama of a soap opera.”¹⁰

Even trials covered live on television may be unrealistic examples of how the U.S. criminal justice system operates. The trial of O. J. Simpson, accused of the murder of his ex-wife and a friend of hers, attracted huge attention from the news media



Judge Judy and Judge Joe Brown. Many people's understanding of and opinions about courts are based on watching television's fictional judges

and the public during the mid-1990s. Simpson was a celebrity defendant with sufficient wealth to hire a cast of attorneys and undergo a lengthy trial. In reality, most criminal trials take little time. The Los Angeles Superior Court disposed of nearly fifty-two thousand cases between the time of Simpson's arrest and his acquittal.¹³

Trials are a staple of entertainment drama.¹⁶ Many television

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series and their spin-offs involve trials. These shows differ drastically from the reality of courts and trials through the addition of drama and emotion: the highlights of cross-examination, attorneys browbeating witnesses and making speeches, and the guilty confessing. They rarely contain procedural elements, and the issues of “jurisdiction, notices to defendants, pleadings, discovery, and choice of a judge or jury trial, all of which can be argued, replied to, and motioned against.”¹⁹ As David E. Kelley, creator of *The Practice* and a former lawyer said, “I am writing the world of law in the way I would like it to be. It’s all a conceit, because most trials are boring.”²²

Relatedly, trial judges are usually portrayed on television as legitimate and judicious, and their decisions almost always as correct. Consider the pseudorealistic television courtroom shows represented by *Judge Judy* and *Judge Joe Brown*.

The prevalence of courtroom shows is a testament to their appeal and to television’s need for cheap and relatively easy-to-produce programming. Frequent viewers believe that judges should—as these “judges” do—ask questions, be aggressive with litigants, express views about their testimony, and make known their

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opinions about the outcome of the cases.²⁵ This is, in fact, the opposite of how most real judges behave.

Organization of the Federal Courts

The first sentence of Article III of the U.S. Constitution created the U.S. Supreme Court—a major innovation. The Articles of Confederation made no provision for a federal judiciary, only for courts created and controlled by the states.

Article III also gave Congress the authority to create lower federal courts. After the Constitution was ratified in 1789, Congress quickly did so through the Judiciary Act of 1789.

Link: The Judiciary Act

Learn more about the [Judiciary Act of 1789](#).

The Federal District and Appeals Courts

There are 94 federal district courts staffed by 667 permanent and several temporary judges. Every state has at least one district with a district court in it responsible for hearing cases that arise within that geographic area.

Above the district courts are the federal courts of appeal. They

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decide whether or not district courts have made an error in conducting a trial. Judges on appeal courts base their rulings on written and oral legal arguments presented by lawyers for each side. There are no witnesses, no testimony, and no jury. Appellate courts answer questions of law rather than questions of fact.

There are currently thirteen courts of appeals, twelve of them based on geographic districts called “circuits.” There are eleven numbered circuits, each of which has jurisdiction over several states. No state straddles more than one circuit.

There is a twelfth circuit for the District of Columbia (known as the “DC Circuit”). The thirteenth circuit is the court of appeals for the “Federal Circuit,” which hears appeals from U.S. Courts of Federal Claims, International Trade, the Patent and Trademark Office, and others. There are approximately 179 judges on the courts of appeals.

A case in district court is usually presided over by one judge, whereas an appeal before a court of appeals is typically heard by a panel of three judges. A majority vote of the panel is necessary to overturn a lower-court ruling. The court of appeals issues a written ruling explaining its decision.

Every litigant in federal court has the right to appeal an unfavorable ruling from the district court. However, because it is expensive to appeal, only about 17 percent of eligible litigants do so. Moreover, higher courts hear few of the cases appealed and rarely reverse lower-court decisions.²⁸

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The Supreme Court

The [Supreme Court](#), the nation's highest tribunal, hears cases arising under the Constitution or the laws of the United States. The Constitution gives Congress the authority to set the number of Supreme Court justices, and it has changed the number several times. The Court started with five justices; it now has nine.

The Constitution does not stipulate any specific qualifications, not even a minimum age or legal training, for Supreme Court justices and other federal judges. Of the over one hundred individuals who have served on the Supreme Court, all except four women and two African American males have been white men.

How the U.S. Supreme Court Works

Article III and the Eleventh Amendment of the Constitution require that the Supreme Court be the first court to hear certain types of cases. This original jurisdiction is limited to cases

- between the United States and one of the states,
- between two or more states,
- involving foreign ambassadors or other ministers,
- brought by one state against citizens of another state or against a foreign country.

Only about 1 percent of the Supreme Court's cases fall under its original jurisdiction. The rest reach it as appeals from civil and criminal cases that have been decided by lower federal and by state courts. As the highest appellate court in the nation, the Supreme Court is the ultimate arbiter in many areas of the law.

If the case involves a federal question, an appeal can be made from the state's appellate court of last resort to the U.S. Supreme Court. A federal question exists if a state law is alleged to violate

federal law (an act of Congress), a treaty ratified by the U.S. Senate, or the U.S. Constitution; or because something that state officials do is claimed to violate the Constitution or federal law. Grounds for appeal include evidence gathered from an unreasonable search and seizure, a coerced confession, and infringement of a constitutional right to a fair trial.

With rare exceptions, the Supreme Court has absolute control over the appeals it chooses to hear. Of the roughly eight thousand cases appealed to the Court every year, the justices typically agree to review a few hundred.

The justices normally decide around seventy of these with comprehensive written opinions during the Court's annual term from October through late June to early July. The Court occasionally issues per curiam decisions: brief unsigned opinions, usually for cases it decides without oral argument.

The justices do not have to give any reasons for accepting or rejecting a case. Even after deciding to hear a case, they can change their minds and “DIG” (dismiss as improvidently granted) it: in other words, they say that they won't decide the case after all, again without giving any reason.

Writ of Certiorari

Most cases reach the Court by way of a writ of certiorari. *Certiorari* is Latin for “to make more certain.” Litigants who receive an adverse ruling in the federal appeals courts or, in cases involving a federal question, from a state's highest appellate court can submit a petition for a writ of certiorari to the Supreme Court, asking it to review the case.

It takes four of the nine justices to “grant cert.” This is called the Rule of Four. If the Supreme Court does not grant cert, the lower court ruling is left standing. This does *not* mean that the Supreme

Court agrees with that ruling, only that the Court has chosen not to review it.

When the Supreme Court grants cert, it is usually because four or more of the justices believe the case represents an important issue, such as an unresolved constitutional or statutory question on which they are interested in ruling. Sometimes disputes between different courts need to be resolved, or Congress and lower courts need the Court's guidance on the Constitution. However, it is not unknown for justices to avoid granting cert to important cases because they do not want to rule on them.³¹

The Solicitor General

The case for cert is strengthened if it is backed by the solicitor general, the presidential appointee in the justice department responsible for presenting the position of the U.S. government to the courts. The solicitor general screens cases before most agencies of the federal government can appeal them to the Court. Consequently, more than half of the Supreme Court's workload comes from cases under the solicitor general. The justices pay special attention to the recommendations of the solicitor general, nicknamed "the 10th Justice" in the news.

Link: The Solicitor General's Office

Visit the [solicitor general's office online](#).

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Briefs

When cert is granted, the lawyers for each side file a brief making their arguments. Others with a stake in the outcome of the case may, with the permission of the Court, each file an amicus curiae brief on behalf of one or the other parties to the case. (They may also persuade the Court to take a case.) These “friend of the court” briefs expose the justices to additional arguments and enable them, should they be so inclined, to gauge interest-group attention to a case and the amount of support from the different sides.³⁴

Oral Arguments

After reviewing the briefs, the justices hear oral arguments, usually limited to an hour split equally between the sides. The justices often interrupt the attorneys with questions, probe arguments made in the briefs, and raise new issues; they may indicate their thinking about the case and possible decision. The arguments can be used by the justices to reach the legal and policy decisions that they prefer³⁷—unless, that is, one side’s lawyer makes a more convincing

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argument than the other.⁴⁰ Oral arguments are the only public part of the Supreme Court's work.

Link: Oral Arguments Heard by the Supreme Court

Find and listen to [archived oral arguments online](#).

Law Clerks

Each justice selects a few law clerks (usually four) to assist in researching cases, deciding which ones to accept, and drafting opinions. These clerks are usually honors graduates from the most prestigious law schools.

A clerkship betokens a promising future in the legal profession. Because the clerks' work is confidential and rarely revealed, the extent of justices' reliance on their clerks is uncertain. One former clerk writing about the Court charged that the justices granted "great and excessive power to immature, ideologically driven clerks, who in turn use that power to manipulate their bosses."⁴³ Yet, most justices are so self-confident and versed in the law that it is hard to imagine them being led to make decisions against their will.

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Opinions

Some time after oral arguments, the justices meet in a conference and vote in order of seniority, starting with the chief justice, on how the case should be decided.

Link: Supreme Court Decisions

Read [archived Supreme Court decisions online](#).

The Supreme Court decides cases by majority rule: at least five of the nine justices need to agree for a majority opinion. They do not, however, have to agree on the reasons for their decision. It is possible for a majority to be composed of justices who agree on their rationale for the decision plus justices who join the decision (but for other reasons) and thus write a joint or individual concurring opinion. Justices who disagree with the majority opinion almost always write a dissenting opinion or join in a colleague's dissenting opinion, explaining why they think the majority was wrong. On rare occasions, when a justice wants to make a dramatic statement arguing that the majority is profoundly wrong, she or he will read this written dissent aloud.



Conference Room of the Supreme Court. The intimacy of the Supreme Court is best captured by the conference room where the nine justices meet to vote on which cases to hear, to discuss opinions, and to decide cases. The junior member of the Court is responsible for opening and closing the doors.

Bargaining and compromise sometimes ensue in an effort to create a majority coalition.⁴⁶ A study of justices' conference notes concludes that the Court's decisions come from "an intricate and shifting composite of law, politics, policy, principle, efficiency, expedience, pragmatism, dogmatism, reason, passion, detachment, individual personality, group psychology, institutional forces, and

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external pressures.”⁴⁹ To this list, we would add the desire for approval from social groups with which they identify or associate and from the legal community of law professors and law students.⁵²

The chief justice, if voting with the majority, determines who will write its opinion. Thus many of the Court’s most important decisions are penned by the chief justice. If the chief justice is not in the majority, the justice in the majority who has served on the Court the longest takes on the assignment.

Key Takeaways

Coverage of most criminal cases is decided by plea bargains. A few trials attract abundant coverage in news and entertainment media, which depict them unrealistically. The federal court system consists of ninety-four district courts, with at least one in each state, and thirteen appeals courts, each one with jurisdiction over several states. At the top of the judicial system is the Supreme Court. The Supreme Court’s decisions entail briefs, oral arguments, conferences, clerks, and opinions.

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1. Patricia Ewick and Susan S. Silbey, *The Common Place of*

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- Law (Chicago: University of Chicago Press, 1998), 18–19. [↵](#)
2. Amy Beach, *Ordinary Injustice: How America Holds Court* (New York: Metropolitan, 2009). [↵](#)
 3. Richard L. Fox, Robert W. Van Sickel, and Thomas L. Steiger, *Tabloid Justice: Criminal Justice in an Age of Media Frenzy*, 2nd ed. (Boulder, CO: Lynne Rienner Publishers, 2007). [↵](#)
 4. Quoted in Lola Ogunnaike, “As Court TV Gets Even Bolder, So Does Its Star,” *New York Times*, December 2, 2004, B1. [↵](#)
 5. “Simpson Trial and Trivia,” *US News & World Report*, October 15, 1995, 43. [↵](#)
 6. See Timothy O. Lenz, *Changing Images of Law in Film & Television Crime Stories* (New York: Peter Lang, 2003); and Anthony Chase, *Movies on Trial: The Legal System on the Silver Screen* (New York: New Press, 2002). [↵](#)
 7. Wende Vyborney Dumble, “And Justice for All,” in *Television Studies*, ed. Gary Burns and Robert J. Thompson (Westport, CT: Praeger, 1989), 106. [↵](#)
 8. Thane Rosenbaum, “Where Lawyers with a Conscience Get to Win Cases,” *New York Times*, May 12, 2002, AR 23. [↵](#)
 9. Kimberlianne Podlas, “Should We Blame Judge Judy? The Messages TV Courtrooms send Viewers,” *Judicature* 86, no. 1 (July–August 2002): 38–43. [↵](#)
 10. Donald R. Songer, Reginald S. Sheehan, and Susan B. Haire, *Continuity and Change on the United States Courts of Appeals* (Ann Arbor: University of Michigan Press, 2000). [↵](#)
 11. Lisa A. Kloppenberg, *Playing It Safe: How the Supreme Court Sidesteps Hard Cases and Stunts the Development of Law* (New York: New York University Press, 2001). [↵](#)
 12. Paul M. Collins Jr., *Friends of the Court: Interest Groups and Judicial Decision Making* (New York: Oxford University Press, 2008). [↵](#)
 13. Timothy R. Johnson, *Oral Arguments and Decision Making on the United States Supreme Court* (Albany: State University of

New York Press, 2004). [↩](#)

14. Timothy R. Johnson, Paul J. Wahlbeck, James F. Spriggs II, “The Influence of Oral Arguments on the U.S. Supreme Court,” *American Political Science Review* 100 (February 2006): 99–113. [↩](#)
15. Edward Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* (New York: Times Books, 1998), 6. [↩](#)
16. The classic early study of such bargaining is Walter Murphy’s *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964); see also Forrest Maltzman, James F. Spriggs II, and Paul J. Wahlbeck, *Crafting Law on the Supreme Court* (New York: Cambridge University Press, 2000); and Saul Brenner and Joseph W. Whitmeyer, *Strategy on the United States Supreme Court* (New York: Cambridge University Press, 2009). [↩](#)
17. Del Dickson, ed., *The Supreme Court in Conference (1940–1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions* (New York: Oxford University Press, 2001), xxvii. [↩](#)
18. Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton, NJ: Princeton University Press, 2006). [↩](#)

46. Reading: Power of the U.S. Supreme Court

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What is judicial review?
2. Why is *Marbury v. Madison* important?
3. What is judicial power and how is it constrained?
4. What are the leading judicial philosophies?

In Federalist No. 78, Alexander Hamilton described the courts as “the least dangerous” branch of government. Yet, they do possess considerable power. For example, because of the Court’s 5–4 decision in 2002, the more than seven million public high school students engaged in “competitive” extracurricular activities—including cheerleading, Future Farmers of America, Spanish club, and choir—can be required to submit to random drug testing.¹

Judicial Review

The federal courts’ most significant power is judicial review. Exercising it, they can refuse to apply a state or federal law because, in their judgment, it violates the U.S. Constitution.

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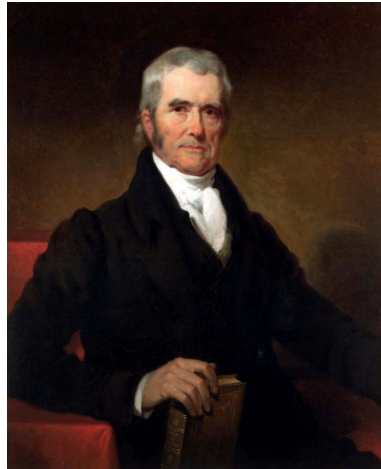
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Marbury v. Madison

Judicial review was asserted by the U.S. Supreme Court in 1803 in the decision of Chief Justice John Marshall in the case of *Marbury v. Madison* (5 US 137, 1803).

Marshall was chief justice of the Supreme Court from 1801 to 1835 and the author of many decisions, including *Marbury v. Madison*.

After losing the election of 1800, John Adams made a flurry of forty-two appointments of justices of the peace for Washington, DC in the last days of his presidency. His purpose in doing so was to ensure that the judiciary would remain dominated by his Federalist party. The Senate approved the appointments, and Secretary of State John Marshall stamped the officials' commissions with the Great Seal of the United States. But no one in the outgoing administration delivered the signed and sealed commissions to the appointees.



Portrait of John Marshall by Henry Inman. Marshall was chief justice of the Supreme Court from 1801 to 1835 and the author of many decisions, including Marbury v. Madison.

The new president, Thomas Jefferson, instructed his secretary of state, James Madison, not to deliver them. One appointee, William Marbury, sued, asking the Supreme Court to issue a writ of mandamus, a court order requiring Madison to hand over the commission.

The case went directly to the Supreme Court under its original jurisdiction. John Marshall was now chief justice, having been appointed by Adams and confirmed by the Senate. He had a

dilemma: a prominent Federalist, he was sympathetic to Marbury, but President Jefferson would likely refuse to obey a ruling from the Court in Marbury's favor. However, ruling in favor of Madison would permit an executive official to defy the provisions of the law without penalty.

Marshall's solution was a political masterpiece. The Court ruled that Marbury was entitled to his commission and that Madison had broken the law by not delivering it. But it also ruled that the part of the Judiciary Act of 1789 granting the Court the power to issue writs of mandamus was unconstitutional because it expanded the original jurisdiction of the Supreme Court beyond its definition in Article III; this expansion could be done only by a constitutional amendment. Therefore, Marbury's suit could not be heard by the Supreme Court. The decision simultaneously supported Marbury and the Federalists, did not challenge Jefferson, and relinquished the Court's power to issue writs of mandamus. Above all, it asserted the prerogative of judicial review for the Supreme Court.⁴

Judicial Review Assessed

For forty years after *Marbury*, the Court did not overturn a single law of Congress. And when it finally did, it was the *Dred Scott* decision, which dramatically damaged the Court's power. The Court ruled that people of African descent who were slaves (and their descendants, whether or not they were slaves) were not protected by the Constitution and could never be U.S. citizens. The Court also

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held that the U.S. Congress had no authority to prohibit slavery in federal territories.⁷

The pace of judicial review picked up in the 1960s and continues to this day. The Supreme Court has invalidated an average of eighteen federal laws per decade. The Court has displayed even less compunction about voiding state laws. For example, the famous *Brown v. Board of Education of Topeka, Kansas* desegregation case overturned statutes from Kansas, Delaware, South Carolina, and Virginia that either required or permitted segregated public schools. The average number of state and local laws invalidated per decade is 122, although it has fluctuated from a high of 195 to a low for the period 2000–2008 of 34.¹⁰

Judicial review can be seen as reinforcing the system of checks and balances. It is a way of policing the actions of Congress, the president, and state governments to make sure that they are in accord with the Constitution. But whether an act violates the Constitution is often sharply debated, not least by members of the Court.

Constraints on Judicial Power

There are three types of constraints on the power of the Supreme

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Court and lower court judges: they are precedents, internal limitations, and external checks.

Ruling by Precedent

Judges look to precedent, previously decided cases, to guide and justify their decisions. They are expected to follow the principle of stare decisis, which is Latin for “to stand on the decision.” They identify the similarity between the case under consideration and previous ones. Then they apply the rule of law contained in the earlier case or cases to the current case. Often, one side is favored by the evidence and the precedents.

Precedents, however, have less of an influence on judicial power than would be expected. According to a study, “justices interpret precedent in order to move existing precedents closer to their preferred outcomes and to justify new policy choices.”¹³

Precedents may erode over time. The 1954 Brown school desegregation decision overturned the 1896 Plessy decision that had upheld the constitutionality of separate but equal facilities and thus segregation.¹⁴ Or they may be overturned relatively quickly. In 2003, the Supreme Court by 6–3 struck down a Texas law that made homosexual acts a crime, overruling the Court’s decision seventeen years earlier upholding a similar antisodomy law in Georgia. The

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previous case “was not correct when it was decided, and it is not correct today,” Justice Kennedy wrote for the majority.¹⁹

Judges may disagree about which precedents apply to a case. Consider students wanting to use campus facilities for prayer groups: if this is seen as violating the separation of church and state, they lose their case; if it is seen as freedom of speech, they win it. Precedents may allow a finding for either party, or a case may involve new areas of the law.

Internal Limitations

For the courts to exercise power, there must be a case to decide: a controversy between legitimate adversaries who have suffered or are about to suffer in some way. The case must be about the protection or enforcement of legal rights or the redress of wrongs. Judges cannot solicit cases, although they can use their decisions to signal their willingness to hear (more) cases in particular policy areas.

Judges, moreover, are expected to follow the Constitution and the law despite their policy preferences. In a speech to a bar association, Supreme Court Justice John Paul Stevens regretted two of his majority opinions, saying he had no choice but to uphold the federal statutes.²² That the Supreme Court was divided on these

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cases indicates, however, that some of the other justices interpreted the laws differently.

A further internal limitation is that judges are obliged to explain and justify their decisions to the courts above and below. The Supreme Court's written opinions are subject to scrutiny by other judges, law professors, lawyers, elected officials, the public, and, of course, the media.

External Checks on Power

The executive and legislative branches can check or try to check judicial power. Through their authority to nominate federal judges, presidents influence the power and direction of the courts by filling vacancies with people likely to support their policies.

They may object to specific decisions in speeches, press conferences, or written statements. In his [2010 State of the Union address](#), with six of the justices seated in front of him, President Obama criticized the Supreme Court's decision that corporations have a First Amendment right to make unlimited expenditures in candidate elections.²⁵

Presidents can engage in frontal assaults. Following his overwhelming reelection victory, President Franklin D. Roosevelt proposed to Congress in February 1937 that another justice be added to the Supreme Court for each sitting justice over the age of seventy. This would have increased the number of justices on the court from nine to fifteen. His ostensible justification was the Court's workload and the ages of the justices. Actually, he was frustrated by the Court's decisions, which gutted his New Deal

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economic programs by declaring many of its measures unconstitutional.

The president's proposal was damned by its opponents as unwarranted meddling with the constitutionally guaranteed independence of the judiciary. It was further undermined when the justices pointed out that they were quite capable of coping with their workload, which was not at all excessive. Media coverage, editorials, and commentary were generally critical, even hostile to the proposal, framing it as "court packing" and calling it a "scheme." The proposal seemed a rare blunder on FDR's part. But while Congress was debating it, one of the justices shifted to the Roosevelt side in a series of regulatory cases, giving the president a majority on the court at least for these cases. This led to the famous aphorism "a switch in time saves nine." Within a year, two of the conservative justices retired and were replaced by staunch Roosevelt supporters.

Congress can check judicial power. It overcomes a decision of the Court by writing a new law or rewriting a law to meet the Court's constitutional objections without altering the policy. It can threaten to—and sometimes succeed in—removing a subject from the courts' jurisdiction, or propose a constitutional amendment to undo a Court decision.

Indeed, the first piece of legislation signed by President Obama overturned a 5–4 Supreme Court 2007 decision that gave a woman a maximum of six months to seek redress after receiving the first check for less pay than her peers.²⁸ Named after the woman who at the end of her nineteen-year career complained that she had been paid less than men, the Lilly Ledbetter Fair Pay Act extends the period to six months after *any* discriminatory paycheck. It also

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applies to anyone seeking redress for pay discrimination based on race, religion, disability, or age.

The Constitution grants Congress the power to impeach judges. But since the Constitution was ratified, the House has impeached only eleven federal judges, and the Senate has convicted just five of them. They were convicted for such crimes as bribery, racketeering, perjury, tax evasion, incompetence, and insanity, but not for wrongly interpreting the law.

The Supreme Court may lose power if the public perceives it as going too far. Politicians and interest groups criticize, even condemn, particular decisions. They stir up public indignation against the Court and individual justices. This happened to Chief Justice Earl Warren and his colleagues during the 1950s for their school desegregation and other civil rights decisions.

WANTED

for Impeachment



EARL WARREN

OCCUPATION: Chief Justice of U.S. Supreme Court. PREVIOUS JUDICIAL EXPERIENCE: None. Warren reportedly leans heavily upon the writings of alien sociologists as authority for many of his court decrees.

DESCRIPTION

WARREN IS CONSIDERED TO BE A DANGEROUS AND SUBVERSIVE CHARACTER. HE IS AN APPARENT SYMPATHISER OF THE COMMUNIST PARTY AND HAS RENDERED NUMEROUS DECISIONS FAVORABLE TO IT. HIS ACCOMPLICES INCLUDE JUSTICE FELIX FRANKFURTER, WHO IS A FORMER DEFENSE ATTORNEY FOR COMMUNISTS, AND JUSTICE HUGO BLACK, WHOSE SISTER-IN-LAW IS A REGISTERED COMMUNIST.

WARREN IS A RABID AGITATOR FOR COMPULSORY RACIAL MONGRELIZATION AND HAS HANDED DOWN VARIOUS DECISIONS COMPELLING WHITES TO MIX WITH NEGROES IN THE SCHOOLS, IN PUBLIC HOUSING, IN RESTAURANTS AND IN PUBLIC BATHING FACILITIES. HE IS KNOWN TO WORK CLOSELY WITH THE N.A.A.C.P. AND FAVORS THE USE OF FORCE AND COERCION TO COMPEL WHITE SCHOOL CHILDREN TO MINGLE INTIMATELY WITH NEGROES.

CRIMINAL RECORD

WARREN HAS BEEN ACCUSED OF GIVING AID AND COMFORT TO THE COMMUNIST PARTY ON FREQUENT OCCASIONS. HE IS GUILTY OF PROMOTING AND INCITING RIOT, DISORDER AND ANARCHY IN LITTLE ROCK AND ELSEWHERE IN THE SOUTH THROUGH HIS ATTEMPTS TO IMPOSE JUDICIAL TYRANNY UPON WHITE SOUTHERNERS. HE HAS ILLEGALLY TRANSFORMED THE SUPREME COURT INTO A SOVIET-TYPE POLITEBURO WITH POWER OVER THE CONGRESS AND OVER THE VARIOUS STATE GOVERNMENTS. AT HIS INSTIGATION FEDERAL MARSHALS AND BAYONET-EQUIPPED FEDERAL TROOPS HAVE BEEN EMPLOYED TO TERRORIZE AND INTIMIDATE WHITE CITIZENS OPPOSED TO HIS INTEGRATION DECREEES.

CAUTION

EARL WARREN IS A PANATIC WHO WILL STOP AT NOTHING TO ACHIEVE HIS GOALS. HE SHOULD BE HANDLED WITH EXTREME CAUTION, AND ALL DECREEES AND DECISIONS HANDED DOWN BY HIM SHOULD BE REGARDED AS SUSPECT. PERSONS WISHING TO AID IN BRINGING HIM TO JUSTICE SHOULD CONTACT THEIR CONGRESSMEN TO URGE HIS IMPEACHMENT FOR TREASON.

The controversial decisions of the Warren Court inspired a movement to impeach the chief justice.

How the decisions and reactions to them are framed in media reports can support or undermine the Court's legitimacy.

Comparing Content: *Brown v. Board of Education of Topeka, Kansas*

How a decision can be reported and framed differently is illustrated by news coverage of the 1954 Supreme Court school desegregation ruling.

The *New York Times* of May 18, 1954, presents the decision as monumental and historic, and school desegregation as both necessary and desirable. Southern opposition is acknowledged but downplayed, as is the difficulty of implementing the decision. The front-page headline states "High Court Bans School Segregation; 9-0 Decision Grants Time to Comply." A second front-page article is headlined "Reactions of South." Its basic theme is captured in two prominent paragraphs:

underneath the surface . . . it was evident that many Southerners recognized that the decision had laid down the legal principle rejecting segregation in public education facilities" and "that it had left open a challenge to the region to join in working out a program of necessary changes in the present bi-racial school systems.

There is an almost page-wide photograph of the nine members of the Supreme Court. They look particularly distinguished, legitimate, authoritative, decisive, and serene.

In the South, the story was different. The *Atlanta Constitution* headlined its May 18, 1954, story "Court Kills Segregation in Schools: Cheap Politics, Talmadge Retorts." By using "Kills" instead of the *Times*'s "Bans," omitting the fact headlined in the *Times* that the decision was unanimous, and including the

reaction from Georgia Governor Herman E. Talmadge, the *Constitution* depicted the Court's decision far more critically than the *Times*. This negative frame was reinforced by the headlines of the other stories on its front page. "Georgia's Delegation Hits Ruling" announces one; "Segregation To Continue, School Officials Predict" is a second. Another story quotes Georgia's attorney general as saying that the "Ruling Doesn't Apply to Georgia" and pledging a long fight.

The *Times*' coverage supported and legitimized the Supreme Court's decision. Coverage in the *Constitution* undermined it.

External pressure is also applied when the decisions, composition, and future appointments to the Supreme Court become issues during presidential elections.³¹ In a May 6, 2008, speech at Wake Forest University, Republican presidential candidate Senator John McCain said that he would nominate for the Supreme Court "men and women with . . . a proven commitment to judicial restraint." Speaking to a Planned Parenthood convention on July 17, 2007, Senator Barack Obama identified his criteria as "somebody who's got the heart, the empathy, to recognize what it's like . . . to be poor or African American or gay or disabled or old."

Judges as Policymakers

Judges have power because they decide cases: they interpret the Constitution and laws, and select precedents. These decisions often influence, even make, public policy and have important ramifications for social conflict. For example, the Supreme Court

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has effectively established the ground rules for elections. In 1962 it set forth its “one person, one vote” standard for judging electoral districts.³⁴ It has declared term limits for members of Congress unconstitutional. It has upheld state laws making it extremely difficult for third parties to challenge the dominance of the two major parties.³⁷

Judicial Philosophies

How willing judges are to make public policy depends in part on their judicial philosophies.⁴⁰ Some follow judicial restraint, deciding cases on the narrowest grounds possible. In interpreting federal laws, they defer to the views expressed in Congress by those who made the laws. They shy away from invalidating laws and the actions of government officials. They tend to define some issues as political questions that should be left to the other branches of government or the voters. When the Constitution is silent, ambiguous, or open ended on a subject (e.g., “freedom of speech,” “due process of law,” and “equal protection of the laws”), they look to see whether the

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practice being challenged is a long-standing American tradition. They are inclined to adhere to precedent.

Judicial restraint is sometimes paired with strict constructionism. Judges apply the Constitution according to what they believe was its original meaning as understood by a reasonable person when the Constitution was written.

Other judges follow a philosophy of judicial activism (although they may not call it that). Activist judges are willing to substitute their policy views for the policy actions or inaction of the other branches of government.

Judicial activism is often paired with loose constructionism, viewing the Constitution as a living document that the founders left deliberately ambiguous. In interpreting the Constitution, these judges are responsive to what they see as changes in society and its needs. A plurality of the Supreme Court found a right to privacy implicit in the Constitution and used it to overturn a Connecticut law prohibiting the use of contraceptives.⁴³ The justices later used that privacy right as a basis for the famous *Roe v. Wade* decision, “discovering” a woman’s constitutional right to an abortion.

The distinction between judicial restraint and strict constructionism on the one hand and judicial activism and loose constructionism on the other can become quite muddy. In 1995, the Supreme Court, by a 5–4 vote, struck down the Gun-Free School Zone Act—an attempt by Congress to keep guns out of schools.⁴⁶ The ruling was that Congress had overstepped its authority and that only states had the power to pass such laws. This

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decision by the conservative majority, interpreting the Constitution according to what it believed was the original intentions of the framers, exemplified strict constructionism. It also exemplified judicial activism: for the first time in fifty years, the Court curtailed the power of Congress under the Constitution's commerce clause to interfere with local affairs.⁴⁹ A 5–4 conservative majority has also interpreted the Second Amendment to prohibit the regulation of guns.⁵² This decision, too, could be seen as activist.

Political Views in Action

One doesn't have to believe that justices are politicians in black robes to understand that some of their decisions are influenced, if not determined, by their political views.⁵⁵ Judges appointed by a Democratic president are more liberal than those appointed by a Republican president on labor and economic regulation, civil rights and liberties, and criminal justice.⁵⁸ Republican and Democratic

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federal appeals court judges decide differently on contentious issues such as abortion, racial integration and racial preferences, church-state relations, environmental protection, and gay rights.

On rare occasions, the Supreme Court renders a controversial decision that graphically reveals its power and is seen as motivated by political partisanship. In December 2000, the Court voted 5–4, with the five most conservative justices in the majority, that the Florida Election Code’s “intent of the voter” standard provided insufficient guidance for manually recounting disputed ballots and that there was no time left to conduct recounts under constitutionally acceptable standards.⁶¹ This ensured that Republican George W. Bush would become president.

The decision was widely reported and discussed in the media. Defenders framed it as principled, based on legal considerations. Critics deplored it as legally frail and politically partisan. They quoted the bitter comment of dissenting Justice Stevens: “Although we may never know with complete certainty the identity of the winner of this year’s presidential election, the identity of the loser is perfectly clear. It is the nation’s confidence in the judge as an impartial guardian of the rule of law.”⁶⁴

Key Takeaways

In this section, we have explained how judicial review originated,

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how it is exercised, and what its effects are. We described the power of the courts, especially of the Supreme Court, and how it may be constrained by precedent, internal limitations, and external pressures. Justices make policy and are influenced by their ideological views and judicial philosophies.

1. *Board of Education v. Earls*, 536 US 822 (2002). [↴](#)
2. This discussion is based in part on Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Holt, 1996), introduction and chap. 13. For an analysis of the distinction between judicial review and judicial supremacy (the obligation of officials to follow the Court's reasoning in the future), and the politics involved in the latter, see Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton, NJ: Princeton University Press, 2007). [↴](#)
3. *Dred Scott v. Sandford*, 60 US 393 (1857). [↴](#)
4. Lawrence Baum, *The Supreme Court*, 10th ed. (Washington, DC: CQ Press, 2010). [↴](#)
5. Thomas G. Hansford and James F. Spriggs II, *The Politics of Precedent on the U.S. Supreme Court* (Princeton, NJ: Princeton University Press, 2006), 130. [↴](#)
6. *Plessy v. Ferguson*, 153 US (1896); *Brown v. Board of Education of Topeka, Kansas*, 347 US 484 (1954). [↴](#)
7. The earlier case was *Bowers v. Hardwick*, 478 US 1861 (1986); it was overruled by *Lawrence v. Texas*, 02-102 (2003). [↴](#)
8. Linda Greenhouse, "Justice Weighs Desire v. Duty (Duty Prevails)," *New York Times*, August 25, 2005, A1. [↴](#)
9. *Citizens United v. Federal Election Commission*, 558 US 50 (2010). [↴](#)
10. *Ledbetter v. Goodyear Tire & Rubber Co.* 550 US (2007). [↴](#)

11. Donald Grier Stephenson Jr., *Campaigns and the Court: The U.S. Supreme Court in Presidential Elections* (New York: Columbia University Press, 1999). [↴](#)
12. *Baker v. Carr*, 369 US 186 (1962). [↴](#)
13. See David K. Ryden, ed., *The U.S. Supreme Court and the Electoral Process* (Washington, DC: Georgetown University Press, 2000), especially the editor's "Overview," 1–4. [↴](#)
14. For the argument that the justices' behavior is largely determined by their individual policy preferences, see Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002); see also Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton, NJ: Princeton University Press, 2009). [↴](#)
15. *Griswold v. Connecticut*, 381 US 479 (1965). [↴](#)
16. *United States, Petitioner v. Alfonso Lopez, Jr.*, 514 US 549 (1995). [↴](#)
17. In *The Supreme Court and the American Elite, 1789–2008* (Cambridge, MA: Harvard University Press, 2009), Lucas A. Powe Jr. argues that the Court "serves ruling political coalitions" and attacks the conservative Rehnquist Court for overturning legislation that extended rights and privileges, and protected and improved society. [↴](#)
18. The cases are *District of Columbia et al. v. Heller*, 554 US (2008) and *McDonald et al. v. City of Chicago et al.* 561 US (2010). [↴](#)
19. For the argument that there is nothing wrong with a political court or with political motives in constitutional adjudication, see Terri Jennings Peretti, *In Defense of a Political Court* (Princeton, NJ: Princeton University Press, 1999), 73. [↴](#)
20. Robert A. Carp, Kenneth L. Manning, and Ronald Stidham, "President Clinton's District Judges: 'Extreme Liberals' or Just Plain Moderates?" *Judicature* 84, no. 5 (March–April 2001): 282–88; and "The Decision-Making Behavior of George W. Bush's Judicial Appointees: Far-Right, Conservative, or

Moderate?" *Judicature* 88, no. 1 (July–August 2004): 20–29. [↩](#)

21. *Bush v. Gore*, 121 S. Ct. 525 (2000); also see David Margolick, Evgenia Peretz, and Michael Shnayerson, "The Path to Florida," *Vanity Fair*, October 2004. [↩](#)
22. Quoted in Linda Greenhouse's analysis "Bush v. Gore: A Special Report; Election Case a Test and a Trauma for Justices," *New York Times*, February 20, 2001, A1. [↩](#)

47. Reading: Selecting Federal Judges

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What factors influence the selection of federal judges?
2. What is the confirmation process?
3. Under what circumstances are the media important in the confirmation (or not) of Supreme Court nominees?
4. Why are some nominations unsuccessful and others successful?

The president nominates all federal judges, who must then be approved by the Senate. President George W. Bush's nominees were screened by a committee of fifteen White House and justice department officials headed by the White House legal counsel. They looked for ideological purity, party affiliation, and agreement with the president on policy issues and often turned to the Federalist Society, a conservative lawyers' group, for nominees.

The appointments of judges to the lower federal courts are important because almost all federal cases end there.¹ Through lower federal judicial appointments, a president “has the

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opportunity to influence the course of national affairs for a quarter of a century after he leaves office.”⁴

Once in office, federal judges can be removed only by impeachment and conviction. Unless compelled to retire due to illness or incapacity, judges may time their departures so that their replacements are appointed by a president who shares their political views and policy preferences.⁷ Supreme Court Justice Souter retired in 2009 and Justice Stevens retired in 2010, enabling President Obama to nominate, and the Democratic-controlled Senate to confirm, their successors.

Choosing Supreme Court Justices

In nominating Supreme Court justices, presidents seek to satisfy their political, policy, and personal goals.¹⁰ They do not always succeed; justices sometimes change their views over time or may surprise the president from the start. “Biggest damfool mistake I ever made,” said President Dwight D. Eisenhower about his appointment of Chief Justice Earl Warren, who led the Supreme Court’s liberal decisions on civil rights and criminal procedure.

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The following are some other factors that can influence presidents' choices of Supreme Court nominees:¹³

- **Senate composition.** Whether the president's party has a majority or a minority in the Senate is a factor. In 1990, when the Democrats had a majority, Republican President George H. W. Bush nominated the judicially experienced and reputedly ideologically moderate David H. Souter, who was easily approved.
- **Timing.** The closer to an upcoming presidential election the appointment occurs, the more necessary it is to appoint a highly qualified, noncontroversial figure acceptable to the Senate, or at least someone senators would be reluctant to reject. Otherwise, senators have an incentive to stall until after the election, when it may be too late to obtain confirmation.
- **Public approval of the president.** The higher the president's approval ratings, the more nominating leeway the president possesses. But even presidents riding a wave of popularity can fail to get their nominees past the Senate, as was the case with Richard Nixon and his failed nominations of Clement Haynesworth and G. Harrold Carswell in 1970. So lacking were Carswell's qualifications that a senator defended him saying "Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation . . . and a little chance."¹⁶
- **Interest groups.** Nominees must usually be acceptable to

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interest groups that support the president and invulnerable (or at least resistant) to being depicted negatively—for example, as ideological extremists—by opposition groups, in ways that would significantly reduce their chances of Senate approval.

Nominations go to the Senate Judiciary Committee, which usually holds hearings. Whether senators should concern themselves with anything more than the nominee's professional qualifications is often debated. Arguably, “nothing in the Constitution, historical experience, political practice, ethical norms, or statutory enactments prohibits senators from asking questions that reveal judicial nominees’ views on political and ideological issues.”¹⁹

The next step is for the Judiciary Committee to vote on whether or not to send the nomination to the Senate floor. If it reaches the floor, senators then can vote to confirm or reject the nomination, or filibuster so that a vote is delayed or does not take place. Fewer than half of recent nominees to the federal appeals courts have been confirmed.²²

The Media and Supreme Court Nominees

Presidents have few opportunities to nominate Supreme Court justices, so the media provide intensive coverage of every stage of the nomination, from the time an incumbent justice leaves office

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until a replacement is confirmed by the Senate. The scrutiny is not necessarily damaging. President Clinton's nominees, Ruth Bader Ginsberg and Stephen Breyer, enjoyed Senate confirmation by votes of 97–3 and 87–9, respectively.

Sometimes the media determine a nominee's fate. President Reagan's nominee Douglas H. Ginsburg withdrew when news stories reported that he had smoked marijuana with some of his Harvard Law School students. The media were also intimately involved with the fates of Robert H. Bork and Clarence Thomas, particularly through their coverage of the Senate Judiciary Committee's hearings.

The Failed Nomination of Robert H. Bork

Bork was a distinguished lawyer who had taught at Yale University, served as solicitor general and acting attorney general of the United States, and was a judge on the U.S. Court of Appeals for the DC Circuit. He opposed civil rights laws and such Supreme Court decisions as *Roe v. Wade* allowing abortion. More than three hundred, mostly liberal, interest groups publicly opposed him.

The anti-Bork coalition adroitly used the media against him. It barraged two thousand journalists and seventeen hundred editorial writers with detailed packets of material criticizing him. It sponsored television and newspaper advertisements attacking him and asking Americans to urge their senators to vote against him.²⁵

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The nominee, touted by his supporters as urbane, witty, and brilliant, contributed to his demise by the impression he made on national television during five contentious days, during which he candidly testified about his legal and political philosophy, defended his views on issues and cases, and responded to questions from members of the Senate Judiciary Committee. Having refused the practice sessions (known as “murder boards”) and coaching offered by the White House, the professorial, scraggly bearded Bork was outmaneuvered by his opponents on the committee, who came up with such sound



Robert Bork with President Reagan. Self-confident at his public nomination by President Reagan, Bork would be defeated by the campaign waged against him by his opponents.

bites—featured on the evening television news—as, “You are not a frightening man, but you are a man with frightening views.”²⁸

The Senate rejected the nominee on October 23, 1987, by a vote of 58–42. The process generated a new verb in politics: “to bork,” which means to unleash a lobbying and public relations campaign, using and facilitated by the media.

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Link: The Bork Hearings

Watch the [video of the Bork hearings](#).

The Successful Nomination of Clarence Thomas

When a similar attack was waged against Clarence Thomas in the fall of 1991, the White House and the nominee's defenders were ready with a highly organized public relations campaign.

President George H. W. Bush nominated Clarence Thomas for the seat of retiring Justice Thurgood Marshall. Both were African Americans. But in contrast to the liberal Democrat Marshall, Thomas was a conservative Republican. The nomination was opposed by leaders of liberal and feminist organizations, and supported by their conservative counterparts. It divided the civil rights community, which wanted an African American justice, but not one as conservative as Thomas.

Because the nomination was shrewdly announced on the Monday afternoon preceding the Fourth of July weekend, reporters had time to transmit only the favorable story, spoon-fed from the White House, of the nominee's rise from poverty to prominence. Later, they reported some of his more controversial decisions during his one-year tenure as a federal appeals court judge.

News coverage of the nomination resumed with the Senate Judiciary Committee's hearings during which Thomas, in contrast to Bork, steadfastly avoided taking clear stands on controversial issues. He had been advised by his White House advisors to "(1) stress his humble roots; (2) [not] engage Senators in ideological debate; and (3) stonewall on abortion."³¹ At the conclusion of the

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hearings, Senate confirmation seemed narrowly assured. Then law professor Anita Hill accused Thomas of having engaged in sexual improprieties when she worked for him at the Department of Education and the Equal Employment Opportunity Commission.

With the salacious accusations, media coverage skyrocketed, especially when the hearings reopened featuring Hill's testimony and Thomas's rebuttals. Entertainment media made light of the issue: on *Saturday Night Live*, Chris Rock observed that "if Clarence Thomas looked like Denzel Washington this thing would never have happened." Thomas angrily accused his detractors of attempting "a high-tech lynching for uppity blacks." In the end, most senators voted as they had been leaning prior to Hill's testimony. Thomas was confirmed by a vote of 52–48.

Link: The Thomas Hearings

Watch the [Thomas hearings online](#).

Nomination of John G. Roberts Jr.

In July 2005, President George W. Bush made the first Supreme Court nomination in eleven years. He chose John G. Roberts Jr., a federal appeals court judge on the DC Circuit, to replace the moderate Republican Sandra Day O'Connor, who was retiring. Roberts was then nominated to be chief justice after the death of incumbent William H. Rehnquist.

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During three days of testifying before the Senate Judiciary Committee, the erudite and engaging Roberts deflected questions by comparing judges to umpires and saying that he would be guided by the law. On September 29, 2005, the Republican-controlled Senate approved him as chief justice of the U.S. Supreme Court by a vote of 78–22.



The media's intense attention to Supreme Court nominees is caught in this photograph showing the gaggle of journalists around John G. Roberts as he meets with the president.

Link: John G. Roberts' Opening Statement

Watch the [opening statement of John G. Roberts](#).

Nominations of Harriet Miers and Samuel A. Alito Jr.

Bush next turned to fill Sandra Day O'Connor's vacant seat. He was under pressure, even in public statements from his wife, to appoint a woman to succeed O'Connor. He nominated his White House general counsel and close friend, Harriet Miers. She had never served as a judge, had little expertise on constitutional matters, and held few reported positions on important issues.

Conservatives, including officeholders, interest-group leaders, columnists, pundits, and bloggers, rejected the president's assurance that she was a candidate they could trust. Leaders of the Senate Judiciary Committee rejected her answers to their questions as "inadequate, insufficient and insulting." Senators expressed

doubts to the news media about her qualifications and knowledge of the Constitution. After twenty-four days of a ferocious barrage of criticism, all reported and amplified by the media, Ms. Miers withdrew from consideration.

President Bush then nominated a federal appeals court judge, Samuel A. Alito Jr. The judge had a record from his time in the Reagan administration and from fifteen years of judicial decisions of deferring to the executive branch, favoring business, and rejecting abortion rights.

In testifying before the members of the Senate Judiciary Committee, Judge Alito followed the stonewalling script. Nothing he said could be used against him by Democratic senators on the committee or by the media. A dramatic moment in his favor, shown on television, occurred when his wife, upset by the questioning directed at him, walked out of the hearings in tears. Soon after the hearings, Judge Alito was approved by 58–42 (54 Republicans plus 4 Democrats against 40 Democrats plus 1 Republican and 1 Independent).

Links: The Miers Nomination and Alito Nomination

Learn more about the [Miers nomination](#).

Learn more about the [Alito nomination](#).

Nominations of Sonia Sotomayor and Elena Kagan

When Justice Souter resigned from the Court, President Obama, making his first nomination, picked Sonia Sotomayor to replace him. Her confirmation hearings in July 2009 followed the script

that had worked for Roberts and Alito. She refused to opine about cases or identify a judicial philosophy other than “fidelity to the law.” Sotomayor would be the first Hispanic and third woman ever appointed to the Court. She would not change its ideological balance, and there were no media revelations to derail her prospects. Since the Democrats had sixty votes in the Senate, it came as no surprise that she was confirmed by a vote of 68–31.

A similar pattern followed the resignation of Justice John Paul Stevens. Obama’s nominee, Solicitor General and former Dean of the Harvard Law School Elena Kagan, was unlikely to change the ideological balance on the Court. She, too, largely stonewalled the hearings and was confirmed by the Senate on August 5, 2010, by a vote of 63–37.

Links: The Sotomayor Nomination and Kagan Nomination

Learn more about the [Sotomayor nomination](#).

Learn more about the [Kagan nomination](#).

Key Takeaways

Presidents usually look to nominate as federal judges people who share their ideological, policy, and partisan views. Nominations attract intense scrutiny from interest groups and the media and can be controversial and contentious. They are subject to confirmation by the Senate, which may delay, block, or approve them. We explain why the nominations of Robert H. Bork and Harriet Miers failed and why those of Clarence Thomas, John G. Roberts Jr., Samuel A. Alito Jr., Sonia Sotomayor, and Elena Kagan were successful.

1. For a study of lower federal court selection, see Sheldon Goldman, *Picking Federal Judges* (New Haven, CT: Yale University Press, 1997). [↓](#)
2. From Tom Charles Huston to President Richard Nixon, 25 March 1969, in WHCF ExFG 50, the Judicial Branch (1969–1970), Box 1, White House Central Files, FG 50, Nixon Presidential Materials Project, College Park, Maryland. [↓](#)
3. Lee Epstein and Jeffrey A. Segal, *The Politics of Judicial Appointments* (New York: Oxford University Press, 2005). [↓](#)
4. Michael Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees* (Lawrence: University Press of Kansas, 2004), thinks the confirmation process is acceptable and effective; but Christopher L. Eisgruber, *The Next Justice: Repairing The Supreme Court Appointments Process* (Princeton, NJ: Princeton University Press, 2007), wants the selection process to produce justices with moderate judicial philosophies; and Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process* (New York: Oxford University Press, 2005), thinks the process is a mess and proposes various ways of electing Supreme Court justices. [↓](#)
5. See David Alistair Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (Chicago: University of Chicago Press, 1999), 4–7 and 17. [↓](#)
6. Warren Weaver Jr., “Carswell Nomination Attacked and Defended as Senate Opens Debate on Nomination,” *New York Times*, March 17, 1970, A11. [↓](#)
7. Albert P. Melone, “The Senate’s Confirmation Role in Supreme Court Nominations and the Politics of Ideology versus Impartiality,” *Judicature* 75, no. 2 (August–September 1991): 529; also Nancy Scherer, *Scoring Points: Political Activists and the Lower Federal Court Confirmation Process* (Palo Alto, CA: Stanford University Press, 2005). [↓](#)
8. Sarah A. Binder and Forrest Maltzman, *Advice and Dissent: The Struggle to Shape the Federal Judiciary* (Washington, DC:

Brookings Institution Press, 2009). [↵](#)

9. Michael Pertschuk and Wendy Schaetzel, *The People's Rising* (New York: Thunder's Mouth Press, 1989), 155; also Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* (New York: Norton, 1989). [↵](#)
10. Senator Howard Metzenbaum (D.-Ohio), cited in Mark Gitenstein, *Matters of Principle* (New York: Simon & Schuster, 1992), 239. [↵](#)
11. Mark Gitenstein, *Matters of Principle* (New York: Simon & Schuster, 1992), 337. [↵](#)

48. Reading: The Courts in the Information Age

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. How do Supreme Court justices interact with the media?
2. How do reporters go about covering the Supreme Court?
3. How are the Supreme Court and its decisions depicted in the information age?
4. What are the consequences of these depictions?

Media Interactions

Occasionally, Supreme Court justices give speeches about broad constitutional issues, talk off the record with a journalist, or rarely, engage in an on-the-record interview.¹ They may write a book

1. An exception was Justice William J. Brennan Jr., who, in 1986, engaged in sixty hours of candid interviews with reporter Stephen Wermiel and allowed him to go through his papers. The agreement was that, after Brennan retired, the reporter would write his biography. Brennan retired in 1990. The book finally appeared in 2010: Sol Stern and Stephen Wermiel, *Justice Brennan*:

setting forth their judicial philosophies and go on television to publicize it.² Justice Stephen Breyer appeared on *Larry King Live* to promote his latest book. He was circumspect, carefully avoiding discussing cases in any detail or revealing the Court's deliberations.⁵

The more flamboyant Justice Antonin Scalia has appeared on *60 Minutes* to promote a book he coauthored on how to persuade judges. During the interview, he did discuss some of his views.⁸ Also, he does not shy away from voicing controversial opinions in statements and speeches, saying, for example, “you would have to be an idiot” to believe that the Constitution is a living document.¹¹ (Watch the [Scalia interview online](#).) Justice Ruth Bader Ginsberg, in a speech that could be seen as a response and that was posted on the Court's website, expressed her preference for

Liberal Champion (Boston: Houghton Mifflin Harcourt, 2010).

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11. Justice Scalia appeared on the American Civil Liberties Union (ACLU) panel on the state of civil liberties televised by C-SPAN (October 15, 2006), explaining and defending some of his decisions.

“dynamic” over “static, frozen-in-time constitutional interpretation.”¹²

Withal, most judges shun the media. They rarely hold press conferences or discuss current cases.¹⁵ Toni House, who served as the Supreme Court’s public information officer for many years, described her job as “peculiar in Washington because this office doesn’t spin, it doesn’t flap, it doesn’t interpret . . . When an opinion comes down, we put it in the hands of a reporter.”¹⁸¹⁹ Nowadays, the court does frequently release audio of the oral arguments.

The main way in which justices communicate with the media is through the legal language of their written opinions. Even when a case is controversial and the Supreme Court is divided 5–4, the justices use such language in their opinions to justify their decisions. No matter how impassioned, this legal language makes it difficult for reporters to raise the subjects of partisanship or politics when writing stories about the Court’s actions.

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Majesty and Secrecy

The justices have two powerful weapons that help them present to the public an image of themselves as above politics and partisanship: majesty and secrecy.

Majesty begins with the Supreme Court building, which commands awe and respect. It continues with what reporters see inside the courtroom—all that they see—which is designed to elevate the justices and the judicial process to a magisterial and impersonal status: the ornate setting, the ritual, the ceremony, the justices presiding in their robes,

seated on high-backed chairs, physically and metaphorically raised up. This effect is conveyed most visibly in the official photograph of the nine justices.



The Supreme Court building: so magisterial and redolent of justice achieved away from the hurly-burly of politics.

Enduring Image: Photos of the Supreme Court Justices

The traditional group photograph that the members of the Supreme Court allow to be taken shows them arrayed and authoritative in their impressive institutional setting. This enduring image enhances the justices' standing and contributes to people's acceptance of their rulings.



Official Photo of the Supreme Court Justices

But what if they were shown discussing cases as bargainers? Or engaged in a nonjudicial activity? Or caught in an embarrassing moment in the way that celebrities are trapped by the tabloids? Such photographs would detract from the justices' authority and the Court's legitimacy.

Note the furor provoked by *America (The Book)*²¹ by Jon Stewart and the writers of *The Daily Show with Jon Stewart*. Wal-Mart refused to stock it. The reason: one page of this parody of a civics textbook shows the faces of the Supreme Court justices superimposed over naked elderly bodies. The facing page has cutouts of the justices' robes and a caption asking readers to

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“restore their dignity by matching each justice with his or her respective robe.”

The second way in which judges obtain favorable media coverage is through secrecy. Denied to reporters—and therefore absent from the news—are the justices’ discussions on granting review, conference proceedings, and the process of creating a majority through opinion writing. The press is not privy to the decision-making processes, the informal contacts among the justices, the appeals and persuasion, the negotiation and bargaining, and the sometimes pragmatic compromises.²⁴

Cameras in the Courtroom

Cameras are prohibited in the Supreme Court during public sessions. The stated reasons for the ban are that it prevents lawyers and justices from playing to the cameras and avoids any physical disruption of the chamber. There is also concern that news coverage would emphasize the brief oral arguments, which can be misleading—since the essence of appellate advocacy before the Court is in the written briefs. The unstated reasons are that cameras might not only cause the justices to lose their cherished anonymity and privacy but also undermine the Court’s mystique by allowing people to see and judge the justices’ behavior.

Television cameras are excluded from most other federal courts for many of the same reasons. They are allowed in all state courts under conditions and restrictions, for example, consent of the

24. When he retired in 1994, Justice Harry Blackman gave his papers to the Library of Congress on the condition that they remained closed for five years.

judge, agreement of the attorneys for both sides, fixed placement, and a prohibition against showing jurors.

Reporters

Reporters covering the Supreme Court tend to be protective of the institution and the justices. In part, this is because they see law and politics as separate and different. Also, they do not have access to the kind of behavior and information that might lead them to think of and frame the Court in terms of policy and, particularly, politics.

Even when reporters at the Court are familiar with the facts and the oral arguments and have read the briefs of cases, they have more than enough to do just summarizing the justices' decisions. These decisions can be complex, containing fifty to a hundred or more pages of dense text, often with detailed concurring and dissenting opinions. At its busiest time of the year, the Court releases several opinions at once; over 40 percent are issued during the last three weeks of the Court's term. Reporters have little time to check over the cases and opinions, decide which ones are important, and prepare a report in layperson's language.

On controversial cases, reporters are bombarded by reactions and analyses from the parties to the case, their attorneys, legal experts, and interest groups. Most of these people are usually available on the plaza in front of the Supreme Court, where microphones are set up for them.

After a controversial Supreme Court decision, reporters can interview the attorneys, their clients, and interest-group spokespersons.

Reporters may include some of these views in their stories and show that the justice's decisions have effects on people's lives. But they usually lack the time and space to explain the decisions in explicitly political terms.



The Supreme Court plaza. After a controversial Supreme Court decision, reporters can interview the attorneys, their clients, and interest-group spokespersons.

Media Depictions of the Supreme Court

After the acrimony of *Bush v. Gore*, the four dissenting justices returned to collegiality. Media and public discussion of the decision as partisan politics died down. The authority and legitimacy of the Court and the justices were reaffirmed.

Apolitical Coverage

Contributing to the return to normalcy, the media usually depict the Supreme Court as apolitical, that is, above and beyond politics and partisanship.

Only infrequently do stories about individual cases decided by the Supreme Court mention their political implications and the justices'

partisan positions.²⁵ Our analysis of all Associated Press (AP) wire-service reports of the Supreme Court’s significant rulings during a typical term (2002–3) for cases decided by a majority of 5–4 through 7–2 revealed that the terms “partisan” or “partisanship” were rare and the words “Democrat,” “Republican,” “political,” and “politics” never appeared. Editorial writers in newspapers across the country infrequently “use ideological labels to identify voting coalitions on the Court and to characterize individual justices . . . The Court and its members are set apart.”²⁸

Journalists do refer to ideology when covering Supreme Court confirmation battles, that is, in the time before the nominees become members of the Court. And when the Court is obviously ideologically divided, the media characterize the blocs as conservative and liberal: for example, the 2006–7 term, when a third of all the cases (twenty-four) were decided by a 5–4 vote, with Chief Justice Roberts leading the identical five-man conservative majority on nineteen of them. A fresh reporter at the Court can see it politically. Thus the *New York Times*’s Adam Liptak, summarizing the 2010 term, cited studies by and data from political scientists to identify the Court as “the most conservative one in living memory.”³¹ He subsequently wrote an article documenting that the

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justices usually selected law clerks who shared their ideological views.³⁴ But such a perspective is exceptional.

Limited Coverage

Media coverage of the Supreme Court is limited. Many of the Court's decisions are not reported by the news media or are recounted only briefly. The television networks give less than 4 percent of their coverage of the three branches of government to the Supreme Court. The leading news magazines focus on only 10 percent of the cases. Even a reader relying on the *New York Times* would not know about many of the Court's decisions.

A few cases, unrepresentative of the Court's docket, usually those involving the First Amendment or other rights, receive extensive coverage, as do cases arousing intense interest-group involvement. Typical is the widespread coverage given to the Court's 5–4 decision upholding a voucher system that partially pays tuition at religious schools.³⁷ Missing are decisions about contracts and taxes, criminal law and procedure, and federal statutes and regulations, except for cases involving big-name litigants.⁴⁰

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Oversimplified Coverage

Coverage of the Court is often oversimplified. For example, in news accounts, the Court's refusal to grant certiorari is said to endorse the lower court's decision, when all it means is that the Court has refused to review the case. In a typical example, an NBC news anchor misleadingly announced that "the Court *upheld* a ban on dances in the public school of Purdy, Missouri, where many people are Southern Baptists who believe that dancing is sinful and satanic."⁴³

New Media

The new media can breach the bulwark of majesty and secrecy protecting the Supreme Court. They can provide political and critical perspectives and cover more cases in more detail.

Reluctantly and cautiously, the Supreme Court has entered the information age. The Court's [official website](#) now contains transcripts of oral arguments on the same day they are made. It also provides the complete opinions of each case on the docket since the 2003 term and instructions on how to obtain opinions for earlier cases. In 2009, former Justice O'Connor launched a website called "Our Courts," which explains courts in relation to the Constitution. Much of the other information now available, however—such as on [Scotusblog.com](#), the go-to site for Supreme Court coverage—is intended for the legal community.

The Internet does contain commentary on the Court's decisions.

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Blogs range from the lighthearted and gossipy [“Underneath Their Robes,”](#) which breaks with judges’ aloofness and inaccessibility, to the academic [“Becker-Posner” blog](#) with essays by the two authors and a comment forum for reader response. There is now even an [“Anti-Becker-Posner-Blog.”](#)

In an example of new-media innovation in covering a politically significant trial, six bloggers joined together to create [Firedoglake](#). The site offered, from a liberal perspective, intensive, real-time coverage of the perjury trial of Lewis Libby Jr., former top aide to Vice President Dick Cheney. The coverage went beyond anything provided by the mainstream media.

Media Consequences

The news media’s coverage makes it hard for people to see the political orientation of judges engaged in making and changing public policies. This is likely to reinforce the legitimacy of the courts and confidence in judges.

Indeed, 80 percent of the people in a survey conducted for the American Bar Association strongly agreed or agreed that “in spite of its problems, the American justice system is still the best in the world.”⁴⁶ Fifty-four percent strongly agreed that “most judges are extremely well qualified for their jobs.” Most faith was expressed in the Supreme Court, with 50 percent having strong confidence in it and only 15 percent having slight or no confidence.

However, reports of dramatic and sensational cases and their depictions in popular culture do make people quite critical of the

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way the legal system appears to operate.⁴⁹ Fifty-one percent of those surveyed agreed that it “needs a complete overhaul.” Close to 80 percent agreed that “it takes too long for courts to do their job” and “it costs too much to go to court.”

Tabloid trials can increase people’s knowledge of some aspects of the legal system. In a survey conducted in the wake of the overwhelmingly publicized criminal and civil cases involving O. J. Simpson, almost everyone knew that anyone accused of a crime has the right to be represented in court by a lawyer and that a defendant found not guilty in a criminal trial can be sued in a civil trial. Two-thirds knew that a criminal defendant is innocent until proven guilty, although one-third mistakenly believed the reverse.

Key Takeaways

The justices of the Supreme Court interact with reporters mainly through the legal language of their written decisions. They accentuate the Court’s majesty while concealing its inner workings and excluding cameras. Reporters perceive the Supreme Court primarily as a legal institution. They lack the time and space to report in detail on its activities. News media coverage of the Supreme Court is incomplete and oversimplified, usually depicting the justices as apolitical. These depictions reinforce the legitimacy of courts and people’s confidence in judges. Americans believe that the legal system is the best in the world, but are critical of how it operates.

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1. Antonin Scalia, with replies by scholars, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, NJ: Princeton University Press, 1998); also Stephen G. Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Knopf, 2005). [↩](#)
2. Stephen G. Breyer, *Making Our Democracy Work: A Judge's View* (New York: Knopf, 2010); the interview was on September 15, 2010. [↩](#)
3. April 27, 2008; the book is Antonin Scalia and Bryan Garner, *Making Your Case: The Art of Persuading Judges* (Eagan, MN: Thomson West, 2008). [↩](#)
4. Adam Liptak, "Public Comments by Justices Veer Toward the Political," *New York Times*, March 19, 2006, 22. [↩](#)
5. Our discussion of interactions draws from Richard Davis, *Decisions and Images: The Supreme Court and the Press* (New York: Prentice Hall, 1994); also Robert E. Drechsel, *News Making in the Trial Courts* (New York: Longman, 1983). [↩](#)
6. 52 [↩](#)
7. Jon Stewart, *America (The Book)* (New York: Warner Brothers, 2004). [↩](#)
8. A study of all decisions handed down by the Court during its 1998 term corroborates our findings: see Rorie L. Spill and Zoe M. Oxley, "Philosopher Kings or Political Actors? How the Media Portray the Supreme Court," *Judicature* 87, no. 1 (July–August 2003): 22–29. [↩](#)
9. Jan P. Vermeer, *The View from the States: National Politics in Local Newspaper Editorials* (Lanham, MD: Rowman &

52. Quoted in Elliot E. Slotnick and Jennifer A. Segal, *Television News and the Supreme Court* (New York: Cambridge University Press, 1998), 33–34.

- Littlefield, 2002), 110. [↩](#)
10. Adam Liptak, “Court Under Roberts Is Most Conservative in Decades,” *New York Times*, July 24, 2010, A1. [↩](#)
 11. Adam Liptak, “Choice of Clerks Highlights Court’s Polarization,” *New York Times*, September 7, 2010, A1, 14, and 15. [↩](#)
 12. *Zelman v. Simmons-Harris*, US Lexis 4885 (June 27, 2002). [↩](#)
 13. Susan Michelich, “Media Coverage of the Supreme Court, 1999–2000 Term in *USA Today* and *ABC News*” (paper for “Politics and the Media,” Duke University, November 2000), 7–8. [↩](#)
 14. NBC News, April 15, 1990, cited in Elliot E. Slotnick and Jennifer A. Segal, *Television News and the Supreme Court* (New York: Cambridge University Press, 1998), 205 (their emphasis). [↩](#)
 15. The American Bar Association, “[Perceptions of the U.S. Justice System](#).” [↩](#)
 16. These data come from Richard L. Fox and Robert W. Van Sickel, *Tabloid Justice: Criminal Justice in an Age of Media Frenzy* (Boulder, CO: Lynne Rienner Publishers, 2001), chap. 4 and the second edition, coauthored with Thomas L. Steiger (2007), chap. 4. [↩](#)

49. Putting It Together

Summary

The federal court system consists of ninety-four district courts, with at least one in each state, and thirteen appeals courts, each one with jurisdiction over several states. At the top of the judicial system is the Supreme Court. The Supreme Court's decisions entail briefs, oral arguments, conferences, clerks, and opinions.

We have explained how judicial review originated, how it is exercised, and what its effects are. We described the power of the courts, especially of the Supreme Court, and how it may be constrained by precedent, internal limitations, and external pressures. Justices make policy and are influenced by their ideological views and judicial philosophies.

Presidents usually try to nominate as federal judges people who share their ideological, policy, and partisan views. Nominations attract intense scrutiny from interest groups and the media and can be controversial and contentious. They are subject to confirmation by the Senate, which may delay, block, or approve them. We examined why the nominations of Robert H. Bork and Harriet Miers failed and why those of Clarence Thomas, John G. Roberts Jr., Samuel A. Alito Jr., Sonia Sotomayor, and Elena Kagan were successful.

News media coverage of the Supreme Court is incomplete and oversimplified, usually depicting the justices as apolitical. These depictions reinforce the legitimacy of courts and people's confidence in judges. Americans believe that the legal system is the best in the world but are critical of how it operates.