AP US GOVERNMENT AND POLITICS



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AP U.S. Government and Politics

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Licensing

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CHAPTER OVERVIEW

1: Thinking Like a Political Scientist

1.1: What is Politics?

1.2: The Nature of Political Power

1.3: Who Has Power in U. S. Politics?

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1.1: What is Politics?

"Politics is the shadow cast on society by big business."

–American Philosopher John Dewey (1)

The Definition of Politics

Political scientists study politics in its many forms. At least one professor would say that politics is everywhere. That may be true. If it is, it requires political scientists to cover considerable ground. However, they typically do not concern themselves with things like office politics, family politics, or student-government politics. Generally speaking, political scientists are interested in political matters of consequence at the city, state, national, or international level.

Political scientist **Harold D. Lasswell** came up with a concise definition of politics that provides a starting point for this course. According to him, politics can be defined as "who gets what, when, and how." (2)

> ***Who*** can refer to any member of a **polity**—a political organization that includes actors such as individuals, groups, corporations, unions, and politicians.
>
> ***What*** might refer to government programs, societal resources, access to rights and privileges, or something as banal as tax breaks.
>
> ***When*** refers to timing. Often the timing of a thing can be as important as the thing itself. As Martin Luther King, Jr. wrote in his *Letter from Birmingham Jail* in 1963, "Justice too long delayed is justice denied."
>
> ***How*** are the processes through which someone gets something in a polity, whether it be democratic or undemocratic, open or closed, fair or unfair; or which institutional arrangements are involved, such as constitutions, regulations, and laws; or which practices are employed, such as voting, lobbying, demonstrating, and decision making.

Lasswell's simple definition of ***gets*** is an important word because it implies that someone has to make a choice among competing interests, that resources or benefits have to be allocated, and that the object of politics is limited in some way. After all, if the pie were larger than our combined appetites, we wouldn't have to struggle over who gets a piece.

Try this **definition of politics**: Politics is the authoritative and legitimate struggle for limited resources or precious rights and privileges within the context of government, the economy, and society.

For this course, we will concern ourselves with the commonly understood practice of authoritatively and legitimately allocating resources—i.e., of who gets what. Of course, these are loaded terms, because one person's view of authoritative and legitimate struggles over allocating resources might be different from another's view. What we mean here is that regularized, established, legal, and generally accepted procedures are employed in allocating resources. If I work through the system and get more resources than you, it's politics. If I steal something from you, it's not politics.

We also want to highlight the word *struggle*. Politics in the United States is often a chaotic and painful clash of entrenched interests. Sometimes, a reasonable accommodation can be reached that satisfies all, but often the solution grossly favors one set of interests over others. As we'll see—and as hinted at in John Dewey's quote above—the struggle is often an unfair one, as those with the most resources and the most persistence have clear advantages in getting what they want out of the political system.

Government is a prime location for political struggles. **Government** refers to the collection of institutions and people who occupy them that is recognized as the legitimate authority to make decisions regarding the whole public in a defined geographic territory. An **institution** is an established organization, custom, or practice formed for a specific public purpose. Governments are composed of institutions like legislatures, courts, bureaucratic offices, and the like. Other institutions like civil marriage or corporations exist because government establishes rules and practices by which they operate.

Our definition broadens the traditional scope of politics to include the economy and society. Politics exists outside of legislative votes, Supreme Court nominations, and the voting behavior of citizens. These other contexts are important considerations. For example, how have historical developments preconditioned certain outcomes in today's political world? Are economic and social considerations such as race, gender, and class relevant in allocating resources or accessing rights and privileges? Should people have a say in all major decisions that affect them? At work? In school? In church? If people do not have the ability to be full-

fledged political actors in those settings, what impact would that have on their behavior and approach to traditional political campaigns, legislative debates, political news, and elections?

Political Imagination



Imagine a Different Society

Throughout this course, you should exercise your political imagination. In other words, ask “What if” questions: What if being informed about political issues and being registered to vote were a high school graduation requirement? What if we got rid of the nomination process and chose our candidates by lottery instead of primaries and caucuses? (Selecting decision-makers by lottery is an idea as old as the ancient Greeks.) What if every person were given an equal amount of money by the government each year to donate to a political cause and that money was the only money allowed to be spent on politics? What if we required that four of the nine Supreme Court justices could *not* possess a law degree?

Asking these kinds of questions gets us into two habits:

1) Envisioning a different and potentially better future

2) Realizing that our future is up to us.

All the good things in our country (national parks, public libraries, and public transportation)—and all the negative things (homelessness, suburban sprawl, and payday loan sharks)—are the result of political decisions that our polity made sometime in the past. We don’t have to accept our predecessors’ bad political decisions. We can make new, hopefully, better decisions. It just takes imagination, organization, and action.

A Word About Terminology

The term "American" has different meanings in different parts of the world. Throughout this course, we have tried to use the United States or U.S., as much as possible.

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1.2: The Nature of Political Power

"There's not enough understanding of the realities of power. In a democracy, supposedly we hold power by what we do at the ballot box, so therefore the more we know about political power the better our choices should be and the better, in theory, our democracy should be."

–Journalist Robert Caro [1]

All definitions of politics include the struggle over resources, rights, or privileges. Lasswell called this struggle 'who gets what', which ties into power. At the most basic level, **power** is the ability to prevail in struggles over resources, rights, or privileges. Generally, power is not evenly distributed in a polity. Some members of a polity are more likely to succeed in their struggle than are others. When some actors have a historical track record of prevailing in political struggles, it can warp the very system itself in ways that allow those actors to continue to prevail.

The First Dimension of Power: Formal Decision Making



The First Dimension of Power is Visible in Formal Votes.

Early 20th Century political and social theorists focused on the results of ***formal decision-making,*** which we will call **the first dimension of power**. In the 1961 book *Who Governs*, political theorist Robert Dahl argued that local elites from a variety of interests compete with each other for decision-making power and that these elites often compromise to reach a result. His focus was on outcomes: which decision was eventually reached on each issue?

In an earlier journal article, Dahl argued that "A has power over B to the extent that he can get B to do something that he would not otherwise do." [2] This definition would also apply if A could prevent B from doing something that B wanted to do. For example, Congress (A) might get the president (B) to refrain from vetoing a bill that the president (B) disliked if it appeared very likely that Congress (A) would override the president's (B) veto. The advantage of the first dimension of power is that it focuses on observable outcomes, making it easier for political scientists to analyze a given situation. But this advantage is also a disadvantage, for it compels us to focus on the obvious at the expense of more subtle manifestations of power.

The Second Dimension of Power: Mobilization of Bias

The second dimension of power is also often called the ***mobilization of bias***. In 1962, political scientists **Peter Bachrach** and **Morton S. Baratz** wrote their "Two Faces of Power" essay, which indicated that power is exercised in ways other than that described by Dahl. They argue that before we can look at the results of formal decision-making, we need to look at the mobilization of bias existing in the political system being analyzed. In other words, we should look at "the dominant values, the myths, and the established political procedures and rules of the game" as well as look at "which persons or groups . . . gain from the existing bias and which . . . are handicapped by it." [3]

For example, Bachrach and Baratz describe that A can obviously force B to do something, but "power is also exercised when A devotes his energies to creating or reinforcing social and political values and institutional practices that limit the scope of the political process to public consideration of only those issues which are comparatively innocuous to A. To the extent that A succeeds in doing this, B is prevented, for all practical purposes, from bringing to the fore any issues that might in their resolution be seriously detrimental to A's set of preferences." [4]

Mobilization of bias occurs in a myriad of different ways. Powerful participants can set the agenda of what is considered an "important" political issue, or they can structure political institutions in ways that preserve their own interests or power, or they can arrange procedural rules to make it difficult for others to challenge the system. Ensuring that a decision is not reached means that A

can prevent B from obtaining what B wants through no apparent act at all. If A can stack the rules of the political game so that B's issues never get addressed, then A has won without ever having to make a decision openly.

The Third Dimension of Power: Preference Shaping

Political and social theorist **Steven Lukes** put forward a **third dimension of power,** also referred to as *preference shaping*. In his *Power: A Radical View (*1974), Lukes acknowledges that Bachrach and Baratz contributed immensely to our understanding of power. However, Lukes argues that both of the first two dimensions of power are based on the assumption of conflict, where A and B have different preferences on key issues. In the first dimension of power, A's preferences win over B's preferences in a formal decision-making setting—a city council vote, an executive decision, or a court ruling. In the second dimension, the rules of the game are arranged in such a way that A's preferences either get preferential treatment in the decision-making process or B's preferences never get heard in the first place.

But what if B has real interests and preferences that differ from A's, but B is not even conscious of his own interests because of A's power? This may occur because B has internalized A's values as his own. Perhaps A controls the media to such an extent that B assumes that what is good for A is also good for B. Maybe A has so structured the educational system that B cannot conceive of the world being any different than the *status quo*, with A on top and B on the bottom of the class structure. Maybe B has been powerless for so long, that B has internalized the idea that she doesn't deserve to get what she wants.

Analyzing an Issue Using the Three Dimensions of Power

The three dimensions of power can be visible on any number of political issues. For example, let's say a bill comes before the U.S. Senate to tax very large estates (over $10 million) upon the owner's death. A vote is held, and the bill is defeated with 44 senators supporting it and 56 senators opposing it. The first dimension of power is easy to see since the vote resulted in a clear decision: one side beat the other.

The second dimension of power is visible as well. The Senate has a set of rules and procedures that are stacked against this kind of bill**.** Because of the filibuster, the bill really needs 60 votes to pass the Senate, so the losers are even further from victory than the vote tally indicates. In addition, because Senators are predominantly white, white interests get privileged. And since whites are more likely to have large estates to pass to their children, a bill taxing those estates has an uphill road in the Senate.

What about the third dimension of power? Have preferences been shaped by elites? It's clear that if one compares political debates from the early part of the twentieth century to that of today, you can see that wealthy interests have been able to get inordinate numbers of the middle class and poor people to stand up against the estate tax, because their perception has been shaped to believe it is a **"death tax"** that might affect them. An erroneous belief because most people are light years away from leaving assets anywhere close to $10 million to their heirs. It is also intentionally cultivated by elites and gives senators cover to vote against increasing the estate tax. [5]

A Guide to Spotting the Three Dimensions of Power

When examining any political struggle, use this guide to see if you can spot the three dimensions of power in action:

First Dimension of Power—Look for situations where people who have authority to directly impact the course of an issue have a say in making key decisions. Often, this takes the form of an actual legislative vote, executive command or veto, or court ruling, but other actions might fit into the first dimension as well. Also, look for nondecisions—decisions to not decide an issue, which typically benefits one side more than another.

Second Dimension of Power—Look for biases in the rules of the game and for procedures that favor one side over another. Do the rules of politics affect the struggle such that one side has higher hurdles to overcome? Look for people or groups whose stories are told by others, for those stories tend to be self-serving. Look for situations where one actor gets to tell the story of another actor.

Third Dimension of Power—Look for people who have had the wool pulled over their eyes, who are apparently acting against their own interests, or who take on the viewpoint of others. Look for people who possess resources and access to media or educational tools with which to manipulate attitudes and opinions. Are they able to use those resources or that access to shape the political preferences of other actors in the polity?

As you consider the three dimensions of power, keep in mind that they become progressively more difficult to detect. The first dimension of power is more visible and more common than the second, which is more visible and more common than the third.

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1. Quoted in Chris McGreal, “Robert Caro: A Life with LBJ and the Pursuit of Power,” *The Guardian*. June 9, 2012.

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3. Peter Bachrach and Morton S. Baratz, “Two Faces of Power,” *The American Political Science Review*. 56 (4): 1962, pp. 947-952.

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5. The “death tax” language is apparently the creation of the National Federation of Independent Business and Republican messaging consultant Frank Luntz. See Mark Abadi, “Republicans Say ‘Death Tax’ While Democrats Say ‘Estate Tax’—and There’s a Fascinating Reason Why,” *BusinessInsider.com*. October 9, 2017.

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1.3: Who Has Power in U. S. Politics?

"[America has] democracy by coincidence, in which ordinary citizens get what they want from government only when they happen to agree with elites or interest groups that are really calling the shots."

— Martin Gilens and Benjamin Page [1]

"America's political establishment has created vast inequities not only in the economy, but in criminal justice, (where street crime is heavily punished, but white collar crime is not), war (it's mostly not the sons and daughters of politicians and CEOs getting killed in overseas conflicts), healthcare (where much of the population lives in fear that getting sick will trigger bankruptcy), debt forgiveness (Wall Street bailout recipients got to write off losses, but people suffering foreclosures and student loan defaults are ruined), and other arenas."

–Matt Taibbi [2]

Theories About American Politics

Over the years, political analysts have tended to split over how the American political system operates. This split involves three theoretical systems: pluralism, hyper-pluralism, and the power elite. The disagreements center around which theory best describes what is really going on in American politics.

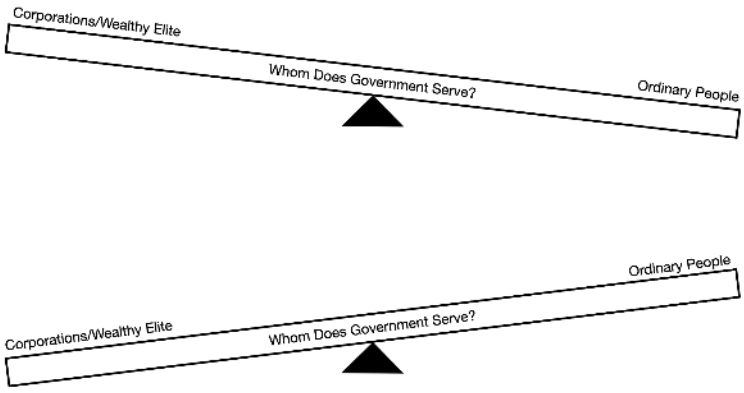
Pluralism is well represented by French aristocrat **Alexis de Tocqueville's** insights into the vitality of early American politics. Convinced that France was moving towards social equality similar to American democracy, de Tocqueville toured the United States in the 1830s to analyze democracy as a political potential. He was struck by how well developed the *principle of association*—a proto form of pluralism—was among average Americans. At the time, American politics was marked by a rich diversity of organized associations and interest groups vying with each other to see that their respective wishes were translated into government policy. [3]

Pluralism is a theoretical approach that emphasizes how ordinary Americans are free to start or join any groups that share interests and whose struggles provide an even playing field with others. In other words, no one set of interests is likely to dominate public policy—at least not for very long, because the many losers will temporarily put aside their differences to collaborate to influence policy. The pluralist argument is bolstered by the number and variety of interest groups and by the fact that interests in one category—business, for example—often struggle with each other.

Political scientists argue that the United States was at some point characterized by pluralism, but over time it transformed into something less healthy: an out-of-control hyper-pluralist polity. **Hyper-pluralism** suggests that the government has essentially been captured by the demands of interest groups. Rather than arbitrating the struggle between organized interests, the government tries to put into effect the wishes of ***all*** groups to the detriment of the country. (This concept may also be referred to as *interest-group liberalism.)* [4] These actions may be contradictory. For example, spending money to subsidize fossil fuel extraction while at the same time passing regulations to limit carbon emissions. As you can see, there isn't really a competition going on as envisioned by pluralism. The hyper-pluralism system more closely resembles a free-for-all.

The third approach is called **elite theory.** Elite theorists hold that the pluralists and the hyper-pluralists fail to accurately show what is really going on: that a relatively small and wealthy class of individuals—the **power elite**—prevails. [5] In other words, the power elite are either the decision-makers or they so influence the decision-makers that the elites get their way most of the time.

Elite theory highlights how business interests create interlocking and overlapping connections that reinforce their position and allow them to control the political system, such as the exclusive and overlapping memberships of corporate boards, foundation boards, and trustee positions for public and private universities, as well as corporate media ownership. The fact that elites have disproportionate power and seek to continue their dominance is not new. As political essayist Noam Chomsky wrote, "Right through American history, there's been an ongoing clash between pressure for more freedom and democracy coming from below and efforts at elite control and domination coming from above." [6]



Whom Does Government Serve–The Numerous Ordinary People or the Relatively Small Number of Large Corporations and Wealthy Families?

Think of elite theory as a teeter-totter in a public park. On one end sit large corporations and the elite, which is composed of a very small number of families firmly entrenched in the top five percent of the U.S' income and wealth distribution. On the other end sit ordinary Americans, comprised of everyone from an emergency room doctor with a very comfortable income, or a college student living in her car and working for minimum wage at a big box store. In whose interest does government work?

According to the bottom image, based on elite theory, the government primarily operates in the interest of corporations and the wealthy elite. Even though there are far fewer people on the elite side of the teeter-totter, they weigh more in the deliberations of government than do the interests of the majority of the population.

Some people would argue that the aim of democratic engagement should be to better balance the teeter-totter and see government serve the broad interests that ordinary Americans have for true equality of opportunity, healthcare, education, and an economy that provides a decent life for all.

Applying the Three Dimensions of Power

Why study the elite theory perspective? How is this theoretical lens useful in studying the three dimensions? Public policy—the results of decision-making—tilts toward the interests of the elite. This action is the first dimension of power. With respect to the second dimension of power, we'd expect the rules of the game to be tilted in favor of elites getting what they want while hindering what ordinary people want. Lastly, through the third dimension of power, we would expect to see ordinary people taking on the viewpoints of the elites against their own interests.

Let's look at the **first dimension of power**. According to political scientist Michael Parenti, "every year the federal government doles out huge sums in corporate welfare in the form of tax breaks, price supports, loan guarantees, bailouts, payments-in-kind, subsidized insurance rates, marketing services, export subsidies, irrigation and reclamation programs, and research and development grants." [7] The public cost of corporate welfare is enormous, and there are two immediate effects. First, the welfare that corporations receive is rarely translated into lower prices for consumers. Instead, it provides better dividends for stockholders and higher salaries for their upper-level employees, who are already in the upper 10 percent of wage earners. Secondly, corporate welfare translates into ordinary people making up for the lost revenues from corporate tax giveaways.

As for the **second dimension of power,** the constitutional system is stacked in favor of elites being able to stop action. Because the American electoral system runs on money, "both major parties tend to be corrupted—and pushed away from satisfying the needs and wishes of ordinary Americans—by their reliance on wealthy contributors." [8] Corporate media systems ensure that progressive ideas

have a more difficult time getting heard. The system of organized interest groups is heavily stacked in favor of business groups and the wealthy.

The **third dimension of power** is the easiest to see. Working people have been marshaled by elites to support other tax breaks, limitations on unions, free-trade agreements, and cuts to the social safety net. Economists Edward Herman and Noam Chomsky [9] argued that political consent... is manufactured through election campaigns that focus on superficial considerations." Consent is also manufactured by frightening people or by getting them angry. Want to cut public assistance for the poor? Get people upset about "welfare queens." Want to invade a country? Talk about that country's leader being "worse than [insert dictator's name]," and posing an existential threat to the United States. Want to increase gun sales and defeat attempts to regulate firearms? Talk about crime. It works just as well when crime is at record lows as when crime is high. All these measures have been successful. These measures only require that you control the media, decide what issues get addressed, and how those issues are framed. Elites have that kind of control.

Even the partisan stalemate in Washington—which is not a myth, but has taken on mythic proportions—plays into the hands of the elites because it creates a sense of futility among many people, a feeling that "politicians are all the same" or "it doesn't matter who wins elections, so I might as well not vote." The political demobilization of ordinary people is perhaps the best tool the wealthy and corporations have to achieve their aims. As South African anti-apartheid activist Steve Biko said, "The most potent weapon in the hands of the oppressor is the mind of the oppressed." [10] If the governed can be made to feel that they are powerless to effect change, then indeed they are powerless.

The People and the Elites

Throughout U.S. history, popular will has translated into public policies that benefited average men and women over the elites. People have risen up and demanded protection from monopoly corporate power, a minimum wage, worker safety laws, and laws against child labor. Women demanded the right to vote. People of all races demanded civil rights laws that guaranteed voting privileges, the right to equality in the workplace, the right to go to neighborhood schools, and freedom from sexual harassment. People demanded that the impoverishment of the elderly be ameliorated—and it was through programs like Social Security and Medicare. While elites have the most power in the U.S. system, the majority has organized itself to protect its interests.

While elites have disproportionate power, we don't need to make conclusions about the character of corporate executives, hedge fund directors, Wall Street bankers, or Silicon Valley titans. Like any group of people, the elite encompasses upstanding, exemplary individuals as well as those whose motives are less than admirable. The question for a political system is whether concentrations of economic and political power can coexist with democracy. Will the self-interest of a powerful elite—a minority of the population—distort the political and economic rules in ways that perpetuate vast inequality? Political philosopher, Danielle Allen put the challenge this way:

"A proper role of government—nearly forgotten today, but the overriding concern of the Founders—is finding ways to prevent undue concentrations of power wherever they occur. Power tends toward self-perpetuation; where it is left undisturbed, it will draw further advantages to itself, shut out rivals, and mete out ever-bolder forms of injustice." [11]

What if . . . ?

Imagine yourself in a national leadership role. What role would it be? Senator? Representative? President? Supreme Court Justice? How would you use your understanding of who has power in the United States to enhance the collective voice of ordinary Americans? How would you use it to, in Danielle Allen's words, "prevent undue concentrations of power?"

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1.4: Political Science as a Social Science

"Science is extraordinarily effective at rooting out rubbish."

–David J. Helfand [1]

"Political science" is a branch of the social sciences, which includes sociology, psychology, anthropology, and economics. Social scientists study individual and social behavior. They explore questions that often come from established **theoretical perspectives** consisting of concepts, definitions, and a body of scholarly literature developed over time. As you engage in this political science class, make sure you pay attention to the various theoretical perspectives that exist in the discipline.

The Attenuated Democracy portion of this textbook approaches political science from a modified version of **elite theory**—namely, that a struggle exists between elites and ordinary people. The conflict is over who and how they use their votes to push the government to serve their interests.

The political world is not as predictable as the physical world studied by chemists and physicists. Political scientists often look for patterns and relationships in what may appear to be a blizzard of random events. They carefully observe phenomena such as voting, political opinions, legislative decisions, campaign finance disclosures, presidential vetoes, Supreme Court decisions, and so forth.

The Scientific Method

Many social scientists employ the scientific method in the same ways that natural scientists do. Other social scientists are more in favor of rigorous interpretations, analyses, or in-depth case studies because historical events and contemporary social phenomena are too complex for simple causal models to address or because people are too self-aware to be measured and studied without distorting results. Nevertheless, all social scientists adhere to empirical, formalized methodologies. Science historian and philosopher Lee McIntyre argues that "the challenge in social science is to find a way to preserve our values without letting them interfere with empirical investigation. We need to understand the world before we can change it." [2]

You might have learned these scientific method steps in elementary school:

- Ask a question
- Research what others have learned about the question
- Formulate a hypothesis
- Conduct an experiment
- Collect and analyze data
- Communicate results

Regarding political science, the **scientific method** is a systematic, logically driven process to gather information and make conclusions about natural and social phenomena. Rather than focusing on an artificial step-by-step approach to understanding the scientific method, we can go into more detail on the features that distinguish science in political science from other ways of knowing.

The words **empiricism**, noun, and **empirical**, adjective, mean that scientists base their conclusions on careful verifiable observation and experience, rather than on intuition, revelation, prejudice, superstition, or anecdote. To westerners, empiricism is a cherished gift of the Renaissance and the Age of Enlightenment. For example, through his telescope, Galileo patiently observed four "stars" dancing around Jupiter, which led him to make the empirical statement that they were in fact moons orbiting around the planet. In addition, English physician Edward Jenner observed that farmhands who contracted cowpox earlier in life did not get smallpox, which led him to make the empirical statement that inoculating individuals with cowpox could protect them against smallpox. He tested this proposition on an 8-year-old boy named James Phipps. Phipps did not get smallpox. The result was the insight that inoculation made a person immune from the disease. These and many other examples illustrate empiricism's power over other forms of knowing such as tradition or revelation.

Hypotheses, Concepts, and Variables

Aside from making careful and patient observations, the scientific method requires that we formulate hypotheses, conceptualize complex phenomena, and analyze constantly changing variables. Political scientists generate a **hypothesis** by asking a research question—an inquiry that asks how the political world operates or why it works the way it does.

The hypothesis posits an answer to the research question that you then test by conducting studies or experiments. The kinds of *why* or *how* questions that make good hypotheses are distinct from questions that elicit factual answers. For example, questions such as "What interests or organizations contribute the most money to political campaigns?" or "How many Supreme Court justices have been women?" are important. But they are the kinds of questions that typically elicit straightforward answers. Rather, here are some examples of large research questions in political science that make good hypotheses:

- Why does the United States—uniquely among advanced democracies—not have universal health coverage? A hypothesis might be that entrenched interests have been able to use the political system to block broad health coverage.
- Why do congressional incumbents have high reelection rates? A hypothesis might be that their financial advantage contributes greatly to their high reelection rate.
- How does the constitutional structure benefit some interests over others? A hypothesis might be that the constitutional structure privileges certain interests over others, particularly those who want to stop new policy over those who want to start it.
- How did conservatives go from spectacular defeat in 1964 to preeminence in all three government branches by 2000? A hypothesis might be that the conservative movement simply expanded to reflect real shifts in popular support on key issues that were favorable to the conservative point of view. In other words, shifts in public opinion caused the success of conservative politicians.

These kinds of questions are complex and require that scholars gather evidence from a variety of sources. Hypotheses must be supported systematically through a process of argumentation with political scientists who might disagree.

Not all hypotheses are the same. Here are the major categories of hypotheses:

Null hypothesis: There is *n*o relationship between the two variables. On the question of money and incumbent reelection rates, the null hypothesis would be that there is no relationship between campaign budgets and chances of succeeding at the polls.

Correlative or correlational **hypothesis:** This simply suggests that two variables vary together. For example, a hypothesis may state that there is a relationship between religious fundamentalism and acts of terrorism. In doing so, the scientist is not speculating which variable is causing movement in the other.

Directional hypotheses: Since correlative hypotheses are not especially powerful, directional hypotheses posit a direction to the relationship in question. For example, a hypothesis could be that as religious fundamentalism increases, acts of terrorism increase. This is called a **positive relationship**—the value of one variable increases along with the value of another variable. A **negative relationship** involves the value of one variable decreases as the value of the other variable increases. For example, we might hypothesize that as personal income increases, willingness to support public transit decreases.

Causal hypothesis: Sometimes some of the variances in one variable is caused by the variance in the other variable. The two variables do connect. Causation is extremely difficult to establish. For example, let's say that we could somehow measure the rise and fall of religious fundamentalism in the world and we have an accurate count of terrorist incidents over time. To establish causation, we would have to show a statistical relationship between the changing values for each variable *and* convince our readers of a valid link between the two variables. On top of this difficulty is the problem of social complexity. Rarely can a complex phenomenon such as terrorism be explained by one variable! Political scientists are much more likely to say that a certain percentage of the variance in terrorism can be explained by the variance in religious fundamentalism than they are to say that fundamentalism causes terrorism.

Hypotheses require the political scientist to conceptualize certain terms. A **concept** is a word or phrase that stands for something more complex or abstract. Political science is often concerned with big concepts such as liberty, democracy, power, justice, equality, war and peace, and representation. But there are many mid-level concepts in the discipline such as political development, political legitimacy, electoral realignment, and globalization. In addition, terms related to political ideologies—liberal, conservative, socialist, fascist, feminist, libertarian, and so forth—are also key concepts.

In turn, researchers need to define or operationalize concepts into measurable concrete **variables**. For example, earlier we hypothesized that as people's income increases, their tendency to support public transit programs would decrease. How are we going to operationalize "income" as a variable that we can use in our analysis? We could ask a sample of people to tell us their income and then ask them questions about public transit. But, let's say we wanted to rely on more concrete income records. We'll

still have questions to consider: gross income before taxes? Only wage income? Family income or individual income? As you can see, operationalizing concepts into measurable variables is not always easy.

A final comment about variables and testing hypotheses: the political scientist must control other relevant variables in the research design or methodology. For example, we might hypothesize that higher income causes people to tend to turn out to vote more, and indeed that's what the data show. However, income also correlates well with higher formal education. How do we know whether we're seeing the impact of income or education on voter turnout? We need to set a 'control' for education. One way to do that would be to sample only people with similar formal education levels and then break down the voting data by income within that educational stratum. Thus, we could look at only people with a bachelor's degree but no graduate degree and see whether the tendency to vote *within that group* increases as personal income rises. Statisticians have developed mathematical techniques to control the effects of unwanted variables, but those techniques are beyond this textbook's scope.

Experiments

Generally speaking, experiments come in two flavors: controlled and natural. A **controlled experiment** is one that is carefully set up by the scientist to control the variables that might affect the outcome, thereby isolating and evaluating the variable in which she is most interested. For example, we are interested in how conservatives and liberals respond to new information about health policy. We could survey 100 people from two groups: one conservative and one liberal. Then, we could develop an instrument to gauge the responses of conservatives and liberals. That instrument might be a knowledge questionnaire, a survey, or a behavior observation, depending on our hypothesis.

A **natural experiment** is an observational study in the real world where the scientist does not control the variables, but where natural processes or social events provide an opportunity for him to see the effect of a variable in action. Natural experiments are often compelling because they happen in the world around us rather than in a laboratory setting. For example, the Affordable Care Act—ACA or Obamacare—unintentionally created a natural experiment. The ACA required states to expand Medicaid to a larger percentage of poor people and funded them to do so. However, the Supreme Court struck down the mandate in 2012, thereby allowing states to choose whether or not to expand Medicaid. As it happens, states controlled by Republicans generally chose not to expand Medicaid, while states controlled by Democrats or that had a Democratic balance tended to expand Medicaid. Over a four-year period, researchers found that states that had expanded Medicaid reduced their mean annual mortality rate by 9.3 percent. Effectively, the 14 states that did *not* take advantage of the ACA had 15,600 people die who would not have died had the states expanded Medicaid. [3] This natural experiment allowed us to see the variable's impact at the state level—was Medicaid expansion a net positive or negative on people's health?

Falsifiability and Professional Responsibilities



Snarky Demonstrators in Favor of Science.

Science's emphasis on empiricism, conceptual clarity, variables, hypotheses, and experiments underscores another characteristic: falsifiability. **Falsifiability**—also known as testability—refers to the fact that scientific knowledge claims are subject to being proven wrong. Science philosopher Karl Popper argued that "A system is to be considered as scientific only if it makes assertions which may clash with observations: and a system is, in fact, tested by attempts to produce such clashes; that is to say, by attempts to refute it." [4]

Scientists make claims about the natural or social worlds and how they work. Those claims are so carefully documented that another scientist can either replicate the original study or marshal another set of observations with the explicit goal of testing whether or not the first scientist's claim was correct. Systematically falsifying incorrect claims makes science progress toward greater understanding. We can empirically test a claim to see if it can either be refuted or confirmed.

What does an **untestable claim** look like? Namely, it is a theory that cannot be refuted. A couple of years before Charles Darwin published *On the Origin of Species by Natural Selection* in 1859, Gosse published a book called *Omphalos: An Attempt to Untie the Geological Knot*. Like Darwin, Gosse was trying to explain the increasing evidence that life had evolved over time. But Darwin used careful observations to explicate his theory of natural selection—a theory that was eminently falsifiable. Gosse, on the other hand, put forward a theory that God had created the currently existing plants and animals as well as fossils to *look* like evolution had taken place over a long period, but that in fact, God had created all life relatively recently. He reconciled his religious beliefs with empirical observations by developing a theory that could not be refuted.

When Darwin came along and wrote that finches on the Galapagos Islands had, through natural selection over time, modified their morphology to suit the kinds of things they ate on the various island ecosystems, Gosse's adherents could simply say, "God just made the finches look that way." Gosse's claim is not falsifiable through any observation or experiment, whereas the theory of natural selection has passed literally thousands of tests for over 160 years. [5]

Scientists of all stripes engage in common behaviors that support their work and to better understand each discipline's study.

- **professional conferences,** scientists present their findings to their peers. There, they challenge each other, share new ideas and data sets, and develop common research interests around which they can collaborate.
- **peer-reviewed journals** publish peer-reviewed articles. If a political scientist sends a manuscript to *International Studies Quarterly* or any of dozens of political science journals, that manuscript will be farmed out to at least two other political scientists who have published in that field. They will review the manuscript and make comments on the methodology, the data, and the conclusions it offers. They will tell the editors of *International Studies Quarterly* whether the manuscript should be published, rejected, or sent back to the author for revisions. This is a blind process—the author of the manuscript does not know who is reviewing it, and the reviewers do not know who wrote the manuscript. The peer-review process is a robust way of ensuring credibility.

Political science is a member of the social sciences. While not all political scientists use the formal scientific method, they all adhere to empirical, falsifiable methods that are peer-reviewed. Political scientists at universities focus primarily on research and secondarily on teaching. Political scientists at community colleges focus primarily on teaching and secondarily on research.

What if . . . ?

What if we did a better job of developing scientific literacy among the American population? What impact would that have on our conversations about political issues that have scientific dimensions to them? How might those conversations be different? How would you go about promoting scientific literacy in America?

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CHAPTER OVERVIEW

2: Constitutional Foundations

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2.1: Natural Rights and the Declaration of Independence

"Nature is none other than God in things."
"God…is everywhere in all things, not above, not outside, but present, not a being outside or above being, not a nature outside of nature, not a goodness outside of good."

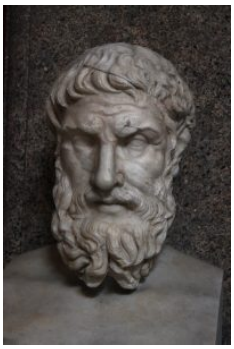
—Giordano Bruno [1548-1600] (1)

"Fix reason firmly in her seat, and call to her tribunal every fact, every opinion. Question with boldness even the existence of a god; because, if there be one, he must more approve of the homage of reason than that of blindfolded fear."

—Thomas Jefferson (2)

Ideas are important—even if they initially appear strange and radical. The current U.S. political system originally came from ideas espoused by various seventeenth- and eighteenth-century European philosophers. These philosophers, in turn, were building upon the work of medieval and ancient philosophers who thought deeply about the proper ordering of a polity, or political system. This work was grounded in concepts of matter, the universe, and God—many ideas that the Christian church saw as heretical. As a student of U.S. politics, it is important to have insight into the ideas and reasoning that shaped the Declaration of Independence and understand the following philosophical systems that helped shape ideals.

- **Materialism** holds that nothing exists except matter, its movements, and modifications. Matter is all that there is, that it is composed of atoms, that matter has always existed, that it cannot be created out of anything, that it cannot be destroyed, that it is continually transformed and recycled into different forms, and that the universe is infinite. Materialism goes back at least to the Greek philosopher **Epicurus** (341-270 BCE), who taught that man can attain the greatest good and a tranquil state, free from fear and pain, through reasoned and virtuous action.
- **Spiritualism** is the doctrine that the spirit exists as distinct from matter and is the only reality. Spiritualists argue that the spiritual world governs the material and is essentially unknowable except through faith and revelation—which means that the material world does not really follow any laws that humans can discern through their own reason.
- **Deism** is the belief in a supreme being or creator, who does not intervene in the universe or interact with humankind, but who disappears into the natural rules that govern all matter.
- **Atheism** is a lack of belief in the existence of God or gods.



Bust of Epicurus

Epicurus's dangerous idea refers to the notion that talking about nature and talking about God are just two ways of talking about the same thing, which has tremendous theological and political implications. If the universe is infinite and has always existed, there is no role for an entity outside of matter and causation to play the role of a prime mover. No need for God in the Judeo-Christian-Islamic sense.

Note the references in the Declaration of Independence to "the Laws of Nature and Nature's God" and to "their Creator." (3) These all fit with a Deist's understanding of the universe. Atheist and Deist approaches differ from Spiritualism, which sees a distinction between the material world and the spiritual one. People like Jefferson recoiled at that notion of spiritualism. Instead, they embraced secularism, Deism, and the Enlightenment's emphasis on reason.

In the 17th and 18th Centuries, the Enlightenment overtook Europe and constituted the intellectual fertilizer in which U.S. independence grew. Enlightenment thinkers argued that the laws of nature were subject to discovery, and the human condition

could be improved through reason. In the area of political philosophy, people like **Thomas Hobbes** (1588-1679) and **John Locke** (1632-1704) were known as social contract theorists.

Some philosophers imagined how people might live in a state of nature that would allow mankind absolute freedom, where there is no authority to limit individual behavior. According to them, this state of nature would essentially be an anarchical condition in which there was no government, and thus no authority to limit individual behavior. Anarchy was not appealing to Hobbes and Locke. Hobbes argued in *Leviathan* that the state of nature would result in a war of all against all, and that people's lives would be "solitary, poore, nasty, brutish, and short." (4) The solution was to construct a civil society.

According to these theories, we could escape from the state of nature, with its unlimited freedoms that give rise to all sorts of conflicts, by setting up a government through a **social contract**, where the people agree to certain government-enforced restrictions on their liberties in exchange for a measure of security. Consequently, one is not entirely free in a civil society to do as one pleases with respect to others. President George Washington put it eloquently: "Individuals entering into society, must give up a share of liberty to preserve the rest…. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved." (5)

Natural rights are those rights that stem from the state of nature, and thus pre-date the government established by the social contract. Philosophers have tended to say that natural rights are granted by nature's God, or by virtue of being born. The important thing to remember is that government does not give you your natural rights when it establishes a bill of rights. The bill of rights merely recognizes, and perhaps specifies, your preexisting natural rights. Locke's classic statement of natural rights went as follows: "…the state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions: for men being the workmanship of one omnipotent, and infinitely wise maker…" (6)

A contemporary listing of natural rights follows Locke's lead and includes equality, life, liberty, and property. In the Declaration of Independence, **Thomas Jefferson**, acting as a scribe for the committee whose most vocal members were John Adams and Benjamin Franklin, substituted "pursuit of happiness" for "property," which is an intriguing turn of phrase that appears to have its proximate origin in Locke and its ultimate origin in Epicurus. Perhaps the immediate source of the Declaration's reference to the pursuit of happiness was his colleague John Adams, who wrote in his *Thoughts on Government* (1776) that "the form of government which communicates ease, comfort, security, or, in one word, happiness, to the greatest number of persons, and in the greatest degree, is the best."

The idea of natural rights frightened monarchs throughout Europe: if the government is not upholding the natural rights of citizens, and instead is consistently undermining them, the people are entirely justified in taking up arms against their rulers. It's this idea that is seen in the American (U.S.) Revolution. Therefore, the Declaration of Independence, —"We hold these truths to be self-evident: that all men are created equal…"—is a careful dissolution of the social contract between Americans and the British Crown. Many colonists revolutionaries felt that being taxed without representation, having troops violate people's property without warrants, and being subject to arbitrary and capricious governance over a period of time were grievances sufficient to warrant a revolution. Indeed, in the words of the Declaration, it is the "duty" of the people under those circumstances, "to throw off such government, and to provide new guards for their future security." The goal of the revolution was not to go back to the state of nature, but to reconstitute the social contract in a form more amenable to Americans preserving their natural rights, safety, and collective happiness.

The Declaration of Independence

In Congress, July 4, 1776.

The unanimous Declaration of the thirteen united States of America, *When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.*

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness–That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, –That whenever any Form of Government

becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.–Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.

He has affected to render the Military independent of and superior to the Civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

For Quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing Taxes on us without our Consent:

For depriving us in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Nor have We been wanting in attentions to our Brittish brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

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2.2: Articles of Confederation, Shays' Rebellion and the Road to the Constitution

"The Articles of Confederation, if one considers the circumstances of the times, were a remarkable creation."

–Rowland L. Young [1]

The United States has had more than one constitution in its history. Prior to the current U.S. Constitution written in 1787, there was the Articles of Confederation written in 1776 and 1777. Before we look at the details, let us familiarize ourselves with confederal government and how it differs from other forms. This idea is especially important given that when the Southern states seceded from the Union beginning in 1860, they formed a confederacy.

Confederal, Federal, and Unitary Governments

Political scientists often classify governmental systems into one of three types: confederal, federal, and unitary. Governments are placed into one of these categories based on the relative power distribution between the central government and the subordinate governments. In the United States, the subunits are called states, while other countries might have provinces, cantons, departments, laender, or something else.

- **Confederal system** is when the states are very powerful relative to the weak central government. Indeed, the central government usually only carries out those functions that the states deem can be more efficiently run from one point. The states retain all other powers. Currently, there are no individual countries that have confederal governments. Historically, confederacies tend not to survive—either because they are defeated by external enemies or because they fragment internally.
- **Unitary system** is when the central government is very powerful relative to the states. Often, the states exist merely as central government administrative units with little autonomy to conduct their own policies. The majority of the world's governments are unitary. England, France, Israel, Sweden, and Japan are countries with unitary governments.
- **Federal system** has a power balance between the central government and the states (although in practice, the balance is often tilted in favor of the center). The United States, Canada, Mexico, Brazil, Germany, India, and Nigeria have this system. As a rule, large diverse countries tend to have federal governments.

The Articles of Confederation



Protest Sign Referencing the Articles of Confederation

Unifying the American colonies is an old concept. In 1697, William Penn proposed just such a union. In 1754, Benjamin Franklin put forward his Albany Plan of Union, which proposed a national legislature to raise a military when needed, make decisions on war and peace in North America, deal with disputed western lands, and levy taxes on the colonies. Franklin's proposal was not accepted. When Franklin joined the Second Continental Congress in 1775, he put forward yet another proposal for an Articles of Confederation and Perpetual Union, which was not taken up. After the Declaration of Independence, Congress appointed a committee to draft a confederation and chose John Dickinson to lead it. Using Franklin's proposal as a starting point, the committee produced a document that gave the states much more power than Franklin had originally proposed. [2]

Dickinson's committee wrote the Articles of Confederation on the assumption that the best way to preserve individual liberty was to fragment political power among the thirteen states. Congress submitted the Articles to the states to ratify in 1777, but disputes over western land claims delayed it from being formally adopted. Finally, in 1781, Maryland became the thirteenth state to ratify it. These Articles remained in effect until superseded by the Constitution.



The Confederal System's Impact

Under the Articles of Confederation, the national government's main legislative accomplishment was the **Northwest Ordinance** of 1787. It allowed territories to enter the Union as states on the same equal legal footing as the original thirteen states. In the territories that became Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota, the Northwest Ordinance also prohibited slavery and provided public education.

Following the Revolutionary War, the United States was in a very precarious economic, social, and diplomatic position. The government was unable to pay off war debts, such as loans from other countries, war bonds, and even IOU's given to soldiers in lieu of pay. Trade was being choked off by state tariffs, and the money system was a mess. Farmers were especially hard hit by excess taxes, interstate tariffs, and generally lacked confidence in the money supply. Consequently, many people were losing their farms at bankruptcy auctions. Ultimately, farmers' rebellions broke out up and down the Atlantic seaboard.

The largest such rebellion was **Shays' Rebellion (1786-87)** in Massachusetts. Unable to make payments on their property and bitter with increased taxes and scarce money due to the state legislature's policies in Boston, farmers peacefully petitioned the state legislature for redress. After the legislature refused to respond to their petitions, the farmers turned to mob violence to prevent debt hearings and their property from being seized for non-payment. The governor sent out a state militia. Daniel Shays, who had been a captain in the Revolutionary War, organized a rebellion. Shays' Rebellion pointed out many of the deficiencies of the Articles of Confederation, and was much discussed at a convention convened in Philadelphia. As historian Joseph Ellis has written, "The ultimate irony of Shays' Rebellion is that what began as a rural protest against centralized government actually ended up strengthening the advocates for a new U.S. Constitution, which consolidated political power at the federal level, in precisely the fashion that the rebels regarded as a betrayal of the American Revolution." [(4)]

The Constitutional Convention

Largely due to the efforts of people like Alexander Hamilton and James Madison—and because of the turmoil under the Articles of Confederation—Congress called on the states to send delegates to Philadelphia in May 1787. The reason for the gathering was "for the sole and express purpose of revising the Articles of Confederation." Every state except Rhode Island sent delegates to what we now know as the **Constitutional Convention**. Madison and Hamilton attended, as did George Washington, Benjamin Franklin, Roger Sherman, Robert Morris, Charles Pinckney, and others. **Thomas Jefferson** and **John Adams** did not attend, because they

were representing the United States in Paris and London, respectively. Patrick Henry did not participate because he “smelt a rat,” and opposed the Constitution once it was written. [5]

Of the original seventy-four delegates picked by the states, fifty-five actually attended the convention in Philadelphia. Some stayed away due to conscience, others because they were busy with other matters. By September 17, 1787, when the final draft was approved, only forty-two delegates were left. Three of those—**Edmund Randolph**, **George Mason**, and **Elbridge Gerry**—could not bring themselves to sign the Constitution. In the end, thirty-nine delegates signed what is now the current U.S. Constitution.

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2.3: Key Features of the U. S. Constitution

"A government of our own is our natural right: And when a man seriously reflects on the precariousness of human affairs, he will become convinced, that it is infinitely wiser and safer, to form a constitution of our own in a cool deliberate manner, while we have it in our power, than to trust such an interesting event to time and chance."

–Thomas Paine [1]

"How is it that we hear the loudest yelps for liberty among the drivers of negroes?"
–Samuel Johnson [2]

You are **not** expected to know all the details of the U.S. Constitution. However, citizens and residents of the United States should be familiar with the key features described in this section.

Balancing Large and Small States

At the 1787 Constitutional Convention in Philadelphia, delegates argued over the individual states' relative weight in the new government. Two competing proposals emerged:

- Virginia Plan proposed that the more populous states would have more seats in Congress than the smaller states, as well as suggested a bicameral legislature—a Congress with two chambers.
- New Jersey Plan proposed that they retain the scheme represented in the Articles of Confederation, with each state having one vote in Congress regardless of the state's population. In addition, the plan called for a unicameral legislature.

James Madison was especially interested in creating a strong central government, which he felt could not legitimately be done if each state was represented equally without regarding the population. "In all cases," he said, "where the General Government is to act on the people, let the people be represented and the votes be proportional" to state population. [3] However, delegates from small states were not happy unless their states got equal representation, which threatened derail the Constitutional Convention.

On July 5, 1787, a committee proposed a solution that is now known as the **Connecticut** or **Great Compromise**. The Compromise called for a **bicameral** legislature and a different representational scheme for each chamber. In the House of Representatives, each state would have seats proportional to its population. Meanwhile, the Senate would have two senators from each state, regardless of population. Representatives would be elected by popular vote, while senators would be chosen by state legislatures. The Connecticut compromise gave disproportionate power to smaller, rural, and less populous states, particularly after the Seventeenth Amendment passed when senators became elected directly by the people.

The Infamous Three-Fifths Compromise

A second dispute occurred related to state representation: If a state's population determined its seats in the House of Representatives, should slaves be counted? Slavery was dying in most Northern states, yet the Southern economy was becoming increasingly dependent on them. Counting slaves in the census would add to Southern political power. The Northern states objected, and the convention settled the dispute via a mechanism eventually called the infamous **Three-fifths Compromise**. Essentially, one slave would be counted as three-fifths of a person.

> Article I, section 2 of the Constitution states, "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a term of Years, and excluding Indians not taxed, three-fifths of all other Persons." (The terms "slave" and "slavery" do not actually appear in the document.)

By counting three-fifths of the slave population in the census, Southern states were allocated additional seats in the House of Representatives and additional electors in the Electoral College. This extra representation had enormous consequences. As a result, "Southerners were able to block federal legislation hostile to slavery and get the House to pass numerous laws that protected slavery. The three-fifths clause allowed the extra pro-slavery representatives in the House to pass the following laws: the Missouri Compromise of 1820, which brought Missouri in as a slave state; Texas was annexed in 1845, which was described at the time as an 'empire for slavery'; the Fugitive Slave Act passed in 1850; the law allowing slavery in Utah and New Mexico passed; and the Kansas-Nebraska Act passed in 1854, which opened the Great Plains and Rocky Mountain territories to slavery. None of these laws could have been passed without the additional twenty-five pro-slavery representatives that were created by counting slaves under

the three-fifths clause." [4] The Three-fifths Compromise was nullified when post-Civil War Amendments to the Constitution were passed.

Power to the Central Government



The U.S. Constitution

According to the Constitution, the Founding Fathers held to a tradition that the government's legislative aspect is the most important. In his Second Treatise on Government, John Locke argued that the legislative was "the supreme power in every commonwealth." In *Federalist #51*, James Madison wrote, "In republican government, the legislative authority necessarily predominates."

Referred to **enumerated powers,** and found in **Article I, section 8,** Congress has the power to tax, borrow money, raise armies and navies, establish lower federal courts, regulate the money supply, regulate interstate and foreign commerce, and declare war. When Congress exercises enumerated powers, they are relatively undisputed; although, arguments have erupted over the years about definitional boundaries—like, what activities fall under the phrase "interstate commerce"? When Congress is attempting to exercise an enumerated power, it cannot do so while violating another part of the Constitution. For example, law professor Kim Wehle notes that while Congress has the power to tax, it would violate the Fourteenth Amendment's Equal Protection Clause if it tried to tax only white people. [5]

At the end of these enumerated powers is the **Necessary and Proper** or **Elastic Clause**, which states that Congress has the power, *"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."* This important phrase has allowed the national government to expand its powers into a variety of areas that were not anticipated by the founders. For instance, Congress has forbidden child labor, set maximum-hour laws, and established a minimum wage—none of which are explicitly mentioned in the Constitution. All these measures have been justified with the Elastic Clause, combined with the enumerated power to regulate interstate commerce. When Congress does expand its powers, it justifies its new role by saying that it is only "carrying into execution" one of its enumerated powers. Following the precedent of *McCulloch v. Maryland (1819)*, the federal courts have usually agreed with Congress.

Constraining the States

The Constitution clearly reduces the power of the states. For example, in **Article I, section 10**, the states would no longer have the kind of autonomy they enjoyed under the Articles of Confederation. They could not conduct their own foreign policy, coin money, tax each other, impair contracts, or pass *ex post facto* laws. If there were any doubts that the power balance in the new federal system would be tilted in the central government's favor, one need only to read the **supremacy clause in Article VI:** "

> *This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."*

Using this clause and the precedent-setting *McCulloch v. Maryland (1819)*, the Supreme Court has repeatedly struck down state laws that conflicted with federal laws, treaties, or the Constitution. In such disputes, the state's only real chance of winning is to show that the federal law violates the U.S. Constitution. A current example that has not yet erupted into a legal battle centers on state initiatives that allow doctors to prescribe or recommend marijuana to their patients. These state laws are in direct violation of federal laws, which indicates that it is illegal to possess, use, buy, sell, or cultivate cannabis in all United States jurisdictions.

Why was *McCulloch v. Maryland* (1819) about? In 1816, the federal government chartered the Second Bank of the United States. The states did not like the Bank of the United States competing with state-chartered banks. So, Maryland state placed a prohibitive tax on "any bank not chartered within the state" in an attempt to drive the Bank of the United States out. Instructed by his superiors, James McCulloch, Bank of the United States Baltimore branch cashier, refused to pay the tax. Maryland brought the case to tax to a state court and won—and even won on appeal—but lost when McCulloch appealed those lower decisions up to the Supreme Court. Two important issues were contested in ***McCulloch v. Maryland* (1819)**:

1. Since "establish a national bank" is not one of the enumerated powers in the Constitution, does Congress even have the ability to do that?
2. Can a state tax an activity of the U. S. government?

In *McCulloch v. Maryland* (1819), Chief Justice **John Marshall** clarified the Necessary and Proper Clause's meaning and its relationship to the enumerated powers. He wrote "let the ends be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." In other words, **if** Congress can legitimately tie its new exercise of power to one of the enumerated powers and **if** the new exercise of power is not expressly forbidden in the Constitution, then it is constitutional.

Thus, it was constitutional for Congress to establish a Bank of the United States. Then Marshall went on to write that the "power to tax is the power to destroy," and that the **Supremacy *Clause*** meant that the states could not nullify and destroy legitimate exercise of federal authority. Maryland lost, and both the Necessary and Proper Clause and the Supremacy Clause were clarified in ways that expanded the central government *vis-a-vis* the states.

Separation of Powers and Checks and Balances

One can hardly fail to notice that the Constitution is organized according to a principle known as the **separation of powers**. John Locke argued for the separation of the legislative and executive powers. In ***The Spirit of the Laws* (1748)**, legal theorist **Baron de Montesquieu** similarly argued that governmental power could be divided into three types and that they ought to be separate:

1. **Legislative**—the power to make law: the Congress
2. **Executive**—the power to enforce law: the Presidency
3. **Judicial**—the power to interpret law, both generally and in particular cases: the Supreme Court and lower federal courts

Note that the Constitution does not set up a hierarchy with the president at the top, nor does it give a president "the right to do whatever I want," as a former president has claimed. [(6)] The Congress, the Presidency, and the Supreme Court are coequal branches of the federal government. On November 15, 1775, **John Adams** wrote to Richard Henry Lee: *"A Legislative, an Executive and a Judicial power, comprehend [encompass] the whole of what is meant and understood by Government. It is by balancing each one of these Powers against the other two, that the Effort in human Nature towards Tyranny can alone be checked and restrained and any degree of Freedom preserved in the Constitution."* [(7)]

According to its advocates, **separation of powers** provides **two benefits**.

- It tends to slow legislation down, because of the squabbling between people who occupy legislative, executive, and judicial positions. Democracy requires time for deliberation, argumentation, and compromise. Legislative speed is a virtue only in rare crisis situations.
- It helps avoid tyranny. The United States has only three compartments, and they are functionally related.

Not only does the Constitution separate governmental powers, but it adds a twist in the form of **checks and balances**. The three separate government institutions are allowed to meddle in each other's business. The term "checks and balances" does not appear in the Constitution, but the practice is woven throughout the document in a very intentional and strategic fashion. Key checks and balances include the following:

- Congress passes legislation, but the president can veto it.
- Congress can override the president's veto with a supermajority in both chambers.
- Legislation passed by Congress and signed by the president can be declared unconstitutional by the Supreme Court.
- Presidential or executive branch actions can be declared unconstitutional by the Supreme Court.
- Supreme Court decisions can be undone if Congress and the states pass a constitutional amendment.

- Presidential appointments to the judicial and executive branches require Senate approval.
- Treaties signed by the president require Senate approval.
- The president can pardon those convicted by the federal courts.
- Congress can impeach and remove executive officials and federal judges from office who violate the law.

Finally, we should note that as a check on the president's commander-in-chief power, the Constitution mandates that only Congress can declare war. Congress has not declared war since World War II, even though presidents have directed the massive use of military force on numerous occasions including Korea, Vietnam, Grenada, Panama, the Persian Gulf War, and the invasion of Iraq. After the 9-11 attacks, Congress passed a very broad Authorization for the Use of Military Force (AUMF) against terrorists and nation-states that might be aiding them. The AUMF, which has no reporting requirement to Congress, was so broad and open-ended that it was used by the Bush, Obama, and Trump administrations to justify the using military force in the Middle East, Africa, and Asia decades after it was passed.

What if . . . ?

What if you were transported back in time as a "consultant from the future" to the attendees at the Constitutional Convention? What would you tell them about American history that could better inform them as they write the Constitution? What events would you highlight for them? Why?

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2.4: The Battle for Ratification and the Bill of Rights

"The Bill of Rights we have is…different in many ways from the one the Constitution's critics wanted. It says nothing about 'no taxation without representation' and 'no standing armies in time of peace.'"

—Pauline Maier [1]

"No free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles."

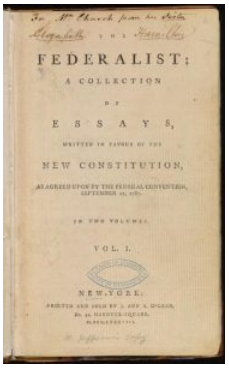
–Virginia Declaration of Rights, 1776

Nine States to Ratify

The Constitutional Convention finished its work on September 17, 1787. Knowing that neither the Congress nor the state legislatures would approve the new Constitution, they created a ratification process in which each state would hold a special convention on the Constitution. The delegates agreed that if nine out of the thirteen states voted to ratify, that would be sufficient to implement the Constitution. After being presented to Congress, there was a debate about whether to censure the delegates for having gone beyond their mandate. Instead of censure, Congress directed state legislatures to hold elections for state ratifying conventions, as called for in Article VII of the new document.

The period from 1787 to 1790 was unique because the people of the United States engaged in a serious debate about the best form of government for a free people. Delaware was the first state to ratify the Constitution on December 7, 1787. New Hampshire became the necessary ninth state to ratify the Constitution. However, it was vitally important that the large states of New York and Virginia join the project, which they both narrowly did later that summer. North Carolina ratified the Constitution after Congress proposed a Bill of Rights in 1789, and Rhode Island held a ratifying convention in 1790 to unanimously approve the new government.

Federalists and Anti-Federalists



First Collection of the Federalist Papers.

Federalists and Anti-Federalists had a bitter and acrimonious debate through newspaper editorials, pamphlets, letters, disagreements in pubs and churches, and at ratification conventions. The most famous documents became known as the **Federalist Papers**, which constituted a defense of the Constitution. Many Federalists in other parts of the country were also writing their own works, and the *Federalist Papers* didn't achieve their fame and influence until well after the Battle for Ratification was over. [2]

The Anti-Federalists worried that the new government would be too powerful, resulting in a tyranny the states would be powerless to stop. [3] The Anti-Federalists had a large list of Constitutional features to which they objected. They saw the "necessary and proper" clause as giving the central government too much power. They feared the president's pardon power. They were suspicious of the president and the Senate's ability to coordinate together to negotiate and ratify treaties that might damage particular states or regions because neither were elected by the people. They feared the supremacy clause.

An anonymous Anti-Federalist writing in the Virginia press under the name Philanthropus concluded that "The new constitution in its present form is calculated to produce despotism, thraldom [a state of subjugation or bondage] and confusion, and if the United

States do swallow it, they will find it a bolus [drug], that will create convulsions to their utmost extremities." [4]



Federalists

- Wanted a strong central government and weak state governments
- Felt the Constitution was enough to protect individual rights
- Major support came mainly from large urban areas
- **Key supporters**: Benjamin Franklin, Alexander Hamilton, George Washington



Anti-Federalists

- Wanted power in the states and NOT the federal government
- Supported the **Articles of Confederation** and believed the Constitution was NOT enough to protect individual rights
- Major support came mainly from rural areas
- **Key supporters**: John Hancock, Patrick Henry, George Mason

The Bill of Rights

Even though they ultimately lost the argument, and the Constitution was ratified, the Anti-Federalists made an important contribution by stressing the Constitution's major deficit: it lacked a **Bill of Rights** to protect the people. Interestingly, the Bill of Rights is said to have been fathered by two men—one Federalist and one Anti-Federalist. Anti-Federalist **George Mason** is sometimes called the father of the Bill of Rights because he wrote the Virginia Declaration of Rights in 1776 and constantly criticized the U.S. Constitution for omitting this important feature. In his "Objections to the Constitution," published on November 19, 1787, in the *Virginia Journal* and the *Alexandria Advertiser*, Mason decried the fact that "there is no declaration of rights," and that the federal government's supremacy over the states would mean that "the declarations of rights in the separate States are no security" for the people's freedom.

After the Pennsylvania convention approved the Constitution, twenty-one delegates who voted against it published a dissent in the *Pennsylvania Packet and Daily Advertiser*, December 18, 1787, arguing that the "omission of a Bill of Rights" jeopardized "those unalienable and personal rights of men, without the full, free, and secure enjoyment of which there can be no liberty." [6]

Largely as a result of pressure in several ratifying conventions, the Federalists promised to add a Bill of Rights to the Constitution. (Rhode Island and North Carolina had refused to approve the Constitution until they saw the Bill of Rights in place.) Federalist **James Madison** originally thought such a listing of liberties was unnecessary—he called them "parchment barriers" to government tyranny in a letter to Thomas Jefferson. [7] Nevertheless, when he ran for Congress, he promised his constituents that he would support a Bill of Rights, and he came to realize that adding the Bill of Rights was the best way to tamp down opposition to the Constitution. Madison originally wanted to weave the various protections into the language of the Constitution, but Congress instead decided to add them to the end of the document. [8] On September 25, 1789, the first Congress under the new Constitution jointly resolved to consider adding twelve amendments in the Bill of Rights.

All twelve amendments passed Congress, but the states only ratified ten by 1791. The two amendments that weren't ratified sought to prevent establishing a political aristocracy—a key Anti-Federalist concern—and aimed to better connect the national legislators with the people. One amendment said that Congress can vote to raise its pay, but the raise doesn't take effect until after an election. It was finally ratified in 1992 as the Twenty-seventh Amendment. The other was a rather complicated amendment that attempted to keep the number of Congressional representatives in proportion to the number of state residents. It fell one state short of ratification. [9]

Source Material for the Bill of Rights

What were the sources of the Bill of Rights? The American Bill of Rights clearly is a great, great, great—many times removed—grandchild of similar historical British assertions of rights. We can go back to the *Magna Carta Libertatum*—the Great Charter of Liberties, or Simply the **Magna Carta**—a settlement in 1215 between England's King John and his barons. The Magna Carta was not a statement of liberties for ordinary people, but it was nevertheless historically significant for firmly establishing due process for free men. In all, four specific rights in the American Bill of Rights can be traced to the Magna Carta: due process, jury trials, prohibiting unlawful seizures, and prohibiting excessive fines.

Additionally, in the **1628 Petition of Right** against Charles I, Parliament prohibited quartering soldiers in civilian households against the civilian's will. The **English Bill of Rights of 1689**—a document forced upon William and Mary as they were invited to replace James II after the Glorious Revolution—first addressed the right of subjects to petition the King and stated that "Protestants may have arms for their defence suitable to their conditions and as allowed by law." In all, seven specific protections in the U.S. Bill of Rights trace their heritage to English precedents.

The majority of the Bill of Rights language—free speech, free exercise of religion, prohibitions against illegal searches, freedom of assembly, the right to counsel, etc.—came from the American colonial context. There are two possible sources to note: delegates at state ratifying conventions proposed amendments and assertions of rights that had already been written into state constitutions. As political theorist Donald Lutz has clearly documented, "The states' constitutions and their respective bills of rights, not the amendments proposed by state ratifying conventions, are the immediate source from which Madison derived what became the U.S. Bill of Rights." [(10)] Interestingly, in those early state constitutions, the assertions of rights were included as prefaces that began those documents, whereas the U. S. Bill of Rights was appended at the end of the U. S. Constitution. For example, the Virginia state constitution of 1776 began this way: [(11)]

Virginia Declaration of Rights

I *That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.*

II *That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.*

III *That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration; and that, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.*

IV *That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge be hereditary.*

V *That the legislative and executive powers of the state should be separate and distinct from the judicative; and, that the members of the two first may be restrained from oppression by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.*

VI *That elections of members to serve as representatives of the people in assembly ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.*

VII *That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people is injurious to their rights and ought not to be exercised.*

VIII *That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land or the judgement of his peers.*

IX *That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.*

X *That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.*

XI *That in controversies respecting property and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred.*

XII *That the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments.*

XIII *That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and be governed by, the civil power.*

XIV *That the people have a right to uniform government; and therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.*

XV *That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles.*

XVI *That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.*

–Adopted unanimously June 12, 1776 Virginia Convention of Delegates. Drafted by Mr. George Mason

Important Features of the Bill of Rights

Unlike several state constitutions of the day, the federal Constitution does not begin with a declaration of rights. Instead, the first ten amendments—and subsequent amendments over the years—are grafted onto the end of the Constitution to modify or add to the original text. With respect to individual liberties, previous documents often used words like “ought” and “should.” For example, note how in the Virginia Declaration of Rights, the right to trial by jury “ought to be held sacred,” and excessive bail and cruel and unusual punishments “ought” not to be imposed. The Bill of Rights is much more direct and prohibitive, using language like “shall make no law” and “shall not be violated” and “shall be preserved.” In other words, the **Bill of Rights** vigorously articulated individual liberties and freedom from an oppressive government. In that sense, the Bill of Rights is a ringing pronouncement that abstract concepts like natural rights have real meaning in our lives and that government needs to respect them.

The liberties enunciated in the Bill of Rights are not, in fact, absolute. All these liberties are subject to legislation. A person cannot threaten to assassinate a political leader and hide behind the First Amendment’s freedom of speech. Your neighbors cannot start a toxic waste dump in their backyard and hide behind the Fifth Amendment’s property rights. A person’s right not to be searched does not protect them against lawfully issued warrants. Nor are they protected in situations where authorities do not have a warrant but have probable cause that a crime has been committed. You may not start a religion that sacrifices a virgin to your god on the summer solstice and claims that you are exercising your religion.

Here is the Bill of Rights—the first ten amendments—passed by Congress, ratified by the states, and appended to the U. S. Constitution:

The Bill of Rights

Amendment I *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

Amendment II *A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*

Amendment III *No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.*

Amendment IV *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

Amendment V *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Amendment VI *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.*

Amendment VII *In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.*

Amendment VIII *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

Amendment IX *The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*

Amendment X *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

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2.5: A Federal Republic

"Over time, federalism forces politicians on both sides of the aisle to do what they are supposed to do— politick, find common ground, and negotiate a compromise that no one likes but everyone can tolerate."

–Heather K. Gerkin [1]

A Federal Republic is Fairly Uncommon

The American political system is a federal republic. A republic is a political system in which supreme authority rests with the people, who elect representatives to make decisions. Thus, a republic differs from a monarchy in which authority rests with a king or queen. Most of the world's political systems are republics, at least in name. Those in which a single party or very small group of people are actually in charge might still call themselves republics, but only those that vest sovereignty with the people are true republics.

Federalism is not a common governing system. Of the nearly 200 countries in the world, only about two dozen divide power and sovereignty between a central government and subordinate governments. In addition to the United States, other federal systems include Canada, Mexico, Brazil, Nigeria, India, and Germany. A rule of thumb is that large geographically and culturally diverse countries are more likely to have federal systems, but most countries do not. The vast majority of countries rely on a unitary system of governance.

Struggles Over Federalism at the Constitutional Convention

The U.S. Constitution created the first modern federal system. Up until 1787, the political philosophy of **shared sovereignty**—states and the central government would share authority over the same territory—hadn't really been considered. It wasn't practical or politically feasible for the Constitution's writers to make the move from the Articles of Confederation all the way to a unitary system with the central government as the sole sovereign. For one thing, the transportation and communication systems were simply inadequate to support a unitary political system that stretched from Maine to Georgia. Regional differences were too great for one set of laws to fit all matters affecting so large a territory. Moreover, there was no support among the delegates or the population to drastically reduce state power and create a unitary government.

Almost all the delegates to the convention ended up being federalists—that is, they supported the Constitution—but they differed on how much power to give to the central government. Political scientist David Brian Robertson distinguishes between the narrow nationalists and the broad nationalists. **Narrow nationalists** included people like Roger Sherman, Oliver Ellsworth and most of the delegates from the small states, who wanted to give the national government limited and well-defined powers. **Broad nationalists** like James Madison, Alexander Hamilton, James Wilson, and Gouverneur Morris, wanted to give the national government more expansive powers. [2] For example, Madison and the broad nationalists proposed that the national government have a legislative veto over state laws. This would mean that majority votes in Congress would allow the national government to nullify state public policies—not because they were unconstitutional, *per se*, but because the national legislators thought them unwise. That proposal was defeated. In the end, the broad and the narrow nationalists compromised on modern federalism: shared sovereignty between the central government and the states, central government's enumerated powers, powers reserved to the states, limits on state power, and the Supremacy Clause combined with the Supreme Court, which implied that state laws could be struck down on constitutional rather than policy grounds.

Balancing Federal and State Power

The Anti-Federalists may have lost the debate over ratification, but echoes of the Federalist/Anti-Federalist argument can be heard all the time in contemporary American politics as clashes over power continue. And what is even more interesting, the arguments often defy ideological categories. One would think that conservatives would consistently *oppose* central government's power while progressives—aka liberals—would consistently *support* it. For example, in response to the 1950s and 60s civil rights movement, both Democrat and Republican conservatives opposed the central government exerting authority, while liberals embraced it. On the other hand, conservatives have moved to increase the central government's power to tap phone calls and internet activity, to dictate educational policy, and to define the terms of marriage, a power that had always been a state responsibility. Of course, the Supreme Court struck down the conservative-inspired federal definition of marriage that discriminated against gay couples. Moreover,

conservatives have wanted to empower states to control environmental regulations, knowing that large multi-national corporations can more easily sway most state legislatures into setting lower standards. Sometimes that backfires, such as when California led several states to evade the Trump administration's attempt to weaken automobile emission standards. (3)

The Supreme Court case ***McCulloch v. Maryland* (1819)** set the stage for central government to expand power. Much of what the central government does is tied to its ability to use the Necessary and Proper Clause to extend the reach of one of its enumerated powers. This action is especially true in government regulation, justified under Congress' power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Thanks to *McCulloch v. Maryland* (1819), Congress has often used the Commerce Clause in conjunction with the Necessary and Proper Clause to expand central government power. Recently, however, the Supreme Court has been unwilling to extend federal power tied to the Commerce Clause. For instance, the Court struck down the Violence Against Women Act in 2000 because the majority felt that the central government was unjustifiably intruding into the states' prerogatives and that the Commerce Clause did not entitle the federal government to allow women to sue in federal court for gender-related violence. (4) Similar future rulings are possible because the Court's conservative majority is more likely to endorse limiting central government's authority regarding social welfare or environmental regulation.

How States Interact under the Constitution

The Constitution manages how states interact with each other. Four provisions of the Constitution are important, although one became irrelevant when slavery was abolished.

Article IV, section 1 contains the **Full Faith and Credit Clause**: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." This statement opens the door to all sorts of interesting possibilities. Consider the days before the Supreme Court struck down the Defense of Marriage Act, which allowed states to refuse to acknowledge gay marriages performed in other states. Gay couples who married in permissive states and who moved to states that banned gay marriage were suddenly no longer married, despite what the full faith and credit clause said.

Privileges and Immunities—Article IV, section 2 reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." As free men and women traveled out of their state, other states were obligated not to discriminate against them with respect to civil rights. But the nondiscrimination terms were set by the state being visited. As Ahkil Amar has put it, "If a free black man from Massachusetts went to Virginia, he could be held to whatever rules Virginia applied to its own free black adult males. Out-of-state women would get the civil rights of in-state women; so, too, with children." (5) When determining whether to protect citizenship privileges across state lines, the Supreme Court looks at whether the privilege is "sufficiently basic to the livelihood of the Nation," and then at whether a limitation of that privilege is related to a substantial interest the state is asserting. For example, the Court has held that states may restrict Freedom of Information requests to its own citizens. (6)

Extradition—Article IV, section 2 goes on to say that "A person charged in any State with Treason, Felony or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the Crime." This article prevents people from fleeing justice across state lines. It allows interstate extradition.

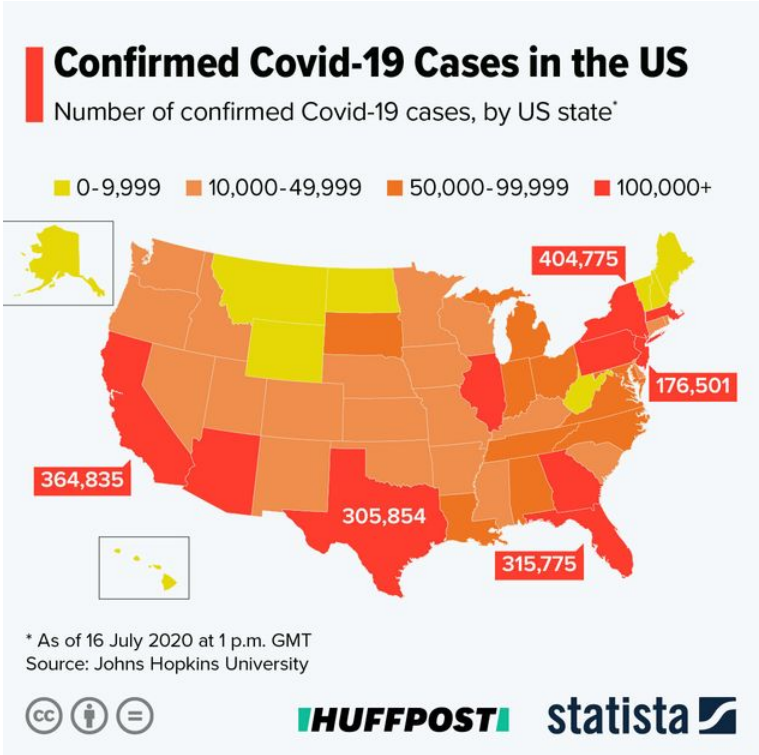
Runaway Slaves—Finally, Article IV, section 2 says that "No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to who such Service or Labour may be due." This section is one of three places in the Constitution that refers to slaves and slavery without using those exact words. This clause forbade Northern states from freeing a slave who had fled from the South, and pledged to give the slave back to his/her master if the master came to claim the slave.

The Advantages of Federalism

Federalism has several advantages.

- serves as laboratories of democracy, an idea put forth by Supreme Court Justice Louis Brandeis in 1932. He wrote that "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory and

try novel social and economic experiments without risk to the rest of the country."[7] States have experimented with welfare policies, pollution control policies, laws against child labor, laws allowing doctor-assisted euthanasia, legalizing marijuana, capital punishment, and so forth. Some state experiments have been translated into national policy, such as Wisconsin's 1932 initiative on unemployment compensation. The COVID-19 pandemic illustrated how different states responded to the public health challenge and the possibilities for re-opening their economies following the quarantines.



- allows for regional differences in a country as large and diverse as the United States. Without federalism, policies in Connecticut, Louisiana, and Kansas would essentially be the same. Large, diverse nation-states tend to find federalism attractive precisely because it allows regional political subcultures to develop that reflect the local population's desires. One state may want to execute murderers, while another may not. One state might want to make access to abortion very difficult, while another might not.
- states often serve as training grounds for national-level politicians. Many representatives, senators, and presidents develop expertise and networks at the state level before moving on to federal government positions. Because the states have dual sovereignty with the central government, state and local politicians don't just implement policies decided by Washington. Thus, they often bring a wealth of experience with respect to how central government policies impact states.
- brings government closer to the people and gives them ample opportunities to participate. Important decisions get made at the state and local levels, which are often more accessible and responsive to local pressure groups. New parties have an easier time starting at the local level. Reformers who want to take existing parties in new directions can also begin that process at the local level.

The Disadvantages of Federalism

Despite the above advantages, federalism is also problematic. Politics are fragmented in a federal system. When you count the total number of discrete governments in this country—including the central government, states, cities and towns, counties, school districts, and a myriad of special districts—there are nearly 88,000 of them! Who is responsible for what? How can any citizen keep up with issues at multiple levels? Can they cast informed votes in presidential, congressional, gubernatorial, state legislative, city, county, school district, and water district elections? What about places where the judges are elected?

In federal systems, state and local governments' purported closeness and accessibility is often a mirage. For one thing, turnout rates in state and local elections are often considerably lower than in national races. State and local governments also tend to listen

intently to local economic interests that may or may not have local people's interests in mind. And because state and local politics gets very little media attention, policies are more likely to be passed there without being properly scrutinized and considered.

The federal nature of the U.S. system also allows large economic interests to play states off against each other. Very often, corporations will announce that they plan to build a new factory somewhere in the United States. They invite states to compete against each other, then states offer the company incentive packages that may include reduced taxes, free land, or developed infrastructure. The company chooses the best offer, which means that the "winning" state pays dearly for whatever new jobs are created. It's often a fool's bargain because taxes are increased or services are cut on ordinary people to keep the corporations happy. (8)

Finally, federalism has sometimes allowed a few states to block initiatives that had majority support. Take the case of education equality. In 1954, the Supreme Court ruled that segregated schools were unconstitutional, but because education is primarily a local responsibility, Southern school districts defied the Court's ruling in *Brown v. Board of Education*. Even ten years after the case was decided, most school districts in the South were still racially segregated.

Federal Grants and Mandates

The federal government** provides a tremendous amount of money to state and local governments. According to 2018 official records, this amount totaled over $696 billion. (10) Federal money comes to states in two basic forms.

1. **Categorical grants** provide money to states and local governments to spend on specific delineated categories or purposes. Categorical grants come with certain strings. For instance, states or local governments receiving the grants must abide by federal nondiscrimination laws, and they may have to pay wages at certain levels. There are two types of categorical grants.
    1. **Project grants** are open on a competitive basis and require an often elaborate application process. Indeed, many entities such as state governments, city governments, and colleges employ people to draft grant applications.
    2. **Formula grants** are pots of money that get distributed to state and local governments based on some pre-established formula, which might entail giving money based on population, per capita income, chance of being hit by terrorists, or some other such reasonable criteria.
2. **Block grants** are the second form of federal money that state and local governments receive. Block grants are looser than categorical grants. They grant states money to use for a broad public policy area, such as the welfare block grants that replaced existing federal welfare programs in the mid-1990s. State governors and legislators tend to like block grants because they prefer the accompanying freedom to design their own solutions to social problems.

By giving money to states and local governments, the federal government gains leverage over some aspects of state policies. For example, in the 1980s, the federal government made it clear that highway construction and repair money would be contingent on states raising their minimum drinking age to twenty-one. Needless to say, the minimum age for purchasing alcohol is twenty-one across the land.

The federal government issues **federal mandates**, which command that states undertake certain public policies or enforce certain restrictions. Very often, states cry that these requirements are **unfunded mandates**, meaning that states must pick up the bill for what is essentially a decision made in Washington, D.C. A great example is the No Child Left Behind Act of 2001, which enforced new performance standards on individual schools and school districts. States complained that the federal government did not provide nearly enough money to restructure curricula, target struggling students, administer tests, and hire qualified teachers. Unfunded mandates also affect private companies. For example, the Clean Air Act requires energy companies to buy expensive equipment to mitigate pollution.

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2.6: Federalism's Historical Development

"After a third of a century of power flowing from the people and the states to Washington, it is time for a New Federalism in which power, funds, and responsibility will flow from Washington to the states and to the people."

—President Richard Nixon [1]

The Definitional Period of American Federalism

Around the world, political power is never equally balanced between the central government and the states. The central government ends up being stronger than the states, which is generally true in the United States. However, as the first modern federal governing system, the United States has experimented and gone through several historical developmental stages of federalism.

Although not officially named, the first instance was marked by states challenging federal authority, which ultimately gave way to officially recognizing federal supremacy. In this Definitional Period of American Federalism (1789 to 1865), the country went through wrenching—and ultimately deadly—struggles over federal versus state power. Another way to think about it: states went from sovereign powers under the Articles of Confederation to subordinate units under the Constitution practically overnight. The key struggles were resolved in favor of central government power.

***McCulloch v. Maryland* (1819)**—States objected to establishing the second Bank of the United States. The Supreme Court ruled that states could not tax federal operations and that Congress had broad implied powers when its enumerated powers were combined with the Necessary and Proper Clause.

***Gibbons v. Ogden* (1824)**—This case centered on interpreting Congress' power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," which is also known as the commerce clause. In the early nineteenth century, New York state gave Robert Fulton and Robert Livingston a monopoly on steam navigation. In turn, they licensed Aaron Ogden to operate steam powered ferries between New York and New Jersey. At the same time, the federal government gave Thomas Gibbons a license to operate ferries in interstate waters. Gibbons' route competed with Ogden's route. Ogden sued Gibbons. Ogden won the suit in the New York state courts. Gibbons appealed up to the Supreme Court and won. The Court made several important decisions.

- Defined "commerce" broadly to include the literal shipment of goods and "commercial intercourse" between states.
- Congress could **not** regulate business activity that solely took place within a state's boundaries, it **could** regulate commerce if part transcended state boundaries.
- Federal law granting Gibbons a commercial license trumped New York's attempt to give Ogden exclusive right to carry goods and people between New York and New Jersey.

The Nullification Crises—During this period, the perilous and unsettled nature of federal and state relations was exemplified by state attempts to nullify federal laws. States effectively said, "We do not recognize this federal law as operable on us." In 1798, Congress passed, and President John Adams signed the Alien and Sedition Acts. Kentucky and Virginia both passed resolutions nullifying the law in their states and asserted the right to disregard the federal laws with which they disagreed. The Kentucky Resolution, secretly written by Thomas Jefferson, said that since the Constitution was created by the states, each state has "the unquestionable right to judge of its infraction". In other words, Kentuckians get to determine whether a law is unconstitutional. [2] The Democratic-Republican/Jeffersonian victory in the 1800 election resulted in states repealing the offending federal legislation.

In the 1830s, a more serious nullification crisis happened. Southern states, which exported agricultural products like cotton, objected to a federal tariff law that they felt unduly punished the South and favored protecting northern manufacturers. John C. Calhoun resigned the Vice Presidency in 1832 so he could run for Senate from his native South Carolina and better lead the fight against the tariffs on the South's manufactured goods. South Carolina passed a resolution nullifying the federal tariff in the state and prepared to militarily resist the federal government should it insist on enforcing the tariff. Congress passed a Force Bill authorizing the president to use the military against South Carolina. The United States was on the verge of civil war. Finally, Congress passed a new tariff bill in 1833 that gave concessions to Southern interests, and South Carolina repealed its nullification resolution. [3]

The Civil War—There were multiple reasons that contributed to the Civil War. One was slavery and the political question of whether additional states would be admitted to the United States as slave or free—thereby determining the political balance in

Congress. Republican Abraham Lincoln's presidential election was the final straw for white southerners who benefited economically, culturally, and psychologically from slavery. Even though Lincoln asserted on many occasions that he did not believe in the inherent equality of blacks and whites, he did say things like, "There is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence, the right to life, liberty, and the pursuit of happiness." [4] South Carolina repealed its ratification of the Constitution on December 20, 1860. On February 4, 1861, six states formed the Confederate States of America. Ultimately, eleven states joined the Confederacy. The Civil War killed at least 670,000 soldiers and civilians, freed 3.5 million people from slavery, and crushed federal authority's most serious challenge in U.S. history.

The Civil War was also a decisive victory for those who held that the states are merely administrative units of the people. The Constitution begins with "We the People," not "We the states." During the Civil War, Abraham Lincoln gave the **Gettysburg Address** to dedicate a cemetery on the site of a great battle between North and South in Pennsylvania. Many people might remember this line... "that government *of* the people, *by* the people, and *for* the people, shall not perish from the earth."

Dual Federalism

Next, the United States entered a period that political scientists call **Dual Federalism** (1865-1932), commonly called Layer Cake Federalism. Despite the outcome of the Civil War, states continued to assert their prerogatives to govern exclusively in important public policy areas, and they were aided by Supreme Court rulings to that effect. Dual federalism indicated that there are public policies over which the federal government predominates, such as foreign policy, tariffs, monetary policy, national defense, interstate commerce, and the mail. Meanwhile, states took the lead in other areas of governmental responsibility like public safety, education, elections, business licensing, family and morals policy, inheritance and property laws, and commerce within state boundaries, including wages and working conditions. Note that state responsibilities more directly impinged on how people lived their day-to-day lives.

The legacy of the dual federalism era was profound. The notion that vast swaths of public policy directly affecting people's lives were off-limits to federal intervention. As a result, during the U.S industrial explosion, state legislatures could empower corporations at the expense of people and embolden white supremacists and nativists when former slave and immigrant populations were struggling to establish themselves as equals within the country. This action led to the era of state Jim Crow legislation, limiting political and economic freedom for African Americans, unregulated child labor, unchecked corporate malfeasance, and morals legislation used to keep women in their place.



Two Girls Working in a Textile Factory in 1909.

One example is the issue of child labor. Congress passed the Keating-Owen Act in 1916, regulating commerce involving goods produced by children. It banned interstate sale of goods made by children under the age of fourteen and by children under sixteen if they were working more than sixty hours a week. However, in the case of ***Hammer v. Dagenhart*** **(1918)**, the Supreme Court struck down the federal law as unconstitutional. Writing for the Court, Justice William Day said that manufacturing itself was not interstate commerce. Since the children were only involved in manufacturing—in this case, cotton—but not involved in transporting the goods once they were manufactured, the federal government had no power to legislate. According to Day, the Tenth Amendment reserved states' powers, including the right to regulate manufacturing, even if the goods were intended to be shipped across state lines. [5] Thus, the federal government was powerless to ban or regulate child labor.

Cooperative Federalism

Cooperative Federalism ran between the 1930s and 1960s. The twin disruptions of the Great Depression and World War II—and the response led by Democratic presidents—created an era that was marked by increased federal power. Congress passed economic regulations and instituted social welfare policies that had never been seen at the U.S. national level. Under the **New Deal**, the

national government regulated the banking industry, supported agricultural prices, set the first federal minimum wage, created unemployment insurance, established social security for the elderly, supported the right of workers to unionize and collectively bargain, and put people to work building schools, hospitals, and roads.

This period was marked by two important developments. First, the federal government and the states became partners as they solved problems associated with the Great Depression, World War II, and then the Cold War. Many programs were entirely or predominantly financed by the federal government and administered jointly by the federal and state governments or solely by the latter. For example, unemployment insurance (part of the Social Security Act of 1935) continues to be administered by states. The National Interstate and Defense Highways Act of 1956 provided federal funding predominantly for interstate highways, while states had significant roles in planning and construction. Some people call mixing federal and state powers "marble cake" federalism.

Second, the Supreme Court finally acceded to government regulating the economy and protecting civil rights and liberties. Initially, the Court struck down Roosevelt's initiatives such as the National Industrial Recovery Act and the Agricultural Adjustment Act. Roosevelt grew so frustrated that he proposed a **court-packing plan** that would allow him to nominate new justices and expand the total number of justices on the Court. [(6)] Beginning in 1937, the Court abandoned the interstate commerce ruling found in *Hammer v Dagenhart* (1918) and began to treat America's economic system as a truly national one. Now, *all* interstate commerce is national. A person digging coal in Kentucky is engaged in interstate commerce, even if they have never left the state, because the coal is likely headed to power plants in other states.

New Federalism

Republican presidents Nixon, Reagan, and the two Bushes joined Democratic presidents Clinton and Obama in devolving federal powers to states where they could. Under former President Nixon, the federal government began offering block grants supporting housing and community development while allowing states to figure out how best to spend the money. President Reagan unsuccessfully proposed to eliminate the Departments of Education and Energy and transfer most of their functions to the states. He was more successful in shifting federal support from categorical to block grants in areas beyond housing, thereby giving states more freedom. In the 1996 welfare reform law, President Clinton presided over the federal government transferring welfare power to the states. The Obama administration allowed California to set its own air pollution regulations. There are, of course, exceptions to this pattern. For example, under President George W. Bush, the No Child Left Behind Act of 2001 consolidated federal power over education.

Conclusion

The United States has a conflicted history of political power in part because of the federal structure built into the Constitution. Struggles over the overall balance of power will continue, as will fights about specific legislation and whether it vests decision-making power with the federal government or the states. The public's need for good governance, regardless of level, is ever-present.

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5. Hugh D. Hindman, *Child Labor: An American History*. Armonk, NY: M. E. Sharpe, 2002. Pages 64-70.
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7. *National Federation of Independent Business v. Sebelius* (2012).
8. *United States v. Lopez* (1995).

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2.7: A Secular Republic

"It does me no injury for my neighbor to say that there are 20 gods, or no god. It neither picks my pocket nor breaks my leg."

–Thomas Jefferson [1]

"Granting a citizen the right to think anything she wants is the preamble to other privacies."

–Jacques Berlinerblau [2]

What is a Secular Republic?

Many Americans are unfamiliar with the extent to which the founders went to create a secular republic as well as a federal one. Indeed, one could argue that the United States was the world's first secular republic. A secular republic is one that is characterized by a separation between government and religion. Above all, it means to avoid the trappings of theocracy in all its variations. [3] In a **secular republic**, people are free to practice religion or non-religion in peace; church and state are separated; people of different faiths are treated equally before the law; and religious tests and oaths are not required to vote or hold office.

American Secularism's European Roots

The Constitution was firmly rooted in the Enlightenment's secular philosophy. In his *Letter Concerning Toleration* (1689), English philosopher **John Locke** argued in favor of religious toleration and tried to "distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other." The American Revolution and the writing of the Constitution happened during a fight in England against the **Test and Corporation Acts**, which prohibited Catholics from holding office there. The American founders were sympathetic with the arguments of **Joseph Priestly**, co-discoverer of oxygen and a founder of Unitarianism, and **James Burgh**, a Scottish minister and political writer, who both wanted the Test and Corporation Acts to be repealed. Burgh wrote, "Away with all foolish distinctions about religious opinions. Those with different religious views are both equally fit for being employed in the service of our country." [4]

The Constitution reflected the Enlightenment views of many of the founding generation. Thomas Jefferson was most proud of three of his accomplishments: The Declaration of Independence, founding the University of Virginia, and writing and passing the Virginia Statute of Religious Liberty in 1786. Under his design, the University of Virginia did not have a church on school grounds, and he forbade teaching theology. When the Virginia Statute of Religious Liberty passed, Jefferson declared that there would be "freedom for the Jew and the Gentile, the Christian and the Mohammeden, the Hindu and infidel of every denomination." [6]

Secularism in the U.S. Constitution



Street Sign: Intersection of Church and State.

Secular features are manifest throughout the U.S. Constitution. Religious tests are explicitly banned in Article VI: "No religious test shall ever be required as a qualification to any office or public trust under the United States." Apparently, this provision passed through the Constitutional Convention with very little debate, which was remarkable given that eleven of the thirteen states had religious tests for public office. In Delaware, for example, office holders were required to affirm their "faith in God the Father, and in Jesus Christ His only son, and in the Holy Ghost, one God blessed forevermore." [11]

Aside from banning religious tests, the Constitution also distinctively failed to invoke God. Before entering office, the president is required to make an oath or affirmation pledging to protect and defend the U.S. Constitution, but the oath does not have to be on a Bible, nor is "so help me God" a part of the affirmation. Adding "In God We Trust" to U.S. money didn't happen until the Civil

War, and the “under God” language of the Pledge of Allegiance wasn’t added until 1954 and was a product of the McCarthy-era’s fear of communism. These additions came through legislation and are not a part of the Constitution.

The Constitutional Convention’s work elicited widespread criticism from those who felt it was a godless Constitution. At the Massachusetts ratifying convention, one critic said that without a religious test for the president, “a Turk, a Jew, a Roman Catholic, and what is worse than all, a Universalist, may be President of the United States.” On March 7, 1788, a writer for the Massachusetts Gazette criticized the Constitution for failing to invoke God, by writing that “it is more difficult to build an elegant house without tools to work with, than it is to establish a durable government without the publick protection of religion.” [12] During the ratification debates, critics made numerous attempts to amend the Constitution to add religious tests and/or to add references to God. All these attempts were defeated. [13]

The Advantages of Secularism

Why a secular republic? Generally, secularism promotes order and peace between different religions.

- Jacques Berlinerblau's idea of **secular compact**, which is the understanding that the state guarantees people the freedom to believe or not believe whatever they want in an orderly society. In exchange, all citizens agree to limit their religious practices to those that do not violate the law or disrupt society. In essence, one can believe whatever one wants but can only act on those beliefs that don’t hurt others or destabilize society.
- Religion, atheism, and agnosticism all tend to thrive in secular republics, perhaps because secularism separates state authority from the dominant religion and all sects equally.
- It defends freedom of conscience, which is a bedrock of democracy. A society in which individuals cannot articulate spiritual truths for themselves is not likely to allow people much freedom to publicize and advocate for any of their worldly beliefs either —especially if they differ from those who hold the reins of power.

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2.8: Amending the Constitution

"The Constitution is ink on parchment. It is forty-four hundred words. And it is, too, the accreted set of meanings that have been made of those words, the amendments, the failed amendments, the struggles, the debates—the course of events—over more than two centuries."

–Jill Lepore [1]

The Comparative Difficulty of Amending the Constitution

Article V provides several possibilities to amend the Constitution. Since 1789, the U.S. has amended the Constitution only twenty-seven times, even though there have been over eleven thousand amendments proposed. By contrast, the Basic Law of the Federal Republic of Germany has been amended more than fifty-five times since it went into effect in 1949. Similarly, France has amended its constitution two dozen times since 1958. Between 1982 and 2015, Canada amended its constitution eleven times. Amending the U.S. Constitution appears to have become politically more difficult over time—so much so that Albert wrote that the Constitution almost seems to be "amendable in theory alone." [3] The latest amendment affecting the lives of ordinary Americans was in 1971 when the 26th Amendment set the national voting age at 18 years. (In 1992, the 27th Amendment affected compensation for Representatives and Senators.)

It's entirely possible that the founders essentially "got it right" when they wrote the document, meaning that there hasn't really been much need for change. The eleven thousand plus amendment proposals suggest that this is not the case. Obviously, people from a wide variety of political perspectives have thought that the Constitution needed updating. Other people would argue that these proposals were justly defeated. Another way to think about it is that the Constitution's amending process puts up too many obstacles.

Amending the Constitution

How can the Constitution be amended? Basically, there are four possibilities situated in two pathways. One pathway starts in Congress and the other with the states. Both pathways need sufficient states to ratify the amendment for it to go into effect.

Congressional Initiation

1. The House and the Senate both must pass the amendment by a two-thirds majority vote. If that happens, then the amendment needs to pass by a simple majority of 50 percent, plus one vote, in three-quarters or thirty-eight of the state legislatures to go into effect.
2. The House and the Senate both must pass the amendment by a two-thirds majority vote. If that happens, then the amendment needs to be accepted at state-level conventions in three-quarters or thirty-eight states to go into effect.

State Initiation

3. Two-thirds or thirty-eight states petition Congress to call for a national convention, which passes the amendment. If that happens, then the amendment needs to pass by a simple majority of 50 percent, plus one vote, in three-quarters or thirty-eight of the state legislatures for it to go into effect.
4. Two-thirds or thirty-eight states petition Congress to call for a national convention, which passes the amendment. If that happens, then the amendment needs to be accepted at state-level conventions in three-quarters or thirty-eight states to go into effect.

The first pathway is by far the most common. All but the Twenty-first Amendment traveled this path. Repealing Prohibition was accomplished with pathway #2 above. Pathways #3 and #4 have never been used to pass an amendment. From 1789 to 1993, there were almost 400 proposals from some states calling for a convention to amend the Constitution. [4] In 2018, conservative interests came within six states of successfully calling for a constitutional convention that they hoped would constitutionally enshrine their values. These efforts were funded and pushed by wealthy people such as the Mercer family and the Koch brothers. [5] Progressives have had less success pushing the same kind of agenda. Legal scholars and jurists from both the Left and the Right worry about a second constitutional convention running amok and radically altering America's constitutional order.

The U.S. Constitution has not been amended much because it is very difficult to get approval from both the House and Senate with a two-thirds majority and thirty-eight states. Consider the fate of the Equal Rights Amendment (ERA), which surmounted the

Congressional hurdle only to fall three states short to ratify. Many years later, Nevada ratified the ERA, followed by Illinois in 2018. After Democrats took over Virginia's state government in 2019, all eyes turned toward that state to finally ratify. The House of Representatives has twice passed a joint resolution declaring the ERA validly ratified—in February 2020 and March 2021—but Republicans have used the filibuster to block the measure in the Senate.

What if . . . ?

What if you led an organization that was proposing a new amendment to the Constitution? What amendment would you propose? Why? What positive results would you hope to achieve with it? What if you were charged with making the Constitution easier to amend? What procedure would you put in place?

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2.9: How Democratic is the U. S. Constitution?

"The Constitution was a compromise between slaveholding interests of the South and moneyed interests of the North."

–Howard Zinn [1]

"Wise as the Framers were, they were necessarily limited by their profound ignorance."

–Robert Dahl [2]

The question *How democratic is the Constitution?* is more complicated than it initially appears. Are we talking about the Constitution as it was written prior to any amendments? Or, are we talking about the Constitution we have now? Are we talking about the authors of the Constitution and what their understanding was of democracy? Are we talking about the Constitution as a document of its own time? Or, are we going to judge it by contemporary standards of democracy? What do we mean by the word *democratic* anyway? If we define **democracy** as rule by the people—either directly or via elected representatives—and if the definition of *the people* has expanded over time, how are we to fairly judge the Constitution on that ground? Not so easy, is it?



Democracy Road Sign

The Constitution in Broad Perspective

Conduct a mental exercise and transport yourself back to the period between 1787 when the Constitutional Convention opened in Philadelphia and 1791 when the Bill of Rights was officially added to the Constitution. Float around the United States' eastern seaboard and get a feel for the nature of the government that was being created there. Next, roam around the rest of the world, examining the governments of all the countries, kingdoms, principalities, empires, and tribal societies that existed at the time. From this perspective, in the book *Miracle at Philadelphia* [3], Catherine Drinker Bowen concluded that the founders themselves thought it was a miracle. The men who wrote the Constitution were remarkably steeped in cutting-edge political philosophy and displayed a thoughtful kind of genius with respect to laying out a written constitution for a large republic based on popular rule. One can hardly overstate how important a step forward the U.S. Constitution was for all of humankind. Given the social norms of the time, it is difficult to imagine how the founders could have produced a document that was *more* democratic than the Constitution and Bill of Rights.

Still, the founders were not angels. Nor were they divinely inspired. Nor could they divorce themselves from the time in which they lived. They were flesh and blood people with several obvious and relevant characteristics, and they represented interests not widely shared by the rest of the population. First, all the founders were men. Further, they shared a world view in which women's interests were only channeled into the public sphere through husbands, fathers, and brothers. The founders were also white and were not concerned about the interests of slaves, free blacks, Native Americans, or other people not white. As propertied men, the founders did not represent the interests of even the majority of white men—those who did not have enough property to vote or hold office.

In 1913, the historian Charles Beard wrote one of the most famous and contentious books on the Constitution called *An Economic Interpretation of the Constitution of the United States*. He asserted that the founders were merchants, people who had money on loan to others, and people who owned public bonds, and that they pushed the Constitution at the expense of farmers and debtors. Subsequent research revealed some limitations of Beard's book, but his work forever changed the way we understand the American founding. [4] The obvious fact is that the groups of writers preferred a central government strong enough to protect those interests, and did not want to empower a popular majority to carry out radical economic policies that would damage their own elite interests.

The Founders' Understanding of Democracy

It may be somewhat of a shock to realize that the American founders were not fond of democracy. As the historian Richard Hofstadter wrote of the founders, "In their minds, liberty was linked not to democracy but to property." Further, Hofstadter argued that the founders were interested in negative liberties—the freedom of propertied interests from "fiscal uncertainty and irregularities in the currency, from trade wars among the states, from economic discrimination by more powerful foreign governments, from attacks on the creditor class or on property, from popular insurrection." [5]

It's easy to see Hoftstadter's ideas in the founder's own words. James Madison argued that "Democracies have ever been spectacles of turbulence and contention," and that they are incompatible with "the rights of property." Indeed, he was concerned that those "without property" and "debtors," which constitute the majority of the population, would use their power to "kindle a flame" for "wicked projects" like "abolition of debts" and "an equal division of property." [6] Similarly, Alexander Hamilton looked down his nose at "the idea of an actual representation of all classes of people," and instead argued that the merchant class should be "more equal" than the others. [7]

Instead of a "democracy," most founders wanted to establish "popular government" or a "republican" form of government. [8] They wanted the government to be founded on the will of the people, and mediated by social customs and elite-dominated institutions that would ensure that their interests would not be jeopardized. Women's interests would be represented by their brothers, fathers, and husbands. Poor white men's interests would be represented by their betters in the merchant and creditor classes. Slaves' interests were not really considered separate from those of their owners. Madison wrote, in *Federalist #10*—that "The public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves." Moreover, the "wisdom" of these leaders would "best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." In reality, U.S. history has shown that representatives, senators, presidents, and Supreme Court justices have repeatedly demonstrated a limited understanding of justice and an unwillingness to act in the public interest unless faced with organized majorities of ordinary people demanding that they do the right thing.

Constitutional Features Limiting Popular Rule

The Constitution is full of features designed to limit popular rule. The House of Representatives was the only popularly elected body. The rest of the document is a minefield of features designed to thwart the majority will and to protect the interests of elites. Consider the following:

Separation of Powers—The separation of powers slows government down and makes it structurally unresponsive to large, sudden changes in popular will. Under the original, un-amended Constitution, such public mood swings need to be sustained over a long time to elect enough representatives to the House and to ensure that enough senators get selected by states to serve in Congress. The president also needs to agree with the policy the people support. Finally, the whole project could be shot down by Supreme Court justices when the new policy is challenged in court. In addition, it hinders the people's ability to hold leaders accountable—even after constitutional amendments designed to make the U.S. more of a democracy. [10]

The Senate—In the original Constitution, senators were not popularly elected. Instead, the senators were chosen by their respective state legislatures. Thus, the Senate was doubly insulated from the popular will. In 1913, the Constitution's Seventeenth Amendment was ratified, which said that senators would henceforth be "elected by the people" of each state. Even now, however, the Senate is a profoundly undemocratic body. Each state is allotted two senators, regardless of the state's population. Voters in smaller, rural states are more empowered, which happens to be whiter than the overall U.S. population and the large, more populous, more diverse states. As noted by Noah Feldman, "The Constitution was designed precisely so that no one would be able to do anything about the undemocratic Senate." [11]

The President—The American president is not elected by the people. Instead, presidents are elected by the Electoral College. Even though we have tied the electors' choice to popular vote in each state—or in particular districts in the case of Nebraska and Maine—the basic fact is that popular vote does not determine who sits in the White House. The Electoral College vote is determinative, not that of the people. For example, George W. Bush became president in 2001 even though Al Gore received about 544,000 more votes nationwide, and this is why Donald Trump became president in 2017 even though Hillary Clinton received about 2,900,000 more votes nationwide. It is difficult to call a country's political system fully "democratic" when majority vote does not elect the president.

The Supreme Court—Justices who sit on the Supreme Court and make enormously significant decisions about the constitutionality of state and federal laws and regulations are insulated from the popular will. They are nominated by the president—who may or may not be in office due to the will of the people—and are approved by the undemocratic Senate. Further, they hold their seats for life, meaning that they can influence the character of the country long after they have fallen out of touch with the lives of ordinary Americans. Most justices come from upper-class backgrounds and attend elite colleges. For most—but not all—of U.S. history, a majority of conservative justices have implemented conservative ideology through their rulings, empowering corporations and putting their finger on the scales of justice in favor of a particular set of interests.

No Positive Right to Vote—The original Constitution never articulated an affirmative right to vote to anyone, and instead, left the vote-granting privileges to states. Initially, of course, states granted voting privileges to the minority of property-owning white men. Through amendments to the Constitution, the "right to vote" was extended to people of color, to women, and to people who are eighteen years and older. However, as Garrett Epps has written, our courts still see voting as a privilege: "The 'privilege' over the years has been made dependent on literacy, or long residency in a community, or ability to prove identity, or lack of a criminal past. None of these conditions would be allowed to restrict free speech, or freedom from 'unreasonable' searches, or the right to counsel," but they have been used to keep people from voting. [12] A truly democratic constitution would positively assert the right of all adult citizens to vote and place the burden of registering people to vote on the government rather than the individual.

The Amendment Process—Suffice it to say that the Constitution is remarkably difficult to amend. Thomas Jefferson once wrote to James Madison that "The earth belongs…to the living…the dead have neither powers nor rights over it." [13] And yet, we are governed by a slightly modified document written by a small number of slave-owning, wealthy white men who did not have the benefit of all we know about the world nor the appreciation we have for the dignity of all people.

What if . . . ?

What if you were invited to a constitutional convention today to write a new Constitution? How would you convince your colleagues that the new U.S. Constitution needs to be more structurally democratic? What features would you insist be a part of the new Constitution?

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CHAPTER OVERVIEW

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3.1: Who are Our Members of Congress and Whom Do They Represent?

"Nobody ever says to men, how can you be a Congressman and a father."

–Congresswoman Patricia Schroeder [1]

"Plutocracy—rule for the rich by the rich—prevails in Congress for the most part."

–Michael Parenti [2]

Who Are Our Members of Congress?



A Committee Meeting in the U.S. House of Representatives.

The United States Congress is composed of 435 representatives and 100 senators. The representatives are elected to two-year terms, and the entire body is up for re-election every two years. Senators have six-year terms, with one-third of them up for re-election every two years. Under the original Constitution, senators were chosen by state legislatures rather than by popular vote, but they have been popularly elected since the Seventeenth Amendment passed in 1913. There are no term limits for either representatives or senators.

The House districts are more uniformly populated than are the states—except in cases like Wyoming where the House district is also the state boundary. The average House district has between 700,000 and 800,000 residents, but states range in population, for example, about 40 million for California to less than 600,000 for Wyoming. Note that the least populous states, like Wyoming, are guaranteed one representative and two senators regardless of their population.

So, there are 535 people whose job ostensibly is to represent the people of the United States. In 1776, when states were writing new constitutions to replace state charters, John Adams wrote that a legislature "should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them." [3] How does our Congress measure up to this standard? An analysis shows that congressional members, in several respects, do not represent average Americans. (These stats are representative of 2018-2019.)

Occupation—Lawyers constitute .6 percent of the U.S. workforce—and even less of the overall population—yet over 40 percent of congressmen were lawyers before entering Congress. Around another 22 percent of congressmen list business/banking as their prior occupation.

Sex—Approximately 51 percent of the U.S. population is female, while women constitute only 24 percent of the Representatives and Senators, which is the largest percentage of women *ever* in Congress. From the beginning of the republic to 2020, only 2.9% of all members of Congress have been women.

Race—Whites comprise 63 percent of the U.S. population, but 78 percent of Congress and 94 percent of the Republicans in Congress are white. The current Congress is the most diverse it has ever been. For example, in 1945 nonwhites accounted for 1 percent of Congress while they account for 22 percent now.

Age—The median age of people in the United States is slightly over 38 years. The median age of House members is 58 years; and for senators, it is 61 years.

Education—Around 96 percent of congressmen have at least a four-year college degree, while only 34 percent of American adults possess a bachelor's degree.

Income—The median family income in 2018 was about $62,000, while the base pay for Representatives and Senators was $174,000.

Wealth—Congressional members don't have to disclose their wealth in exact terms. However, at least 12 members of Congress have a net worth of over $50 million; 34 have a net worth of $10-50 million; 157 have a net worth of $1-10 million; and 155 have a net worth of $100,000-1 million. The median net worth of Americans aged 55-64 is about $164,000. Thus, the majority of the 535 congressional members possess considerably more wealth than the average American.

Whom Do Members of Congress Represent?

Descriptive representation—concerns "the extent to which a representative resembles those being represented." [(5)] Collectively, we would ask: to what extent do our representatives resemble the population being represented, and does it matter if they don't? Historically speaking, Congress has descriptively represented wealthy, educated, white males. It is, however, slowly becoming more diverse with respect to race and gender, but not with respect to wealth and education. Is a legislature populated disproportionately by men qualified to legislate on women's access to abortion and reproductive health services? What about a legislature deliberating health insurance policy when the overwhelming majority of its members have never gone a day without health insurance? What about these wealthy individuals debating whether or not to increase the minimum wage? What are people of color to think about a predominantly white legislature's ability to fully address civil rights?

Surely, men can understand and empathize with women's perspectives. One does not have to be African American, Asian American, or Latinx to argue against criminal justice discrimination or against voting discrimination. One does not have to be of a particular religious denomination to uphold freedom of conscience for believers and non-believers alike. Still, there's something disconcerting about a legislature whose members do not descriptively represent the population's diversity, because representative democracy is about the whole population turning over decision-making power to a smaller group. Discuss with your friends, family, and classmates the issue of descriptive representation.

Substantive Representation—concerns whether representatives "advance the policy preferences that serve the interests of the represented." [(6)] Representation turns the collective's decision-making powers over to a subset of people who are supposed to make wise, far-seeing decisions in the interests of those they represent. In many ways, Congress is the beginning point, for it can fulfill its function to represent ordinary Americans only if it passes legislation that the public wants and that serves the public's broad interest in promoting the general welfare, facilitating justice, and securing the blessings of liberty. As political scientists Benjamin Page and Martin Gilens wrote, "It seems obvious to us that in a democracy, the government should pay attention to what policies its citizens want." [(7)]

Congress' substantive representation track record is not very good. Consider the following policy options, public support for each, and the legislative outcome. [8]

Policy Option	Public Support	Outcome So Far
Background checks for guns	89%	No law passed
Paid maternity leave	84%	No law passed
Overturn *Citizens United* decision	75%	No law passed
Government support for childcare	75%	No law passed
Medicare option for health insurance	70%	No law passed
Federally regulated drug prices	67%	No law passed
Pathway to citizenship for illegal immigrants	64%	No law passed
Green jobs and infrastructure	63%	No law passed
Increase taxes on incomes over $1 million	62%	No law passed
Increase minimum wage	60%	No law passed
Medicare for all	54%	No law passed
2017 tax cut mostly for businesses and the rich	33%	Law passed
2008 Wall Street bailout	20%	Law passed

Based on this table, it appears that a majority of people would like Congress to pass laws that address specific issues affecting broad swaths of the populace. In reality, Congress seems unable to substantively represent the interests of ordinary Americans, but does appear able to deliver on the wishes of corporations and the rich. For example, in the 2008 Great Recession, Congress bailed out banks and other financial institutions without providing any corresponding help for the millions of people who lost their homes. In another example, Congress passed a tax reform act in 2017. Analyses of the change indicate that by 2027, 83 percent of the tax reduction benefits will go to the top 1 percent of wage earners. [9] Even worse, the tax cut ballooned the federal deficit and did not stimulate the economy as promised. So: What is the purpose of Congress if it typically does not act in accord with public opinion? Could the lack of substantive representation be a key reason why Congress' public-approval rate typically hovers between only 20 and 25 percent?

Congress *has* acted in the interests of ordinary Americans and *will* do so in the future only if enough representatives and senators are sufficiently afraid of the one real source of power that people have—their votes. For example, outside of the South, solid majority support for civil rights legislation combined with various civil rights group's legal, public relations, and civil disobedience strategies put enough pressure on Congress to pass the Civil Rights Act of 1964—even though a white majority was still uncomfortable with integration. [10] Similarly, growing environmentalism among the public and the first Earth Day celebration were instrumental in convincing President Nixon and enough representatives and senators to establish the Environmental Protection Agency, to pass the Clean Water Act, and to enhance the Clean Air Act. (Note: Former President Trump rolled back many of the clean water protections, which President Biden has counteracted and put back in place.)

What if . . . ?

What if we did away with elections for Congressional members? What if we chose Representatives and Senators by lottery—Representatives for one six-year, non-renewable term and Senators for one nine-year, non-renewable term? What would be the advantages and disadvantages of selecting our legislators this way? Would you put qualifications in place regarding who is eligible

for the congressional lottery? What if we did a lottery for nominations, and picked two people for each congressional election, who would then debate each other, put out platforms, and face the voters? Would that better preserve popular choice?

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3.2: Congressional Roles

"This country has come to feel the same when Congress is in session as when the baby gets hold of a hammer."

–Will Rogers [1]

Legislation

Being a senator or representative is a complicated job and involves several roles. Of course, its primary function is legislative (law writing).

- **Substantive laws** are those that make a change in federal law or that authorize spending taxpayer dollars.
- **Ceremonial laws** are those that do relatively trivial things like rename federal buildings, award medals, or designate special days.

In the past twenty years, Congress has passed between 200-450 substantive laws per session and between 50 and 250 ceremonial laws per session. [2] Sitting congressmen run for reelection based on their legislative records: What "good" bills did they push, and what "bad" bills did they oppose? They campaign on their legislative abilities, and local media report on the status of a candidate's important legislation. The theory of representative democracy rests on the rather large assumption that voters assess legislation and reward those politicians who have voted "correctly" on the issues that matter to voters.

Representation

Representation is closely related to the legislative role. Congressmen are elected to represent their constituents' interests. Elections often do not convey the voters' wishes clearly to the politician. If a politician wins with 53 percent of the vote, she cannot be certain from those results of what the voters want her to do. As a result, politicians are fond of polls and focus groups conducted by survey-research organizations. In addition, congressmen can access other information sources by reading local newspapers, conversing with lobbyists, talking to elites in the district, and soliciting constituent views during town meetings. Also, the representative's role is to decide what kind of representation is best.

- Should the politician be a **delegate**, who is bound to vote the way constituents want?
- Should the politician be a **trustee**, a representative who is directed by his or her own judgment rather than their constituents' views*?*

In *Federalist #10*, James Madison wrote that representatives "may best discern the true interest of their country," and that their "patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." What do you think? Should a member of Congress be a delegate or a trustee? Who is more likely to assume the delegate roll—representatives or senators?

Constituent Service

Another important congressional role is to perform **constituent service**, which is often referred to as casework. Are your veteran's benefits caught up in red tape? Did you fail to receive the cost-of-living adjustment in your social security check? Did your community theater federal grant application get lost? Call your senator or representative's office—staff people are there to help you if they can.

Constituent service is a way for a congressman to garner good favor and positive news coverage in their district. Also, casework can serve to educate congressmen, particularly with respect to legislation and oversight. As one Congressmen put it: "You learn more about the job by doing constituent service work than anything else. . .It tells you whether or not the legislation is doing what it is supposed to do." [3] Constituent service can also become controversial, especially when politicians are seen to be doing the bidding of well-heeled citizens or corporations, both of whom donate money to congressional campaigns and seem to have better access to congressmen than do ordinary citizens.

Oversight

A final important congressional role is performing executive-agency **oversight**. Congress is interested to see how programs and regulations are actually working and what impacts federal laws have once they go into effect. So, standing committees and their subcommittees hold hearings to inquire into those executive agencies' operations. Congressmen sometimes have an interest in

exposing waste, fraud, and abuse in the executive branch. Often, those agencies' heads are called to testify before a committee or subcommittee, and experts from the General Accounting Office—which is the investigative arm of Congress—testify about their investigations.

Presidents from both parties as well as the intelligence agencies have resisted Congress' efforts to get the information it needs. With respect to presidents and other executive officials, there is a clear tension surrounding executive privilege. Although **executive privilege** is never explicitly mentioned in the constitution, presidents have long held that they are entitled to withhold from Congress certain executive branch documents and deliberation transcripts within executive agencies. They also contend that executive privilege allows them to defy congressional subpoenas to testify before oversight committees. We'll talk more about executive privilege when we get to the presidency section of the text.

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3.3: How Congress Passes Legislation

"[T]he theoretical process of how an idea becomes law is drastically more complicated when one attempts to put the theory into practice."

–Trevor Corning, et al [1]

"Legislation intended to assist the needy moves along the slow lane."

–Michael Parenti [2]



U.S. Capitol Building

Please keep in mind that this page represents a simplified view of the lawmaking process. It's far more complicated than discussed here.

Party Leadership

Each chamber's party leadership shapes the whole legislative labyrinth. More seats in each chamber equate to more political considerable power—not just from the numerical majority—but also the ability to select the **leadership positions** in each chamber. In the House of Representatives, the **Speaker of the House** is the preeminent leadership position, and elected by the majority party and serves as both the House's partisan and administrative leader. Even though the Speaker typically does not vote, engage in debate, or sit on standing committees, it is the House's most powerful position. The Speaker articulates and pushes the majority party's political agenda. She manages the House's floor business and makes parliamentary decisions—typically to the majority party's advantage. She is also the House's business manager, handling everything from procurement to calendaring.

The **Senate Majority Leader** is elected by the majority party and schedules and manages all the Senate's business. These leadership positions are very powerful, which is why parties are so keen to gain the most votes in each chamber. In addition to having majority votes to pass legislation, if all the members hang together, they get to elect the Speaker and the Senate Majority Leader who can use their powers to their party's advantage.

There are other important positions. In the House of Representatives, the majority party selects a Majority Leader and a Majority Whip, and the minority party selects a Minority Leader and a Minority Whip. These positions serve as floor leadership and try to ensure party unity on important upcoming votes. Parties in the Senate also have Whip positions—both majority and minority whips—that serve similar roles as their House counterparts.

Standing Committees

House and Senate members propose bills in their respective chambers. A clerk assigns the bills a number, for example, HR 1205 or S 683. Only the House can initiate bills that increase federal government revenue, but other bills may originate in either chamber, or they may simultaneously work their way through both chambers. The **Speaker of the House** refers the bills to **standing committees.** Or, the Senate majority and minority leaders negotiate between themselves to decide who refers the bill to a standing committee.

Standing committees—so-called because they persist over time—do much of the work in Congress. The House of Representatives has twenty standing committees, and the Senate has sixteen. In addition, there are about a dozen joint committees in both chambers, such as the Joint Taxation Committee, or there are select committees, such as the Select Intelligence Committee. Most standing committees are organized around topics such as agriculture, defense, foreign relations, taxation, and so on. Committees, in turn, are divided into subcommittees. A bill having to do with gas pricing might be referred to the committee on energy, or to the committee

on transportation, or to the committee on foreign relations, or to all three. In the House, the Ways and Means Committee deals with taxing, and the Appropriations Committee handles discretionary spending. In the Senate, the corresponding committees are the Finance Committee and the Appropriations Committee.

Generally speaking, when writing legislation, standing committees go through three stages:

1. **Hearings**— The committee or subcommittee chairman invites interested individuals to testify. People who commonly testify are executive department heads, technical experts and scholars, and interest-group representatives.
2. **Mark-up Sessions**—During several meetings, committee members edit the bill's language. In pre-computer days, congressmen literally marked-up paper bills with pens. Mark-ups often attract lobbyists whose clients pay them to favorably influence the legislation's wording.
3. **Reporting Out**—If the committee votes to approve the bill, it is reported out to the main chamber along with a report describing the bill and its rationale. The bill's supporters and opponents can include their views in the report.

How does someone get a seat on these standing committees? Congressional members have two main priorities: Generally speaking, they want to be on the more powerful and visible committees, but they also have an interest in being on committees that are most relevant to their states or districts. If a military base is in your district, it would be in a congressmen's interest to be on the House Armed Services Committee or the Defense Subcommittee of the Appropriations Committee. The taxation, appropriations, and budget committees are all-purpose powerful committees. But it costs to get a plum committee assignment. Joseph Califano, former Defense Department lawyer, as well as Secretary of Health, Education, and Welfare, notes that both the Democratic and the Republican congressional leadership essentially charge "dues" to their congressional members to get committee assignments—the better the assignment, the more money the congressman needs to raise for their respective party re-election committee—the Democratic Congressional Campaign Committee or the National Republican Congressional Committee. Members are advised to spend four hours per day on the phone to raise money to pay these committee-assignment party dues, as well as for their own re-election efforts. [(3)]

Most bills introduced in Congress die somewhere in the committee process. If a bill does make it through the standing committees, each chamber will debate it on the floor. The overall **Rules of the House** is a document passed in a new congressional term's first week that expresses how the majority party wants to conduct business. Often, the incoming majority either adopts or makes slight changes to the existing Rules of the House. For instance, during the Trump impeachment, House Republicans complained bitterly about the Oversight, Intelligence, and Judiciary Committee's closed-door hearings, but Republicans are the ones who originally passed the rules allowing such meetings in 2015 when they had the majority. Indeed, they used the same kind of closed-door meetings to investigate events surrounding the attack in Benghazi, Libya.

House Rules Committee

When a bill comes out of the House committee, the bill must first make a stop at the **House Rules Committee**, which has been called "the majority leadership's traffic manager" for floor debate. [(4)] Like other committees, the majority party has the most rules-committee seats, and these members are very likely to have the party leadership trust. The Rules Committee attaches a special rule to each bill that specifies the debate's nature: The rule indicates how much debate time is allowed and how many amendments can be introduced, and the rule might indicate that only certain portions of the bill can be amended. The Rules Committee can also waive points-of-order against a bill, meaning that procedural challenges against the bill cannot halt its progress. There are four types of special rules:

- *Open*—allows any congressional member to offer an amendment to the bill on the floor so long as the amendment is germane to the bill's topic. Appropriations bills are usually considered under open rules, but the amendments offered are restricted to changing funding levels.
- *Modified Open*—allows any congressional member to offer an amendment to the bill on the floor so long as the amendment is preprinted in the Congressional Record ahead of time. This action gives the majority party time to strategize over how best to handle minority-party amendments.
- *Structured*—allows only certain amendments which must be approved by the Rules Committee and written into the rule itself. The amendments approved for floor debate are given a certain time limit during which they can be debated.
- *Closed*—allows no amendments to the bill on the floor.

The majority party tends to use structured and closed rules on legislation in which it is heavily invested and wants to see pass. This is a tremendous majority party advantage. When the bill reaches the House floor, each party is given time to debate it, and each parties' leadership divides up their time-block among the representatives who are best positioned to speak on the bill.

The Senate Floor

While the Senate does have a Rules Committee, it is not really comparable to the House Rules Committee, so both parties' Senate leadership may try to achieve a result similar to a rule by drafting a **unanimous consent agreement** for the bill. This agreement would set a debate time, a debate time limit, and may limit the amendments allowed. To be accepted, however, a unanimous consent agreement requires all 100 senators to agree to those debate rules—and that might not happen.

If the Senate does not pass a unanimous consent agreement to limit the debate, some senators might **filibuster** a bill to kill it or to gain concessions. A filibuster prevents a bill from passing by dragging out the debate—if the debate does not end, there can be no vote, and without a vote, the bill cannot pass. The filibuster can be when a senator continuously speaks, although this is rare now. The record for a single filibuster is held by South Carolina's Strom Thurmond, who filibustered the 1957 Civil Rights Act for twenty-four hours and eighteen minutes. A filibuster can also be stopped by a **motion of cloture,** which places a time limit on the filibuster. At least sixty senators must agree to the cloture, and then debate ends and a vote happens on the bill.

Due to the 1970s, filibuster reforms, changes in Senate processes, and cloture motions have actually become a standard routine. [5] According to political scientist Sara Binder, "From roughly 1920 to 1970, filibusters averaged *one* a year. In stark contrast, in 2005-2006, there were an average of thirty-four cloture motions filed to end filibusters, and in the 2007-08 Congress there were 139 cloture motions filed, roughly *seventy* a year." [7] Now, the mere threat of a filibuster can derail a bill or stymie a presidential nomination.

Legal scholar Josh Chafetz argues that the filibuster is unconstitutional, and points out how undemocratic the situation has become by writing that "a measure that cannot command the support of sixty Senators is unlikely even to be introduced onto the Senate floor." [8] Early in the 113th Congress (2013-14), Democratic senators Tom Harkin, Jeff Merkley, and Tom Udall attempted—but failed—to push through significant filibuster reforms that would have limited the minorities' ability to stop the Senate majorities' will. [9] In 2013, after Republicans refused to allow President Obama to fill empty seats on the D.C. Circuit Court, Democrats pushed through an end to the filibuster for lower federal court nominations. Then, in 2017, after Democrats filibustered President Trump's nomination of Neil Gorsuch to fill a Supreme Court seat that Republicans had earlier refused to allow President Obama to fill, Republicans killed the filibuster for Supreme Court nominations.

Conference Committees

After debate has ended, each chamber takes a floor vote. At this point, an interesting problem can develop. If the House's version of the bill differs from the Senate's version, the bill cannot be sent to the president. One of three things can happen:

- One chamber can just agree to adopt the bill version that passed in the other chamber.
- The two chambers can send the different versions to each other to attempt to get to a compromise.
- The two bill versions can be melded into one in a **conference committee**, which is composed of both representatives and senators who are chosen by the bill mark-up committee(s) chair and senior-minority party leader. These committees have ranged in size from seven to over 250 members, and there does not have to be an equal number of representatives and senators. If the conference-committee members cannot compromise with each other, the bill is stuck. If a majority can agree, then the conference report is voted on directly in the House and the Senate, with no floor amendments allowed from either chamber. If the conference report fails to pass both chambers, the conference committee can be reconvened. Once both chambers accept the conference report, it can be sent on to the president.

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3.4: Pathologies of Congressional Behavior

"Toward the end of an age, more and more people lose faith in their institutions and finally they abandon their belief that these institutions might still be reformed from within."

–Historian John Lukacs [1]

The legislative process is susceptible to several pathologies, meaning that it can be manipulated in ways that grossly distort the original version of how a bill becomes a law.

Log Rolling

Nineteenth century German Chancellor Otto von Bismarck once remarked that laws had something in common with sausages: "It's better for your stomach not to watch either one of them being made." Sometimes, the legislative process resembles interested minorities clashing, then rationally deliberating the public good. One legislative practice that Bismarck may have had in mind is **logrolling**, or trading votes for something desired: A congressman votes on something he doesn't really care about, in exchange for something in return. For example, although a congressman would never admit it, they might vote for a bill to build a defense project in another state, knowing it's a waste federal money. In exchange, the congressman who wanted the defense project votes to support a road project in another district.

Pork Barrel Spending



Cartoon of a Pork Barrel in 1849

Those same congressmen will pat themselves on the back for "bringing home the bacon" on the road project, while decrying wasteful government spending. That phrase, "bringing home the bacon," is related to **pork-barrel spending**. There are multiple stories about the phrase's origin. Some say the name comes from the pre-Civil War practice of distributing salt pork to slaves from large barrels. Another story says that pork barrels were a common staple in nineteenth century rural kitchens. The barrel's pork level was a sign of the family's prosperity. In any case, the practice of congressmen dipping into the national treasury to fund local projects came to be known as dipping into the **pork barrel**—and the name and the practice have continued ever since.

According to the watchdog group Citizens Against Government Waste (CAGW), in 2019 Congress spent $15.3 billion on what it defines as pork barrel projects. The organization's *Pork Hall of Shame* documents the worst abuses, including funding for local museums and recreation facilities, upgrades to military equipment that the Pentagon didn't request, and targeted research funds that go to particular universities. [2] Critics say that these projects do not serve the national interest and therefore should not be funded by national taxpayer dollars.

Pork barrel spending is largely accomplished through inserting earmarks into congressional bills. An **earmark** is typically a small paragraph of very specific language inserted into a budget appropriation bill directing an agency to fund a project. CAGW identifies hundreds of earmarks every year., which are a result of congressmen bowing to lobbying pressures and organized interests' campaign contributions. CAGW defines an earmark as pork if one of these conditions are met: Only one congressional chamber requested it; not specifically authorized; not competitively awarded; not requested by the president; greatly exceeds the president's budget; not the subject of congressional hearings; and/or serves only a local or special interest.

Corruption

The legislative process is also occasionally subject to outright **corruption** and illegal behavior, which includes a form of bribery where special interests provide tangible benefits for congressmen in exchange for congressmen providing favors. Other forms of corruption are more mundane. In 2002, Representative James Traficant (D-OH) was convicted of racketeering, tax evasion, and bribery. He was one of the House's few members to be formally expelled by his colleagues. In 2005, Representative Randall "Duke" Cunningham (R-CA) pled guilty to a variety of offenses including bribery and mail fraud involving his relationship with defense contractors Mitchell Wade and Brent Wilkes and co-conspirators. In exchange for earmarks, government contracts, and other favors, the contractors provided Cunningham with a yacht on which to live and bought a California house from him for $700,000 above market value. In 2009, Representative William Jefferson (D-LA) was convicted of bribery and money laundering. The FBI raided Jefferson's home and discovered $90,000 in cash stashed in the freezer. The money was part of a bribe Jefferson received in exchange for help with a Nigerian business deal.

Another example comes from both houses. A number of congressmen—Representative Tom DeLay (R-TX), Senator Conrad Burns (R-MT), Representative Roy Blunt (R-MO), Representative Bob Ney (R-OH), and others—were implicated in the corrupt web surrounding the disgraced and convicted lobbyist Jack Abramoff. Representative Ney pled guilty to taking money and gifts in exchange for doing work on behalf of Abramoff, and resigned from Congress in October 2006. The scandal resulted in two Bush administration White House officials and congressional staff members going to jail.

Insider trading is another type of corruption. Federal law prohibits the use of information not available to the public when executing securities trades. As a result of the practice, the STOCK Act was passed in 2012, which explicitly said that representatives, senators, and their staff, "are not exempt from the insider trading prohibitions arising under the securities laws." But cases still do arise. In 2019, Representative Chris Collins (R-NY), one of Congress' wealthiest members at the time, pled guilty to insider trading and conspiracy—part of which involved a phone call to his son Cameron Collins made from the White House lawn to give him inside information on a biotech company's failed drug trial. [3] In 2020, several members of Congress were accused of dumping stocks after they found out via classified briefings that the coronavirus pandemic was going to be severe. [4]

Gridlock

Perhaps the legislative processes' biggest pathology—gridlock—is the ability to stop something that the American people desire. Most bills get bottled up in committee and never come to a floor vote. This action happens frequently when the bill is attempting something that organized interests' lobbyists don't want to see happen. Some bills get poison pill amendments attached to them to render the bill useless or to damage its chances of passing. The Senate filibuster kills some bills. When one chamber is controlled by one party and the other chamber is controlled by the other, frequently bills will pass one of the chambers only to be defeated—or not even considered—in the other.

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3.5: The Undemocratic Senate

"We should keep in mind that the original one-state, two-senators rule was written and ratified by property-owning white men, almost half of whom owned slaves…"

–Eric Orts [1]

The Senate as an Affront to Democratic Principles

Journalist and former congressional candidate Norman Solomon wrote that "today, the U.S. Senate is the most undemocratic elected body in the nation." [2] Of course, the Senate was never designed to be a democratic body—remember that the Senate was initially chosen by state legislators rather than the people.

In 1913, the **Seventeenth Amendment** changed the Senate selection process by having the people directly elect senators. This action made senators more responsive to the democratic will within their respective states, but the basic problem is structural and has to do with how senators are apportioned. Senate seats are **apportioned** equally between the states, with each state getting two senators regardless of population. This enormously distorts the democratic principle of one-man, one-vote. Consider that the 7 million residents of Alaska, Delaware, Montana, North Dakota, Rhode Island, South Dakota, Vermont, and Wyoming elect sixteen senators; meanwhile, the 147 million Americans living in California, Florida, Illinois, New York, Ohio, Pennsylvania, and Texas elect only fourteen senators.



Senate of the 111th Congress

In the 1964 case ***Wesberry v. Sanders***, the Supreme Court ruled that unequal House election districts were an unconstitutional violation of the "one-man, one-vote" standard for legislative districts. House districts are sized accordingly and are roughly equal in population, with the important caveat that each state gets at least one representative. [4] Unfortunately, this logic cannot penetrate the U.S. Senate because the Constitution's language enshrines that body's undemocratic structure. From the strictly mathematical view, any constitutional amendment to remedy the situation would have to garner a two-thirds vote in the House of Representatives **and** the Senate itself. Also, Article V of the Constitution stipulates that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." Thus, fixing the senators' apportionment would also require the small states to agree to give up the disproportionate power they now have.

The Senate's unrepresentative structure—being based on states rather than on population—has real-world political consequences. For one thing, the senators from the twenty-six smallest states hold the most Senate seats even though they represent only 17 percent of the U.S. population. They can refuse to pass legislation desired by the majority of the population, the House, and the president. Small states and rural interests gain disproportionate power in this scheme.

The Senate apportionment problem is compounded by the **filibuster.** Currently, it only takes forty-one senators to defeat a cloture motion and prevent a bill from being voted on. If the forty-one senators sustaining a filibuster happened to come from the least populous states, it would mean that the senators representing less than 12 percent of the population are inhibiting legislation that the population's vast majority wants. In response to Senator Rand Paul's thirteen-hour filibuster to protest the Obama administration's drone attacks, Adam Winkler notes that the filibuster is not mentioned in the Constitution and it was not even used until 1841. The Constitution requires only a simple majority vote to pass legislation, and it carefully spells out the few situations that require a different rule—for example, a two-thirds Senate vote to remove someone who has been impeached by the House or a two-thirds Senate vote to support a treaty. [6]

Possible Solutions to the Undemocratic Senate Problem

People have often entertained possible ways to fix the problem.

- Leave the apportionment system alone but break up large states so that each new state would have its own two senators. California, for instance, could be broken up into six or eight states. [7]
- Simply abolish the Senate by constitutional amendment. [8]
- Expand the Senate to 110 seats, give one seat to each state, and then give additional seats to states according to population. (The move would only require legislation rather than a Constitutional amendment. Why? Because in cases like *Reynolds v Sims* (1964) and even *Bush v. Gore* (2000), the Supreme Court has already firmly established the constitutional principle of one-man-one-vote, and the Congress is already empowered through amendments like the Fourteenth, Fifteenth, and the Nineteenth to uphold American citizens' privileges and immunities—of which voting is one. [9])

What if . . . ?

What would you do about this undemocratic institution sitting firmly in the middle of our republic? Would you vote to support splitting up large states? What if you were a resident of one of the less populous states? Would you vote to abolish the Senate altogether? What does it say about our democracy when we seem so unable to address such an obviously undemocratic anachronism?

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CHAPTER OVERVIEW

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4.1: The President as Person and Institution

"[Woodrow] Wilson's administration was not overwhelmingly popular among intellectuals in its first few years—especially among those who thought that the Progressive movement should go beyond the effort to realize the old competitive ideals of small businessmen and do something about child labor, the position of Negroes, the condition of workingmen, and the demand for women's suffrage."

—Richard Hofstadter [1]

"Unelected bureaucrats and cabinet appointees were never going to steer Donald Trump in the right direction in the long run, or refine his malignant management style. He is who he is."

—Anonymous [2]

The presidency is two things: a person who has prevailed in an electoral struggle to attain the White House, and an institution that has developed over time to support and enable each president's policies. The institutional presidency has largely been built up since the Great Depression and World War II. It is staffed by presidential appointees, some of whom require the Senate's "advice and consent" and some of whom do not.

The President as Person



President Joseph R. Biden

Presidents serve a four-year term and can be re-elected for one more term before they must leave office. The original Constitution placed no limits on the number of consecutive terms a president could serve. Franklin Roosevelt was elected in 1932, 1936, 1940, and 1944. In 1951, the **Twenty-second Amendment** was ratified, and stated that "No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once." Thomas Jefferson would have liked this amendment, for he worried that if we didn't have term limits for the president, other nations would interfere in our political processes to keep someone in the presidency who served their interests rather than those of the people. [3]

As of this writing, all U.S. presidents have been men. Hilary Clinton came close to becoming the first female president in 2016, when she won the popular vote but lost the electoral college tally. All presidents except Barack Obama have been white. Common occupations before becoming president include lawyer, U.S. senator, vice president, and state governor. About half of U.S. presidents have served in the military at some point in their life. Donald Trump is the only modern president never to have either served in the military or held any elected or appointed office before becoming president. Woodrow Wilson was the only political scientist professor ever to have been elected president.

The Constitution uses "he" throughout and places few requirements on who can serve. At the time the Constitution was adopted, it said the president must be

- "a natural born citizen, or a citizen of the United States"
- a resident of the United States for at least fourteen years before assuming office
- at least thirty-five-years-old.

The Institutional Presidency

The president is a person and an institution—one of three co-equal branches of government. The presidency's physical institution is the White House and the Eisenhower Executive Office Building, located just west of the White House. The people, entities, and agencies who help the president—who make up that bureaucracy—are called the president's cabinet and the Executive Office of the President.

The Cabinet

At the 1787 Constitutional Convention and during the ratification debates, George Mason advocated that the president be ensconced in what he called "a constitutional council" composed of the president, two members from New England, two from the mid-Atlantic states, and two from the Southern states. [4] Of course, Mason's proposal did not make it into the document. Instead, the Constitution says that the president "may require the opinion, in writing, of the principal officer in each of the executive departments." From that prerogative, the **cabinet** evolved, the main role of which is to advise the president.

Originally, the cabinet was composed of the Secretary of War, the Secretary of State, the Secretary of the Treasury, and the Attorney General. Think of the cabinet as the major executive agencies' leaders and anyone else designated by the president to sit with that group. With the exception of the Vice President, cabinet members are approved by the Senate. In modern times, presidents typically do not gather all of their cabinet members at once and have real deliberations over policy—photo ops, maybe, but not true deliberations. Instead, presidents will gather some cabinet members as needed to discuss particular policy issues. As of this writing, the cabinet consists of the following offices:

Secretary of Agriculture	Secretary of Health & Human Services	Secretary of State
Attorney General	Secretary of Homeland Security	Secretary of Transportation
Director of the Central Intelligence Agency	Secretary of Housing and Urban Development	Secretary of the Treasury
Secretary of Commerce	Secretary of the Interior	U. S. Trade Representative
Secretary of Defense	Secretary of Labor	Secretary of Veterans Affairs
Secretary of Education	Director of the Office of Management & Budget	Vice President
Secretary of Energy	Director of National Intelligence	White House Chief of Staff
Administrator of the Environmental Protection Agency	Administrator of the Small Business Administration	

The Executive Office of the President

The **Executive Office of the President** was created by Congress during the Franklin Roosevelt administration when the demands of modern government made it clear that the presidency needed a more extensive organization. The Executive Office of the President employs several thousand people, and comprises staff and agencies that directly support the president. As of 2022, the following are key components of the Executive Office of the President:

The White House Staff—The **Chief of Staff** manages the White House staff operations and often controls access to the president. The staff comprises key aides and support personnel who do not require Senate approval.

- president's secretarial staff, who are responsible for correspondence and calendaring
- White House Legal Counsel, who advises the president on what he can and cannot do with respect to constitutional and statutory powers
- White House Press Secretary, who is responsible for all communications with the news media
- National Security Advisor, who coordinates security policy and the various agencies involved with those matters
- Office of Legislative Affairs, which is concerned with getting the president's agenda through Congress; plus a variety of other offices dedicated to presidential trips, intergovernmental affairs, communication, economic policy, domestic policy, and so

forth.

Presidents typically have not had family members play roles on the White House staff. President Clinton had his wife, Hillary Rodham Clinton, chair the National Commission on Health Care Reform. President Trump added his daughter, Ivanka Trump, as an Advisor to the President and his son-in-law, Jared Kushner, as an Assistant to the President and Senior Advisor. Neither were paid a salary for their services. (5)

Important Support Agencies—The Executive Office of the President also contains a number of important support agencies. Here are the ones commonly referred to in the media:

- **Office of Management and Budget**. Originally created in 1921 as the Bureau of the Budget in the Treasury Department, President Franklin Roosevelt moved it into the White House in 1939. Later, President Richard Nixon reorganized it and renamed it the Office of Management and Budget (OMB) in 1970. The OMB is a powerful agency within the executive branch. According to the White House, the OMB assists the president with the following:
  - Developing and executing the budget.
  - Managing agency performance and oversight, human capital, federal procurement, financial management, and information technology.
  - Coordinating and reviewing all significant executive agencies' federal regulations policy.
  - Coordinating the Legislative branch and providing them clearance.
  - Coordinating Executive Orders and Presidential Memoranda. (6)
- **National Security Council**. The National Security Council (NSC) was established in 1947 by the National Security Act. Its responsibility is to advise the president and coordinate American security and foreign policy, and reflects the highly militarized way in which the United States views its foreign policy. In addition to the President, Vice President, and the National Security Advisor, the NSC's principle members are the Secretary of Defense, the Chairman of the Joint Chiefs of Staff of the military, the Secretary of State, the Director of National Intelligence, the Secretary of Energy, and the Secretary of the Treasury.
- **Council of Economic Advisors**. Established by Congress in the Employment Act of 1946, the group is charged with providing the president helpful domestic and international economic policy analysis and guidance. The Council is composed of three prominent presidential appointed economists, one of whom is designated as the chairman, and a variety of other consulting economists who specialize in fields like international economics, housing economics, or healthcare economics. Since the group shares the president's approach to economics, their ideas are often used by presidents to justify actions regarding domestic and international economic policy.
- **Office of the United States Trade Representative**. Established by Congress with the Trade Expansion Act of 1962, the Office of the United States Trade Representative is responsible for coordinating U.S. trade policy and negotiating international trade agreements. In its role, the U.S. Trade Representative has pursued a heavily pro-corporate agenda, opening up foreign markets to U.S. capital, negotiating agreements that open up U.S. markets to imports, promoting offshoring U.S. jobs, and putting U.S. workers in direct competition with lower-paid international workers who have fewer rights to organize and who typically don't have as robust safety and environmental protections as U.S. workers. (7)

What if . . . ?

The Constitution doesn't allow immigrants to become president. What if we changed that? Would you support or oppose such a change? If you support it, what limitations would you put on the practice?

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4.2: The Vice President and Presidential Succession

"Hence also sprung that unnecessary & dangerous Officer the Vice President; who for want of other Employment, is made President of the Senate; thereby dangerously blending the executive & legislative Powers; besides always giving to some one of the States an unnecessary & unjust Pre-eminence over the others."

–George Mason [1]

The Vice President



Vice President Kamala Harris

In the original Constitution, electors cast two ballots, and the person who got the most votes became president while the person with the next most votes became the vice president. That procedure resulted in issues. In the 1800 election, the electoral college votes tied for Jefferson and Aaron Burr, both of whom were from the same party. That election was thrown into the House of Representatives, which took thirty-six ballots to finally elect Jefferson as president. As a result of the **Twelfth Amendment** (1804), the electors cast separate ballots for president and vice president. In addition, presidents and vice presidents run on a ticket together.

George Mason's concerns about the dangers of the vice president have not come to pass. With the exception of Dick Cheney in the George W. Bush administration, most vice presidents have not been especially powerful—although some, such as Lyndon Johnson in the John F. Kennedy administration, were fairly useful to the president's agenda.

One power is serving as the **President of the Senate**. But, this role is mostly a formality, and the vice president isn't even allowed to participate in Senate debates. However, they do preside over the electoral college vote-counting, which takes place in a joint session of Congress. The vice president also has the ability to cast a tie-breaking vote if one is needed in the Senate. During the Obama administration, Vice President Joe Biden cast zero tie-breaking votes. During the first year of the Clinton administration, Vice President Al Gore cast the tie-breaking vote on a budget that set the U.S. back on the course of balanced budgets after the deficit-ridden Reagan and George W. Bush years. Early in the Trump administration, Vice President Mike Pence cast a tie-breaking vote to ensure that nominee Betsy DeVos became Secretary of Education—a controversial choice, as DeVos never attended a public school, never worked at one, did not send her children to public schools, never served on a public board of education, and who had worked to subvert public education.

Beyond their few formal powers, vice presidents are nevertheless important in U.S. politics. They are often chosen by presidential candidates to **"balance the ticket"** either geographically or politically. In 1960, Massachusetts liberal John F. Kennedy needed someone like Texan Lyndon Johnson to help him win the presidency. In 2012, Mitt Romney—who had expressed pro-choice values and had pushed RomneyCare through in Massachusetts—needed someone with strong conservative credentials like Paul Ryan from Wisconsin. In 2016, Donald Trump needed someone pious and influential with white Christians like Mike Pence from Indiana. Once in office, vice presidents are used by presidents in many ways. They might be relied upon for political advice, be put in charge of special initiatives, and represent the president at ceremonies and functions domestically and around the world.

Presidential Succession

If the president resigns or dies in office, he is succeeded by his vice president. When William Henry Harrison died thirty-one days into his first term, John Tyler became the first vice president to succeed to the presidency. Tyler established the precedent that when a Vice President becomes President, he does so fully and without qualification. Lyndon Johnson became president in 1963 when

John F. Kennedy was assassinated in Dallas, Texas. Gerald Ford became president when Richard Nixon resigned due to his role in the Watergate scandal. When a sitting vice president becomes president, they nominate someone to be vice president, and according to the **Twenty-fifth Amendment**, that nominee needs both the House and the Senate majority approval.

The Twenty-fifth Amendment also has two provisions that deal with presidential incapacity.

- The president can inform the President Pro Tempore of the Senate and the Speaker of the House that he is unable to fulfill the powers and duties of the office. When this occurs, the vice president becomes Acting President until the president informs Congress that he is ready to resume office. In 1985, this provision was used when Ronald Reagan had a colonoscopy, and George H. W. Bush became Acting President. Twice for the same reason, President George W. Bush temporarily transferred authority to Vice President Dick Cheney in 2002 and in 2007.
- The vice president and a cabinet majority can inform the President Pro Tempore of the Senate and the Speaker of the House that the president is unable to fulfill the powers and duties of the office, and then the vice president would become the Acting President. This action has never been done, but there were persistent rumors of it being contemplated during the Trump administration. [(2)]

Beyond the 25th Amendment provisions, there is the **Presidential Succession Act of 1947**, which has been amended several times. This law spells out the succession order if the president and vice president are both killed or otherwise incapacitated. Any person occupying one of these positions who does not meet the eligibility requirements to become president would be skipped. Here is the succession order after the vice president:

1. Speaker of the House	10. Secretary of Labor
2. President pro Tempore of the Senate	11. Secretary of Health and Human Services
3. Secretary of State	12. Secretary of Housing and Urban Development
4. Secretary of the Treasury	13. Secretary of Transportation
5. Secretary of Defense	14. Secretary of Energy
6. Attorney General	15. Secretary of Education
7. Secretary of the Interior	16. Secretary of Veterans Affairs
8. Secretary of Agriculture	17. Secretary of Homeland Security
9. Secretary of Commerce	

There has been a long cautionary practice that ensures that someone on the succession list is safe in case some catastrophe takes out most or all of the top executive branch officials. For example, the person identified as the designated survivor does not attend major events like the President's State of the Union Address.

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4.3: The President's Domestic Powers

"It is important. . . that the habits of thinking in a free country should inspire caution in those entrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another."

–George Washington [1]

American presidents have a wide range of formal powers, but the founders were "artfully vague about the extent and limits" of those powers. [2] Put another way, "the Constitution permits either an active or a passive executive." [3] Several factors determine the extent to which a president can successfully exercise domestic political power.

- Margin of victory
- Congress' partisan power balance
- President's own understanding of how to act while in office.

One important situation is whether a **divided government** exists. That means the president and at least one congressional chamber are from different parties. Such a situation does not necessarily have to lead to gridlock, but it does make it difficult for a president to accomplish his policy goals.

If a president is politically well-positioned to act and is personally predisposed to act, they can draw upon the following key powers.

Veto Power

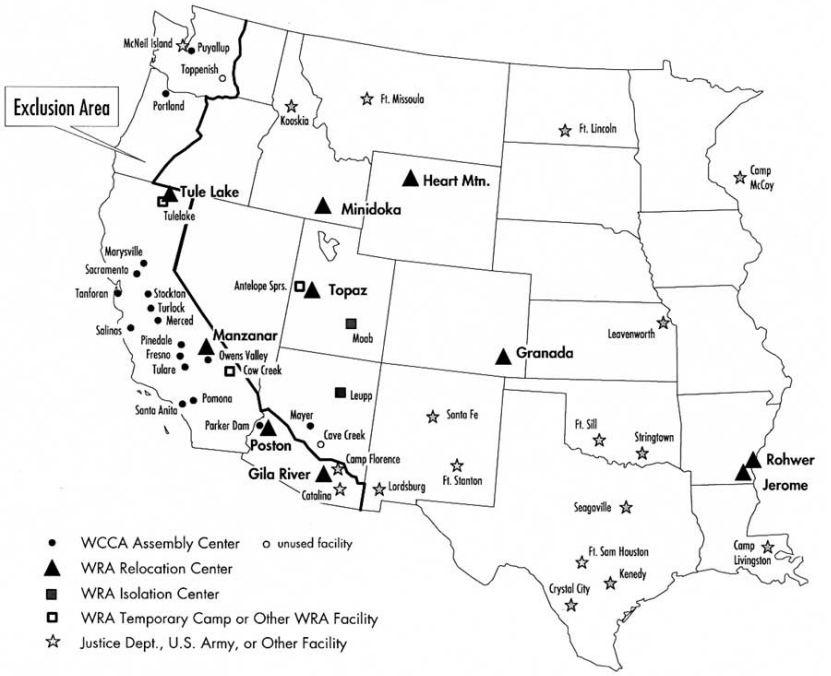
The word "**veto**" is Latin for "I refuse." The president has two kinds of veto. When Congress sends a bill to the president, he can handle it in several different ways

- Sign the bill, usually in a ceremony, and it becomes law.
- Do not sign the bill, it will become law anyway after ten working days.
- Veto the bill by sending it back to Congress with a veto message about why he feels the bill should not become law (also called a **regular veto)**. Congress can override a regular veto with a two-thirds vote in both chambers. Of the 1,507 regular vetoes issued from 1789 through 2016, only 111 were successfully overridden. [4]
- If Congress happens to adjourn in the ten-day period, the president must consider the bill. If the president does not sign the bill, then a **pocket veto** occurs. Congress cannot override a pocket veto.

Executive Orders

Another presidential power is issuing **executive orders**, which direct executive branch members to perform certain actions, so long as those actions lie within the law and do not entail appropriating new federal money. Congress can overturn an executive order with a simple majority vote in the House and 60 votes to end a filibuster in the Senate. An incoming president can issue an executive order countermanding an executive order issued by a previous president.

Rarely do executive orders get more than a passing reference in newspapers. Presidential critics from both parties often claim that executive orders constitute a "power grab" by the president who is issuing them. However, William Howell, a political science professor at the University of Chicago, argues that "it just doesn't match up with the facts on the ground. It's not all power grabs. A lot of it is clearly trivial stuff." [5] Still, it's always a good idea to be vigilant about presidents acting on their own without a legislative mandate.



Map of Internment Camps for Japanese-Americans During World War II

Occasionally, executive orders have broader consequences or make big news. You may be familiar with some prominent executive orders.

- **Executive Order #9066**, issued February 1942—President Franklin Roosevelt authorized the Secretary of War "to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion…" [6] The

U.S. military detained and removed over 100,000 Japanese Americans living in California, Oregon, Washington, and Arizona. These people, most of whom were U.S. citizens, were placed in prison camps for the war's duration because they constituted a security risk, even though no evidence was ever presented to that effect. In 1988 Congress issued a public apology and gave $20,000 in restitution to each of the 60,000 surviving internees.

- **Executive Order #9981**, issued July 1948—President Harry Truman directed "that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin." [7] This order effectively desegregated the U.S. military and officially ended a long-standing practice of assigning less desirable duties to racial minorities.
- **Executive Order #13228**, issued October 8, 2001—President George W. Bush **created the Office of Homeland Security.** The new agency was to "identify priorities and coordinate efforts for collection and analysis of information within the United States regarding threats of terrorism against the United States and activities of terrorists or terrorist groups within the United States." [8] Rather quickly, this order transformed into legislation creating the Department of Homeland Security, charged with preventing terrorist attacks and minimizing damage from potential terrorist attacks and natural disasters.
- **Executive Order #13769,** issued January 2017—President Donald Trump issued an executive order called **Protecting the Nation from Foreign Terrorist Entry into the United States**. For 120 days, it barred entry to any refugee waiting to resettle in the United States; it prohibited all Syrian refugees from entering the U.S.; and it banned "the citizens of seven Muslim-majority countries—Iraq, Iran, Syria, Somalia, Sudan, Libya, and Yemen—from entering the U.S. on any visa category." [9] After some early defeats in court, the Trump administration altered the language of the ban and took the case to the Supreme Court. In a 5-4 decision, the Court majority ruled that the president was within his powers under the Immigration and Nationality Act, which allows the executive to suspend an entire "class" of people from entering the United States. The dissenter justices argued that the Immigration and Nationality Act forbids the executive from discriminating based on nationality. [10]

Executive Branch Appointments

The president can also appoint officeholders throughout the executive branch. These officials are often politically loyal as well as capable of carrying out the president's domestic policy agenda. [11] Presidential appointments such as cabinet-level secretaries, other executive agencies' high officials, and ambassadors are all subject to the "advice and consent of the Senate," which means that the **Senate must approve each appointment with a simple majority vote**. The Supreme court case ***Meyers v. United States* (1926)** established that presidential appointees to executive agencies can be removed by the president without Senate approval. However, the Court did rule in ***Humphrey's Executor v. United States* (1935)** that presidential appointees to independent regulatory commissions or agencies that have "quasi-judicial" or quasi-legislative" functions can only be removed according to the legislative stipulations that created the agency or commission. This is important, because the federal government has a many of these kinds of commissions or agencies, and conservative members of the Supreme Court would like the president to have unlimited authority over their members.

At the president's direction, executive branch appointees use their congressionally granted statutory authority to put the president's program into effect. Much of the statute's language is either open to interpretation or allows executives discretion in how exactly to enforce the law. Law professor Kim Wehle points out that Article II's provision that the president "shall take care that the laws be faithfully executed, and shall commission all the officers of the United States" still allows the president and her appointees a fair amount of discretion in applying the law. For example, the Obama administration was within its powers to defer action on children who were brought to the United States by their undocumented parents, as was the Trump administration to end that program. [12]

The State of the Union Address and the Bully Pulpit

According to the Constitution, the president "shall from time to time give to Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient". This statement has given rise to the annual **State of the Union Address**. In January or February, the president addresses a joint session of Congress, accentuates his administration's accomplishments, and argues for measures he would like Congress to pass.

Thomas Jefferson preferred to send Congress a letter. The traditional annual personal visit to Congress to give an address did not develop until Woodrow Wilson started the trend in 1913. The State of the Union's effectiveness depends heavily on the level of public support the president enjoys at the time. More broadly, presidents are able to use their rhetorical abilities and media attention to force the country to at least consider specific policy proposals. President **Theodore Roosevelt** recognized and used these abilities, coining the term **bully pulpit** to refer to his ability to push an agenda. Today, we generally refer to a bully pulpit to mean any position which gives the holder the positional and rhetorical context with which to strongly advocate a position. Note that the word "bully" in this context doesn't mean to bully people. Instead, President Roosevelt simply meant that his office was a "wonderful" or "awesome" pulpit from which to preach his views.

Pardons and Reprieves

The Constitution gives presidents the power to "grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."

- Note the **two limitations on the pardon power**: presidents can only pardon people who have been charged with a federal (not state) crimes, and presidents cannot pardon someone in the executive or judicial branches who Congress has impeached. The president can issue a **full pardon**, which restores the recipient's full rights so they can run for office, serve on juries and purchase firearms, or a **conditional pardon**, which restores partial rights. Pardons do not imply that the person is innocent, nor do they expunge the original conviction.
- The president can also **commute a sentence** which typically allows a person to leave federal prison before completing their full sentence, but they maintain the other impacts of their federal conviction. Most presidential pardons and commutations are not controversial. The Department of Justice's Office of Pardon Attorney has a process to handle petitions from people convicted of federal crimes, and it periodically presents presidents with lists of people who could be pardoned if the president so chooses.

NOTE: The presidential pardon power is absolute in the sense that neither Congress nor the Supreme Court can countermand a presidential pardon. If, however, a president was to use his pardon power in a way that abused his office, he could be subject to impeachment and removed.

Some controversial presidential pardons:

- In 1974, President Gerald Ford pardoned former President Richard Nixon for any crimes committed while in office. Nixon avoided prison, even though people who carried out his orders ended up in jail. This action may have caused Ford to lose the 1976 election.
- In 1992, President George H. W. Bush issued controversial pardons to several high Reagan administration officials who had been involved in the Iran-Contra Scandal where they circumvented Congress and sold arms to Iran, using the proceeds to illegally fund the Contra rebels in Nicaragua. Bush pardoned Secretary of Defense Casper Weinberger, who allegedly lied to the independent counsel investigating the scandal, and six others who were involved in the scheme.
- In 2001, President Bill Clinton pardoned billionaire financier Marc Rich, who fled the country in 1983 before he was indicted for allegedly evading taxes, committing fraud, and illegally participating in oil deals with Iran. While he was out of the country, Marc Rich's ex-wife, Denise, donated roughly $1 million to the Democratic

Party and gave money to Hillary Clinton's successful Senate campaign. [13]

- In 2017, President Donald Trump issued the first of several controversial pardons. First, he pardoned Sheriff Joe Arpaio, who had been found guilty of defying a judge's order to stop detaining and harassing Latinx residents of Maricopa County, Arizona. [14]) In 2019, Trump pardoned an Army officer and a Navy SEAL who had been convicted of committing war crimes—one for murder and obstruction of justice and the other for posing with the corpse of an enemy combatant. He also pardoned another Army officer who was awaiting trial for murdering a detainee in Afghanistan. The president disregarded the recommendations of the Pentagon leaders, who felt that the pardons would undermine military leadership's ability to maintain proper order. [15]

Emergency Powers

President Trump declared a national emergency at the U.S. border with Mexico as a way to divert funds to support building a wall between the two countries, which Congress did not approve. Congress passed a joint resolution denouncing the move, but Trump vetoed it. Several lawsuits followed, but ultimately a 5-4 Supreme Court majority refused to stop the president. [16] This case highlights the importance of the president's emergency powers.

In 1957, the 1807 Insurrection Act was used by President Eisenhower to send federal troops to desegregate Little Rock High School; and by President George H. W. Bush in 1992 to send the military in to quell the Los Angeles riots that erupted after Los Angeles police officers were acquitted for beating Rodney King. The Insurrection Act is impressive in its scope. Elizabeth Goitein describes it this way:

"As amended over the years, [the 1807 Insurrection Act] allows the president to deploy troops upon the request of a state's governor or legislature to help put down an insurrection within that state. It also allows the president to deploy troops unilaterally, either because he determines that rebellious activity has made it 'impracticable' to enforce federal law through regular means, or because he deems it necessary to suppress 'insurrection, domestic violence, unlawful combination, or conspiracy' (terms not defined in the statute) that hinders the rights of a class of people or 'impedes the course of justice.'" [19]

Congress could limit or better define presidential emergency powers, but it has not done so. The Supreme Court has traditionally deferred to presidential action in emergencies. In one famous case—***Youngstown Sheet and Tube Company v. Sawyer* (1952)**—the Court struck down President Truman's efforts to seize steel plants during a strike to keep them running because he feared production delays would harm the Korean War effort. Interestingly, however, Truman did not invoke statutory emergency powers in that situation and instead argued that the Constitution gave him inherent power to seize the steel plants. It's an open question how the Court might have ruled had Truman invoked emergency powers.

What if . . . ?

What if a president declared a national emergency and used law enforcement and the military to target people of a particular religion or lawful visa status to apprehend, detain, and/or deport them? What if you knew someone well who was a member of the targeted population? What would you do?

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4.4: The President's Foreign Policy Powers

"My fellow Americans: As President and Commander in Chief, it is my duty to the American people to report that renewed hostile actions against United States ships on the high seas in the Gulf of Tonkin have today required me to order the military forces of the United States to take action in reply."

–President Lyndon Johnson, escalating U.S. involvement in Vietnam in 1964 (1)

Commander in Chief

The president is **commander in chief** of U.S. military forces. In other words, the president is a civilian in charge of the U.S. military. Generals and admirals must take orders from him. Indeed, recent presidents have become quite involved in managing the armed forces. Here are some examples:

- Without a congressional declaration of war, President Harry Truman ordered U.S. troops into battle to defend South Korea in 1950. When General Douglas MacArthur, commander of U.S. troops in Korea, made reckless statements about bombing China and spoke to congressmen about Truman's poor strategy, he was relieved of his command. Most people recognized the president's constitutional right to make the decision.
- With congressional authorization—although not a formal declaration of war—President George H. W. Bush launched an invasion of Iraq in response to Iraq invading Kuwait. Then, he unilaterally made the decision to halt the war's ground phase before Iraqi President Saddam Hussein was ousted.
- Following the 9/11 attacks, President George W. Bush's administration decided to invade Iraq even though that country had nothing to do with the attacks. The Bush administration had previously invaded Afghanistan, whose Taliban regime had sheltered Osama bin Laden and the al-Qaeda network.
- Without a declaration of war, although with congressional support, President George W. Bush initiated a pre-emptive war on Iraq in 2003 that removed Saddam Hussein from power.

Congress has tried unsuccessfully to restrain presidential commander-in-chief powers. For instance, Congress passed the **War Powers Resolution** in 1973 over President Nixon's veto. The Resolution stipulates that

- presidents consult with Congress when possible before committing U.S. military forces to action
- forces are to be withdrawn after sixty days unless Congress either declares war or grants a use-of-force extension
- Congress can pass a concurrent resolution ending American use-of-force at any time.

Presidents of both parties have considered the resolution to be unconstitutional, but it has never come before the Supreme Court. By and large, Congress has not been able to muster the political will to challenge presidents on war issues. When it does, it runs into constitutional limitations. For example, in 2019 Congress passed a bipartisan resolution to end the U.S.'s support for Saudi Arabia's war in Yemen. President Donald Trump vetoed the resolution, and America continued to assist Saudi Arabia. (3)

Diplomatic Powers



President Donald Trump and Chairman Kim Jong Un

In foreign affairs, the president has **treaty power**, or the ability to negotiate and sign formal agreements with other countries. These treaties *require* ratification by a two-thirds Senate vote. Most treaties are ratified. However, there are notable exceptions. In 1919,

the Treaty of Versailles was negotiated and signed by President Woodrow Wilson, officially ending World War I and creating the League of Nations. The Senate refused to ratify the treaty, and the United States never did join the League of Nations. In 1999, President Bill Clinton could not round up enough Senate votes to ratify the Comprehensive Test Ban Treaty, which would have banned all nuclear weapons testing.

Because the formal treaty process is so onerous, presidents have more frequently turned to creating **executive agreements**, which are agreements with at least one other country's head of state. These documents have the same force as treaties. Since they do not require Senate approval, an incoming president can stop honoring or can renegotiate executive agreements entered into by previous presidents. For example, in 2019 President Donald Trump formally announced that the U.S. was withdrawing from the Paris Climate Agreement, whose goal was to limit global temperature increases to below 2 degrees Celsius from the preindustrial average.

The North American Free Trade Agreement between Canada, the United States, and Mexico is an economic example of an executive agreement. As commander in chief, the president often negotiates **status of force agreements**—a type of executive agreement—with other heads of state in countries where the U.S. has stationed military personnel.

According to the U.S. Constitution, a president can "receive ambassadors and other public ministers." In other words, the president, acting without Congress' approval, has **diplomatic-recognition** power. When two countries receive ambassadors from each other, a diplomatical-recognition has occurred. The United States diplomatically recognizes most countries of the world. However, the U.S. does not diplomatically recognize North Korea, although the two countries have been negotiating for years over Korean peninsula security matters or Bhutan, which has a long-running border dispute with the People's Republic of China.

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4.5: Contemporary Issues of Presidential Power

"*The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.*"

–James Madison in *Federalist #47*

" Altogether, the Russian action to elect Donald Trump in 2016 ranks among the most successful intelligence operations in world history."

–David Frum [1]

The Problem of Executive Power

The Constitution performs a delicate balancing act between empowering and constraining the presidency. It is no surprise, then, that U.S. political history has witnessed numerous controversies about presidents exercising power. Some presidents have pushed the envelope, while others have not. However, the long-term trend is clear: over time, presidential power has increased considerably.

Executive power is always a tricky political problem. The founders were especially cognizant of what history had to teach about checking executive power. Democratic republics are fragile, as the demise of Athenian democracy and the Roman republic demonstrate. It was a long time before anything resembling popular democracy returned to the West. In 1215, King John of England—after disastrous foreign policy mistakes and domestic power abuses—was forced to accept the **Magna Carta**, or Great Charter. The Magna Carta limited the king's power vis a vis the nobility and the clergy. Later, in 1649, Parliament executed **Charles I**. During his rule, he levied taxes without Parliament's approval, disbanded Parliament for eleven years, forced people to loan money to the government, and sent an armed force into Parliament to arrest members.

During the Commonwealth period, Oliver Cromwell ruled a fractious England as "Lord Protector." The monarchy was restored in 1660 when Charles II, son of Charles I, was invited to be king. A later king, James II was forced from power in the **Glorious Revolution** when Anglicans feared that his son's birth would establish a Catholic dynasty in England. Instead, his Protestant daughter, Mary, and her husband, William of Orange, were invited to rule. They were forced to accept the **1689 Bill of Rights**, which guaranteed, among other things, the right not to be taxed without Parliament's approval, the right to petition the King, the right for Protestants to bear arms for self-defense, freedom from cruel and unusual punishments, freedom from excessive bail, freedom of speech in Parliament, and guarantees of a trial before having to pay fines. This background and the colonists' belief that both Parliament and King George III denied their "rights of Englishmen" underscores struggles with executive power.

Informed citizens should be familiar with four key issues regarding United States executive power. Keep in mind that the issues are all interrelated, even though they are treated separately here.

Executive Privilege

Presidents have exerted a right to executive privilege, even though this right is nowhere mentioned explicitly in the Constitution. Basically, **executive privilege** asserts that the separation of powers built into the Constitution gives presidents a certain amount of discretion when responding to the legislative and judicial branches' orders and information requests. [2] Specifically, presidents have argued that they are entitled to withhold from Congress, the courts, and the public certain executive branch documents and deliberation transcripts within executive agencies. Executive privilege is not absolute.

Unitary executive theory advocates would say that there should be no limits. However, mainstream opinion among scholars and lawyers indicated that presidential prerogative is limited. General consensus says that executive privilege cannot do the following:

- Protect the president when he is acting in his personal capacity.
- Shield information related to presidential decisions once they have been made.
- Hide communications related to committing a crime.
- Block information Congress requires in an impeachment proceeding.
- Protect communications that the president or his office never received.
- Provide absolute immunity to congressional subpoenas. [3]

During the Watergate scandal, President Nixon refused to turn over White House tape recordings and written documents to special prosecutor Leon Jaworski by invoking executive privilege. The Supreme Court ruled against Nixon—a decision that sealed his presidency's fate. In ***United States v. Nixon* (1974)**, the Court recognized "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties," and that "human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process."

President Bill Clinton's administration invoked executive privilege on thirteen occasions. Clinton's special counsel Lloyd Cutler wrote a memo indicating that "Executive privilege will be asserted only after careful review demonstrates that assertion of the privilege is necessary to protect Executive Branch prerogatives," and that "Executive privilege belongs to the President, not individual departments or agencies." (4) Clinton asserted executive privilege on its least defensible issue—the Monica Lewinsky scandal--by concealing information about their affair and how his White House personnel handled it. As with the Watergate scandal, the dispute between the White House and Congress eventually went to the courts. In this case—and relying on the precedent in *United States v. Nixon (1974)*—Federal Judge Norma Holloway Johnson again seemed to embrace executive privilege but ruled against the president on the particular case's merits. (5)

President George W. Bush invoked executive privilege six times, including on such issues as energy policy, Pat Tillman's death, firing federal prosecutors, and allegedly misusing organized crime informants. Barack Obama invoked executive privilege one time to prevent Congress from having access to certain documents related to Operation Fast and Furious, which was a weapons-trafficking sting that was poorly conceived and poorly executed. Federal agents lost track of many weapons that they sold to suspected Mexican gun traffickers. (6) Republicans in Congress held Obama's Attorney General, Eric Holder, in contempt for refusing to turn over documents, but the Obama administration successfully ran out the clock and withheld the documents throughout Obama's term.

President Donald Trump exerted executive privilege over releasing the full *Mueller Report* regarding Russian ties to Trump's 2016 campaign and to Trump's attempts to obstruct investigating those ties. Then, he attempted to completely deny Congress' ability to investigate anything having to do with his administration. For example, he would not allow the IRS to turn over his tax returns to a congressional committee even though federal law explicitly says the IRS "shall" do so upon request, and then he would not let the IRS director or the Treasury Secretary testify to Congress about the issue. When the House began impeachment proceedings against him for bribery, abuse of office, and obstruction of justice, Trump refused to allow key figures like Chief of Staff Mulvaney, Attorney General Barr, and Vice President Pence to testify.

Unitary Executive Theory

Republican administration members and their supporters have been the strongest proponents of **unitary executive theory**. George W. Bush had relied on this theory to authorize the National Security Agency to wiretap phone calls in the United States without a warrant as required by the Foreign Intelligence Surveillance Act. Even before that, however, the Bush administration relied on the unitary executive theory in its War on Terror. The president and his defenders asserted that the unitary executive idea allowed the executive branch to hold what it called "enemy combatants" in a state of legal limbo where they were not criminal defendants, nor prisoners of war, nor covered by the Geneva Convention, nor able to talk with lawyers, nor able to see any of the evidence against them. (8)

The **unitary executive theory** argues that the White House's occupant has broad inherent powers that are implied by the Constitution's executive authority vestment with the presidency. In other words, the president can act without legislative authorization and is virtually without check in the realm of national security. In addition, the president can go beyond merely executing the law, he can execute the law as he interprets it. Here, the issue concerns **presidential signing statements**, that are attached to a signed bill. In the country's history up through the Clinton administration, all presidents combined, issued a total of 322 signing statements. President Bush issued 435 of them in his first term alone. (9)

Congress, spurred on by Republican Senator John McCain, passed the McCain Anti-Torture Law to push back against the executive branch's excesses during the War on Terror. President Bush signed the bill, but issued the following signing statement:

> *"The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent*

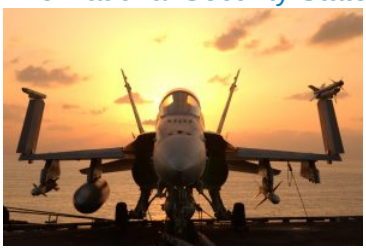
with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President…of protecting the American people from further terrorist attacks." [10]

The Supreme Court has not ruled specifically on signing statements. If the Constitution requires that the president "shall take care that the laws be faithfully executed," and if the Supreme Court allows the president to "construe" the very laws he is supposed to be enforcing, it brings into question whether the president would become more like a monarch than the leader of a democratic republic. In any case, it would further shift the balance of power away from Congress and toward the president. A 2006 report by the American Bar Association condemned Bush for abusing signing statements, saying that it was "contrary to the rule of law and our constitutional system of separation of powers." [11]

President Obama did not issue nearly as many signing statements as his predecessor, but even those remained controversial. The American Bar Association was sufficiently concerned with Obama's signing statements that it issued a public letter "restating its objection to the practice and urging him to instead veto bills if he thinks sections are unconstitutional." [12] President Donald Trump continued with the practice—most famously indicating that he considered numerous provisions of the National Defense Authorization Act unconstitutional infringements on his executive authority. [13]

The unitary executive theory has important implications for the rule of law in the United States. (**The rule of law** refers to the related ideas that no one is above the law, that all of us are equally subject to the laws that we collectively make together, and that decisions are reached by following pre-established procedures.) During Donald Trump's presidency, the president and his Attorney General William Barr, acted together to ensure that the law fell lightly on the president's friends and heavily on the president's detractors. [14]

The National Security State



F-18 on the USS John C. Stennis

Much of the executive/presidential power's growth can be attributed to the **rise of the national security state**. This concept suggests that the exigencies of protecting the United States from real or imagined external enemies inflates the power of the military, the intelligence agencies, and the internal security agencies—all of which are directed by the president. The founders feared this sort of development would inevitably erode democracy and the civil liberties they cherished, and they continually warned against a large standing army in peacetime. James Madison wrote to Thomas Jefferson in 1798 that "perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretend, from abroad." [15]

World War II was clearly a watershed event in expanding the United States' national security apparatus. Before that conflict, the country's peacetime armed forces were relatively small—in 1896, there were only 41,680 active-duty military personnel. Indeed, on the eve of World War I, Belgium's tiny army was larger than the United States Army. Since 1945, however, the United States armed forces have never comprised fewer than 1.3 million people and have often included more than twice that figure, which doesn't count reservists and guardsmen.

During World War II, the Pentagon—still the largest office building in the world—was created to coordinate military efforts against the axis powers. It has become the national security state's focal point. [16] After the war, the United States spending priorities shifted to favor military spending, largely due to the standoff between the U.S. and the Soviet Union. During the Cold War (1948-1991), the United States spent tens of trillions of inflation-adjusted dollars on its military. If we had spent only half that much on the military, the government could have funded numerous domestic policy priorities. [17]

Military spending goes through cycles of ups and downs, but always at a very high level. The United States spends about the same on its military as the other top twenty countries combined, many of which are U.S. allies. The United States and its allies spend approximately six times more on their armed forces than Russia, China, Sudan, Cuba, Libya, North Korea, Iraq, Syria, and Iran altogether. [18]

In 1947 the **National Security Act** passed, which consolidated the Department of War and the Navy Department into the Department of Defense—notice the rhetorical shift from War to Defense. The Act created the National Security Council to advise the president on foreign affairs and security. It also created the Central Intelligence Agency (CIA), which was designed to gather intelligence and engage in covert operations around the world. Over the years, the CIA has led or participated in overthrowing foreign leaders and unsuccessfully attempting to overthrow others; the CIA has experimented with mind-altering drugs on Americans and illegally spied on Americans. Later, the United States established the National Security Agency (NSA), which is charged with gathering information from electronic intercepts and satellite imagery.

In his famous 1961 farewell address, President Dwight Eisenhower—who spent his career in the military before becoming president—warned against the power of what he called the **military-industrial complex**.

> *This conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence – economic, political, even spiritual – is felt in every city, every Statehouse, every office of the Federal government. We recognize the imperative need for this development. Yet we must not fail to comprehend its grave implications. Our toil, resources and livelihood are all involved; so is the very structure of our society.*
>
> *In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.* [19]

Because of the **War on Terror** declared by President George W. Bush following the events of September 11, 2001, spending on the military and other security operations increased, intelligence and law enforcement operations of the CIA, the NSA, and the FBI became more aggressive. The president asserted broad executive authority in the name of national security.

President Obama continued to do so by expanding the U.S. presence in Afghanistan and ramping up drone attacks and raids in neighboring Pakistan. Eric Holder, Obama's Attorney General, said in 2013 that in some "extraordinary circumstances" the president would be legally allowed to direct a drone strike on U.S. citizens on U.S. soil. Presumably, the permitted circumstances would be if said citizens were about to carry out a terrorist attack. [20] President Trump and a compliant Congress increased military spending by hundreds of billions of dollars per year. [21]

Imperial Presidency

In his classic book, *The Imperial Presidency*, Arthur Schlesinger, Jr., warned that the growth of presidential power—particularly in response to national security concerns—threatened to warp the country's constitutional fabric. The presidencies of George Bush and Barack Obama have also been condemned from the left and the right for their imperial character, and the president appears in case after case to act outside of—or at the margins of—the rule of law. When such actions are revealed in the media, the administration goes on a public relations blitz justifying its actions as necessary and thereby undercutting Congress' political will to stand up. Writing in *Newsweek*, Jonathan Alter feared that because of the Bush years manifesting the imperial presidency, "we are in danger of scrapping our checks and balances—not just for a few years as was done during the Civil War, but for good." [23] During the Trump administration—with its seizure of money and diverting it to build a wall against Congress' wishes and using his office to attack his political rivals, Attorney General William Barr was such an advocate for the unified executive theory and the imperial presidency that even conservative commentators recoiled at the notion of an unfettered chief executive. [24]

What if . . . ?

Can you articulate a one-paragraph vision for the president's proper role in the American republic? In other words, if you could define for the country, what would be the presidential role when it comes to enforcing laws passed by Congress and signed by the president? What should and should not the president be doing? What amount of discretion and leeway should she have?

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4.6: Impeachment and Removal of the President

"No point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice? . . . Shall the man who has practiced corruption & by that means procured his appointment [election] in the first instance, be suffered to escape punishment, by repeating his guilt?"

–George Mason [1]

Members of the executive and judicial branch officials can be impeached and removed. Executive branch officials who get into trouble tend to resign, or the president removes from office. In 1804, the House impeached sitting Supreme Court Justice Samuel Chase, but he survived the trial in the Senate. In 1969, Supreme Court Justice Abe Fortas resigned under threat of impeachment for financial improprieties. Eight federal judges have been impeached and removed from office. An additional three federal judges have been impeached and resigned before they completed their Senate trials. The charges against these judges ranged from sexual assault to bribery and perjury. [3]

It is the prospect of a president being **impeached and removed** that is the most interesting and historically significant possibility examined in this section. The founders were aware that neither ancient Grecian or Roman societies had figured out how to peacefully remove a chief executive who was abusing his office—often assassination or uprisings were the only remedies. Thus far, no U.S. president has been impeached by the House *and* removed by the Senate.

Impeachment Power

Even though the British monarch could not be impeached him/herself, the House of Commons proclaimed that impeachment was a principal instrument to hold royal power accountable. In the American colonies—particularly after 1755 and then intensifying in the 1770s—colonial assemblies "came to see impeachment as the mechanism by which the people could begin the process of ousting official wrongdoers, understood as those who betrayed republican principles, above all by abusing their authority through corruption or misusing power." [5] After independence, several states put impeachment provisions in their state constitutions.

The U.S. Constitution's impeachment process is to be applied to any future president who had, in the words of Benjamin Franklin, "rendered himself obnoxious" to the Constitutional order and the rule of law. The president, vice president, and other civil U.S. officers can be removed from office by Congress if they are found guilty of "treason, bribery, or other high crimes and misdemeanors." While the definitions of treason and bribery are clear, the phrase "other high crimes and misdemeanors" sometimes confuses people. However, the founders were quite clear about what they meant. George Mason originally proposed that the House be able to impeach in cases of treason, bribery, or "maladministration," but that was deemed to be too broad a term. Instead, they chose the phrase "or other high crimes and misdemeanors," which had precedent in English law going back to 1642.

The founding fathers were particularly concerned about presidents who fraudulently achieved office, who might be under the influence of—or conspire with—foreign powers, who improperly enriched themselves, who undermined the rule of law, or who became incapacitated. [6] It is clear that the president's offenses need not be law violations and could instead be technically legal assaults against the common good or the public trust. For example, Alan Hirsch argues that it is perfectly legal for a president to pardon all members of his own party for any federal offenses, but such action would be reasonable grounds to impeach and remove that president. [8]

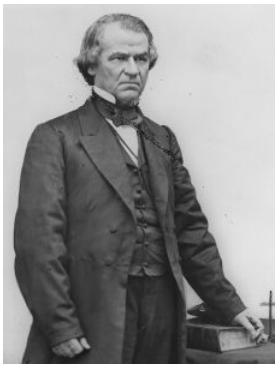
The impeachment process is a fairly straightforward one. At its most basic, constitutionally removing a president is a two-step process:

- The impeachment process begins in the House of Representatives, where one or more members introduces a bill to impeach. This bill is referred to the House Judiciary Committee, which will hold hearings and vote whether to report out articles of impeachment to the full House. Other relevant House committees may hold hearings as well. Articles of impeachment are essentially the specific charges against the president. The full House debates the articles of impeachment and votes; a successful majority vote on one of the charges means that the president has been impeached.
- Then the process moves to the Senate, where the president is put on trial and the senators determine whether the president is "guilty" of the offenses spelled out in the articles of impeachment. Members of the House Judiciary Committee come over to the Senate to present the case against the president, while the president's lawyers mount a defense. The Chief Justice of the

Supreme Court comes into the Senate to preside over the trial. The Constitution requires a two-thirds vote in the Senate to convict and remove the president.

Congress has never gone through the whole process and successfully removed a sitting president. However, there have been four notable cases in U.S. history.

Andrew Johnson



President Andrew Johnson

In the 1864 presidential election, Republican Abraham Lincoln chose Democrat Andrew Johnson as his running mate in an effort to reach out to Democrats who supported the Union's war effort. The Lincoln-Johnson ticket won. After Lincoln's assassination on April 14-15, 1865, Johnson became president. At this time, the Republican Party's Radical Republican wing was adamant that the defeated Southern states be "reconstructed" into loyal Union members and that African Americans be guaranteed political rights and full participation. Johnson was more inclined to be lenient with the former Confederate states, which included his home state of Tennessee. Indeed, he did not believe that blacks were capable of democratic governance and said in 1865 that "White men alone must manage the South." [(9)] He vetoed the 1866 Civil Rights Act and the Freedmen's Bureau bill, which were designed to enlarge and solidify the powers of the already existing Freedmen's Bureau to protect the civil rights and liberties of newly freed slaves and refugees. His action angered the Radical Republicans, and Congress overrode his vetoes. Johnson also opposed passing the Fourteenth Amendment, which granted former slaves citizenship. It passed anyway.

To limit Johnson's power, Congress passed the ***Tenure of Office Act in 1867***, which said that the president could not remove the holders of any appointed positions unless the Senate concurred. When Johnson removed Secretary of War Edwin Stanton without the Senate's approval and replaced him with Lorenzo Thomas, the House voted to impeach him for the clear violation of the Tenure of Office Act. They also impeached him for very derogatory statements he made about Congress, specifically that he "did attempt to bring into disgrace, ridicule, hatred, contempt and reproach to the Congress of the United States." (That's not a crime, although they impeached him for it anyway.) After a three-month trial in 1868, President Johnson's opponents came one vote short of a two-thirds majority to remove him from office. He served out the remainder of his term. Interestingly, the Tenure of Office Act was repealed in 1887. Later, the Supreme Court definitively ruled in *Meyers v. United States* (1926) that the president does not need Senate approval to fire executive branch officials.

Richard Nixon



President Richard Nixon and Advisors

On June 17, 1972, agents of President Richard Nixon's Committee for the Re-Election of the President (CREEP) were caught breaking into the Democratic Headquarters in the **Watergate** office and residential complex. Nixon immediately tried to cover up

the incident by ordering hush money payments and telling the Federal Bureau of Investigation to not look into it. The cover-up ultimately did not work, and the revelations that followed constituted a shock to the American public that reverberated for decades.

Nixon did everything he could to forestall the inevitable. In the famous **Saturday Night Massacre**, Nixon ordered Attorney General Elliot Richardson to fire Archibald Cox, who was serving as the independent special prosecutor in the case. Richardson resigned rather than carry out the order. Nixon then ordered Deputy Attorney General William Ruckelshaus to fire Cox. Ruckelshaus also refused to do it and resigned. Then Nixon asked Solicitor General Robert Bork to fire Cox, and Bork complied.

Other elements of corruption came to light. Nixon and his subordinates were responsible for extorting money from rich individuals and corporations; spying on U.S. citizens because they disagreed with the president's policies; trying to use the Internal Revenue Service to destroy "enemies" of the president; selling government favors in exchange for campaign contributions; seriously contemplating the murder of a journalist; and breaking into psychiatrists' offices looking for dirt on opponents. (10)

Nixon had a taping system in the White House that recorded his conversations with everyone who came into his office. When faced with a congressional subpoena, he refused to turn over the tapes until forced by a unanimous Supreme Court decision. ***United States v. Nixon (1974)*** established that while the president had the right to confidentially record conversations with his advisors, executive privilege did not extend to refusing to turn over records pertinent to a criminal proceeding. Apparently, Nixon contemplated refusing to turn over the tapes, as well as pardoning the bunglers and those people who had already been convicted and indicted. But, in the end, he decided to comply with the Supreme Court's order. (11)

The tapes revealed the cover-up's "smoking gun": Nixon suggested to his chief of staff that the FBI tell the CIA to stay out of the Watergate investigation because it dealt with national security issues—an assertion that was not true and that clearly indicated obstruction of justice. Nixon resigned the presidency on August 9, 1974, just before the full House had a chance to vote on accepting three articles of impeachment. By resigning before he was actually impeached by the House, Nixon was eligible to be pardoned by Gerald Ford, who assumed the presidency after Nixon's resignation.

Bill Clinton



President Bill Clinton and Monica Lewinsky

The House of Representatives voted along party lines in 1998 to impeach President Bill Clinton. The complicated story can be distilled as follows: While he was still governor of Arkansas, Clinton allegedly propositioned an Arkansas state employee named Paula Jones in a Little Rock hotel. With support from conservatives, including lawyer Kenneth Starr, Jones pursued a sexual harassment lawsuit against now President Clinton. Later, Kenneth Starr would become the independent counsel charged with investigating a variety of non-sexual allegations against Clinton and his wife. Starr eventually failed to find enough evidence that the Clinton's ever did anything impeachable in their finances or in running the White House.

During depositions in the Paula Jones case designed to demonstrate Clinton's pattern of sexual harassment, the president was asked whether he had had "sexual relations" with Monica Lewinsky, a former White House intern. She was asked a similar question. Clinton and Miss Lewinsky both said that they had not had sexual relations, when in fact they had. Independent Counsel Starr received this information from Paula Jones' lawyers and went to Attorney General Janet Reno to get his investigative mandate extended to cover this salacious affair. The Attorney General agreed to grant Starr's request, although Starr allegedly hid from Reno the fact that he had an obvious conflict of interest in this case. (12) Both Clinton and Lewinsky were brought before Starr's grand jury to testify, and they again stated that they did not have sexual relations. In the meantime, the president's secretary recovered gifts Clinton had given Lewinsky. Finally, the Independent Counsel's report indicated that Clinton and Lewinsky had ten "sexual encounters" short of actual intercourse. (13)

The House passed two articles of impeachment that centered on his under-oath perjury and his obstruction of justice by encouraging others to perjure and conceal evidence. The case's facts were not really in dispute: Clinton did what the House alleged.

When the impeachment case reached the Senate, Clinton survived by a comfortable margin, with only fifty of the required sixty-seven senators voting to convict. Very few people outside of the president's staunchest political allies argued that Clinton's testimony did not constitute perjury—he clearly gave false statements under oath in a federal case.

The debate in the Clinton impeachment revolved around two issues:

- Did lying under oath in court about an embarrassing extramarital affair constitute a serious enough offense to remove the president? a
- How much damage did the Clinton scandal—with its salacious details—do to the presidency's moral authority?

In the end, the broad national consensus was that Republican efforts to impeach and remove Clinton amounted to an overly moralistic and politically opportunistic overreaction to a scandal that in no way threatened the Constitutional order.

Donald Trump



President Donald Trump with Ukrainian President Volodymyr Zalensky

As a businessman who inherited wealth from a father who flouted the law, Trump's conduct before taking up his position in the White House allegedly included tax fraud, running a fraudulent foundation, running a fraudulent university, bilking subcontractors, posing as a publicist and praising himself to a reporter, and engaging in sexual harassment and assault. (14) During the 2016 campaign, Trump flouted post-Nixon custom and refused to release his tax returns. He also paid off at least two women to keep their adulterous sex stories out of the news during the campaign.

Once in office, President Trump engaged in numerous potentially impeachable offenses that included

- violating the Constitution's emoluments clause by accepting money from foreign governments
- obstructing justice by firing FBI Director James Comey when he opened up an investigation into Russian ties to the Trump campaign
- obstructing justice with respect to Special Counsel Robert Mueller's Russian ties to the Trump campaign investigation
- violating his duty to see that laws are executed by advocating violence perpetrated by various supporters and law enforcement personnel
- abusing his pardon power in the cases of Joe Arpaio and the pardons for war crimes, thereby undermining the rule of law
- committing crimes against humanity for separating children from their parents at the U.S. border, placing them in inhumane conditions and having no plan to reunite them when their cases were adjudicated
- violating campaign finance laws while he was president by reimbursing his personal lawyer Michael Cohen and by discussing sexual-affair hush money payments in the Oval Office. (15)

Trump was not impeached for any of those possible offenses. However, he would become the first president to be impeached twice.

First Impeachment--In late 2019, the House of Representatives impeached President Trump on a party-line vote because a whistle-blower came forward with a claim: Trump's months-long conspiracy to use his office and taxpayer resources for his personal political benefit to get Ukraine to announce that it sought to investigate Democratic presidential candidate Joe Biden. Trump compounded his troubles by refusing to release any relevant documents—except a summary of two calls between Trump and the Ukrainian president—or to allow any administration personnel to testify to the House Intelligence Committee about the matter. Several people involved in or knowledgeable of the conspiracy came forward and testified anyway, but principals including the president's personal lawyer Rudy Giuliani, Secretary of State Mike Pompeo, Acting Director of the Office of Management and Budget Mick Mulvaney, former National Security Advisor John Bolton, Vice President Michael Pence, Attorney General William Barr, and several other staff followed Trump's direction and refused to come forward during the House investigation.

Ultimately, the House passed two articles of impeachment:

- Abuse of power by soliciting foreign interference in the 2020 election and compromising the national security of the United States
- Obstruction of Congress by the categorical and indiscriminate defiance of lawful Congressional subpoenas for information and testimony in an impeachment investigation

Republican senators blocked all attempts to request relevant documents and interview eyewitnesses to Trump's alleged abuse of power. It was the first impeachment trial that heard from no witnesses and introduced no documents into the record. As far as the Republican senators were concerned, "facts and evidence—reality—were viewed as grave threats, which is why they had to be buried." (16)

Trump's defense team didn't attempt to present counter evidence—instead, they sought to rationalize the president's actions—and Republican senators acknowledged that the president did what was alleged in the articles of impeachment. (17) One Republican senator attempted to get Chief Justice John Roberts to reveal the name of the whistleblower, but Roberts refused. During the trial, the Government Accountability Office confirmed that the president's actions violated the Impoundment Control Act. (18) Bolton's upcoming book manuscript alleged that Pat Cipollone, the White House Counsel and part of Trump's legal team, participated in the criminal conspiracy. (19)

In the end, all Republicans except for Senator Mitt Romney (R-UT) voted "not guilty" on both articles of impeachment, and all Democrats voted "guilty" on both articles of impeachment—a result that fell far short of the two-thirds vote needed to remove Trump from office. Senator Romney voted "yes" on the abuse of power charge and "no" on the obstruction of Congress charge.

Two legacies of the Trump impeachment are likely to have long-term consequences.

- Getting away with blanket obstruction of a congressional inquiry--An executive whose actions cannot be investigated by Congress and who has a compliant Justice Department is more like an all-powerful monarch than an U.S. president. That's a frightening precedent for the Senate to set.
- A president could exercise his legal authority to declassify national security secrets for another country in exchange for that country's help with his re-election. It is a way of thinking that subsumes the national interest of the United States underneath the personal political interest of the president.

Second Impeachment--Called to action by Trump, thousands of his supporters gathered in Washington, D.C., on January 5 and 6 to support his false claim that the 2020 election had been "stolen by emboldened radical-left Democrats" and to demand that Vice President Mike Pence and Congress reject Biden's victory. Starting at noon on January 6, at a "Save America" rally, Trump repeated false claims of election irregularities and said, "If you don't fight like hell, you're not going to have a country anymore."

As a result, a mob of 2,000–2,500 his supporters attacked the Capitol Building in Washington, D.C. They sought to overturn his defeat in the 2020 presidential election by disrupting the joint session of Congress assembled to count electoral votes that would formalize President-elect Joe Biden's victory. The Capitol Complex was locked down and lawmakers and staff were evacuated as rioters assaulted law enforcement officers, vandalized property, and occupied the building for several hours. Five people died either shortly before, during, or following the events. Many people were injured, including 138 police officers.

On January 13, 2021, Trump was impeached on one article: incitement of insurrection. At the conclusion of the trial, the Senate voted 57–43 to convict Trump of inciting insurrection, falling 10 votes short of the two-thirds majority required by the Constitution. It's important to note that he was leaving the presidency on January 20 anyway. Thus, removal from office would only have prevented him from becoming president again at a later date.

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CHAPTER OVERVIEW

5: The Supreme Court

5.1: Purpose and Operation of the Supreme Court

5.2: Paths to the Supreme Court

5.3: Appointing and Confirming Supreme Court Justices

5.4: The Interpretive Work of the Supreme Court

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5.1: Purpose and Operation of the Supreme Court

"Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution."

–Alexander Hamilton [1]

"The Founders created the Supreme Court as a critical, presidentially appointed-for-life check on the popular will."

–Paul Street [2]

The Supreme Court—Unbiased Umpire or Crooked Referee?

In *Federalist #78*, Hamilton argued that the legislative branch was powerful because it "commands the purse," (meaning that it taxes and spends), and legislative passes laws whereby it "prescribes the rules by which the duties and rights of every citizen are to be regulated." The executive branch enforces law, which Hamilton metaphorically describes as "hold[ing] the sword of the community." The judicial branch, on the other hand, was to be less feared because it "has no influence over either the sword or the purse," but merely has judgment.

Street would say that Hamilton vastly underestimated the federal judiciary's power—especially the Supreme Court—to use the Constitution to recognize rights for some and deny them to others. Moreover, Hamilton seems to be saying that the Court is just like an unbiased baseball umpire who calls balls and strikes, while Street would say that the Court acts like a biased basketball referee who, by calling fouls, unevenly impacts who wins the game. What are we to make of these different interpretations of the Supreme Court's political role? Before we explore that question, let's set some context by discussing the Court's purpose and establishing some basics about how it operates.

Purpose of the Supreme Court



United States Supreme Court

The United States strives to be a country governed by the rule of law. This goal, ultimately, requires an arbiter who can review legal decisions as objectively as is humanly possible. Thus, the Supreme Court serves two purposes.

- be the **final court of appeal** for lower courts—there is no appeal if someone loses in the Supreme court.
- exercise **judicial review**, which refers to examining the actions of Congress, the executive branch, and the states to determine whether or not they are constitutional. While the supremacy clause implies that the Supreme Court can strike down state actions, the Constitution never explicitly stated whether congressional and executive branch actions could be ruled unconstitutional as well. This matter was settled by ***Marbury v. Madison* (1803)**, wherein for the first time, the Supreme Court voided a congressional law. [3]

Marbury v. Madison (1803) established judicial review. The 1800 presidential election marked a peaceful power shift when Democratic-Republican candidate Thomas Jefferson defeated the incumbent Federalist, President John Adams. With Jefferson's win, the Federalists lost their congressional majority. In those days, the new administration started the March after the election, instead of January as they do now. During the four lame-duck months between November and March, the Federalists, who were still in charge of Congress, passed a Judiciary Act that President Adams signed into law in February 1801. The Judiciary Act created twenty-six new federal-district and circuit court judgeships. The Adams administration then rushed to name Federalists to all those new positions, and the Federalist Senate rushed to confirm them all. Of course, the Democratic-Republicans decried the Federalist attempt to pack the federal courts with "midnight judges" of the Federalist persuasion. Remarkably, Secretary of State

John Marshall failed to deliver the official commissions to all the judges before Jefferson was sworn in as president on March 4, 1801. Jefferson ordered his new Secretary of State, James Madison, to deliver only some of the commissions that were still on Marshall's desk.

One of the undelivered judgeship commissions was addressed to **William Marbury**, who filed suit straight in the Supreme Court and asked it to issue a writ of *mandamus*—basically an order to Secretary of State Madison to deliver the commission so he could take his place as a federal judge. It took two years before the Supreme Court took the case, and guess what? The same **John Marshall,** who had failed to deliver the commissions, had been appointed by President Adams to be Supreme Court Chief Justice! It would appear that Marbury had a good case—he was nominated by Adams and confirmed by the Senate. His judicial commission was properly signed by the Secretary of State—it just wasn't delivered.

Writs of *mandamus* were well established in English common law, allowing courts to order government officials to do their jobs. Moreover, section 13 of the Judiciary Act of 1789 specifically gave the Supreme Court the ability to issue such writs. However, the last thing the Democratic-Republicans wanted was to have the federal courts packed with additional Federalist judges. Marshall was in a jam. If he ruled in Marbury's favor, he risked having the Jefferson administration ignore the ruling, thereby permanently weakening the Supreme Court.

So, Marshall resorted to legalistic sleight-of-hand. Article III of the Constitution gave the Supreme Court original jurisdiction over a limited set of circumstances, and issuing writs of *mandamus* wasn't on that list. This rule might Marbury made a mistake bringing his case straight to the Supreme Court instead of appealing from a lower court. Thus, Marshall said that due to this legal technicality, he couldn't help Marbury. But Marshall went further and declared that section 13 of the Judiciary Act of 1789 violated the Constitution and therefore was void.

Since his remarks were what the Democratic-Republicans wanted, they went along with Marshall in exerting Supreme Court power to strike down congressional legislation that had been passed and signed into law by the president. Marshall, a Federalist, thought the decision would set the Court up to be a check on future Democratic-Republican policies. In his majority opinion, Marshall wrote that "it is emphatically the province and duty of the judicial department to say what the law is," and that arguments that "courts must close their eyes on the Constitution, and see only the law would subvert the very foundation of all written constitutions." *Marbury v. Madison* (1803) is considered one of the most important Supreme Court cases because since it was decided, no one has seriously questioned the Court's power of judicial review. (4)

The Supreme Court's power stems from the way the U.S. legal system is structured. Even though the Supreme Court decides relatively few cases per year, those decisions carry weight due to the principle of ***stare decisis***, which literally means "to stand by that which is decided." Courts—particularly those lower than the Supreme Court—must make decisions that are consistent with past decisions on similar cases. In other words, "cases, once decided, are not to be overturned simply because new judges come on the Court, or new parties win elections, or newly tenured law professors think they were wrong; the radical step of voiding precedent is saved for cases that have been proven unworkable or unjust in the years since they were decided." (5) The pressure of *stare decisis* is exerted downward from the Supreme Court to lower courts. When the Supreme Court makes a definitive ruling on a matter of law, that decision sets a **precedent** for other courts to follow in subsequent cases.

Two caveats apply to the power of precedent in lower court decisions:

- The case at hand must be similar enough to the one that set the precedent.
- A later Supreme Court can always decide to change precedent by overturning a previous Supreme Court's decision. Sometimes, it takes decades for the Court's membership or societal changes to allow it to overturn precedent, and other times it happens fairly quickly.

Operation of the Supreme Court

Most Supreme Court cases come on appeal, but the Court is under no obligation to hear all appealed cases. In fact, the Court refuses to hear the vast majority of the thousands of appeals that it receives. What happens then? The next lower court's decision stands. For example, widower Walter Daniel, whose wife died in a military hospital giving birth, tried to get the Supreme Court to carve out an exception to *Feres v. United States* (1950). In this precedent-setting case, the Court said that military personnel cannot sue the United States "for injuries to members of the armed forces arising from activities incident to military service." Daniel argued that even though his wife was in the military, her labor and delivery were far removed from the battlefield or even her

position's duties, and thus his wife's case ought not to be covered by *Feres*. Daniels wanted to sue for malpractice damages, holding the negligent military hospital responsible for his wife's death. Daniel lost in the Ninth Circuit Court of Appeals, which followed the *Feres* precedent, and the Supreme Court refused to take the case. Therefore, Walter Daniel was left with the Ninth Circuit's decision against him. [(6)]

The most common way to appeal to the Supreme Court is to petition for a *writ of certiorari*, which is a formal request to review a lower court's decision. Such petitions are governed by an informal **rule of four**, whereby four or more justices must agree to take the case. If the rule of four condition is met, then the Supreme Court issues a **writ of *certiorari***—an order to the lower court to send up the case's records and an announcement that the Court is taking a case. Since *certiorari* is difficult to pronounce, people normally say or write that "cert has been granted," or "cert has been denied" by the Court. Normally, a petitioner must pay a fee and meet paperwork requirements to petition for a *writ of certiorari*, but indigent petitioners can file ***in forma pauperis***, which waves the fee and many of the paperwork requirements.

The people or groups involved in a case are called the **litigants**. The **petitioner** brings the case or the appeal, and the **respondent** answers. Despite whether the U.S. government is the petitioner or the respondent, the **solicitor general** handles its case; this is a Justice Department position dedicated to this function. The petitioner's name is written first in the case's title. Thus, in a case named *Plessy v. Ferguson* (1896), we know that Plessy is the petitioner bringing the case to the Court and that Plessy lost in the lower court, hence the appeal to the Supreme Court. When the Supreme Court accepts a case, the litigant's lawyers file **legal briefs** for the justices to examine. Legal briefs are written legal documents arguing why precedent supports their client's case and potential victory. At this time, other individuals or groups who are not litigants, but nevertheless interested in the case's outcome, may file what are known as ***amicus curiae*** briefs. *Amicus curiae* means "Friend of the Court." *It* is not uncommon in a significant Supreme Court case to have dozens of *amicus curiae* briefs filed. In what kinds of cases do you think the National Rifle Association would file *amicus curiae* briefs? What about the U.S. Chamber of Commerce? What about individual states or groups of states?

After briefs have been filed, the Court picks an **oral argument** date. Oral argument takes place in public sessions on Mondays, Tuesdays, and Wednesdays from October to May. There is a public gallery, so visitors can watch the Supreme Court work. Normally, the petitioner and respondent's lawyers are each allowed thirty minutes to present their case to the assembled justices. Some justices interrupt the lawyers often to ask questions that occurred to them while they were reading briefs. Others listen quietly to the presentations. Often, justices want lawyers to discuss the case's broader implications regarding the Court's possible decisions one way or another. If the U.S. government is one of the litigants, the solicitor general will likely handle the case's oral argument.

Shortly after a case's oral argument, the Chief Justice presides over the justices in a **conference meeting** where they reach a preliminary decision on the case. The Chief Justice speaks first, followed by the other justices in the order of their Court seniority. This conference meeting is very private, with only the justices allowed in the room. The justice with the least seniority "acts as 'doorkeeper,' sending for reference material, for instance, and receiving it at the door." [(7)] Their deliberation's outcome is made public, but their conversations are private and largely the subject of speculation.

The Supreme Court operates by majority vote, so decisions can be 9-0, 8-1, 7-2, 6-3, or 5-4. The decision's legal validity and political acceptability depend on the winning majority's size.

- **majority opinion** explains the Court's decision in terms of its compelling legal precedent. If the Chief Justice is in the majority, he will assign who writes it; if he is not in the majority, the most senior justice voting with the majority will assign the majority opinion. The majority opinions carry legal weight in the form of precedent, and they also instruct legislators about how acceptable the proposed legislation is.
- **dissenting opinion** explains why the minority feels the majority erred in applying precedent or constitutional principle. Assigning the dissenting opinion operates just like that of the majority opinion. Dissenting opinions become important if the Supreme Court decides later to reverse itself.
- **concurring opinion** explains why a judge supports the majority but for different reasons.

What if . . . ?

If you could articulate a purpose for the Supreme Court that was different from what it is now, what would it be? Could you add to, subtract from, or modify its role in ways that would be a net positive for the United States?

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5.2: Paths to the Supreme Court

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

–U.S. Constitution, Article III

Federalism in America's Court System

Since the United States is a large federal republic, it has a fairly complicated court system. The phrase **judicial federalism** refers to the dual court systems—federal and state—operating in the United States. State courts handle most United States' criminal and civil cases, while federal courts handle federal criminal and civil statutes, regulations, and constitutional provisions. Below is a simplified diagram of judicial federalism.

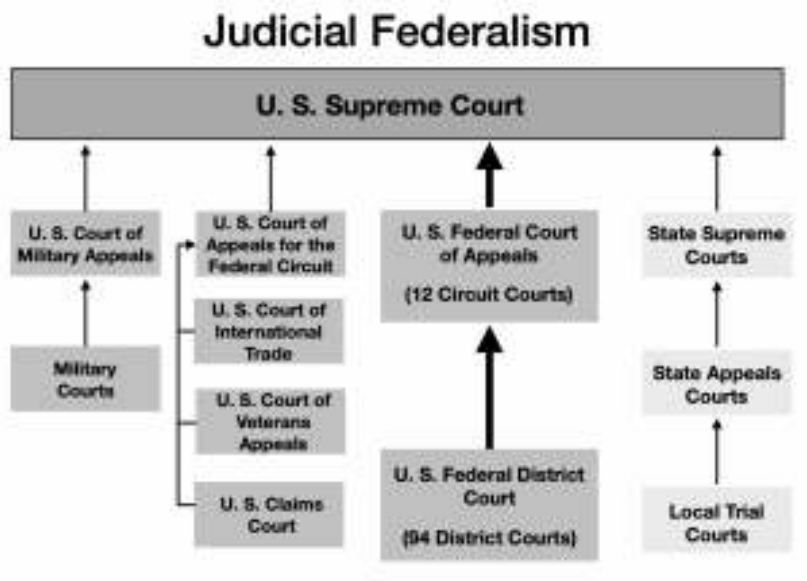


Diagram of Judicial Federalism

Paths to the Supreme Court

Let's flesh out three important things about the diagram. First, note that the three boxes on the right represent the state court system where most U.S. cases occur—e.g., people on trial for murder, rape, robbery, burglary, embezzlement, fraud, civil lawsuits, and so on. Cases can go straight through the state court system and on to the Supreme Court, but that is not a common path. The lightly shaded boxes on the right represent a large amount of work overall but represent a comparatively smaller source of Supreme Court cases.

Second, note the diagram's two boxes in the middle with thick arrows. Most Supreme Court cases come up through the federal district courts and then through one of the twelve federal circuit courts of appeals. Other federal cases such as military cases and trade cases, etc. have their own paths, but again, the main route is depicted with the thick arrows.

Cases handled in state courts can sometimes raise questions that need to be adjudicated in federal courts. If a state defendant has exhausted her state options, she may seek a **writ of *habeas corpus*** from a federal court. *Habeas corpus* literally means "you have the body," and refers to the court ordering state or federal authorities to bring a detained person to the court and show cause for the detention or incarceration. Obviously, the person is hoping the court will release them because of some federal rights violation. For example, the defendant may argue that her Fourth Amendment protections against unreasonable search and seizure were violated, or perhaps her Fifth and Fourteenth Amendment due process protections were violated.

Supreme Court Jurisdiction

The paths to the Supreme Court are conditioned by its jurisdiction, or the scope/mandate of a court. *What* kinds of cases can it hear, and *how* does it hear them? The Supreme Court has the broadest jurisdiction of any federal court, but its mandate is divided into its

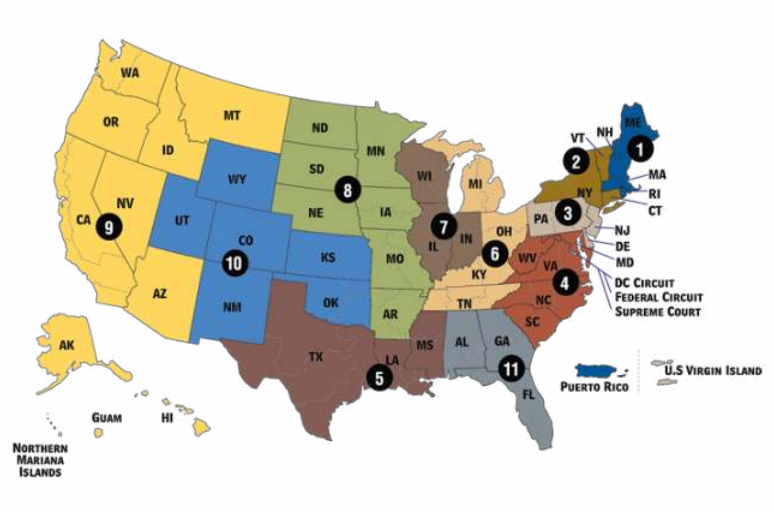
original and appellate jurisdictions. **Original jurisdiction** refers to those cases that are heard first in the Supreme Court. According to Article III of the Constitution and federal statutes, the Supreme Court has original jurisdiction in the following kinds of cases:

- Controversies between two states.
- All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties.
- All controversies between the United States and a state.
- All actions or proceedings by a state against the citizens of another state or against aliens. (1)

The Supreme Court must take these cases when they arise but will often appoint a "special master" to hear the dispute and recommend a solution. Original jurisdiction cases are rare, but when they do occur, the Supreme Court behaves more like a trial court, collecting evidence, hearing testimony, and establishing facts.

The Supreme Court also has **appellate jurisdiction**—that is, cases on appeal from lower federal or state courts. Most of the Supreme Court's caseload falls here. When exercising its appellate jurisdiction, the Supreme Court does not act as a trial court, but instead reviews lower court rulings and either upholds them as correct or reverses them. The Court is under no obligation to take cases on appeal. Every year, thousands of cases land on the Supreme Court's doorstep, of which typically less than 100 are argued before the justices. The rest are denied cert, or the justices decided without plenary review. Within the court's appellate jurisdiction, about two-thirds of the Supreme Court's caseload comes on appeal through the federal courts, and about one-third comes from state courts, with few to no original jurisdiction cases.

The federal court system's lowest rung is composed of the ninety-four **federal district courts**. For the less populous states like Utah, the federal district court's jurisdictional boundaries follow the state boundaries. Large states contain several district courts within their boundaries. Federal district courts are trial courts in cases involving federal criminal statutes, applicable civil lawsuits, and suits against federal agencies. Usually, one federal judge presides over each case at the district court level. Hundreds of thousands of criminal and civil cases are initiated in federal district courts around the country, most of which never make it to trial. (2)



Source: *U.S. Federal Courts Circuit Map @USCourts.gov*

The district courts are grouped into twelve **circuit courts of appeal**, plus there is a court of appeals for the federal circuit that handles appeals from the U.S. Claims Court, the U.S. Court of International Trade, and other national-level courts. As you can see in the map, (3) cases arising out of federal district courts in Utah, Wyoming, Colorado, New Mexico, Kansas, and Oklahoma are appealed to the Tenth Circuit Court of Appeals, located in Denver, Colorado. There, a panel of three judges hears cases. The circuit courts are appellate courts—judges review the district courts' decisions rather than develop new evidence or testimony. They are called "circuit" courts because, in earlier times, judges literally rode circuits via horseback or stage to remote areas to hear court appeals.

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2. Specific caseloads can be found on the U.S. Courts website.
3. Map is taken from the website of the Federal Bar Association.

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5.3: Appointing and Confirming Supreme Court Justices

"[Federal judges] have become the most consequential policymakers in the country. They have gutted America's campaign finance law and dismantled much of the Voting Rights Act. They have allowed states to deny health coverage to millions of Americans. They've held that religion can be wielded as a sword to cut away the rights of others. They've drastically watered down the federal ban on sexual harassment. And that barely scratches the surface."

–Ian Millhiser [1]

"Separate educational facilities are inherently unequal."

–Chief Justice Earl Warren [2]

The Supreme Court Justices

The U.S. Supreme Court currently has nine justices. The Constitution does **not** specify the number. In the **Judiciary Act of 1789.** Congress initially established a six-member Supreme Court, with a Chief Justice and five associate justices. Around the Civil War era, the number fluctuated. In 1869, Congress raised the number of justices to nine, where it has stayed ever since.

In 1937, President Franklin Roosevelt proposed to expand the number of justices by adding one for every sitting justice who was seventy- and one-half-years-old and who didn't retire. Potentially, this move could have increased the number of justices to fifteen. Roosevelt was frustrated that the Court was thwarting his New Deal policies, which were targeted at ameliorating the effects of the Great Depression. His **court-packing plan** was not approved by Congress, but the Court nevertheless became more amenable to an activist federal government. [3] The Court's change to begin endorsing Roosevelt's policies became popularly known as "the switch in time that saved nine."

Article II, Section 2, of the Constitution says that the president appoints Supreme Court justices with the Senate's advice and consent. The same procedure applies to seating all federal judges. The president's nominee needs at least **fifty-one votes** in the Senate to take his or her seat on the bench. The Constitution does **not** list Supreme Court or other federal judgeship qualifications. Senate Judiciary Committee members interview district and circuit court seat nominees, scrutinizing the nominee's stances on previous cases or their approach to making decisions. This kind of scrutiny's magnitude is enormously greater for Supreme Court nominees. In 2017, the Senate Republican majority enforced new rules to disallow filibustering Supreme Court nominees.



The Supreme Court as composed on June 30, 2022.
Front row, left to right: Associate Justice Samuel A. Alito, Jr., Associate Justice Clarence Thomas, Chief Justice John G. Roberts, Jr., Associate Justice Stephen G. Breyer, and Associate Justice Sonia Sotomayor.
Back row, left to right: Associate Justice Brett M. Kavanaugh, Associate Justice Elena Kagan, Associate Justice Neil M. Gorsuch, and Associate Justice Amy Coney Barrett.

Who are our current Supreme Court justices? Although few Americans can name them, you should know who they are and something about their perspectives. You can always check the Supreme Court's website for the current membership. Talk about the Supreme Court justices with your professors, classmates, family, and friends. What do you know about who appointed them and their ideological perspectives?

Here are some Supreme Court membership historical facts. Up through mid-2020, 114 people have served as Supreme Court justices. More than 97 percent have been white, and more than 96 percent have been men. (4) Of all the Supreme Court justices who have served since the Civil War, more than 65 percent have been nominated by Republican presidents.

Controversies Surrounding Some Court Nominations

Nominating a Supreme Court justice is a very politically consequential act because that person is likely to serve on the court for decades—there is no term or age limit for justices. In other words, they affect public policy and the lives of ordinary Americans long after the president is out of office. The Supreme Court has decided whether schools can be racially segregated, whether couples can access contraception, whether local police must possess a warrant to search a person's house or car, and whether federal agencies can regulate child labor and air pollution. Given the stakes, some Court nominations have proven to be very controversial. Here are some examples:

Robert Bork—In 1987, President Ronald Reagan nominated Robert Bork to the Supreme Court. Reagan was seeking to replace retiring centrist Justice Lewis Powell Jr., with an activist conservative justice. The Senate defeated Bork's nomination 58-42. As far as most Democrats and a few moderate Republican senators were concerned, Bork had two strikes against him. First, Robert Bork was the Justice Department official who carried out President Nixon's "Saturday Night Massacre." Nixon had ordered his Attorney General to fire the special prosecutor investigating the Watergate scandal. The Attorney General refused and resigned instead, as did the Deputy Attorney General. Bork, who was third in command at the Justice Department, carried out Nixon's order and fired the special prosecutor. Second, Bork's legal opinions put him far to the right of mainstream legal thinking. He opposed the Court's actions to ensure one-man-one vote; he opposed civil rights Court decisions; he opposed the right to privacy. After Bork's nomination was defeated, Reagan tried another appointment but had to rescind it. Then, he settled on Anthony Kennedy, who served for thirty years on the Court as a swing vote. Kennedy was approved by a 97-0 vote. (5)

Clarence Thomas—In 1991, President George H. W. Bush appointed Clarence Thomas to replace Thurgood Marshall, who had retired from the Supreme Court due to his failing health. While both justices were African-American, Marshall was a prominent liberal with an historically long progressive interpretation of the Constitution. Thomas was an up and coming conservative originalist. Thomas' Senate confirmation hearings became a national television event. Anita Hill, who had worked for Thomas when he led the Equal Employment Opportunity Commission (EEOC), accused him of pestering her for dates, sexually harassing her, and creating a hostile workplace environment replete with crude references to sex and pornography. (The EEOC is charged with investing federal sexual harassment cases.) The all-male, all-white Senate Judiciary Committee, that was holding the hearings, allowed Thomas to testify before and after Hill, and refused to bring in other witnesses who would have corroborated Hill's account of Thomas' behavior. The Republican Senators who went after Hill in the hearing, included Arlen Specter, Orrin Hatch, Strom Thurmond, Alan Simpson, and John Danforth among others. Thomas was approved by a 52-48 vote. As a result of this incident, a few more women were subsequently elected to the Senate, and EEOC workplace sexual harassment reports more than doubled. (6)

Merrick Garland—In February 2016, sitting Supreme Court Justice Antonin Scalia died unexpectedly. President Barack Obama nominated centrist Merrick Garland to fill that Court seat. Garland had served for twenty years as chief judge of the D.C. Circuit Court and had never had one of his decisions overturned by the Supreme Court. Flouting Constitutional norms, Senate Majority Leader Mitch McConnell and his fellow Republican senators said they would not meet with Garland, hold confirmation hearings, or hold a vote. The Republicans argued that they did not have to hold hearings or a vote on a president's nominee and that the voters should speak in the 2016 presidential election before the seat was filled. So, the Republicans kept the seat vacant for **over a year**. When President Trump won the election, McConnell and his colleagues promptly approved Trump's nominee, a conservative originalist named Neal Gorsuch, to fill the empty seat. Later, McConnell made clear that if a seat were to come open during 2020, he would hold hearings and a vote rather than wait until the presidential election that fall. (7)

Brett Kavanaugh—When Justice Anthony Kennedy announced his retirement in 2018, it afforded President Trump an opportunity to replace a swing-voting centrist with a solid conservative. Thus, tilting the court even more to the right. Trump appointed conservative Brett Kavanaugh. During the confirmation process, his high school classmate Christine Blasey Ford came forward with sexual assault allegations that had allegedly happened when the two were in school together. Kavanaugh vehemently denied the allegations and launched partisan invective at the Democratic senators on the Judiciary Committee. Classmates who knew Kavanaugh at Yale University made similar

allegations, but they were not heard at the hearings, and the FBI did a superficial job of investigating them. [8] Moreover, credible allegations were made during the confirmation process that Kavanaugh had perjured himself on multiple topics. [9] Nevertheless, the Republicans chose not to seriously probe those allegations, and Kavanaugh was approved by a vote of 50-48.

Amy Barrett--On September 26, 2020, President Donald Trump announced the nomination of Amy Coney Barrett to the position of Associate Justice of the Supreme Court of the United States to fill in the vacancy left by the death of Ruth Bader Ginsburg. On October 26, the Senate voted to confirm Barrett's nomination to the Supreme Court, with 52 of 53 Republicans voting in favor and all 47 Democrats voting against. Barrett took the judicial oath on October 27. Democrats rebuked Republicans and accused them of hypocrisy, stating that they had violated their own interpretation of the rule, which they set in 2016 when they refused to consider President Obama's nomination of Merrick Garland more than nine months before the end of his term. (See above.) The entire process took 35 days, which was the shortest period of time between a nomination and an election in US History.

Staffing the Rest of the Federal Judiciary

Speaking plainly, the federal judiciary has become politicized to a remarkable degree. We live in a highly politicized time with respect to the federal judiciary. Congressional partisanship has not only led to contested nominations, but it has spilled over into the judiciary. Battles lost in Congress manifest themselves as wars in the federal courts. Republicans have been particularly aggressive and successful in packing the courts with conservative judges. How have they accomplished this? Via the following three mechanisms:

Creating a conservative judicial strategy—In recent decades, Republicans have been far more unified and strategic with their approach to the federal judiciary than have Democrats. In the 1950s, 60s, and 70s, a centrist federal court system was amenable to civil rights, female bodily integrity, economic regulations, and environmental regulations. They developed a strategy to turn that tide.

Founded in 1982, the **Federalist Society** has been key to that strategy. They have cultivated conservative law students and jurists, as well as been funded with tens of millions of dollars by deep-pocketed conservatives, including the Koch brothers—oil, chemicals, commodities, fertilizer; the Scaife family—oil, aluminum, banking; the Templeton Foundation—Wall Street investments; the Searle Foundation—pharmaceuticals; Exxon—oil; Chevron—oil; Google—Internet search and advertising; Verizon—telecommunications; and the U.S. Chamber of Commerce—business interests. [10] The Federalist Society "educates" law students and early career jurists to cut federal regulations, take an originalist approach to Constitutional interpretation, defend corporate personhood, and embrace a social-Darwinian approach to the question of whether government policies should help improve ordinary peoples' lives. The Federalist Society regularly hosts fundraisers in which big donors have access to Supreme Court justices like Antonin Scalia, Clarence Thomas, and Samuel Alito. [11] The liberal alternative to the Federalist Society is the American Constitutional Society, which doesn't have nearly as large a stable of billionaires and corporate donors. Moreover, Democratic presidents have thus far not been particularly strategic in their federal judiciary nominations.

Frustrated by the obstruction, Democrats changed the Senate rules to no longer allow lower court nominations to be filibustered. In 2014, when Republicans regained the majority in the Senate, they were in a position to significantly hamper Obama's nominations, which they certainly did. Democrats approved 68 of Republican George W. Bush's court nominees in the final two years of his presidency, while the majority of Republicans approved just twenty of Democrat Barack Obama's nominees. As a result, Obama left office with an astonishing 107 federal court seat vacancies—twice as many as when Bush left office. [13]

Rushing nominations through during the Trump administration—Once President Trump took office, Senator McConnell and his fellow Republicans ramped up the judicial approval process to get as many young conservatives on the federal bench as possible. Of Trump's first eighty-seven judicial nominations, 92 percent were white, and the Trump administration placed a strong emphasis on getting originalists and textualists on the federal judiciary. [15] Indeed, more than twenty of Trump's appointees refused to say whether the unanimous *Brown v Board of Education* (1954) decision against segregated schools was correctly decided. [16] The Trump administration essentially turned over its vetting of federal judicial nominations to the Federalist Society. According to Amanda Hollis-Brusky, author of *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*, "When you look at [Trump's] list of judges and the people that he's put on the bench, it's been entirely controlled by the Federalist Society." [17]

From a strictly political science point of view, it will be interesting to see how the most recent phase of judiciary politicization will play out. The country may be entering a long period in which the public policy aspirations of ordinary people may be disproportionately stricken down by a federal judiciary that hews to originalism, textualism, and conservative values.

What if . . . ?

Part of the reason judicial nominations are so high stakes is that nominees hold their positions for life. What if term limits were placed on Supreme Court justice positions and other federal judgeships? What would be the advantages and disadvantages of doing so?

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5.4: The Interpretive Work of the Supreme Court

"The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution."

–Edwin Meese [1]

"It is difficult to find a professed originalist, in the judiciary. . . who believes that the original meaning of the Constitution is significantly different from his or her personal policy preferences."

–Frank Cross [2]

The Supreme Court sits at the apex of the U.S. judicial system. It rarely acts as a fact finder. That role typically belongs to the first court to hear a case. Instead, the Supreme Court is an appellate court; it hears lower-court cases on appeal. The issues that reach the Court require the justices to interpret the meaning of laws and governmental actions. This interpretive function falls into two broad categories: Statutory interpretation and constitutional interpretation. [3] Each justice approaches their interpretive work in a unique way, but it's rather easy to see broad patterns emerge if one steps back and asks, "Of what is this particular case an example?"

Statutory Interpretation

When Congress passes a bill and the president signs it into law, it enters into the U.S. Code as either a free-standing statute or an update to an existing statute. Often, disputes arise as to the meaning of words or phrases in federal statutes, and the Supreme Court has the ultimate say in how such words and phrases are to be interpreted. As American public law specialist Larry Eig wrote for the Congressional Research Service, "The exercise of the judicial power of the United States often requires that courts construe statutes so enacted to apply them in concrete cases and controversies." [4] This statement represents **statutory interpretation**: when the Supreme Court authoritatively defines ambiguous words and phrases in federal laws as they apply to specific controversies between litigants. Once the Court has defined such a word or phrase, that interpretation becomes binding on all lower courts should future disputes arise.

How do justices go about statutory interpretation? Justice Oliver Wendell Holmes once famously wrote that "We do not inquire what the legislature meant; we ask only what the statute means." [5] **Textualism** refers to the desire to rely on the plain meaning of words when interpreting federal law. Textualism puts a burden on the legislature to be clear when writing bills so that there will be no ambiguity when that statute is actually applied by the executive branch. This concept allows a justice to say that he is just acting like a baseball umpire, calling balls and strikes, using the statute's plain language. The justices apply what is known as the **plain meaning rule**, if the statutory language is plain and unambiguous, it must be followed and applied to the case at hand. [6]

Intentionalism attempts to take into consideration the broad intent of the legislation. Justice Billings Learned Hand once wrote: "There is no surer way to misread any document than to read it literally . . . As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and, although their words are by far the most decisive of what they would have done, they are by no means final." [7] Intentionalism can be used as an alternative to textualism but is primarily employed as a supplement when the plain meaning rule doesn't apply. Using this method, a justice would want to consider the congressional deliberations that occurred when the bill was debated, its legislative history, and the broad goal or goals that Congress was trying to achieve.

How does statutory interpretation operate in the real world? Let's look at two examples.

Example 1: When Congress passed the Clean Air Act in 1970, it empowered the brand-new Environmental Protection Agency (EPA) to regulate air "pollutants," such as particulates and sulfur dioxide coming out of tail pipes and smokestacks. (According to the *Cambridge English Dictionary*, to pollute means "to make air, water, or earth dirty or harmful to people, animals, and plants, especially by adding harmful chemicals or waste." [8]) In 1970, congressional members were not thinking about the climate emergency, so the statute did not have carbon dioxide, methane, and other greenhouse gasses in mind when passing the law. During the Obama administration, the EPA began to regulate greenhouse gases as part of the United States response to the climate emergency.

Imagine yourself as a Supreme Court justice, and litigants like the Chamber of Commerce, the state of Texas, and the American Chemistry Council are challenging the EPA's ability to regulate carbon dioxide. What was the legislative intent? What is the plain

meaning of the word pollutant? In a series of complicated decisions along ideological lines, the Court has ruled that the EPA does, indeed, have authority to regulate greenhouse gases under the Clean Air Act provisions, but the Court does not agree that the EPA has unlimited freedom to act. [9]



Gerald Bostock, petitioner in Bostock v. Clayton County (2020)

Example 2: Originally passed in 1964, the Civil Rights Act's reference to "sex" was limited to differences between men and women, particularly with respect to women's ability to become pregnant and deliver children. Nevertheless, the Court interpreted the meaning of 'sex' broadly enough to encompass sexual harassment. Thus, both broad categories of sexual harassment—*quid pro quo* and hostile workplace environment—are violations of the victim's civil rights, regardless of whether the victim is male or female.

More recently, the Court was called upon once again to interpret the meaning of "sex" in cases involving gay and transgender individuals. Gerald Bostock came out as gay and was fired from his child welfare coordinator job with Clayton County, Georgia. Aimee Stephens, after working for six years as a male funeral director, informed her employer that she was transgender and would thenceforth be coming to work as a woman. She was fired. In 2019, Bostock and Stephens both sued. During the case's oral argument, conservative justices fell back on textualism and expressed their concern that in 1964, congressional members did not intend to protect gay and transgender employees. Progressive justices, on the other hand, asked questions in oral argument that indicated their comfort with a broad interpretation because the intent of the Civil Rights Act was to prevent invidious discrimination. [10] In the end, the Trump administration argued against the LGBTQ employees in the Supreme Court, but the Court ruled 6-3 in *Bostock v. Clayton County* (2020) that the Civil Rights Act's reference to "sex" protected gay and transgendered employees.

Constitutional Interpretation

As with statutory interpretation, each individual justice has her own way to approach interpreting constitutional passages. The issues of constitutional interpretation mirror those of statutory interpretation. Some text in the Constitution is easy to understand and apply, while other passages are ambiguous. Therefore, justices have developed conventions that they employ when the passage's meaning is unclear.

Originalism indicates that the Constitution should mean now what it meant to the people who wrote it, and is loudly favored by conservative media figures, politicians, and a few prominent justices. Writing for the Court in *South Carolina v. United States* (1905), justice David Brewer wrote that "The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when adopted, it means now." [11] Before his death in 2016, Justice Antonin Scalia was probably the Court's strongest advocate for originalism. He argued that originalism ought to be "the normal, natural approach to understanding anything that has been said or written in the past." [12] With Scalia's passing, Neil Gorsuch took up the Court's mantle of originalism.

What are the advantages of originalism as an interpretive framework?

- It fixes the meaning of constitutional language in the eighteenth century, unless there are subsequent constitutional amendments passed specifically to update that language. Conservatives argue that originalism provides stability to the legal structure's system.

- It keeps the judicial branch out of the legislating business. According to this view, the Court's role is to interpret current laws in light of constitutional meanings that were fixed in 1787, not to legislate from the bench. Conservatives also find this appealing because they know that the American political system has many ways to stop legislation.
- Its advocates say that it keeps current judges from imposing their values on the law.

Originalism's critics point to numerous flaws.

- The Constitution's language is often unclear, calling into question the entire project of following the founders "original intent." In fact, many phrases in the Constitution were intentionally broadly written, because a narrowly written document would not serve any republic for long. As Chief Justice Marshall wrote in *McCulloch v. Maryland* (1819), "We must never forget that it is a Constitution we are expounding," a Constitution "meant to be adapted and endure for ages to come."
- It can only be applied selectively. For example, originalist justices would claim that the Second Amendment gives an individual the right to own massively destructive weapons, while most jurists and historians believe it was intended to be a collective right to preserve state militias from federal encroachment.
- The founders themselves disagreed on many small and large matters before, during, and immediately after the Philadelphia Convention. Consider George Mason, who stayed for the entire convention and became a fierce opponent of the Constitution: of its lack of a bill of rights, of the way the executive branch was constituted, of the pardon power, of the elastic clause, of the supremacy clause, and other provisions. (13)

One final argument against originalism comes from **legal realism**, which is a political science and legal school-of-thought, arguing that justices use contrivances such as originalism, textualism, intentionalism, and other interpretive methods to support their own policy preferences. In other words, originalists do not have some special power that allows them to divine the founders' "original intent" or the "plain textual meaning" of the Constitution's words.

Value choices are inevitable when cases get to the Supreme Court. So, what values should guide a justice when interpreting the Constitution? Conveniently, the Constitution does a wonderful job of articulating its values. Legal scholar Erwin Chemerinsky argues that the **Constitution articulates five important core values**. Four of these are right in the Constitution's preamble*:*

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

- **Democratic government**—The document rests on "we the people" who have come together to establish government in the wake of our separation from Great Britain and our failed experiment in a confederation of states.
- **Effective governance**—We the people seek to establish "a more perfect union" and "insure domestic tranquility, provide for the common defense, [and] promote the general welfare."
- **Justice**—We the people seek to "establish justice," in contrast to the unjust ways the British king and parliament were treating the American colonists.
- **Liberty**—We the people seek to "secure the blessings of liberty to ourselves and our posterity."

Chemerinsky's fifth value was not in the preamble to the Constitution, although it was certainly articulated in the Declaration of Independence. Instead, the fifth value was added by the Fourteenth Amendment in 1868:

- **Equality**—We the people chose to add the Fourteenth Amendment to the Constitution, which contains the equal protection clause: No state shall "deny to any person within its jurisdiction the equal protection of the laws." The Court then chose to apply that principle to the federal government as well as the states, for it makes no sense to hold the states to a standard not applicable to the federal government. (15)

By keeping these values in mind, a progressive reading of the Constitution errs on the side of expanding liberty and equality whenever disputes arise over the meaning of words like sex, race, equal, and discrimination. Similarly, when disputes arise over things like access to the ballot, gerrymandering, and suppressive voter I.D. laws, a progressive reading of the Constitution errs on the side of allowing citizens to vote and to have voters select their politicians rather than the other way around. When disputes arise as to whether the EPA can regulate carbon dioxide as a pollutant even though that was not on senators' and representatives' minds when they passed the Clean Air Act, a progressive reading of the Constitution errs on the side of effectively regulating pollutants, which serves the general welfare.

Important words used in the Constitution have dramatically changed their meaning in the intervening centuries. Are we locked into the 1787s prevailing meaning of "cruel and unusual punishment"? What about "equality?" Given what we know about how tremendously difficult it is to formally amend the Constitution, an originalist's approach to constitutional interpretation effectively ties the political system's hands as it tries to adapt to ever-changing social norms and economic conditions. One could argue, for example, that an originalist interpretation of the Constitution would forbid a woman from becoming president. After all, the Constitution only uses the male pronoun "he" when referring to the president, and the Nineteenth Amendment only granted women the right to vote, not to hold office.

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CHAPTER OVERVIEW

6: Civil Rights and Civil Liberties

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6.1: The Difference Between Civil Rights and Civil Liberties

"Laws passed after years of untiring effort, guaranteeing married women certain rights of property, and mothers the custody of their children, have been repealed in states where we supposed all was safe. Thus have our most sacred rights been made the football of legislative caprice, proving that a power which grants as a privilege that what by nature is a right, may withhold the same as a penalty when deeming it necessary for its own perpetuation."

—National Woman Suffrage Association in 1876 [(1)]

Americans are accustomed to using "civil rights" and "civil liberties" interchangeably. However, the terms have different meanings. Both civil rights and civil liberties ultimately originate from the idea of natural rights. In addition, mankind went through a **civil liberties revolution** between the Medieval period and the nineteenth century. We all continue to benefit from that revolution.

Civil Liberties

Your **civil liberties** are essentially your natural rights of life, liberty, and property translated into specific guarantees by the United States Constitution, especially the Bill of Rights and the **due process clause** of the **Fourteenth Amendment**, which says that no state may "deprive any person of life, liberty, or property, without due process of law." These guarantees were designed to protect each individual from the potentially abusive power of government. However, civil libertarians are growing increasingly concerned about the ability of large corporations to infringe on individual rights today.

The bulk of your civil liberty guarantees are located in the **Bill of Rights**. These include freedom of speech and the press, freedom of religion, freedom from unreasonable searches and seizures, procedural guarantees if you are accused of a crime, freedom from cruel and unusual punishment, and property rights. Some civil liberties protections are included in the body of the Constitution itself, including the privilege of

- *habeas corpus*, which literally means "you have the body," and refers to a court ordering state or federal authorities to bring a detained person to the court and show cause for the detention or incarceration.
- **bill of attainder** is when a legislative body acts as a judicial body by passing a law that declares a person or a group guilty of a crime and punishes them. Congress and state legislatures are forbidden from doing that.
- *Ex post facto* means "after the fact." This law declares an action illegal after it has already happened and subjects the person or group who did it to arrest and trial. It would also refer to a law that increased the penalty for a crime if the legislature tried to apply the stiffer penalty to those who committed the crime before the law was passed.

Civil Rights

In addition to life, liberty, and property, natural rights philosophers were concerned that individuals be treated equally. Of course, those very same philosophers had a fairly limited notion of "the people" for whom they sought equal treatment. The same is true for the Constitution's framers, who did not concern themselves with equal treatment of women, men without property, and non-whites.

Our modern notion of **civil rights**—freedom from discriminatory treatment based on some characteristic—is tied in large part to the **civil rights clause** of the **Fourteenth Amendment**, which says that no state may "deny to any person within its jurisdiction the equal protection of the laws." The verb "to discriminate," in its generic sense, brings to mind someone who is making fine distinctions between two things that are otherwise similar. For instance, a wine connoisseur with a discriminating palate might be able to tell whether a German wine came from the Rhine Valley or the Mosel Valley. In the political arena, **discrimination** occurs when people—who are otherwise quite similar—are not receiving equal protection of the laws or equal access to liberties based on a characteristic such as their gender, race, religion, national origin, sexual orientation, age, or disability.

Civil Rights and Civil Liberties Issues

The presence or absence of discrimination determines if something is a civil rights or a civil liberties issue. Were a state to pass a law stripping all citizens of the right to possess firearms, that would be regarded as a civil liberties issue. If that same state passed a law forbidding African Americans from possessing firearms, then that would be a civil rights issue. In the latter case, a person's

freedom from government intrusion is contingent upon his race, which is an idea that is no longer constitutionally acceptable in the United States.

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6.2: Incorporation or Nationalization of the Bill of Rights

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."

—Justice Hugo Black [(1)]

Does the Bill of Rights protect you only against United States government intrusions, or does it protect you against your state and local government as well? Today, the answer would be 'yes'. But this has not always been true, as an example is ***Barron v. The Mayor of Baltimore* (1833)**. Beginning in 1815, Baltimore began a series of construction and paving projects that involved diverting streams. As it happened, the diverted streams came out into the harbor immediately next to John Barron's wharf. By 1822, Barron sued Baltimore city and the mayor because the newly diverted streams were causing silt to build up to such a degree that ships were no longer able to access his wharf. Barron's lawsuit rested on the Fifth Amendment, which says that no one's property may be seized for public use without due process and just compensation. Since there was neither due process nor any compensation for damage to the economic viability of his property, Barron felt he would win. However, the Supreme Court ruled in favor of Baltimore, saying that the Bill of Rights protects people from actions of the central government, not state and local actions. Further, Barron needed to seek redress from the Maryland state constitution. But, there was no such provision in that document that would help Barron. The *Barron* decision set up a dual system of civil liberties: a national one to protect individuals from the central government, and widely varying standards to protect people from state and local government abuses. Therefore, your civil liberties depended upon where you lived and what level of government you faced.

After the Civil War, the Fourteenth Amendment seemed to correct the imbalance defined in *Barron* by saying that no state "shall abridge the privileges and immunities of citizens of the United States." However, the Supreme Court did not interpret the **privileges and immunities clause** as a corrective to *Barron*. Instead, in the late nineteenth century, the Court began **incorporating the Bill of Rights protections** using the Fourteenth Amendment's **due process clause** instead of the privileges and immunities clause. The due process clause says that states may not "deprive any person of life, liberty, or property, without due process of law."

In specific cases, the Court incorporated individual Bill of Rights protections into the due process clause by limiting states' ability to infringe upon them. This action was completed selectively and patiently, waiting for individuals to challenge their state from infringing on specific civil liberties. The process of **incorporation** lasted into the early twenty-first century.

Examples of Incorporation Cases

***Gideon v. Wainwright* (1963)–**Deals with the Sixth Amendment's provision that criminal defendants have a **right to counsel** for their defense. Following the *Barron* precedent, the Court had long held that indigent defendants facing federal charges would be provided a public defender, but states could set their own rules for defendants facing state criminal charges. Later, the Supreme Court ruled that defendants charged with a capital offense must be provided a lawyer if they could not afford one. Still, the vast majority of criminal defendants do not face either federal or capital charges.



Clarence Earl Gideon in 1961

Clarence Earl Gideon, a 51-year old drifter had been in and out of trouble with the law since he had run away from home at age sixteen. In 1961, Gideon was arrested in Panama City, Florida for breaking into a poolhall and stealing some money and alcohol. At his trial, he asked the judge for a lawyer to defend himself, but was denied because he was charged with neither federal nor capital offenses. Without a lawyer, he was convicted and sentenced to five years in prison.

While incarcerated, Gideon made use of *in forma pauperis*, a Supreme Court procedure that waives the filing fees and other requirements for indigent petitioners. The Court granted certiorari and appointed Abe Fortas, a well-respected Constitutional lawyer and future Supreme Court justice himself, to represent him. The majority ruled in Gideon's favor, and remanded the case back to Florida where Gideon was given a retrial with a public defender. Gideon's lawyer was able to show that the state of Florida could not meet its burden of proving beyond a reasonable doubt that Gideon had done the crime, so he was released.

As a result of the case, the Sixth Amendment was incorporated into the Fourteenth, and criminal defendants must be appointed lawyers if they cannot afford one. This Interpretation is extremely important, because approximately 80 percent of all criminal defendants are too poor to hire their own lawyer. [3] Public defenders are clearly overworked and underpaid, but defendants without any legal assistance are at a huge disadvantage when faced with state power in a court of law.

***McDonald v. Chicago* (2010)–**The most recent incorporation case involved the Second Amendment's guarantee of the right to bear arms. In 1983, Chicago banned the sale and ownership of handguns. In 2008, the Chicago Police Department refused Otis McDonald, a 76-year old retired maintenance engineer, permission to own a handgun. McDonald wanted a gun to protect himself in his crime-ridden neighborhood. Supported by gun rights groups and joined by three other petitioners, McDonald sued the city.

Meanwhile, in 2008 the Supreme Court had struck down Washington D.C.'s gun ban and said that despite the Second Amendment's reference to a "well-regulated militia," it did confer an individual right to bear arms. However, that case did not have broad implications for other city and state gun laws because of D.C.'s special status as a federal district.

In McDonald v. Chicago (2010)**,** the Supreme Court decided (5-4) in McDonald's favor, and incorporated the individual right to bear arms into the Fourteenth Amendment. The ruling was applicable to states and cities across the United States. However, the opinion made it clear that the individual right to bear arms was subject to regulation.

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6.3: The Boundaries of Freedom of Speech and the Press

"Pussy Power"

"Our Voices Together Can't Be Silenced"

"Fuck the Electoral College"

—Protest signs during a march in Manhattan on January 21, 2017 [1]

The First Amendment to the U. S. Constitution says that "Congress shall make no law…abridging the freedom of speech, or of the press…" Because of incorporation, this protection also applies to state and local governments. Does this mean that you are free to say or print anything you want and remain protected by the First Amendment? The answer is "No." However, the Supreme Court often applies a standard known as strict scrutiny to cases where government attempts to restrict overtly political or ideological speech. **Strict scrutiny** means that limiting speech is presumptively unconstitutional unless the government can "show that the law is narrowly tailored to achieve a compelling government interest." [2] The case law regarding freedom of speech and press is considerably large, yet here are of cutting-edge boundaries.

Endangering Others

Coming out of ***Schenck v. United States*** **(1919), the clear and present danger doctrine** held that speech is not protected by the First Amendment if it clearly endangers the lives, health, and property of others, or the national security of the United States. In the *Schenck* case, socialists were prosecuted for distributing flyers during World War I that encouraged men to avoid service in the army. [3] The Court upheld their prosecution because it considered their actions to be a threat to American national security. In his opinion, Justice Oliver Wendell Holmes argued hypothetically that someone could not shout "Fire!" falsely in a crowded theater, and then hide behind the First Amendment. That kind of utterance imperils the lives of others as well as the theater owner's property because the crowd will stampede to get out. The clear and present danger standard essentially still applies, although the Court does not explicitly rely on it. Note that it refers to speech that is essentially lawful, but that in certain contexts crosses the line. If the theater really is on fire, by all means shout "Fire!" Or, better yet, pull the fire alarm.

What about speech that is unlawful or that advocates lawless behavior? In these cases, the Court relies on the imminent lawless action standard. Consider when someone threatens to assassinate the president or incites people to riot. Those forms of speech are not protected by the First Amendment. However, in ***Brandenburg v. Ohio*** **(1969),** the Court established the **imminent lawless action standard** in its majority opinion. The case dealt with Ohio prosecuting a Ku Klux Klan leader for publicly advocating violence. Ruling against Ohio, the court said that the First Amendment does not allow a state statute "to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless actions and is likely to incite or produce such action." In other words, *advocacy* of violence is not punishable in general, but *inciting* violence is.

Fighting Words and Hate speech

In ***Chaplinsky v. New Hampshire*** **(1942),** the court defined 'fighting words' as those that "by their very utterance inflict injury or tend to incite an immediate breach of peace." Civil libertarians worried about fighting words because the Constitution was so vague —there is no list of words and phrases that fall under it. For instance, in the *Chaplinsky* case, one man started a fight after he was called "a damned Fascist" and "a goddamned racketeer!". As a result, the Court backed away from fighting words as legitimate grounds for restricting speech.

Many people argue that the First Amendment shouldn't protect hate speech. According to the American Library Association, hate speech doesn't have a formal legal definition, but that it refers to "any form of expression through which speakers intend to vilify, humiliate, or incite hatred against a group or a class of persons." [4] Generally, hate speech are comments that are racist, sexist, anti-Semitic, and otherwise bigoted. Such utterances in a public forum are protected by the First Amendment if they are intended to make a political point. For example, most college campuses have student codes of conduct that discourage hate speech. However, most of these restrictions cannot be enforced unless they are targeted at specific people and used to harass or threaten them. A college campus is a public forum—much like a public street, a public square in front of city hall, or even a county cemetery—in which really distasteful things can be injected into the marketplace of political ideas.

Libel

Libel—written defamation of another person, especially of public figures—is not protected by the First Amendment. Yet, the Court has set high standards for victims to win libel cases. In ***The New York Times v. Sullivan* (1964)**, the Court announced guidelines that the public figure needs to establish in court if s/he is to win a libel case. In that case, the *New York Times* was sued in an Alabama court by a police commissioner named Sullivan, who claimed that an advertisement taken out by the Committee to Defend Martin Luther King had libeled him by implication. The Supreme Court ruled in favor of the *New York Times* and applied the **Sullivan Test,** which states that the victim must show:

- 1) that the information printed about them was false,
- 2) that the publisher either knew it was false or the statements "were made with a reckless disregard for the truth,"
- 3) the information was written due to malice,
- 4) publication of the inflammation damaged the victim.

Obscenity

Obscenity is not protected by the First Amendment. In the not too distant past, officials could arbitrarily ban various published materials that they personally deemed inappropriate. In the post-World War II period, the courts stepped in to provide more rigorous definitions—although they are still open to considerable debate. In ***Miller v. California* (1973)** the Court articulated a set of criteria by which lower courts could determine whether something was officially obscene. Popularly known as the Miller Test, these standards have been incorporated into federal and state statutes. A work—e.g., a novel, magazine, video, play, or statue-- may be declared obscene if it passes *all three* of the following:

1. The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to a prurient interest in sex.
2. The work depicts or describes sexual conduct in a patently offensive way as specifically defined in an applicable law.
3. The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

If a work is determined to be obscene, it can be banned. However, many juries have difficulty coming to consensus about obscenity, given the difficulty of passing the Miller Test.

In 1996, Congress passed and President Clinton signed into law the **Communications Decency Act**. The law made it a federal crime to knowingly transmit to a minor—or post on a web site where a minor might visit—any obscene, indecent, or patently offensive picture or text. Many groups immediately sued. In *Reno v. ACLU* (1997), the Court unanimously struck down the Communications Decency Act because the law would require that the Internet only carry information suitable for children. Quoting one of its earlier decisions, the Court said, "the level of discourse reaching a mailbox cannot be limited to that which would be suitable for a sandbox."

To replace the Communications Decency Act, Congress passed the **Child Online Protection Act of 1998**, which threatened prison and fines for anyone caught placing material that is "harmful to minors" on a Web site available to children under the age of seventeen. The ensuing legal battles lasted more than a decade. Finally, in 2009, the Supreme Court declined to review yet another appeal. Most courts were uncomfortable with the broad language of the law. In addition, the phrase "harmful to minors" was vague. Most federal judges and Supreme Court justices were concerned that the law allowed any community—even the most rural and conservative—to define the content of the Internet for everyone in the country. Also, in 1982, the Supreme Court had declared bans on child pornography are constitutional, so long as the material in question depicted an actual—as opposed to a virtual—child. [(5)]

Symbolic Speech



Mary Beth Tinker as an Adult

Symbolic speech is defined as nonverbal or nonwritten behavior or symbols that convey a political viewpoint. Since the 1930s, the Court has recognized the right of Americans to engage in symbolic speech. In ***Stromberg v. California* (1931)** the Court struck down a California law that banned displays of red flags targeted at Socialists and Communists. Later, during the Vietnam War, the Court confronted the issue of symbolic speech again when students in Iowa protested the war by wearing black armbands to school. The students were peaceful and did not disrupt classes, but the school board had banned the wearing of armbands in an effort to head-off the students' protest. Several students–including Mary Beth Tinker–sued when they were suspended for wearing the armbands. As a result, the court ruled in ***Tinker v. Des Moines School District* (1969)** that such peaceful symbolic speech was protected even for minors.

Another aspect of symbolic speech concerns flag burning. At the 1984 Republican National Convention in Dallas, Texas, Gregory Johnson was arrested for burning a U.S. flag while making a speech condemning the Reagan administration. He filed suit, claiming his freedom of speech was violated. In a narrow 5-4 decision, the Supreme Court agreed with Johnson. In ***Texas v. Johnson* (1989),** the court ruled that flag burning is protected by the First Amendment as a form of symbolic speech. Congress repeatedly tried to overturn this decision by passing a Constitutional amendment but came just short of having sufficient votes.

Two Considerations with Respect to News Outlets

The Court has interpreted freedom of the press to mean that government should not be able to engage in what is known as **prior restraint.** In others words, the government cannot prevent the publication of something that it finds to be objectionable or illegal. The most famous case involving this principle was ***New York Times v. United States* (1971).** During the Vietnam War, **Daniel Ellsberg** stole a copy of a secret history of U.S. involvement in that conflict., and produced a secret report for the Secretary of Defense. The report was then given to Neil Sheehan, a reporter for the *New York Times*, which began to print the report in installments, collectively called ***The Pentagon Papers***. It was explosive, because it revealed the extent of the morass in Vietnam, important decisions along the way, and the considerable degree to which the U.S. people were deceived by the government. Even though most of the deception had occurred under Democratic administrations, Republican President Richard Nixon *wanted The Pentagon Papers* suppressed. At the urging of the government, a federal court issued an order to the *New York Times* to desist from further publication, arguing that publication violated the Espionage Act's prohibition against willfully communicating information it "knew or had reason to believe. . . could be used to the injury of the United States. . . to persons not entitled to receive such information." In a 6-3 decision, the Court ruled that the government had not met its "heavy burden of showing justification" for prior restraint of *The Pentagon Papers*. [(6)]

Journalists often obtain information from sources who wish to be anonymous. Often, governments are interested in knowing the names of those sources in case they have violated any laws in revealing the information or in the course of their duties. Sadly, sometimes this information is wanted in order to discredit or endanger the sources' lives—witness the fervor over revealing the whistleblower's name during President Trump's impeachment. Many states have **shield laws** that protect journalists from having to reveal their sources, but the federal government does not. In 2005, *New York Times* reporter Judith Miller was jailed by a federal court for eighty-five days for refusing to reveal her sources in a story about the Bush Administration, which revealed the name of CIA operative Valerie Plame. [(7)]

Corporate Speech

The Supreme Court's logic runs like this: People are protected by the First Amendment to express their political opinions. Corporations are people under the law. Therefore, corporations have the same level of First Amendment protection for their right to speak about political issues. In addition, the Court has ruled in cases like *Buckley v. Valeo* (1976) and *Citizens United v. Federal Election Commission* (2010) that spending money is a form of protected free speech. The Court's majority refuses to make a free speech distinction between different types of corporations—e.g., those that are for-profit like oil companies and pharmaceutical companies that lobby governments, and companies that are in the business of reporting on political events.

Often, the Court has acted to ensure that consumers are able to get information via commercial advertisement. For example, in *Central Hudson Gas and Electric Corporation v. Public Services Commission* (1980), the Court established what is known as the **Central Hudson Test**. The government may regulate commercial speech under the following conditions:

1. The government may regulate commercial speech that is fraudulent or misleading.
2. The government's interest in regulating a particular instance of commercial speech must be substantial.

3. The regulation must directly advance the government's asserted interest in regulating the commercial speech.
4. The regulation must be narrowly tailored to advance the government's interest in regulating the commercial speech.

In the time since the *Central Hudson Gas* case, Supreme Court has placed greater limits on government's ability to regulate commercial speech. In addition, the Court has worked to empower corporations with the kind of freedom of expression traditionally reserved for natural persons, and corporations are taking full advantage of the leeway granted by the conservative majority. Justice Clarence Thomas firmly asserted in his concurring opinion in ***44 Liquormart, Inc. v. Rhode Island* (1996)** "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial speech.'"

If a strict standard is applied to commercial speech, it might become difficult for government to regulate anything corporations say to the public unless it is blatantly fraudulent. For example, can the government require that dairy products containing bovine growth hormone be so labeled? Doing so would be in the interest of consumers, but courts have sided with the dairy associations that such government-mandated labeling violates their free speech rights. [(11)]

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6.4: The Law and Politics of Religious Freedom

"Man has turned his back on God. We have sinned against Him and we need to ask for God's forgiveness. . . This pandemic — this is a result of a fallen world, a world that has turned its back on God."

—Franklin Graham [1]

Historical Perspective

On first glance, the words of the First Amendment appear to be clear: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." However, it's difficult to understand what the legal status of religion is in the United States, particularly when it clashes with other values such as civil rights.

The United States has a long tradition of people fleeing religious persecution. Some of the groups moved rather quickly to establish their own "official" religions or to set up theocracies. For example, Salem minister Roger Williams was an early colonial political and religious leader who advocated the separation of church and state and established the U.S.'s first Baptist church. Generally, the country has a long tradition of opposing religious intolerance. Indeed, Thomas Jefferson advocated for a "wall of separation" between church and state. The nation also has a long tradition of invoking God's blessing and making other religious displays at public events. Simultaneously, citizens have embraced science and empiricism. Reconciling these often-conflicting traditions has not been easy.

Establishment and Free Exercise of Religion

The First Amendment's treatment of religion occurs through two phrases

- **establishment clause,** which restricts Congress' ability to legislate regarding "an establishment of religion."
- **free exercise clause**, found in the phrase, "or prohibiting the free exercise thereof,"

When taken together... Clearly, the founders did not want the United States to become a country like England and its Church of England, with an established official religion. Interestingly, the only time religion is mentioned in the Constitution, is when it says, "No religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." In other words, the government is forbidden from requiring that elected or appointed leaders be from a particular religion or even that they believe in God.

An important milestone in how the Constitution interpreted the establishment clause developed in ***Lemon v. Kurtzman*** **(1971).** Rhode Island was subsidizing private religious schools for money spent on teacher salaries, and Pennsylvania was reimbursing it. In both states, these provisions were part of larger, general state statutes that supported elementary and secondary education. The Court struck down these practices as a violation of the establishment clause. And in doing so, it set forth the Lemon Test for government laws concerning religious organizations:

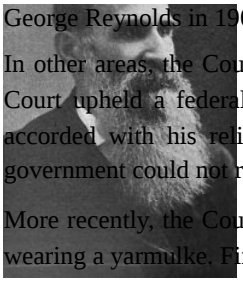
1. The statute "must have a secular legislative purpose."
2. Its "principal or primary effect must be one that neither advances nor inhibits religion."
3. It must not foster "an excessive government entanglement with religion." [2]

Beyond this, the Supreme Court has generally ruled that the government

- should not show a preference for a particular religion
- not support the propagation of religion
- not endorse religious symbols on public facilities unless all other kinds of expression are also supported or unless there is a secular justification for the symbols.

The Court has also allowed "incidental" religious displays on public property, such as in God We Trust" on the nation's currency. The court has allowed tax dollars to support students going to religiously affiliated colleges and universities, as well as to support some aspects of elementary and secondary religious school attendance, such as purchasing books and tests and providing transportation.




George Reynolds in 1909

In other areas, the Court has allowed government to restrict religion in some instances. In ***Reynolds v. United States* (1878),** the Court upheld a federal law banning polygamy, even though George Reynolds was married to more than one wife because it accorded with his religious beliefs. Through this case, the Court made the distinction between religious beliefs, which the government could not regulate, and religious practices, which the government could regulate.

More recently, the Court ruled in *Goldman v. Weinberger (1986)* that an Orthodox Jew in the Air Force could be prohibited from wearing a yarmulke. Finally, in *Employment Division v. Smith (1990)*, the Court ruled against Native Americans who had been fired and denied state unemployment benefits because they used peyote as part of an off-duty religious ceremony. However, in *West Virginia State Board of Education v. Barnette (1943)*, the Court ruled that a compulsory flag salute law violated the religious rights of Jehovah's Witnesses, whose religious practices prohibit them from worshipping graven images. Finally, in *Wisconsin v. Yoder (1972)*, the justices ruled that because of Amish religious beliefs, they were not bound by state compulsory school attendance laws.

In 1993, Congress passed the **Religious Freedom Restoration Act (RFRA),** which prohibited state and federal governments from limiting a person from exercising their religion unless it was in the government's compelling interest to do so and unless the regulation is the least restrictive way to achieve the government interest. In 1997, the Supreme Court struck down part of the RFRA as intruding too greatly on state powers. The case involved the Catholic Archdiocese in San Antonio Boerne, Texas, which wanted to expand a 1920s-era church building. The town of Boerne denied the building permit based on a local ordinance forbidding construction on historic district buildings. The Court sided with the town. [3] In response, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000, which gives religious organizations special land-use considerations.

The Supreme Court's conservative majority has looked very favorably on religious expression, even when it conflicts with other values. Consider the Court's recent decisions:

- Since Missouri funds playground construction and maintenance at public schools, it must also fund playground construction and maintenance at church schools as well. [5]
- The Colorado Civil Rights Commission displayed bias against religion in its treatment of a wedding cake baker who refused on religious grounds to bake and decorate a cake for a same-sex wedding. [6]
- The religious owners of privately held companies can be exempt from the Affordable Care Act mandate that their health insurance cover contraception for their employees. [7]
- Stores cannot have dress codes that forbid employees from wearing any kind of head scarf because it would discriminate against employees who wear head scarves for religious reasons. [8]
- Governments can own and maintain religious statues on public land—in this case a cross commemorating soldiers who died in World War I—if they have existed for a long time and if their display serves secular purposes as well as religious ones. [9]

And yet the Court also ruled that. . .

- A Muslim death row inmate could not have an imam present when he was given lethal injection, even though Alabama routinely allows Christians in that situation to have clergy with them. [10]
- President Trump's travel-ban that was clearly motivated by anti-Muslim animus does not violate the establishment clause if it is officially justified on national security grounds. [11]

Religion in Public Schools

The First Amendment's establishment clause and the free exercise clause intersect is the vexing problem of religion in public schools. In the 1960s, the Court limited some religious expression that could legally occur in public schools. For example, in ***Engel v. Vitale* (1962),** the Court struck down a New York law that required students to recite daily the following prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." Despite the fact that the prayer was nondenominational and that students with permission from parents could opt out of reciting the prayer, the Court ruled that the practice constituted an establishment of religion.

On June 27, 2022, in Kennedy v Bremerton School District, the Supreme Court ruled 6-3 that a Washington state public high school football coach had a right to pray on the field with students, declaring that such activity is protected under the Constitution because it counts as free speech. It's important to note that this case is **not** connected to Engel v. Vitale.

Progressives and conservatives alike have grossly distorted court decisions for their own political reasons. Some on the far left have argued that the Court has banned prayer from public schools. Similarly, some on the far right have argued that the Court has indeed banned prayer from public schools. The Supreme Court has not banned prayer or other religious expressions from public schools. This table delineates the forms of religious expression that are and are not allowed in public schools. [13]

Students in Public Schools Can:	Students in Public Schools Cannot:
Pray any time they want, so long as it is not disruptive.	
Observe a moment of silence and be asked to observe a moment of silence.	
Express their religious beliefs in homework or other course assignments, if such expression fits the assignment.	
Form and join religious clubs at school.	
Proselytize fellow students in a non-harassing manner.	Be asked to recite a prayer by school officials.
Distribute religious literature to the same extent as they are allowed to distribute other literature.	Be asked to observe a moment of silence, the purpose of which is explicitly to pray.
Express their religious beliefs orally in class where appropriate.	Use the school PA system to recite their personal prayer.
Wear religious clothing or jewelry.	Disrupt the classroom or other school routines with their prayer.
Bring religious texts to school and read them openly when appropriate.	Be proselytized by school officials.
Take courses about religion—e.g., comparative religion; the Bible as literature.	Proselytize fellow students in a harassing manner.
Be excused from religiously objectionable lessons with parental approval.	Be forced to listen to a broadcast prayer at after-school functions such as football games.
Pray or invoke God in a graduation speech of their own composition.	
Receive public tax revenue vouchers to attend public or private schools, even religious schools.	

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6.5: The Individual and the Criminal Justice System

"The USA offers procedural rights at trial that are on par with international standards, but this is of little consolation to those who, facing the threat of overwhelming sentences upon conviction and forced into insincere plea deals, never benefit from the protection of these rights."

—Fair Trials International [1]

The power differential between individuals and government is starkly on display when people stand accused of committing a crime. The founders were very familiar with the English criminal justice system's historic abuse of the American colonists, and worked to create changes.

The Fourth Amendment

> *"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."*

In ***Mapp v. Ohio* (1961)**, the Supreme Court ruled that states—as well as the federal government—are bound to apply the Fourth Amendment's search and seizure protections to people. This idea also applies to the **exclusionary rule**, meaning that any evidence that state or federal authorities gather in violation of the Fourth Amendment must be excluded from the defendant's trial. The Fourth Amendment has been used to require authorities to get warrants before they do the following:

- Attach GPS tracking devices to a suspect's car. [2]
- Search a suspect's phone for incriminating information. [3]
- Access records that reveal the physical location of cellphones. [4]



March to End Racial Profiling in Stop and Frisk

On the other hand, federal courts have given authorities broad latitude to search people on the street. In ***Terry v. Ohio* (1968),** the Supreme Court ruled that police may stop and frisk people on the street if they have a **reasonable suspicion** that the person has committed a crime, is in the process of committing a crime, or is about to commit a crime. Reasonable suspicion is a lower standard than **probable cause**, which is the standard used when judges issue warrants or when police operate in what are known as exigent circumstances. The Court also ruled that even if police do not have reasonable suspicion to stop and frisk someone, if that person has an outstanding warrant, police can use anything they find in court. [5]

Since *Mapp v. Ohio* was decided, the Supreme Court has placed many other limitations on the exclusionary rule including good faith exceptions, exceptions for evidence obtained by someone other than police, and exceptions for situations where the incriminating evidence likely would have been found anyway without an illegal search. During traffic stops, police are allowed to examine that which is in **plain view**—e.g., on your dashboard or sitting on the back seat—without reasonable suspicion or probable cause, but they would need probable cause to search further without your permission. Anything incriminating that is in plain view can be grounds for probable cause. They can ask you to step out of the car and can frisk you with reasonable suspicion, which presumably they already have if they legally stopped your vehicle.

The Fifth and Sixth Amendments

> *"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or*

public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fifth and Sixth Amendments have many protections for criminal defendants. The Fifth Amendment says that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This clause protects an individual against **double jeopardy.** A notable exception concerns the **separate sovereigns doctrine**, which means that the federal government and the state governments are separate units under our federal system. In other words, the state government and the federal government can prosecute you separately for the same crime. (7)

The Fifth Amendment also protects against self-incrimination: no person "shall be compelled in any criminal case to be a witness against himself." In a federal or state trial, defendants are not obligated to testify, nor are suspects required to say anything to police when they are detained or arrested. To ensure that people fully exercise their freedom from self-incrimination, the Supreme Court took action in ***Miranda v. Arizona*** **(1966)**. In a tight 5-4 decision, the majority threw out Ernesto Miranda's kidnap and rape conviction because he gave his confession without understanding that he had a right to remain silent and had a right to have a lawyer present at his interrogation. As a result, police must inform someone of their **Miranda rights**:

- you have a right to remain silent
- anything you say can be used in a case against you
- you have the right to have a lawyer present
- if you cannot afford a lawyer one will be appointed for you

The Fifth Amendment provides a person **due process**, which is defined as "A fundamental, constitutional guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one's life, liberty, or property. . . [and] a constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious." (9) In a lecture to the University of Pennsylvania Law School, Judge Henry Friendly put together a nice list of what procedural due process means:

1. An unbiased tribunal.
2. Notice of the proposed action and the grounds asserted for it.
3. Opportunity to present reasons why the proposed action should not be taken.
4. The right to present evidence, including the right to call witnesses.
5. The right to know opposing evidence.
6. The right to cross-examine adverse witnesses.
7. A decision based exclusively on the evidence presented.
8. Opportunity to be represented by counsel.
9. Requirement that the tribunal prepare a record of the evidence presented.
10. Requirement that the tribunal prepare written findings of fact and reasons for its decision. (10)

The Fifth Amendment also provides for **grand juries**, which are panels of citizens who hear evidence and decide if there is sufficient evidence to proceed with a prosecution. At this time, the protection for a grand jury indictment before moving to trial operates at the federal level only. Note that this protection has not been incorporated into the Fourteenth Amendment or made a requirement for state criminal prosecutions.

The Eighth Amendment

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Cherise Fanno Burdeen writes that "More than 60 percent of people locked up in America's jails have not yet been to trial, and as many as nine in ten of those people are stuck in jail because they can't afford to post bond." (15) Being stuck in jail because you can't pay cash bail makes it impossible to work. Being unable to afford steep fines after you've pled guilty to get a fine instead of

jail time, makes for a never-ending engagement with the criminal justice system. Obviously, America's criminal justice system burdens fall heaviest on the poor. In *Timbs v. Indiana* (2019), the Supreme Court indicated in its 9-0 ruling that it does not intend to let states impose excessive fines.



The Florida Electric Chair in 1999

The Eighth Amendment's ban on cruel or unusual punishment is the focus of the U.S longstanding debate over **capital punishment**, which is when the government kills someone as punishment for a crime. Historically, governments imposed capital punishment for many offenses, including rape, counterfeiting, accomplice to murder, and piracy. Now, capital punishment is reserved for murder, although still a possibility for treason, espionage, and terrorism. The federal criminal justice system allows for capital punishment, as does the criminal justice systems in twenty-eight of fifty states.

Due to the arbitrary and racially biased way that capital punishment was meted out across the United States, in ***Furman v. Georgia* (1972),** the Supreme Court essentially invoked a moratorium on applying capital punishment. Two of the justices—Thurgood Marshall and William Brennan—opined that the death penalty violated the Constitution's prohibition against cruel and unusual punishments, regardless of procedural issues. States that practiced capital punishment rewrote their statutes, and in ***Gregg v. Georgia* (1977),** the Court upheld capital punishment again. According to the Death Penalty Information Center, since the Supreme Court re-allowed capital punishment in the *Gregg* case, over 1,500 people have been put to death and there still appears to be racial disparities in how the death penalty is applied. [(16)]

What if. . . ?

What if we restricted plea bargaining and equalized resources between prosecutors and public defenders? In 1987, state circuit court judge Ralph Adam Fine argued that plea bargaining was a double evil: "It encourages crime by weakening the credibility of the system on the one hand and, on the other, it tends to extort guilty pleas from the innocent." [(17)] Another problematic aspect of plea bargaining is that it is paired with cash bail or the threat of very high penalties, which really put defendants in a tough spot. As former state prosecutor Melba Pearson says, "If you are in jail because of a cash bail you can't pay, pleas can sound like a great alternative to losing your job, failing to pay rent, and a variety of other negative consequences." [(18)] The practice of **plea bargaining**—admitting guilt to obtain a reduced sentence—has, in fact, been abandoned in a few jurisdictions in the United States, but is growing around the world. [(19)]

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6.6: Threats to Individual Freedom--Government Versus Corporations

"The personal-data privacy war is long over, and you lost."

—Ian Bogost [1]

"As a general rule, a police officer can't arrest you because you wore a hat supporting a particular political candidate. But your boss could fire you for the very same reason."

—Tom Spiggle [2]

Citizens of a republic need to be guarded against encroachments of liberty. Two significant threats to liberty stand out that have a track record of undermining freedom and the power to enforce tyrannical policies: governments and corporations.

The Threat from Government



The Mochida Family Being Relocated Against Their Will
to a Detention Center in 1942

Based on historical evidence, governments will limit freedom of speech and the press; they will aggressively incarcerate people; they will inflict cruel and unusual punishments; they will seize property without due process or fair compensation. In all likelihood, governments will continue to do these things in the future, especially in times of war or other types of civil unrest or threat.

While it is clear that the federal government has historically committed some very serious civil-liberties violations, state and local governments pose the more likely threat to individual liberties. State and local governments largely enforce criminal law, regulate things like marches and demonstrations, make decisions regarding property use and eminent domain, control schools, and enforce moral legislation. Obviously, citizens can turn to the courts to right specific wrongs. They can also elect new leaders and insist that they change oppressive laws. In a democratic system—even an attenuated one—the government is the citizens' servant. As such, people can ask the government to help answer these types of questions: Should parents be able to deny their children life-saving modern medicine because they have objections to it? Should people be able to flout public health guidelines, even though doing so endangers everyone else and makes the need for those guidelines last longer? To what extent should the government decide who can marry?

The Threat from Corporations

Unlike civil liberties, individual liberty is enormously threatened by corporate power. Corporations, particularly those that are large and cross state and country boundaries. If you want the factory to stay in the United States, you'd better be willing to take a pay or benefits cut. If the company office moves from a high-tax state to a low-tax state, you'll have to uproot your family and move if you want to stay employed. This kind of corporate power is taken for granted in the United States because workers are often in a poor bargaining position.

Fifty years ago, one-third of workers belonged to a union; now only 7 percent of private-sector workers belong to a union. [3] The United States also doesn't structurally empower workers as some other countries do. Take Germany's **Mitbestimmungsrecht**—or codetermination—requirement, which dates back to the 1920s and says that "depending on the size of a German limited company, a third or even half of the members of its supervisory board are voted in by its employees." [4] This kind of workers' power has helped support German wages, working conditions, and the vitality of Germany's manufacturing sector.

Large American corporations are in a political situation where they can limit their workers' or customers' liberties, and the federal government has often encouraged this development. Consider these examples:

Privacy—Privacy is not a liberty enumerated in the Constitution, but the Supreme Court has relied on privacy arguments to protect intimate family planning decisions. [5] Shoshanna Zuboff describes **surveillance capitalism**—"a new economic order that claims human experience as free raw material for hidden commercial practices of extraction, prediction, and sales." [6] In other words, your labor is worth something to corporations—they must pay for it if they want to produce value—but almost all of the information about you is freely available to corporations, who buy and sell it between themselves, aggregate it, and compile it to expand their profits. For example, the National Rifle Association (NRA) rails against gun licensing because they don't want the government to have a list of gun owners, but fails to consider that corporate America knows exactly who owns which guns. Under surveillance capitalism, we traded privacy for convenience and connection. The European Union implemented a uniform General Data Protection Regulation in 2018 to give Europeans better privacy protections, but nothing similar has passed in the United States.

Free speech—Americans cherish the ability to speak freely about the issues of the day. But those protections stop at the office or factory door. Attorney Tom Spiggle states that "Despite what many employees think, your rights to freedom of speech are fairly limited at work, and it's often perfectly legal for an employer to take action against a worker for something they said or wrote." [7] Employees can talk about harassment or fraud or other illegal activities that they see in the workplace, and they can talk about wages and working conditions, but employers can prevent them from talking about politics. As employment lawyer Daniel Schwartz puts it, "Companies have a right to manage their workplaces as they want. They can prefer one point of view over another if they want." [8]

Neo-feudalism—Almost all people below retirement age are dependent on worker wages. Indeed, most people are only one or two paychecks away from financial ruin.[9] In addition, most working-age people are dependent on their job—or their spouse or parent's job—for health insurance. America's economy is characterized by regional booms and busts. Journalist Chris Hedges' coined the memorable phrase, **sacrifice zones** to describe an America's brand of exploitative capitalism—places where the project of endless exploitation of natural resources and human labor manifests itself in the form of agricultural fields where laborers endure near slave-like conditions to produce cheap food for American tables, fulfillment centers crammed with low-wage workers and robots process cheap goods for American front porches, and abandoned industrial centers where jobs disappeared over the horizon to places with lower wages and fewer regulations. [10]



Amazon Workers Protesting Working Conditions and Corporate Surveillance in Shakopee, Minnesota

Neo-feudalism refers to the idea that society resembles the feudalism that existed in the Medieval period in which most ordinary people had very limited freedom and the economic, political, and legal structures were dictated by the aristocracy. In the modern world, aristocracy has been replaced by the wealthy corporate elite. Ordinary people in U.S. don't like to think of themselves as serfs, but consider how controlled people are by corporations and financial institutions. Debt—student debt, home mortgages, car loans, credit card balances, and medical bills—combined with the wage-labor imperative, the reality of sacrifice zones, and the desperation to avoid having one's family fall into the lower classes keeps citizens in line. People are too busy and too dependent to engage in something like a general strike. Individuals are too afraid to step too far out of line for fear of losing their jobs or livelihood. In addition, propaganda is used by corporate media to convince people that the current state of affairs is normal and unchangeable.

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6.7: Civil Rights Case Study--Race

"We claim exactly the same rights, privileges and immunities as are enjoyed by white men—we ask nothing more, and will be content with nothing less."

—Declaration of the Colored Mass Convention in Mobile, Alabama in April 1867 [(1)]

"In affirming that Black Lives Matter, we need not qualify our position. To love and desire freedom and justice for ourselves is a prerequisite for wanting the same for others."

—Belief Statement of Black Lives Matter, retrieved in 2020. [(2)]

African Americans is one group that has experienced discrimination at the hands of the government, corporations, or their neighbors. The legal changes that resulted largely from the black Civil Rights Movement have revolutionized life in the United States for all people.

Race and Civil Rights Before and After the Civil War

Prior to the U.S. Civil War, most African Americans were slaves, and the legal position of free blacks was tenuous. The Supreme Court's decision in ***Dred Scott v. Sanford (1857)*** is particularly instructive in this regard. Dred Scott, a slave from Missouri, sued his owner for freedom based on the fact that his owner had taken him to Illinois, a free state, and to the Wisconsin Territory, a free territory. Chief Justice Roger Taney ruled that Scott did not have standing to sue and even summed up free blacks' precarious position when he answered his own summation question: "Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?" The Court answered a resounding "No," which was its way of saying that blacks—slave or free—could not ever expect to become full and equal members of the American political community.

In the wake of the North's victory in the Civil War, Congress passed three amendments to the Constitution commonly referred to as the **Civil War Amendments**.

- Thirteenth Amendment abolished slavery
- Fourteenth Amendment's **civil rights clause** mandated that all people receive "equal protection of the laws."
- Fifteenth Amendment provided that citizens shall not be denied voting rights based on "race, color, or previous condition of servitude." (NOTE: Women were not still now allowed to vote.)

In order to give the civil rights clause practical effect, Congress passed several Civil Rights Acts during Reconstruction (1865-1877). The **Civil Rights Act of 1875** stipulated that people must be allowed full and equal access to public accommodations—public facilities as well as private businesses that serve the general public, like theaters, inns, restaurants, etc.—regardless of their race or color. When President Rutherford B. Hayes removed federal troops from the South in 1877, whites moved quickly to reinstate a racial hierarchy resembling the one that had developed under slavery.

The majority of Southern whites had no intention of allowing free blacks to vote, to be treated equally by the law, or develop economic independence. Immediately after the Civil War, a series of laws passed that would become known as **Black Codes**. Blacks were forbidden from self-employment, and thereby denied trades like blacksmithing, which they may have learned while they were slaves. More importantly, Black Codes required blacks to sign "annual labor contracts with plantation, mill, or mine owners. If African Americans refused or could show no proof of gainful employment, they would be charged with vagrancy and put on the auction block, with their labor sold to the highest bidder. . . [If] they left the plantation, lumber camp, or mine, they would be jailed and auctioned off." [(3)] And, of course, whites discriminated rampantly by not allowing blacks to access basic commercial businesses.

African Americans continued to be refused service on account of their race at inns, hotels, railroads, and theaters around the country. In Tennessee, Sallie J. Robinson purchased a ticket to ride on the Memphis & Charleston Railroad, but was removed by the conductor because she was black. In Missouri, W. H. R. Agee was denied accommodation at the Nichols House Inn because he was black. Similarly, Bird Gee was not allowed to eat at an inn in Topeka, Kansas because he was black. In San Francisco, George M. Tyler was not allowed to attend a production at Maguire's Theatre because he was black. [(4)] These four cases reached the

Supreme Court, were decided together as the ***Civil Rights Cases (1883)***, and tested the meaning of civil rights and the Fourteenth Amendment's mandate that no state may deny any person equal protection of the laws. Eight of the nine Supreme Court justices ruled in favor of private business owners and overturned the 1875 Civil Rights Act as unconstitutional. The Court ruled that while states must not discriminate, the owners of private businesses were free to discriminate against potential customers on the basis of race. The decision sent a huge message to businessmen that the United States Constitution would not stand in the way if they wanted to refuse service to blacks. Many did just that—and this behavior was not limited to the South, nor was it only targeted at African Americans.

The Supreme Court sent an even more disastrous signal in the case ***Plessy v. Ferguson (1896)***. In 1890, the Louisiana legislature passed the Separate Car Act requiring that all trains operating in the state be segregated by race and forbidding people from "going into a coach or compartment to which by race he does not belong." Most train companies resented the costs of putting extra cars on their trains to meet the Separate Car Act requirements. Train companies and a New Orleans civil rights group known as the Committee of Citizens worked with New York lawyer Albion Tourgee to bring suit against the law. On June 7, 1892, **Homer Plessy** purchased a first-class ticket on the East Louisiana Railroad's train running from New Orleans to Covington, Louisiana, and took a seat in a car reserved for whites only. A married shoemaker whose heritage was African and French was asked by the train conductor to identify his race before he was arrested for being in the "wrong" car. According to the Committee of Citizens, surely this arrest was a violation of the civil rights clause of the Fourteenth Amendment: Here is a state law that mandates segregating train passengers according to race. But the Supreme Court held that no civil rights clause violation had taken place because the passengers were all treated equally, albeit in a segregated fashion. This reasoning became known as the **separate but equal doctrine**.

Categories of Racial Discrimination in the Twentieth Century

Discrimination against African Americans took many forms. Here are five main categories.

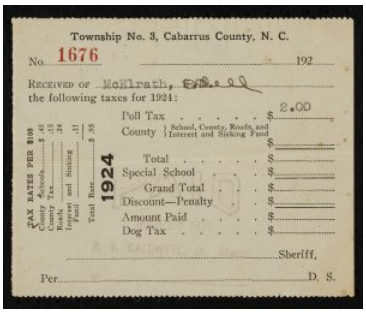
Segregated Public Accommodations—Using as precedents the *Civil Rights Cases (1883)* and *Plessy v. Ferguson (1896)*, states and businessmen freely segregated and excluded African Americans as well as other racial and ethnic group members. This practice was not restricted to the South. Public accommodations such as trains, buses, drinking fountains, hospitals, cemeteries, parks, beaches, and swimming pools were segregated. Private business owners from gas stations, hotels, inns, theaters, restaurants, lunch counters, and the like were free to refuse service to African Americans and others.



Sign Put up in 1942 Outside a New Housing Development in Detroit

Segregated Housing—Many cities used **overt city ordinances** that divided the town into racial zones and mandated that residential property in "white" areas be purchased by whites, while property in "black" areas be purchased by nonwhites. The Supreme Court ruled these kinds of city ordinances unconstitutional in 1914, but the practice continued as a matter of custom. Another form of housing discrimination was **restrictiveracial or religious covenants**, which were agreements entered into between buyer and seller that restricted the future sale of the property to only certain kinds of people. The Court ruled against these kinds of covenants in 1948, but it was very difficult to enforce the Court's ruling until the Fair Housing Act passed in 1968. The third form of housing discrimination took the form of **redlining**, which was a practice once encouraged by the federal Home Owner's Loan Corporation in which minority neighborhoods found it very difficult to get loans. This institutionalized discrimination in government-backed mortgages made it difficult for black families in particular to build home equity, which is the primary way that most families build wealth. [7]

Segregated Education—The separate but equal doctrine was applied to education with a vengeance. Even school districts outside of the South were segregated, including the schools in the nation's capital. In 1946, the 9th Federal Circuit Court struck down separate "Mexican schools" in Orange County, with the Court saying that "A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage." [9] However, the most economic was ***Brown v. Board of Education of Topeka, Kansas (1954)***, in which the Supreme Court ruled 9-0 that segregated schools were inherently unequal, reversing the *Plessy* doctrine as it applied to education. Thus, *de jure*, by law, segregation is unconstitutional, but *de facto*, in fact, segregation is alive and well in America's schools. [10]


Township No. 3, Cabarrus County, N. C.
No. 1676 192
Received of McElrath, the following taxes for 1924:
Poll Tax $ 2.00
County / School, County, Roads, and Interest and Sinking Fund $
Total $
Special School $
Grand Total $
Discount—Penalty $
Amount Paid $
Dog Tax $
Sheriff,
Per D. S.
TAX RATES PER $100
1924

Poll Tax Receipt for Odell McElrath in 1924

Voter Discrimination—The Fifteenth Amendment guaranteed the right to vote regardless of race. After Reconstruction ended in 1877, state legislatures undertook several measures to keep blacks from voting. One measure was extralegal and consisted of outright **intimidation**. Groups like the Ku Klux Klan lynched blacks, shot those who were politically active, bombed their houses, got them fired from their jobs, burned crosses to frighten communities, and spied on civil rights organizations. In many southern states, **literacy tests** were used to keep African Americans from registering to vote. Potential voters were required to take an often-subjective "test" of their literacy, their knowledge of the federal or state constitution, or their knowledge of completely arcane bits of information. Literacy tests were combined in some cases with **good character clauses**, in which people needed to be certified as being of good character in order to register. **Grandfather clauses** automatically registered anyone, whites, whose male ancestors were eligible to vote at some date before the Fifteenth Amendment passed. Southern states instituted **white primaries**, in which nonwhites were barred from voting. **Poll taxes** were also used to discourage blacks from voting. Finally, whites used **racial gerrymandering** to design election districts that bisected African Americans populations, thereby diluting their numbers should they actually register to vote.

Affirmative Action for Whites—Ira Katznelson, Columbia University political science and history professor, has documented how twentieth-century government policies designed to help all Americans ended up being tailored in ways that disproportionately helped white Americans. Many of the New Deal programs (1930s) were specifically designed to disadvantage most African Americans. Social Security is a classic example. According to Katznelson, fully 65 percent of blacks were excluded from the program because of concessions to politicians. The same thing can be said of the National Recovery Administration, the National Labor Relations Board, and the Fair Labor Standards Act.

Important Civil Rights Legislation

Beginning in 1957, the federal government passed several civil rights laws: Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Civil Rights Act of 1968.



President Lyndon Johnson Signing the Civil Rights Act of 1964

Civil Rights Act of 1964—Demanded by civil rights leaders for decades, proposed by President John F. Kennedy, and pushed through by President Lyndon Johnson after Kennedy's assassination, the Civil Rights Act of 1964 was a monumental political achievement. It was truly bipartisan legislation, with a majority of congressional Republicans and Democrats supporting it. The Civil Rights Act of 1964 did the following:

- Outlawed discrimination in voter registration, but this section had poor enforcement language.
- Established that "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."
- Authorized the U.S. Attorney General to sue in cases where people were denied the equal protection of the laws, unequal access to public accommodations, or equal access to public schools and colleges.
- Banned discrimination in programs that receive federal assistance.
- Banned employment discrimination directed at "any individual because of his race, color, religion, sex or national origin." This includes hiring, firing, conditions of employment, and compensation.
- Created the Equal Employment Opportunity Commission (EEOC), which is empowered to make prosecution recommendations to the U. S. Attorney General regarding employment discrimination. (12)

Voting Rights Act of 1965—During the 1965 State of the Union address, President Johnson vowed to "eliminate every remaining obstacle to the right and the opportunity to vote." The Voting Rights Act was designed to shore up a weakness of the Civil Rights Act—namely, that it was insufficiently aggressive in defending the right of all people to vote regardless of race. Passed later in 1965, the Voting Rights Act did the following:

- Established that "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."
- Established that whenever the U. S. Attorney General was engaged in a proceeding against a state or district that was violating the right to vote, federal authorities were empowered to come in and take over the voting registration and election management from local authorities until the problems were rectified.
- Established that "no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State" that has used such tests or devices to disenfranchise people on the basis of race or color.
- Established a pre-clearance provision whereby states or political subdivisions of states who have engaged in racially motivated voter discrimination need to submit "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" to the Justice Department for approval.

In ***Shelby County v. Holder*** **(2012),** the Supreme Court struck down the Voting Rights Act's important "pre-clearance" provision, allowing primarily Southern states to change their voting laws without having them approved ahead of time by the Justice Department. This ruling allowed many Republican-led state legislatures to pass onerous voter I.D. laws that fell heaviest on the poor, the elderly, and people of color. Writing in dissent, Justice Ginsberg argued that "Throwing out preclearance because it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet." (13)

Civil Rights Act of 1968—The Civil Rights Act of 1968 was primarily designed to address two issues that previous legislation had not—namely, applying the Bill of Rights protections on Native American reservations and equal access to housing. Thus, in popular parlance, the Civil Rights Act of 1968 encompasses the following two main pieces:

- **Indian Civil Rights Act**—This part applied most of the Bill of Rights and Constitutional protections to Native Americans living under the various tribes' jurisdiction. It stipulated that no Indian tribe shall prohibit free exercise of religion, free speech, free press, or the right of people to assemble peaceably and petition for redress of grievances. Further, no Indian tribe violate the Fourth Amendment's protections against unreasonable and warrantless searches and seizures. Indian tribes were forbidden from conducting unreasonable and warrantless searches and seizures, taking of private property without just compensation, violating fair trial procedures, and inflicting cruel and unusual punishments.
- **Fair Housing Act**—This part outlawed housing discrimination. The Act made it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling

to any person because of race, color, religion, sex, familial status, or national origin." Further, it made it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." Another interesting part of the law is that it made it unlawful "to represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."

These three laws set the framework for

- ***de jure* discrimination**—that is, discrimination written into laws and official policies at the federal, state, local, and company levels.
- ***de facto* discrimination**, which is discrimination in everyday life that is unsupported by law or policy.

According to civil rights leaders, the nation is still dealing with the lasting impact of past *de jure* discrimination, discriminatory policing, social prejudice affecting how people interact in all sorts of settings, and unequal access to economic and educational opportunities. Some of these challenges can be addressed by public policy, while others are difficult to address via government action.

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6.8: Civil Rights Case Study--Sex

"The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her."

—Seneca Falls Declaration [1]

"The backlash against U.S. women is real. As the misconception of equality between the sexes becomes more ubiquitous, so does the attempt to restrict the boundaries of women's personal and political power. . . Let this dismissal of a woman's experience move you to anger. Turn that outrage into political power. Do not vote for them unless they work for us. Do not have sex with them, do not break bread with them, do not nurture them if they don't prioritize our freedom to control our bodies and our lives. I am not a post-feminism feminist. I am the Third Wave."

—Rebecca Walker [2]

The Condition of Women in the Early Nineteenth Century

In the early part of the nineteenth century, women could not vote, own property, or sign legally binding contracts. Tradition and the laws of marriage held that men ruled over their wives and controlled whatever income they earned. Nor could women easily escape horrible marriages, as divorce was extremely difficult to obtain. The so-called **Cult of True Womanhood** or the **Cult of Domesticity** held that women should be the moral cultivators of their children, should be devoted to their domestic duties, and should be morally pure, religiously pious, and submissive to men. Even though institutions of higher education would admit women starting in the 1830s, educational opportunities for women were limited until after World War Two. Women who worked out of the home were almost always relegated to low-paying factory work, or later, to low-paying office or classroom work. Moreover, they were banned by social custom, educational disadvantage, and professional discrimination from entering higher-paying or prestigious professions like law, medicine, and business. Women were banned from religious leadership positions, and in some cases were forbidden even to speak in church. [3]

Overview of the Women's Movement

The women's movement has undergone four waves of activity.

- **First Wave Feminism** focused on attaining the right to vote and other changes in the law.
- **Second Wave Feminism** worked to change discriminatory laws, but also saw that *de facto* social discrimination was equally responsible for the oppression of women.
- **Third Wave Feminism** was concerned about the backlash against women, male violence, and harassment. Also, it witnessed the emergence of **intersectionality**, "the complex, cumulative way in which the effects of multiple forms of discrimination—such as racism, sexism, and classism—combine, overlap, or intersect, especially in the experiences of marginalized individuals or groups." [4]
- **Fourth Wave Feminism** focuses on the empowerment of women, the use of internet tools, and intersectionality. It also seeks greater gender equality by focusing on gendered norms and the marginalization of women in society.

Is there a Fifth Wave of Feminism? Some social scientists are arguing that the Covid-19 pandemic has brought forth a new wave, which aims to destroy the current systems and build a new world that prioritizes the needs of all marginalized people. [15] However, it's too early to tell if this hypothesis is correct.

Establishing Political Equality

Beginning in the late eighteenth century, women started to question the exclusion of half the human population from the principles espoused by natural rights philosophers—i.e., liberty, equality, and property. In 1792 England, **Mary Wollstonecraft (1759-1797)**—incidentally, the mother of Mary Shelley, the author of *Frankenstein*—wrote the extremely influential book, *A Vindication of the Rights of Woman*, as an explicit attack on liberal theories that argued for liberty and equality only among men. She emphasized that women and men were both capable of developing their mental faculties through education, but that women were denied that opportunity. She wrote that, "to render . . . the social compact truly equitable . . . women must be allowed to found their virtue on knowledge, which is scarcely possible unless they be educated by the same pursuits as men. For they are now made so inferior by ignorance and low desires, as not to deserve to be ranked with them." [6]



Elizabeth Cady Stanton

The U.S. feminist movement supported, and received support from, the abolition movement that developed in the 1830s and 40s. For example, abolitionist leaders such as Frederick Douglass and William Lloyd Garrison spoke out against the second-class status of women. In 1840, **Lucretia Mott (1793-1880)** and **Elizabeth Cady Stanton (1815-1902)** attended the World Anti-Slavery Convention in London as representatives of American abolitionist organizations. However, the mostly male delegates refused to allow the female delegates seats. Due to that snubbing, the two women had to watch the proceedings from the balcony. That experience led to the Seneca Falls Convention of 1848. The ensuing Seneca Falls Declaration was modeled after the Declaration of Independence, asserting that, "all men and women are created equal," and leveled a series of charges against men—that they have denied women the right to vote, the right to own property, education, employment opportunity, and that women are held to a different moral standard than men.

After the Civil War, the Republican-dominated Congress passed the **Fifteenth Amendment** to the Constitution, which guaranteed the right to vote regardless of "race, color, or previous condition of servitude." Feminists were outraged when the Fifteenth Amendment left women out, and they created two organizations to fight for the right to vote: The National Woman Suffrage Association and the American Woman Suffrage Association, which differed in their tactics. The two organizations merged in 1890 to form the **National American Woman Suffrage Association** (NAWSA). **Carrie Chapman Catt** (1859-1947), took over leadership of the Association from **Susan B. Anthony** (1820-1906). Feminists marched in parades, held demonstrations, gave speeches, wrote editorials, chained themselves to the gates of the White House, and went on hunger strikes in prison. The suffragettes were often attacked by angry crowds and suffered daily insults and criticism. Between 1906 and 1920, NAWSA membership grew from less than 20,000 to two million, and a whole series of states granted women the right to vote. The **Nineteenth Amendment** to the Constitution, granting the right to vote regardless of sex, passed Congress in 1919 and was ratified by Tennessee in 1920, just barely giving it enough states to put it into effect.

Other Frontiers for Women's Civil Rights

While passing the Nineteenth Amendment was the hallmark achievement of feminism in the U.S., there have been numerous other successes. In 1890, 19 percent of women worked for pay outside of the home, typically as domestic servants, textile workers, food workers, and other low-paid factory workers. While these jobs were similar to male workers, female workers were routinely paid less. Labor unions saw female workers as competitors and their presence in the workforce as suppressing male wages. As a result, women formed their own unions, such as the Women's Trade Union League and the International Ladies Garment Workers Union. The first major female-led labor strike took place in 1909-1910 among low-paid garment workers in New York City. The strike collapsed when male garment workers went back to work in 1910. The next year, a massive fire broke out at the Triangle Shirtwaist Company. Because management had locked the fire escapes, 146 workers, mostly women, perished in the blaze. The **Triangle Shirtwaist Factory Fire** was a watershed in both the women's movement and the worker-safety movement.

The role of women in the workplace was transformed by the labor requirements of World War II. As men flooded into the armed services, millions of women worked in arms factories doing skilled jobs that had never before been opened to women. In addition, thousands of women served in the armed forces in capacities ranging from nurses to pilots. [8] When the war ended, women were again displaced by men in the workforce. In addition, women continued to face discrimination in professional fields such as medicine, law, sports, and business. For instance, both Sandra Day O'Connor and Ruth Bader Ginsberg—who later became Supreme Court justices—faced discrimination in the law profession in the 1950s when they graduated from law school.

Many people argue that the second wave of feminism was launched by the 1963 publication of **Betty Friedan's *The Feminine Mystique***, which argued that women—especially educated women—are unfulfilled by the social requirement of subsuming their identities under their domestic duties demands as wives and mothers.

Even though many professional doors opened, discrimination persisted. In 1976, the Supreme Court ruled that discrimination against pregnant women was not a form of sex discrimination that was forbidden by the Civil Rights Act of 1964 because not all women are pregnant. Congress responded in 1978 and passed the **Pregnancy Discrimination Act**, which banned discrimination "on the basis of pregnancy, childbirth, or related medical conditions" in medium and large sized companies. [(9)]

Alice Paul, of the National Women's Party, first proposed an **Equal Rights Amendment** to the Constitution in 1923. It reads:

> "Men and Women shall have equal rights throughout the United States and every place subject to its jurisdiction."

The proposal languished for decades in the U.S. Congress, despite being reintroduced repeatedly. A later version did pass Congress. It read "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."

The Equal Rights Amendment was three states short of the three-quarters needed for ratification when the deadline ran out in 1982. In 2020, Virginia became the thirty-eighth state to ratify the Equal Rights Amendment, but in the meantime, some states had rescinded their amendment support. Democrats in the House of Representatives pushed through a measure to retroactively eliminate the ratification deadline. However, Republicans in the Senate refused to take up the measure and the Trump administration did not support it either. [(10)] If supporters of the Equal Rights Amendment want to see it pass, they may have to start over with Congress resubmitting it to all the states and setting an indeterminate clock for ratification.

Oral contraceptives were developed in the 1960s, and they revolutionized sexual relationships by giving women greater choices and control over whether and when to have children. States continued to try to limit access to birth control devices. The Supreme Court ruled in ***Griswold v. Connecticut* (1965)** that married couples had a right to privacy with respect to reproductive issues, thereby striking down a Connecticut law that forbade anyone from selling contraceptive devices or instructing anyone on their use. ***Roe v. Wade* (1973)** granted a fundamental right to terminate an unwanted pregnancy in the first trimester. Most feminists defend the "right to choose" as essential to women taking their place alongside men in modern society. In addition, a government that is strong enough to force a woman to carry a pregnancy to term against her will is strong enough to intrude itself into any sort of intimate medical or personal decision a woman or a man might want to make.

> **Update:** On June 24, 2022, the Supreme Court declared that the constitutional right to abortion, upheld for nearly a half-century, no longer existed. As result, a Michigan law dating back to 1931 would make abortion a felony. Meanwhile, 'trigger laws', which were newer laws pushed through by anti-abortion rights legislators in many states in anticipation of the Supreme Court's action, will also go into immediate effect. The Supreme Court ruling will disproportionately impact people who are poor, low income, and representative of minority groups.

During the 1990s, third-wave feminism was forcefully articulated by women from ethnic minority groups, who had intimately felt oppressed on account of their gender as well as their race. In addition, the movement embraced the cause of lesbians and trans-gendered people. This overreaching ideology also consisted of eco-feminists, who understood ecological degradation as being linked to women's oppression and the triumph of male-oriented exploitive behaviors.



Black and Pink Feminist Symbol

Today, one of the most difficult obstacles to feminism is the sense that leaders of the past have already "solved" women's problems. Fourth-wave feminists note that women are still subject to verbal harassment and physical violence at the hands of men; that they are portrayed in the media as men's playthings; that they are subject to moral double standards not inflicted upon men; that male politicians seem to be on a crusade to control women's bodies; and that their aspirations are often not supported by educators. This kind of treatment is referred to by feminist writer Laura Bates as **Everyday Sexism**. This type of sexism serves to make the public sphere—public streets, mass transit, workplaces, colleges, and universities—hostile places for women. [14]

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6.9: Civil Rights Case Study--Sexual Orientation

"You can have as many debates about gay marriage as you want, and over the last 22 years of campaigning for it, I've had my share. You can debate theology, and the divide between church and state, the issue of procreation, the red herring of polygamy, and on and on. But what it all really comes down to is the primary institution of love. The small percentage of people who are gay or lesbian were born, as all humans are, with the capacity to love and the need to be loved. These things, above everything, are what make life worth living. And unlike every other minority, almost all of us grew up among and part of the majority, in families where the highest form of that love was between our parents in marriage. To feel you will never know that, never feel that, is to experience a deep psychic wound that takes years to recover from."

—Andrew Sullivan in 2011 (1)

Background and Historical Development of Homosexuality as an Identity



Human Variety

Homosexual behavior is as old as human civilization and is evident across both tolerant and intolerant societies. Throughout U.S. history, many homosexuals repressed or hid their identities from their families, their employers, and from themselves. For those who embraced their sexual orientation, it was important for them to meet and develop relationships with other gay men and women. By the 1910s and 1920s, gay and lesbian bars, bathhouses, cafés, restaurants, and music halls were flourishing in most large American cities such as New York, Chicago, Boston, San Francisco, St. Louis, and Los Angeles. Other homosexuals formed private social clubs or cruised notorious pick-up areas in major cities. They faced prosecution, social ostracism, and employment discrimination if they were caught. (4)

The Early Gay Rights Movement

The **Society for Human Rights**, formed by Henry Gerber (1892-1972) in Chicago in 1924, was the first gay rights group in America. The Society set out to publish a journal and make connections with European gay rights groups, but its leaders were quickly arrested and prosecuted by Chicago police. The cost of defending himself at three separate trials bankrupted Henry Gerber, even though the charges were ultimately dismissed. He lost his job at the Postal Service, and the Society didn't survive. In New York, the **Veterans Benevolent Association** formed in 1945 and attempted to secure G. I. Bill benefits for homosexual veterans who had been dishonorably discharged. It did not succeed. (9)

Persecution of homosexuals ramped up during the McCarthy period—i.e., late 1940s and the 1950s—as the federal government looked for national security risks by investigating the private lives of its employees. Between 1950 and 1953, between 40 and 60 homosexuals a month were driven out of their government positions. (10) State and local governments persecuted homosexuals as well by continually raiding gay establishments and hangouts, prosecuting people either for being gay or for homosexual behavior and removing homosexuals from government positions.

IFor example, in 1957 Frank Kameny was fired from his government position with the Army Map Service because he was gay. His case because the first civil rights case on the issue of sexual orientation to reach the Supreme Court. He lost, but did not give up the fight. In 1965, he organized the first gay rights demonstration in front of the White House. However, it was not until 2009 that he received a formal apology from the U.S. government for his unjust dismissal from federal service.




Phyllis Lyon, 79, left, and Del Martin, 83, right, at Their Marriage Ceremony

The modern gay rights movement was born in the midst of this persecution. In 1947 under the pseudonym Lisa Ben, Edythe Eyde wrote *Vice Versa: America's Gayest Magazine*, America's first regular homosexual publication. (11) Founded in 1951 by Harry Hay, the **Mattachine Society** was dedicated to changing the public's mind about the "deviancy" of homosexuals. The Society published a magazine called *One*, which was initially banned by the Post Office. In 1958, the Supreme Court ruled that the ban violated the Mattachine Society's first amendment rights. By the 1970s more militant groups took over, and the society finally disbanded in 1987. The first postwar lesbian organization was the Daughters of Bilitis, founded in 1955 in San Francisco by Del Martin and Phyllis Lyon. It, too, created a magazine--*The Ladder*.

From Compton's Cafeteria to Don't Ask Don't Tell

Perhaps, the most well-known event in the history of the U.S. gay liberation movement is the **Stonewall Rebellion**. The Stonewall Inn was a gay bar in the Greenwich Village section of New York City. Eight police officers raided the establishment after midnight on June 28, 1969. On that night the police met considerable resistance from Stonewall patrons and others in the neighborhood. More police arrived, beating protesters—who, in turn, were throwing bottles and rocks. Eventually, hundreds of police officers were battling a couple thousand protesters. The rioting lasted three nights. This rebellion was the first time that large numbers of homosexuals resisted police action, and it energized an already-forming nationwide revitalization of the gay-liberation movement. Activists founded new groups such as the Gay Liberation Front and the Gay Activists Alliance, and employed traditional political tactics such as marches, demonstrations, strikes, boycotts, lobbying, campaigning, and fund-raising.

Aside from making political demands to decriminalize and end discrimination against homosexuality, gay rights groups targeted the medical establishment's century-old stance that homosexuality was an illness. That line became untenable as research into the nature of homosexuality increasingly suggested that problems suffered by gays and lesbians were less a result of their sexual orientation and more a result of homophobia, discrimination, alienation from families, and social marginalization. The National Association of Mental Health passed a resolution in 1970 calling to decriminalize homosexuality. In 1972, the National Association of Social Workers decided to reject the notion that homosexuality was an illness. By 1975, both the American Psychological Association and the American Psychiatric Association had voted to remove homosexuality from their lists of pathologies.

The 1970s and 80s also saw changes in the political sphere. In 1974, **Elaine Noble** became the first openly lesbian woman elected to public office. She won a seat in the Massachusetts state House of Representatives. In an interview, Noble said that her first campaign was "ugly," with gunshots through her windows and, people visiting her house and campaign office were harassed. Once, while in office, feces were left on her desk. She won re-election in 1976. (14)

In 1978, **Harvey Milk** took office as the first openly gay man elected to public office, having been elected in November of 1977 to be on the San Francisco Board of Supervisors. Ten days after the election he recorded three tapes that he gave to friends and his lawyer, to be listened to in the event of his assassination. He said, "I fully realize that a person who stands for what I stand for—a gay activist—becomes the target or potential target for a person who is insecure, terrified, afraid, or very disturbed themselves." He sponsored a bill banning discrimination in San Francisco on the basis of sexual orientation, and Mayor George Moscone signed it into law. On November 27, 1978, Dan White, a former member of the Board of Supervisors who had recently resigned his position and then asked to be reinstated, assassinated Mayor Moscone and Harvey Milk with a .38 revolver. (15)

In 1994, President Bill Clinton's administration instituted a Don't Ask, Don't Tell policy in the U.S. military. This policy essentially allowed homosexual men and women to serve in the military as long as they remained closeted—which was the *don't tell* part of the policy. The military would not actively look for gays and lesbians in the ranks—the *don't ask* part of the policy. However, it would not tolerate them if they were discovered. In 2010, Democrats in the House of Representatives amended the Defense Authorization Act to end Don't Ask, Don't Tell and allow gays and lesbians to serve openly in the military, but Republicans led by Senator John McCain successfully filibustered it in the Senate. Later that year, a standalone bill ending Don't Ask, Don't Tell finally passed both chambers and was signed by President Barack Obama.

Marriage Equality and the Equality Act

A high-profile issue with respect to the gay liberation movement was marriage equality. The marriage equality issue came to a legal battle pitting civil rights leaders against two prominent attempts to stop the cultural shift in favor of marriage equality: The Defense

of Marriage Act and California's Proposition 8.

In 1996, Congress passed the **Defense of Marriage Act (DOMA)**, which defined marriage for federal purposes to exclude same-sex marriage and also permitted states to refuse to recognize same-sex marriages performed in other states. At the time, no state allowed same-sex marriages, but it became legal in some places either as a result of court decisions or changes in state law. Challenges to DOMA and California's Proposition 8 worked their way up to the Supreme Court, and in 2013, the Supreme Court issued rulings on both.

> In ***United States v. Windsor (2013)***, the Court invalidated those portions of DOMA that denied federal benefits to same-sex marriage partners. The Defense of Marriage Act's provisions regarding the federal definition were declared unconstitutional.

In 2009, California's **Proposition 8** amended the California state constitution to forbid gay marriage. In 2010, a federal district court ruled that Proposition 8 was an unconstitutional violation of the Fourteenth Amendment's due process and equal protection clauses. The state of California refused to participate in the appeal and the case–*Hollingsworth v. Perry (2013)*—was appealed to the Supreme Court by the original private proponents of Proposition 8. However, the Court ruled on technical grounds that the private proponents of Prop 8 did not have the standing to bring the appeal. That decision left in place the lower federal court's ruling that Prop 8 is unconstitutional. Both *Hollingsworth v. Perry (2013)* and *United States v. Windsor (2013)* were decided by narrow 5-4 decisions.



Supreme Court Decides Obergefell v. Hodges

The legal fallout from the Windsor case was swift. In Utah, a federal judge named Robert Shelby struck down a state referendum that had defined marriage as one man and one woman, writing, "Applying the law as it is required to do, the court holds that Utah's prohibition on same-sex marriage conflicts with the United States Constitution's guarantees of equal protection and due process under the law. The State's current laws deny its gay and lesbian citizens their fundamental right to marry and, in so doing, demean the dignity of these same-sex couples for no rational reason. Accordingly, the court finds that these laws are unconstitutional." [(18)]

A test case arose almost immediately. James Obergefell and John Arthur married in Maryland right after the Windsor case was decided, and then sued the state of Ohio, their state of residence, when it refused to recognize their union. By the time the case reached the Supreme Court in 2015, it had been joined with three other similar cases from different jurisdictions around the country. The Court ruled 5-4 in ***Obergefell v. Hodges*** **(2015)** that state prohibitions against same-sex marriages were unconstitutional, as was the portion of the Defense of Marriage Act that allowed states to refuse to recognize gay marriages performed in other states.

In 2020, the Supreme Court ruled that the 1964 Civil Rights Act's prohibition of workplace discrimination based on "sex" covered discrimination against members of the LGBTQ. [(21)]

In 2021, Democrats in the U.S. House of Representatives passed the **Equality Act**, which "prohibits discrimination based on sex, sexual orientation, and gender identity in areas including public accommodations and facilities, education, federal funding, employment, housing, credit, and the jury system. Specifically, the bill defines and includes sex, sexual orientation, and gender identity among the prohibited categories of discrimination or segregation." [(19)] The bill was not voted on by the Senate.

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CHAPTER OVERVIEW

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7.1: Public Opinion and Political Socialization

"A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good."

—James Madison [1]

What is Public Opinion?

Public opinion refers to an individual's aggregated political view. In *Federalist #10* James Madison referred to "popular governments" that base the source of their legitimacy and authority on the people rather than some other source like God, and that take into account peoples' aggregate views when making policy. Indeed, if democracy is to mean anything it must refer to a government that periodically turns to the people to either make decisions directly or to select representatives to make decisions. In addition, the government's policies should align with what the public wants it to do.

Political Socialization

Political scientists and psychologists have long been interested in how people develop their individual approach to politics and political issues. There is no definitive answer, nor is there ever likely to be. Indeed, a mix of influences unique to each individual is likely to be the real source of our ideologies, attitudes, opinions, prejudices, and dispositions. We are each subject to **political socialization**, or "the process by which people acquire their political attitudes, beliefs, opinions, and behaviors." [2] Here are four examples.

Innate--Research suggests that our political orientation may be in part a hard-wired component of our personality. Just as two siblings born to the same parents and raised in the same household can have vastly different personalities, we may be born with dispositions that affect the political ideologies we develop. Psychologists and political scientists have found that conservatives and progressives appear to have an innate difference in threat perception, with conservatives more attuned to potential threats. Similarly, conservatives may be more fearful of those threats and want government to respond to them with military or police forces and/or laws. Conservatives have a higher tolerance for ambiguity and a lower tolerance for disorder than do progressives. [3] Psychologist Jonathan Haidt has argued convincingly that political beliefs come from different moral standpoints. For instance, take the issue of fairness. According to Haidt, progressives see fairness as one of access to basic resources, whereas conservatives see fairness as getting what one deserves based on effort expended. In other words, both conservatives and progressives value fairness, but they may have innately different moral understandings of the concept. [4]

In Federalist #10 James Madison wrote that,

> *"the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views."* [5]

Occupation--In other words, one's occupation is intimately tied to one's vested interests and political opinions. For example, teachers have different opinions than do members of the general public on issues like teacher pay, vouchers, the impact of teachers' unions, and how often students should be subject to standardized tests. [6] Factory workers are likely to have a different opinion of globalization and offshoring jobs than the people who own the company. Blue-collar workers are likely to have a different opinion of unskilled immigrants than are white-collar workers who don't have to compete with such immigrants for jobs.

Those around us--Family and friends also shape our political opinions. Children are raised by parents who have more or less well-developed political outlooks and in families with particular moral or ethical values. Parental viewpoints can transfer to children. Psychologist Eugene Thomas found an average 75 percent congruence rate between college-age students and their parents with respect to political attitudes. Moreover, two aspects of the family dynamic contributed the most to fostering parent-child attitude

congruence: the extent to which the parents were dedicated to political causes and the extent to which the parents explicitly tutored children "into an awareness of the political realm." [7] As children grow, they engage with other young people who influence and reinforce their attitudes and behaviors. Sociologist Denise Kandel noted that "adolescents who share certain prior attributes in common tend to associate with each other and tend to influence each other as the result of continued association." [8] What Dr. Kandel described is the importance of **homophily**, which is "the tendency for individuals to associate with similar others," and it is "one of the most persistent findings in social network analysis." [8]

Education--What about education? Broadly speaking, formal education can play a role in fostering tolerance for people who are racially, ethnically, or religiously different from us—assuming that the school is itself inclusive and promotes those values. Formal education also tends to promote what is known as **political efficacy**, or a person's belief that they can influence public policy through their political behaviors like voting, demonstrating, donating to candidates, and organizing collectively for action. The famous psychologist Jean Piaget once asked and answered an important question: "How are we to bring children to the spirit of citizenship and humanity which is postulated by democratic societies? By the actual practice of democracy at school." [10]

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7.2: Ideological Spectrum

Ideologies and the Ideological Spectrum

Ideologies can be placed on a spectrum for visual comparison. Liberal ideologies are traditionally put on the left and conservative ideologies on the right. (This placement dates from the French Revolution and is why liberals are called left-wing and conservatives are called right-wing.) The ideologies at the ends of the spectrum are the most extreme; those in the middle are moderate.

In the United States, ideologies at the right side of the spectrum prioritize government control over personal freedoms. They range from fascism to authoritarianism to conservatism. Ideologies on the left side of the spectrum prioritize equality and range from communism to socialism to liberalism. Moderate ideologies fall in the middle and try to balance the two extremes.

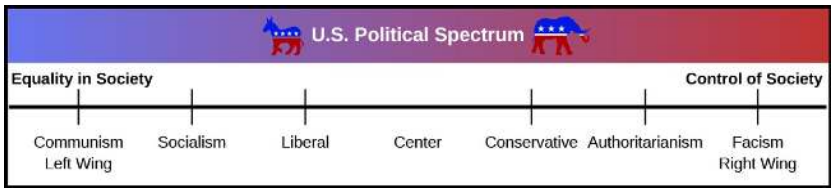


Figure 5. People who espouse left-wing ideologies in the United States identify with beliefs on the left side of the spectrum that prioritize equality, whereas those on the right side of the spectrum emphasize control.

Definitions of Terms

Fascism promotes total control of the country by the ruling party or political leader. This form of government will run the economy, the military, society, and culture, and often tries to control the private lives of its citizens. Typically, there is an authoritarian leader.

Conservative governments attempt to hold tight to the traditions of a nation by balancing individual rights with the good of the community. **Traditional conservatism** supports the authority of the monarchy and the church, believing government provides the rule of law and maintains a society that is safe and organized. **Modern conservatism** differs from traditional conservatism in assuming elected government will guard individual liberties and provide laws. Modern conservatives also prefer a smaller government that stays out of the economy, allowing the market and business to determine prices, wages, and supply.

Classical liberalism believes in individual liberties and rights. It is based on the idea of free will, that people are born equal with the right to make decisions without government intervention. It views government with suspicion, since history includes many examples of monarchs and leaders who limited citizens' rights. Today, **modern liberalism** focuses on equality and supports government intervention in society and the economy if it promotes equality. Liberals expect the government to provide basic social and educational programs to help everyone have a chance to succeed.

Under **socialism**, the government uses its authority to promote social and economic equality within the country. Socialists believe government should provide everyone with expanded services and public programs, such as health care, subsidized housing and groceries, childhood education, and inexpensive college tuition. Socialism sees the government as a way to ensure all citizens receive both equal opportunities and equal outcomes. Citizens with more wealth are expected to contribute more to the state's revenue through higher taxes that pay for services provided to all. Socialist countries are also likely to have higher minimum wages than non-socialist countries.

In theory, **communism** promotes common ownership of all property, means of production, and materials. This means that the government, or states, should own the property, farms, manufacturing, and businesses. By controlling these aspects of the economy, Communist governments can prevent the exploitation of workers while creating an equal society. Extreme inequality of income, in which some citizens earn millions of dollars a year and other citizens merely hundreds, is prevented by instituting wage controls or by abandoning currency altogether. Communism presents a problem, however, because the practice differs from the theory. The theory assumes the move to communism is supported and led by the proletariat, or the workers and citizens of a country. Human rights violations by governments of actual Communist countries make it appear the movement has been driven not by the people, but by leadership.

Economic variations on these ideologies add another dimension to the ideological spectrum—whether we prefer that government control the state economy or stay out of it. The extremes are a command economy, such as existed in the former Soviet Russia, and a laissez-faire ("leave it alone") economy, such as in the United States prior to the 1929 market crash, when banks and corporations were largely unregulated. Communism prioritizes control of both politics and economy, while libertarianism is its near-opposite. Libertarians believe government exists to maintain freedom and life, so its main function is to ensure domestic peace and national defense. Libertarians also believe the national government should maintain a military in case of international threats, but that it should not engage in setting minimum wages or ruling in private matters, like same-sex marriage or the right to abortion.

Though people can sometimes be liberal on one issue and conservative on another, a citizen to the left of liberalism, near socialism, would likely be happy with the passage of the Raise the Wage Act of 2015, which would eventually increase the minimum wage from $7.25 to $12 an hour. A citizen falling near conservatism would believe the Patriot Act is reasonable, because it allows the FBI and other government agencies to collect data on citizens' phone calls and social media communications to monitor potential terrorism.

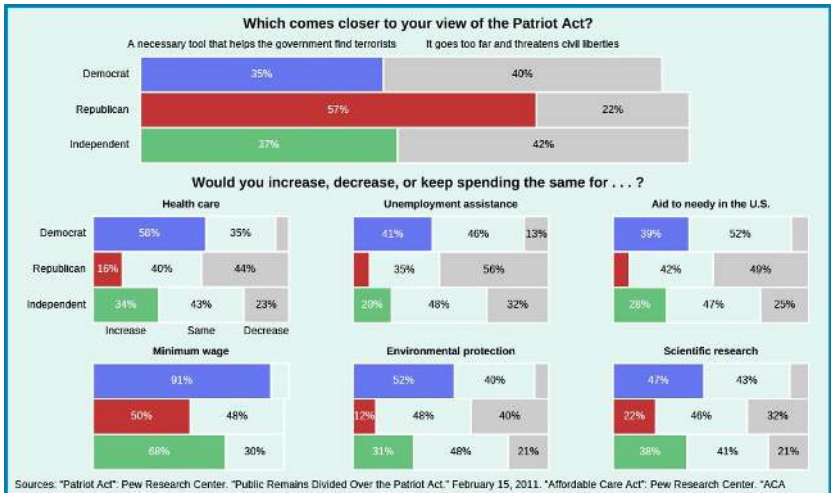




Figure 6. Public opinion on a given issue may differ dramatically depending on the political ideology or party of those polled.

Summary of 7.1 and 7.2

Public opinion is more than a collection of answers to a question on a poll; it represents a snapshot of how people's experiences and beliefs have led them to feel about a candidate, a law, or a social issue. Our attitudes are formed in childhood as part of our upbringing. They blend with our closely held beliefs about life and politics to form the basis for our opinions. Beginning early in life, we learn about politics from agents of socialization, which include family, schools, friends, religious organizations, and the media. Socialization gives us the information necessary to understand our political system and make decisions. We use this information to choose our ideology and decide what the proper role of government should be in our society.

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7.3: How Is Public Opinion Measured?

History of Polling

Polling has changed over the years. The first opinion poll was taken in 1824; it asked voters how they voted as they left their polling places. Informal polls are called **straw polls**, and they informally collect opinions of a non-random population or group. Newspapers and social media continue the tradition of unofficial polls, mainly because interested readers want to know how elections will end. These informal, pop-up quizzes ask a single question about politics or an event, and are intended to provide a general idea of what the readership thinks.

Modern public opinion polling is relatively new, only eighty years old. These polls are far more sophisticated than straw polls and are carefully designed to probe what we think, want, and value. The information they gather may be relayed to politicians or newspapers, and is analyzed by statisticians and social scientists. As the media and politicians pay more attention to the polls, an increasing number are put in the field every week.

Taking a Poll

Most public opinion polls aim to be accurate, but this is not an easy task. Political polling is a science. From design to implementation, polls are complex and require careful planning and care.

A number of criteria must be met if a poll is to be completed scientifically. First, the methodologists identify the desired population, or group, of respondents they want to interview. For example, if the goal is to project who will win the presidency, citizens from across the United States should be interviewed. If we wish to understand how voters in Colorado will vote on a proposition, the population of respondents should only be Colorado residents. When surveying on elections or policy matters, many polling houses will interview only respondents who have a history of voting in previous elections, because these voters are more likely to go to the polls on Election Day. Politicians are more likely to be influenced by the opinions of proven voters than of everyday citizens. Once the desired population has been identified, the researchers will begin to build a sample that is both random and representative.

A **random sample** consists of a limited number of people from the overall population, selected in such a way that each has an equal chance of being chosen. In the early years of polling, telephone numbers of potential respondents were arbitrarily selected from various areas to avoid regional bias. While landline phones allow polls to try to ensure randomness, the increasing use of cell phones makes this process difficult. Cell phones, and their numbers, are portable and move with the owner. To prevent errors, polls that include known cellular numbers may screen for zip codes and other geographic indicators to prevent regional bias.

A **representative sample** consists of a group whose demographic distribution is similar to that of the overall population. For example, nearly 51 percent of the U.S. population is female.[2] To match this demographic distribution of women, any poll intended to measure what most Americans think about an issue should survey a sample containing slightly more women than men.

Pollsters try to interview a set number of citizens to create a reasonable sample of the population. This sample size will vary based on the size of the population being interviewed and the level of accuracy the pollster wishes to reach. If the poll is trying to reveal the opinion of a state or group, such as the opinion of Wisconsin voters about changes to the education system, the sample size may vary from five hundred to one thousand respondents and produce results with relatively low error. For a poll to predict what Americans think nationally, such as about the White House's policy on greenhouse gases, the sample size should be larger.

Generally, a larger sample makes a poll more accurate, because it will have relatively fewer unusual responses and be more representative of the actual population. Pollsters do not interview more respondents than necessary. Increasing the number of respondents will increase the accuracy of the poll, but once the poll has enough respondents to be representative, increases in accuracy become minor and are not cost-effective.[5]

When the sample represents the actual population, the poll's accuracy will be reflected in a lower margin of error. The margin of error is a number that states how far the poll results may be from the actual opinion of the total population of citizens. The lower the **margin of error**, the more predictive the poll. Large margins of error are problematic. For example, if a poll that claims Hillary Clinton is likely to win 30 percent of the vote in the 2016 New York Democratic primary has a margin of error of +/-6, it tells us that Clinton may receive as little as 24 percent of the vote (30 – 6) or as much as 36 percent (30 + 6). A lower of margin of error is clearly desirable because it gives us the most precise picture of what people actually think or will do.

With many polls out there, how do you know whether a poll is a good poll and accurately predicts what a group believes? First, look for the numbers. Polling companies include the margin of error, polling dates, number of respondents, and population sampled to show their scientific reliability. Was the poll recently taken? Is the question clear and unbiased? Was the number of respondents high enough to predict the population? Is the margin of error small? It is worth looking for this valuable information when you interpret poll results. While most polling agencies strive to create quality polls, other organizations want fast results and may prioritize immediate numbers over random and representative samples. For example, instant polling is often used by news networks to quickly assess how well candidates are performing in a debate.

Technology and Polling

The days of randomly walking neighborhoods and phone book cold-calling to interview random citizens are gone. Scientific polling has made interviewing more deliberate. Historically, many polls were conducted in person, yet this was expensive and yielded problematic results.

In some situations and countries, face-to-face interviewing still exists. Exit polls, focus groups, and some public opinion polls occur in which the interviewer and respondents communicate in person. Exit polls are conducted in person, with an interviewer standing near a polling location and requesting information as voters leave the polls. Focus groups often select random respondents from local shopping places or pre-select respondents from Internet or phone surveys. The respondents show up to observe or discuss topics and are then surveyed.



Figure 2. On November 6, 2012, the Connect2Mason.com team conducts exit surveys at the polls on the George Mason University campus. (credit: Mason Votes/Flickr).

Most polling now occurs over the phone or through the Internet. Some companies, like Harris Interactive, maintain directories that include registered voters, consumers, or previously interviewed respondents. If pollsters need to interview a particular population, such as political party members or retirees of a specific pension fund, the company may purchase or access a

list of phone numbers for that group.

Other organizations, like Gallup, use random-digit-dialing (RDD), in which a computer randomly generates phone numbers with desired area codes. Using RDD allows the pollsters to include respondents who may have unlisted and cellular numbers.[8] Questions about ZIP code or demographics may be asked early in the poll to allow the pollsters to determine which interviews to continue and which to end early.

The interviewing process is also partly computerized. Many polls are now administered through computer-assisted telephone interviewing (CATI) or through robo-polls. A CATI system calls random telephone numbers until it reaches a live person and then connects the potential respondent with a trained interviewer. As the respondent provides answers, the interviewer enters them directly into the computer program. These polls may have some errors if the interviewer enters an incorrect answer. The polls may also have reliability issues if the interviewer goes off the script or answers respondents' questions.

Robo-polls are entirely computerized. A computer dials random or pre-programmed numbers and a prerecorded electronic voice administers the survey. The respondent listens to the question and possible answers and then presses numbers on the phone to enter responses. Proponents argue that respondents are more honest without an interviewer. However, these polls can suffer from error if the respondent does not use the correct keypad number to answer a question or misunderstands the question. Robo-polls may also have lower response rates, because there is no live person to persuade the respondent to answer. There is also no way to prevent children from answering the survey. Lastly, the Telephone Consumer Protection Act (1991) made automated calls to cell phones illegal, which leaves a large population of potential respondents inaccessible to robo-polls.[9]

The latest challenges in telephone polling come from the shift in phone usage. A growing number of citizens, especially younger citizens, use only cell phones, and their phone numbers are no longer based on geographic areas. The Millennial generation (currently aged 21–37) is also more likely to text than to answer an unknown call, so it is harder to interview this demographic group. Polling companies now must reach out to potential respondents using email and social media to ensure they have a representative group of respondents.

Yet, the technology required to move to the Internet and handheld devices presents further problems. Web surveys must be designed to run on a varied number of browsers and handheld devices. Online polls cannot detect whether a person with multiple email accounts or social media profiles answers the same poll multiple times, nor can they tell when a respondent misrepresents demographics in the poll or on a social media profile used in a poll. These factors also make it more difficult to calculate response rates or achieve a representative sample. Yet, many companies are working with these difficulties, because it is necessary to reach younger demographics in order to provide accurate data.[10]

Problems in Polling

For a number of reasons, polls may not produce accurate results. Two important factors a polling company faces are timing and human nature. Unless you conduct an **exit poll** during an election and interviewers stand at the polling places on Election Day to ask voters how they voted, there is always the possibility the poll results will be wrong. The simplest reason is that if there is time between the poll and Election Day, a citizen might change his or her mind, lie, or choose not to vote at all. Timing is very important during elections, because surprise events can shift enough opinions to change an election result. Of course, there are many other reasons why polls, even those not time-bound by elections or events, may be inaccurate.

Polls begin with a list of carefully written questions. The questions need to be free of framing, meaning they should not be worded to lead respondents to a particular answer. For example, take two questions about presidential approval. Question 1 might ask, "Given the high unemployment rate, do you approve of the job President Trump is doing?" Question 2 might ask, "Do you approve of the job President Trump is doing?" Both questions want to know how respondents perceive the president's success, but the first question sets up a frame for the respondent to believe the economy is doing poorly before answering. This is likely to make the respondent's answer more negative. Similarly, the way we refer to an issue or concept can affect the way listeners perceive it. The phrase "estate tax" did not rally voters to protest the inheritance tax, but the phrase "death tax" sparked debate about whether taxing estates imposed a double tax on income.[11]

Many polling companies try to avoid **leading questions**, which lead respondents to select a predetermined answer, because they want to know what people really think. Some polls, however, have a different goal. Their questions are written to guarantee a specific outcome, perhaps to help a candidate get press coverage or gain momentum. These are called push polls. In the 2016 presidential primary race, MoveOn tried to encourage Senator Elizabeth Warren (D-MA) to enter the race for the Democratic nomination. Its poll used leading questions for what it termed an "informed ballot," and, to show that Warren would do better than Hillary Clinton, it included ten positive statements about Warren before asking whether the respondent would vote for Clinton or Warren.[12] The poll results were blasted by some in the media for being fake.



(a) (b)

Figure 3. Senator Elizabeth Warren (a) poses with Massachusetts representatives Joseph P. Kennedy III (left) and Barney Frank (right) at the 2012 Boston Pride Parade. Senator Hillary Clinton (b) during her 2008 presidential campaign in Concord, New Hampshire (credit a: modification of work by "ElizabethForMA"/Flickr; credit b: modification of work by Marc Nozell)

Sometimes lack of knowledge affects the results of a poll. Respondents may not know that much about the polling topic but are unwilling to say, "I don't know." For this reason, surveys may contain a quiz with questions that determine whether the respondent knows enough about the situation to answer survey questions accurately. A poll to discover whether citizens support changes to the Affordable Care Act or Medicaid might first ask who these programs serve and how they are funded. Polls about territory seizure by the Islamic State (or ISIS) or Russia's aid to rebels in Ukraine may include a set of questions to determine whether the respondent reads or hears any international news. Respondents who cannot answer correctly may be excluded from the poll, or their answers may be separated from the others.

People may also feel social pressure to answer questions in accordance with the norms of their area or peers.[13] If they are embarrassed to admit how they would vote, they may lie to the interviewer. In the 1982 governor's race in California, Tom Bradley was far ahead in the polls, yet on Election Day he lost. This result was nicknamed the **Bradley effect**, voters who answered the poll were afraid to admit they would not vote for a black man because it would appear politically incorrect and racist. In the 2016 presidential election, the level of support for Republican nominee Donald Trump may have been artificially low in the polls due to the fact that some respondents did not want to admit they were voting for Trump.

In 2010, Proposition 19, which would have legalized and taxed marijuana in California, met with a new version of the Bradley effect. Nate Silver, a political blogger, noticed that polls on the marijuana proposition were inconsistent, sometimes showing the proposition would pass and other times showing it would fail. Silver compared the polls and the way they were administered. Some polling companies used an interviewer and others used robo-calling. He proposed that voters speaking with a live interviewer gave the socially acceptable answer that they would vote against Proposition 19, while voters interviewed by a computer felt free to be honest.[14] While this theory has not been proven, it is consistent with other findings that

interviewer demographics can affect respondents' answers. African Americans, for example, may give different responses to interviewers who are white than to interviewers who are black.[15]

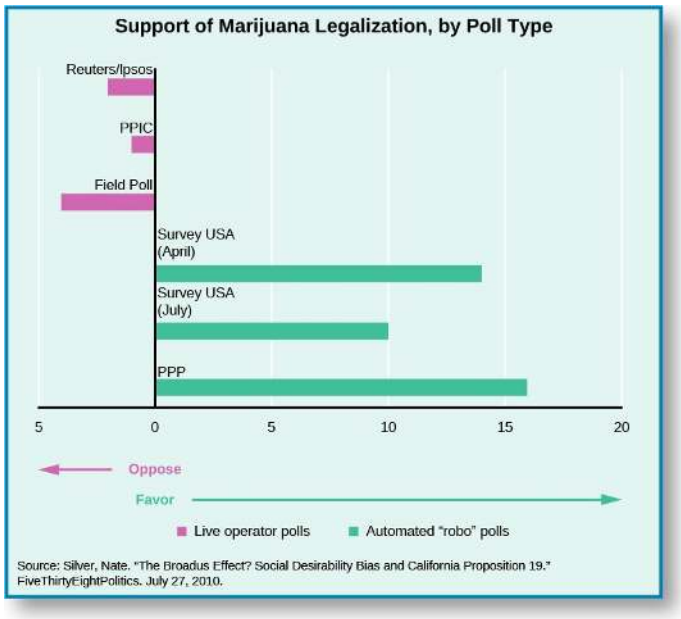


Figure 4. In 2010, polls about California's Proposition 19 were inconsistent, depending on how they were administered, with voters who spoke with a live interviewer declaring they would vote against Proposition 19 and voters who were interviewed via a computer declaring support for the legislation. The measure was defeated on Election Day.

Push Polls

One of the newer byproducts of polling is the creation of **push polls**, which consist of political campaign information presented as polls. A respondent is called and asked a series of questions about his or her position or candidate selections. If the respondent's answers are for the wrong candidate, the next questions will give negative information about the candidate in an effort to change the voter's mind.

In 2014, a fracking ban was placed on the ballot in a town in Texas. Fracking, which includes injecting pressurized water into drilled wells, helps energy companies collect additional gas from the earth. It is controversial, with opponents arguing it causes water pollution, sound pollution, and earthquakes. During the campaign, a number of local voters received a call that polled them on how they planned to vote on the proposed fracking ban.[16] If the respondent was unsure about or planned to vote for the ban, the questions shifted to provide negative information about the organizations proposing the ban. One question asked, "If you knew the following, would it change your vote . . . two Texas railroad commissioners, the state agency that oversees oil and gas in Texas, have raised concerns about Russia's involvement in the anti-fracking efforts in the U.S.?" The question played upon voter fears about Russia and international instability in order to convince them to vote against the fracking ban.

These techniques are not limited to issue votes; candidates have used them to attack their opponents. The hope is that voters will think the poll is legitimate and believe the negative information provided by a "neutral" source.

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7.4: What Does the Public Think?

While attitudes and beliefs are slow to change, ideology can be influenced by events. A student might leave college with a liberal ideology but become more conservative as she ages. A first-year teacher may view unions with suspicion based on second-hand information but change his mind after reading newsletters and attending union meetings. These shifts may change the way citizens vote and the answers they give in polls. For this reason, political scientists often study when and why such changes in ideology happen, and how they influence our opinions about government and politicians.

Experiences that Affect Public Opinion

Ideological shifts are more likely to occur if a voter's ideology is only weakly supported by his or her beliefs. Citizens can also hold beliefs or opinions that are contrary or conflicting, especially if their knowledge of an issue or candidate is limited. And having limited information makes it easier for them to abandon an opinion. Finally, citizens' opinions will change as they grow older and separate from family.[1]

Citizens use two methods to form an opinion about an issue or candidate.

- The first is to rely on **heuristics**, shortcuts or rules of thumb (cues) for decision making. Political party membership is one of the most common heuristics in voting. Many voters join a political party whose platform aligns most closely with their political beliefs, and voting for a candidate from that party simply makes sense. Studies have shown that up to half of voters make decisions using their political party identification, or party ID, especially in races where information about candidates is scarce.[2]
- The second method is to do research, learning background information before making a decision. Candidates, parties, and campaigns put out a large array of information to sway potential voters, and the media provide wide coverage, all of which is readily available online and elsewhere. But many voters are unwilling to spend the necessary time to research and instead vote with incomplete information.[3]

Gender, race, socio-economic status, and interest-group affiliation also serve as heuristics for decision making. Voters may assume female candidates have a stronger understanding about social issues relevant to women. Business owners may prefer to vote for a candidate with a college degree who has worked in business rather than a career politician.

Opinions based on heuristics rather than research are more likely to change when the cue changes. If a voter begins listening to a new source of information or moves to a new town, the influences and cues he or she meets will change. Even if the voter is diligently looking for information to make an informed decision, demographic cues matter. Age, gender, race, and socio-economic status will shape our opinions because they are a part of our everyday reality, and they become part of our barometer on whether a leader or government is performing well.

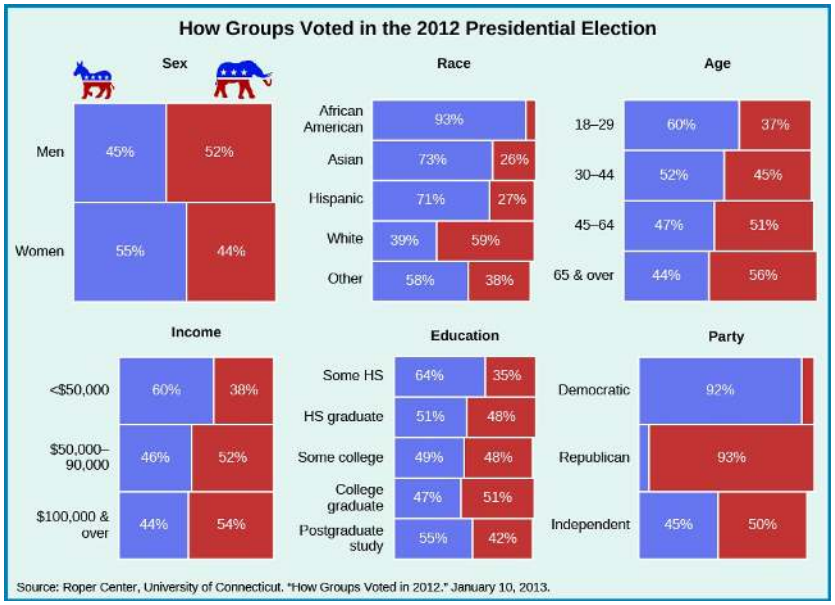


Figure 1. Breaking down voters by demographic groups may reveal very different levels of support for particular candidates or policies among the groups.

Similar demographic effects were seen in the 2016 presidential election. For instance, 54 percent of women voted for the Democratic candidate, Hillary Clinton, and 52 percent of men voted for the Republican candidate, Donald Trump. If considering age and race, Trump garnered percentages similar to Mitt Romney in these categories as well. And, as in 2012, households with incomes below $50,000 heavily favored the Democratic candidate, while those households in the $50,000–90,000 bracket slightly favored the Republican.[5]

The political culture of a state can also have an effect on ideology and opinion. In the 1960s, researcher Daniel Elazar determined that states had unique cultures and that different state governments instilled different attitudes and beliefs in their citizens, creating **political cultures**. Some states value tradition and their laws try to maintain longstanding beliefs. Other states believe government should help people and therefore create large bureaucracies that provide benefits to assist citizens. Some political cultures stress citizen involvement whereas others try to exclude participation by the masses.

State political cultures can affect the ideology and opinions of those who live in or move to them. For example, opinions about gun ownership and rights vary from state to state. Polls show that 61 percent of all Californians, regardless of ideology or political party, stated there should be more controls on who owns guns.[6] In contrast, in Texas, support for the right to carry a weapon is high. Fifty percent of self-identified Democrats—who typically prefer more controls on guns rather than fewer—said Texans should be allowed to carry a concealed weapon if they have a permit.[7] In this case, state culture may have affected citizens' feelings about the Second Amendment and moved them away from the expected ideological beliefs.

Workplace groups such as professional organizations or unions can also influence opinions. These organizations provide members with specific information about issues important to them and lobby on their behalf in an effort to better work environments, increase pay, or enhance shared governance. They may also pressure members to vote for particular candidates or initiatives they believe will help promote the organization's goals. For example, teachers' unions often support the Democratic Party because it has historically supported increased funding to public schools and universities.

Important political opinion leaders, or **political elites**, shape public opinion, usually by serving as short-term cues that help voters pay closer attention to a political debate and make decisions about it. Through a talk program or opinion column, the elite commentator tells people when and how to react to a current problem or issue. Millennials and members of Generation X (currently ages 38–53) long used Jon Stewart of *The Daily Show* and later Stephen Colbert of *The Colbert Report* as shortcuts to becoming informed about current events. In the same way, older generations trusted Tom Brokaw and *60 Minutes*.

Public opinion about American institutions is measured in public approval ratings rather than in questions of choice between positions or candidates. The congressional and executive branches of government are the subject of much scrutiny and discussed daily in the media. Polling companies take daily approval polls of these two branches. The Supreme Court makes the news less frequently, and approval polls are more likely after the court has released major opinions. All three branches, however, are susceptible to swings in public approval in response to their actions and to national events. Approval ratings are generally not stable for any of the three.

The president is the most visible member of the U.S. government and a lightning rod for disagreement. Presidents are often blamed for the decisions of their administrations and political parties, and are held accountable for economic and foreign policy downturns. For these reasons, they can expect their approval ratings to slowly decline over time, increasing or decreasing slightly with specific events. Former President Trump experienced significantly lower approval ratings than average, taking the oath of office with an approval rating of 45 percent, which declined to a low of 34 percent in 2021.[24]

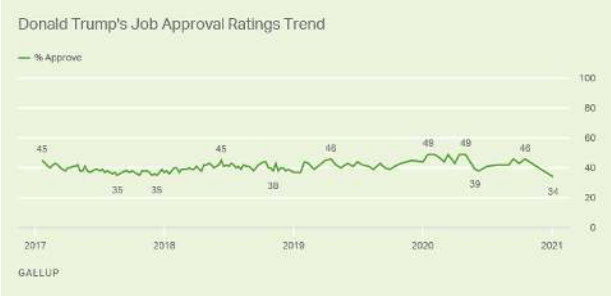


Figure 2. The approval ratings reported here are based on Gallup Daily tracking averages for President Donald Trump in 2017 and 2018, and periodic multiday polls for Trump starting in 2019

Some presidents have had higher or lower public approval than others, though ratings are difficult to compare, because national and world events that affect presidential ratings are outside a president's control. Several chief executives presided over failing economies or wars, whereas others had the benefit of strong economies and peace.

Gallup polling has tracked approval ratings for all presidents since Harry Truman. The Presidential Job Approval Center allows you to compare weekly approval ratings for all tracked presidents, as well as their average approval ratings.

Public Mood and Watershed Moments

Polling is one area of U.S. politics in which political practitioners and political science scholars interact. Each election cycle, political scientists help media outlets interpret polling, statistical data, and election forecasts. One particular watershed moment in this regard occurred when Professor James Stimson, of the University of North Carolina at Chapel Hill, developed his aggregated measure of public mood. This measure takes a variety of issue positions and combines them to form a general ideology about the government. According to Professor Stimson, the American electorate became more conservative in the 1970s and again in the 1990s, as demonstrated by Republican gains in Congress. With this public mood measure in mind, political scientists can explain why and when Americans allowed major policy shifts. For example, the Great Society's expansion of welfare and social benefits occurred during the height of liberalism in the mid-1960s, while the welfare cuts and reforms of the 1990s occurred during the nation's move toward conservatism. Tracking conservative and liberal shifts in the public's ideology allows policy analysts to predict whether voters are likely to accept or reject major policies.

What other means of measuring the public mood do you think might be effective and reliable? How would you implement them? Do you agree that watershed moments in history signal public mood changes? If so, give some examples. If not, why not?

Congress as an institution has historically received lower approval ratings than presidents, a striking result because individual senators and representatives are generally viewed favorably by their constituents. While congressional representatives almost always win reelection and are liked by their constituents back home, the institution itself is often vilified as representing everything that is wrong with politics and partisanship.

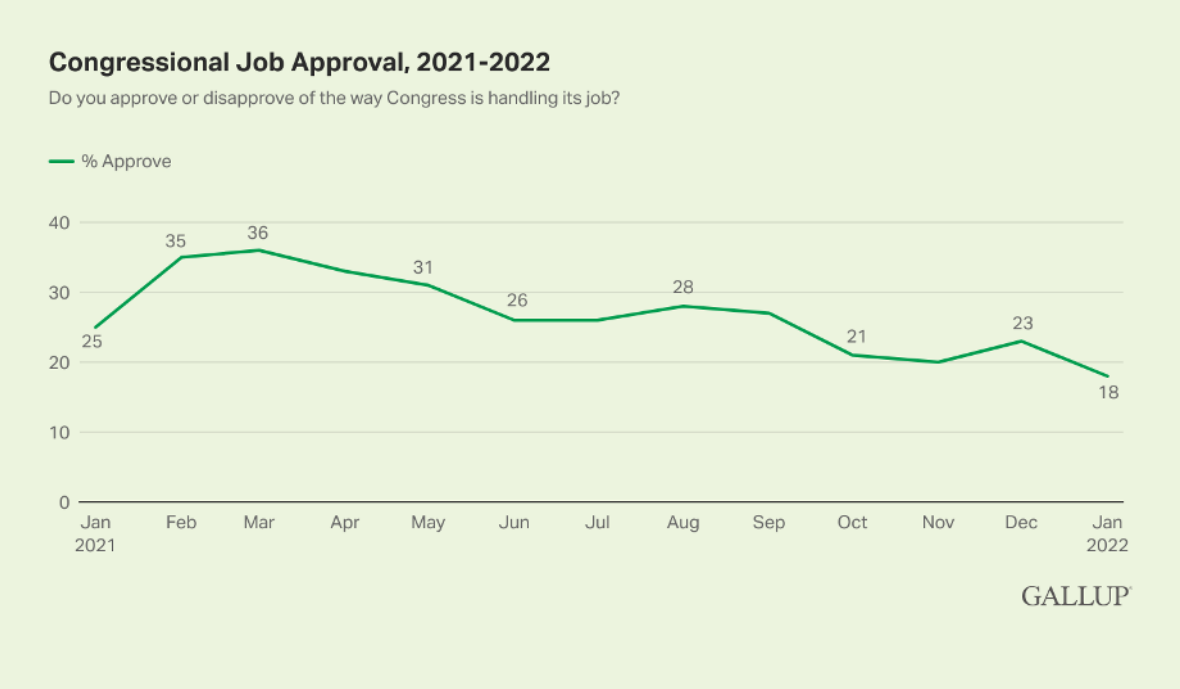


Figure 5. As recently as April 2021, congressional approval was at its highest point since 2009, when Democrats last controlled both chambers of Congress and the presidency.

While presidents are affected by foreign and domestic events, congressional approval is mainly affected by domestic events. When the economy rebounds or gas prices drop, public approval of Congress tends to go up. But when party politics within Congress becomes a domestic event, public approval falls. The passage of revenue bills has become an example of such an event, because deficits require Congress to make policy decisions before changing the budget.

The Supreme Court generally enjoys less visibility than the other two branches of government, which leads to more stable but also less frequent polling results. The court is protected by the justices' non-elected, non-political positions, which gives them the appearance of integrity and helps the Supreme Court earn higher public approval ratings than presidents and Congress.

Summary

When citizens change their sources of information, their opinions may change. The influence of elites and workplaces, life experiences, and state political culture can all help change our opinions. Economic and social policies are likely to cause controversy if the government has to serve the needs of many different groups or balance rights and liberties, all with limited resources.

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7.5: The Effects of Public Opinion

Public opinion polling is prevalent even outside election season. Are politicians and leaders listening to these polls, or is there some other reason for them? Some believe the increased collection of public opinion is due to the growing support of delegate representation. The **theory of delegate representation** assumes the politician is in office to be the voice of the people.[1] For example, if voters want the legislator to vote for legalizing marijuana, the legislator should vote to legalize marijuana. Legislators or candidates who believe in delegate representation may poll the public before an important vote comes up for debate in order to learn what the public desires them to do.

Others believe polling has increased because politicians, like the president, operate in permanent campaign mode. To continue contributing money, supporters must remain happy and convinced the politician is listening to them. Even if the elected official does not act in a manner consistent with the polls, he or she can mollify everyone by explaining the reasons behind the vote.[2]

Regardless of why the polls are taken, studies have not clearly shown whether the branches of government consistently act on them. Some branches appear to pay closer attention to public opinion than other branches, but events, time periods, and politics may change the way an individual or a branch of government ultimately reacts.



Figure 1. In 2016, Republican presidential candidate Donald Trump became the center of the media's horserace coverage. As the field winnowed from over twenty candidates down to three, the media incessantly compared everyone else in the field to Trump. (credit: Max Goldberg)

Public Opinions and Elections

Elections are the events on which opinion polls have the greatest measured effect. Public opinion polls do more than show how we feel on issues or project who might win an election. The media use public opinion polls to decide which candidates are ahead of the others and therefore of interest to voters and worthy of an interview. From the moment President Obama was inaugurated for his second term, speculation began about who would run in the 2016 presidential election. Within a year, potential candidates were being ranked and compared by a number of newspapers.[3] The speculation included **favorability polls** on Hillary Clinton, which measured how positively voters felt about her as a candidate. The media deemed these polls important because they showed Clinton as the frontrunner for the Democrats in the next election.[4]

During presidential primary season, we see examples of the **bandwagon effect**, in which the media pays more attention to candidates who poll well during the fall and the first few primaries. Bill Clinton was nicknamed the "Comeback Kid" in 1992, after he placed second in the New Hampshire primary despite accusations of adultery with Gennifer Flowers. The media's attention on Clinton gave him the momentum to make it through the rest of the primary season, ultimately winning the Democratic nomination and the presidency.

Polling is also at the heart of **horserace coverage**, in which, just like an announcer at the racetrack, the media calls out every candidate's move throughout the presidential campaign. This coverage can be neutral, positive, or negative, depending upon what polls or facts are covered. During the 2012 presidential election, the Pew Research Center found that both Mitt Romney and President Obama received more negative than positive horserace coverage, with Romney's growing more negative as he fell in the

polls.[5] Horserace coverage is often criticized for its lack of depth; the stories skip over the candidates' issue positions, voting histories, and other facts that would help voters make an informed decision. Yet, the coverage is popular because the public is always interested in who will win, and it often makes up a third or more of news stories about the election.[6]

Should Exit Polls Be Banned?

Exit polls, taken the day of the election, are the last election polls conducted by the media. Announced results of these surveys can deter voters from going to the polls if they believe the election has already been decided.

Exit polling seems simple. An interviewer stands at a polling place on Election Day and asks people how they voted. But the reality is different. Pollsters must select sites and voters carefully to ensure a representative and random poll. Some people refuse to talk and others may lie. The demographics of the polled population may lean more towards one party than another. Absentee and early voters cannot be polled. Despite these setbacks, exit polls are extremely interesting and controversial, because they provide early information about which candidate is ahead.

In 1985, a so-called gentleman's agreement between the major networks and Congress kept exit poll results from being announced before a state's polls closed.[7] This tradition has largely been upheld, with most media outlets waiting until 7 p.m. or later to disclose a state's returns. Internet and cable media, however, have not always kept to the agreement. Sources have been accused of reporting early, and sometimes incorrect, exit poll results.

On one hand, delaying results may be the right decision. Studies suggest that exit polls *can* affect voter turnout. Reports of close races may bring additional voters to the polls, whereas apparent landslides may prompt people to stay home. Other studies note that almost anything, including bad weather and lines at polling places, dissuades voters. Ultimately, it appears exit poll reporting affects turnout by up to 5 percent.[8]

On the other hand, limiting exit poll results means major media outlets lose out on the chance to share their carefully collected data, leaving small media outlets able to provide less accurate, more impressionistic results. Few states are affected, since the media invest only in those where the election is close. Finally, an increasing number of voters are now voting up to two weeks early, and these numbers are updated daily without controversy.

What do you think? Should exit polls be banned? Why or why not?

Public opinion polls also affect how much money candidates receive in campaign donations. Donors assume public opinion polls are accurate enough to determine who the top two to three primary candidates will be, and they give money to those who do well. Candidates who poll at the bottom will have a hard time collecting donations, increasing the odds that they will continue to do poorly. This was apparent in the run-up to the 2016 presidential election. Bernie Sanders, Hillary Clinton, and Martin O'Malley each campaigned in the hope of becoming the Democratic presidential nominee. In June 2015, 75 percent of Democrats likely to vote in their state primaries said they would vote for Clinton, while 15 percent of those polled said they would vote for Sanders. Only 2 percent said they would vote for O'Malley.[9] During this same period, Clinton raised $47 million in campaign donations, Sanders raised $15 million, and O'Malley raised $2 million.[10] By September 2015, 23 percent of likely Democratic voters said they would vote for Sanders,[11] and his summer fundraising total increased accordingly.[12]

Public Opinion and Congress

The relationship between public opinion polls and government action is murkier than that between polls and elections. Like the news media and campaign staffers, members of the three branches of government are aware of public opinion. But do politicians use public opinion polls to guide their decisions and actions?

The short answer is "sometimes." The public is not perfectly informed about politics, so politicians realize public opinion may not always be the right choice. Yet many political studies, from the *American Voter* in the 1920s to the *American Voter Revisited* in the 2000s, have found that voters behave rationally despite having limited information. Individual citizens do not take the time to become fully informed about all aspects of politics, yet their collective behavior and the opinions they hold as a group make sense. They appear to be informed just enough, using preferences like their political ideology and party membership, to make decisions and hold politicians accountable during an election year.

Overall, the collective public opinion of a country changes over time, even if party membership or ideology does not change dramatically. As James Stimson's prominent study found, the public's mood, or collective opinion, can become more or less liberal

from decade to decade. While the initial study on public mood revealed that the economy has a profound effect on American opinion,[15] further studies have gone beyond to determine whether public opinion, and its relative liberalness, in turn affect politicians and institutions. This idea does not argue that opinion never affects policy directly, rather that collective opinion also affects the politician's decisions on policy.[16]

House of Representatives members, with a two-year term, have a more difficult time recovering from decisions that anger local voters. And because most representatives continually fundraise, unpopular decisions can hurt their campaign donations. For these reasons, it seems representatives should be susceptible to polling pressure. Yet one study, by James Stimson, found that the public mood does not directly affect elections, and shifts in public opinion do not predict whether a House member will win or lose. These elections are affected by the president on the ticket, presidential popularity (or lack thereof) during a midterm election, and the perks of incumbency, such as name recognition and media coverage. In fact, a later study confirmed that the incumbency effect is highly predictive of a win, and public opinion is not.[17] In spite of this, policy shifts in Congress, often match the policy preferences of the public. When the shifts happen within the House, they are measured by the way members vote. The study's authors hypothesize that House members alter their votes to match the public mood, perhaps in an effort to strengthen their electoral chances.[18]

The Senate is quite different from the House. Senators do not enjoy the same benefits of incumbency, and they win reelection at lower rates than House members. Yet, they do have one advantage over their colleagues in the House: Senators hold six-year terms, which gives them time to engage in fence-mending to repair the damage from unpopular decisions. In the Senate, Stimson's study confirmed that opinion affects a senator's chances at reelection, even though it did not affect House members. Specifically, the study shows that when public opinion shifts, fewer senators win reelection. Thus, when the public as a whole becomes more or less liberal, new senators are elected. Rather than the senators shifting their policy preferences and voting differently, it is the new senators who change the policy direction of the Senate.[19]

Beyond voter polls, congressional representatives are also very interested in polls that reveal the wishes of interest groups and businesses. If AARP, one of the largest and most active groups of voters in the United States, is unhappy with a bill, members of the relevant congressional committees will take that response into consideration. If the pharmaceutical or oil industry is unhappy with a new patent or tax policy, its members' opinions will have some effect on representatives' decisions, since these industries contribute heavily to election campaigns.

Public Opinion and the Supreme Court

Studies that look at the connection between the Supreme Court and public opinion are contradictory. Early on, it was believed that justices were like other citizens: individuals with attitudes and beliefs who would be affected by political shifts.[20] Later studies argued that Supreme Court justices rule in ways that maintain support for the institution. Instead of looking at the short term and making decisions day to day, justices are strategic in their planning and make decisions for the long term.[21]

Further research has revealed a more complex relationship between public opinion and judicial decisions, largely due to the difficulty of measuring where the effect can be seen. When examining the number of reversals taken by the Supreme Court, one study found that public opinion slightly affects cases accepted by the justices.[22] In a study looking at how often the justices voted liberally on a decision, a stronger effect of public opinion was revealed.[23]

Whether the case or court is currently in the news may also matter. If the majority of Americans agree on a policy or issue before the court, the court's decision is likely to agree with public opinion.[24] A second study determined that public opinion is more likely to affect ignored cases than heavily reported ones.[25] In these situations, the court was also more likely to rule with the majority opinion than against it. For example, in *Town of Greece v. Galloway* (2014), a majority of the justices decided that ceremonial prayer before a town meeting was not a violation of the Establishment Clause.[26] The fact that 78 percent of U.S. adults recently said religion is fairly to very important to their lives[27] and 61 percent supported prayer in school[28] may explain why public support for the Supreme Court did not fall after this decision.[29]

Overall, however, it is clear that public opinion has a less powerful effect on the courts than on the other branches and on politicians.[30] Perhaps this is due to the lack of elections or justices' lifetime tenure, or perhaps no one has determined the best way to measure the effects of public opinion on the Court.

What if.

Wondering how your favorite candidate is doing in the polls? The site RealClearPolitics tracks a number of major polling sources on the major elections, including the presidential and Senate elections.

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7.6: The Historical Development of the News Media

"The media . . . tend to ignore broad social and economic policy issues because their complexity makes it difficult to simplify and dramatize them."

—William Hudson [1]

The mass media provides information and images that range from the ridiculous to the sublime. Entertainment has political ramifications. Indeed, the entertainment industry can be overtly political while also covertly reinforcing or challenging established social and political norms and myths. For this page, the term *media* refers to mass communication's whole range, involving newspapers, books, radio, television, movies, recorded music, and the internet. N*ews media* reflects mass communication's subset news forms, which impart useful information that citizens need in a democratic republic.

A Quick History of the Media in U.S. Politics

From the beginning, the news media has been intimately involved in the U.S. political process. **John Peter Zenger** began publishing the New York *Weekly Journal* in 1733, and almost immediately printed critical articles about New York colony governor William Cosby, accusing him of "schemes of general oppression and pillage, schemes to depreciate or evade the laws, restraints upon liberty and projects for arbitrary will." The paper went on to say that Cosby's rule was so corrupt that the people of New York might soon rise up against the government. Zenger was arrested in 1734 and tried for seditious libel. The jury found him not guilty because the critical stories were factual and so did not constitute libel. Andrew Hamilton, Zenger's lawyer, told the jury that "every man, who prefers freedom to a life of slavery, will bless and honor you, as men who have baffled the attempt of tyranny…exposing and opposing arbitrary power in these parts of the world at least, by speaking and writing truth." [2] The case encouraged a rowdy press in the American colonies and also dissuaded the British from prosecuting writers who criticized them in the run-up to the American Revolution.

At the Constitutional Convention, the delegates adopted a secrecy rule. When someone carelessly left a copy of the Virginia Plan outside the meeting chamber, **George Washington** rose to "entreat the gentlemen to be more careful, least our transactions get into the newspapers and disturb the public repose by premature speculations." [3] At the time of the American Revolution and the Constitutional Convention, the United States possessed a broadly literate population of white men who, for the most part, were able to read the arguments over independence and the debates between the federalists and the anti-federalists published in newspapers, journals, pamphlets, and flyers.

In 1798, Congress passed, and President Adams signed the **Sedition Act**, generally considered to be one of the greatest threats to a free press in the United States. Basically, the Federalist politicians were attempting to stifle the voices of opposition newspapers.

> *That if any person shall write, print, utter or publish…or shall knowingly assist or aid in writing, printing, uttering, or publishing any false scandalous and malicious writing or writings against the government of the United States, or either house of Congress of the United States, or the President of the United States, with intent to defame the said government, or to bring them…into contempt or disrepute; or to excite against them…the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States…then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.* [4]

The law did not exactly spell out how one would go about establishing the truth of an unfavorable opinion. Twenty-five Americans were arrested under the Sedition Act. Of which, fifteen were indicted for trial. The Sedition Act expired the day before President Jefferson took office in 1801, and Jefferson pardoned those who had been convicted under the law. Jefferson went on to bring seditious libel charges against Harry Croswell, a Federalist newspaper editor. Again, the case hinged on whether Croswell had printed the truth when he alleged that Jefferson paid James Callender to slander George Washington, John Adams, and other Federalists. Croswell was initially convicted of seditious libel but was granted a new trial after New York changed its libel laws. He was acquitted in the second trial, but no definitive evidence established the truth of his claims. [5]

During the latter half of the nineteenth century that the number of daily newspapers exploded from approximately 250 to over 2,000. The increase was partly due to the colonization of the American West and the creation of towns and cities that needed their

own newspapers. Technology also improved and made it easier to print large runs of a newspaper in one day and then turn around and do it again the next day. Prices decreased as well.

After Benjamin Day began the first penny press in New York in 1833, more inexpensive newspapers proliferated. The 19th Century was the golden era of the **partisan press**. Most newspapers didn't worry about objectively printing the day's or week's events. Indeed, they were often openly tied to political parties or movements and tilted the news accordingly. Competition in the business was stiff, and publishers often went for scandal and sensationalism to sell newspapers. This **yellow journalism** was perfected through the rivalry of the New York *World*, published by Joseph Pulitzer, and the New York *Journal*, published by William Randolph Hearst. Both Hearst and Pulitzer stirred up stories of Spanish atrocities in Cuba and implicated Spain in the explosion that destroyed the *U.S.S. Maine* in Havana harbor, which swayed the people to support the Spanish-American War.



Ida B. Wells, Muckraker Against Lynching

The early 20th Century muckrakers were pioneers of investigative journalism that continues to challenge the politically and economically powerful. [6] Considered a badge of honor among investigative journalists, a **muckraker** is a progressive-minded writer who investigates and reports on abuses of power and on the ways that government serves powerful interests at ordinary people's expense. **Lincoln Steffens** was an editor and writer for McClure's Magazine, where he wrote a series of investigative reports called "The Shame of the Cities" and "The Shame of the States," focusing on political corruption and efforts to fight it. **Ida Tarbell** investigated the Standard Oil Trust, exposing the secret bookkeeping, bribery, sabotage, conspiracy and other machinations of the monopoly. **Upton Sinclair** wrote, *The Jungle*, which described the life of meatpacking industry workers through the character of Jurgis Rudkos and his family, as they experience corruption, injury on the job, unsanitary work conditions, jail, and homelessness. The publication of *The Jungle* aided the movement to pass the Pure Food and Drug Act of 1906. **David Graham Phillips** wrote a nine-installment series called "Treason of the Senate" in 1906, which documented corporate manipulation and the corrupt process of selecting U.S. Senators, which galvanized the reform movement that eventually resulted in the Seventeenth Amendment (1913) mandating that senators be elected directly by the people. **Ida B. Wells**, who was born into slavery and become a journalist and a African-American and women's rights crusade organizer, wrote the pamphlet *Southern Horrors: Lynch Law in All Its Phases*, in which she referred to lynching as "that last relic of barbarism and slavery."

By the 1920s, newspapers had a competitor. Radio was becoming commonplace, having an immediacy and presence that newspapers couldn't replicate. Politicians could speak directly to people, unmediated by journalists and newspaper editors. The most effective early use of radio was **Franklin Roosevelt's "fireside chats"** that began in 1933 and ran to 1944. These broadcasts helped him explain his policies and decisions directly to millions. For example, in the December 9, 1941 fireside chat he said,

> *"We are now in this war. We are all in it—all the way. Every single man, woman, and child is a partner in the most tremendous undertaking of our American history. We must share together the bad news and the good news, the defeats and the victories—the changing fortunes of the war."* [7]

In 1982, President Reagan revived the practice of doing a weekly radio broadcast, and presidents George Bush, Bill Clinton, George W. Bush, and Barack Obama continued to do so. President Trump initially started doing weekly broadcasts on YouTube, but then stopped the practice.

The early 20th Century also witnessed the rise of a **journalistic culture of objectivity**. The partisan press of the nineteenth century began to fade, and professional journalism schools graduated journalists committed to reporting the news without intentionally slanting their coverage to suit party politics or ideology. Newspaper pages began to be separated into news stories, editorials,

columns, and letters to the editor. The news stories were supposed to be objective, while the others were free to express opinions that would come from the author's partisan or ideological preferences. The culture of objectivity continues to characterize most mainstream media outlets. Generally speaking, this is a positive aspect of American journalism. However, critics have pointed out that the culture of objectivity has unfortunately led to a **false balance** on some issues. False balance has been defined as "when journalists present opposing viewpoints as being more equal than the evidence allows. But when the evidence for a position is virtually incontrovertible, it is profoundly mistaken to treat a conflicting view as equal and opposite by default." (8) According to these critics, both sides of issues like climate change and the efficacy of vaccines are treated equally in the media, when the science is overwhelmingly one-sided.



Presidential Candidates John F. Kennedy and Richard Nixon in 1960

In the 1950s, the emergence of television eroded the preeminence of both radio and newspapers. Political campaigns started marketing candidates in television commercials that became increasingly more sophisticated over time. Televised presidential debates began in the 1960 election, and it immediately became clear that a candidate benefited from being telegenic. In the first of the four **Nixon-Kennedy presidential debates in 1960**, radio listeners thought that Nixon bested Kennedy, while television viewers came to the opposite conclusion. The reason? The radio listeners couldn't see that with no make-up and sporting a five o'clock shadow, Nixon looked horrible compared to the tanned, make-up-wearing Kennedy. No presidential candidate has ever made Nixon's mistake again. (9)

From 1949 to 1987, communication on public airwaves like radio and television was governed by the **fairness doctrine.** The Federal Communications Commission required licensees to serve the public interest in two ways:

- devote a "reasonable percentage of their broadcasting time to the discussion of public issues of interest to the community served by their stations"
- design programs "so that the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community." (10)

Conservatives campaigned against the fairness doctrine, and Republican-appointed FCC commissioners voted to end it in 1987 even though congressional Democrats objected. Scrapping the fairness doctrine helped give rise to the resurgence of partisan media in the United States. This action, in turn, has contributed to the polarizing of the people.

The most recent development in political media's history is the **rise of the partisan conservative media ecosystem**. The demise of the fairness doctrine in 1987 allowed corporations and wealthy libertarians to develop an especially insular media empire centered on conspiracy theories and partisan news. The *Columbia Journalism Review* explains the conservative media ecosystem's meteoric rise after Republicans junked the fairness doctrine:

> *"A remarkable feature of the right-wing media ecosystem is how new it is. Out of all the outlets favored by Trump followers, only the New York Post existed when Ronald Reagan was elected president in 1980. By the election of Bill Clinton in 1992, only the Washington Times, Rush Limbaugh, and arguably Sean Hannity had joined the fray. Alex Jones of Infowars started his first outlet on the radio in 1996. Fox News was not founded until 1996. Breitbart was founded in 2007, and most of the other major nodes in the right-wing media system were created even later."* (12)

This media ecosystem predominantly exists outside of traditional journalistic outlets. It operates with its own journalistic standards and draws stories from the conspiratorial fringes to the more prominent outlets like Fox News, which is owned by the Australian billionaire Murdoch family. Often immune from facts, this media ecosystem recycles conspiracy theories: climate change is a Chinese hoax; prominent Democrats were running a child pornography ring out of a pizza restaurant in Washington; Ukraine was

behind the theft of Democratic emails, and the server in question was hidden somewhere in that country; millions of illegal immigrants regularly voted in recent American elections; Barack Obama's birth certificate was forged, and he wasn't really born in Hawaii; a Democratic National Committee staffer stole the Democratic emails in 2016—not the Russians, as U.S. intelligence agencies concluded—and then was murdered for it, and so on. [13] This conservative media ecosystem's alternate reality empowers and normalizes what, in the past, were ideas that only existed at the fringes of U.S. political culture.

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7.7: The Contemporary News Media Ecosystem

"Who wants a revolution? No one who owns a major media outlet."

—Julie Hollar [1]

Where Do People Get Their News?



Selling the Chicago Defender in 1942

As mentioned above, newspapers used to dominate. Radio challenged newspapers as news sources, but it was television—with its combination of audio and video elements, plus the ability to go live—that really dealt newspapers a blow. Newspaper readership stagnated after 1970. Physical newspapers were dealt a second blow by the internet's onset. In 1989, the first dial-up access to the internet started, which was quickly followed by the development of internet browsers and search engines. [2] Newspapers, magazines, and television news channels migrated online. Today, people rely on getting their political news on television, the internet, social media feeds, newspapers, and radio, roughly in that order of importance. [4]

Concentration of Ownership

The contemporary media ecosystem is marked by the concentration of media company ownership. In 1983, 90 percent of American media was owned by fifty companies. By 2012, 90 percent of American media was owned by just six companies: Viacom, News Corporation, Comcast, CBS, Time-Warner, and Disney. [5] Various mergers and acquisitions have occurred since then as the mediasphere has become even more concentrated. Nearly every form of mass media we use is controlled by the few people who run these corporations. Consider this---we watch the movies these media giants decide to produce, read the books they decide to print, watch the television shows they decide to create on the cable or satellite systems that they own, read the magazines they decide to publish, watch what they consider to be news, and listen to the music that their musicians create.

Along with the general corporate media consolidation, the news media is quite concentrated as well. CNN is owned by AT&T's WarnerMedia; ABC News is controlled by Disney; ViacomCBS owns CBS News; Fox News Channel is owned by the News-Corp; Comcast owns NBC News and MSNBC. PBS and NPR are owned by the Corporation for Public Broadcasting, for which conservatives have repeatedly tried to cut funds and make ever more reliant on private and corporate donations. [6]

The concentration of the news media ecosystem encompasses local newspapers and radio stations across the country. A report 2016 by University of North Carolina at Chapel Hill's School of Media and Journalism documented local newspapers' travails. Readership is down, many papers have closed or merged, and the number of companies that own newspapers has declined—the largest twenty-five companies own more than half of all daily newspapers in the U.S., and the three largest companies own twice as many newspapers now than they did a decade ago. These companies often have little connection to the communities in which they own and operate newspapers. Many other towns don't have daily newspapers at all, and the internet does not provide local news. As a result, the U.S. is pockmarked by **news deserts**, areas that receive little or no substantive public affairs or community-interest news coverage . [7]

> Do you know who owns the newspapers in your state or city?

Overall, radio ownership is less concentrated. Still, the top ten corporations that own radio stations account for nearly half of all radio station advertising revenue. [8] Many of these corporations push a conservative agenda with prominent right-wing talk shows and mandatory "talking points" for radio and TV journalists to read on air. [9]

Media ownership concentration has been enabled by the **Telecommunications Act of 1996**. The congressmen who voted for this law—and President Clinton, who signed it—promised that it would create more media competition, more diversity, lower prices for things like cable service, and more jobs in the media and telecommunications industries. According to Common Cause, however, the law brought the public "more media concentration, less diversity, and higher prices." The Telecommunications Act did the following:

- Lifted the cap on the number of radio stations any one company could own, which allowed Clear Channel to grow from a relatively small company to one that owns over 1600 radio stations across the country.
- Extended broadcast license terms from five to eight years and made it more difficult for the public to challenge license renewals.
- Deregulated cable rates, resulting in cable costs increases.
- Raised the caps on the number of television stations that any one company could own and the audience that it could reach. Now just five companies control 75 percent of primetime viewing.
- Eased cable system cross ownership. Ninety percent of the top fifty cable stations are owned by the giant companies that also own the media networks.
- Gave away valuable publicly owned digital broadcasting spectrum to the media conglomerates. (10)

Following the Telecommunications Act passage, numerous high-profile media mergers occurred and the Federal Communications Commission subsequently further loosened media ownership regulations.

On what other issues does media concentration affect the picture we are receiving? Former reporter Tom Fenton argues that corporate news-media dominance and the attendant concentration on the bottom line—has led to the evisceration of foreign reporting. He writes that in the two decades before the terrorist attacks of 9/11/01, American newspapers and television news stations reduced their coverage of foreign news by 70-80 percent. He also says that, "In the three months leading up to September 11, the phrase 'al Qaeda' was never mentioned on any of the three evening news broadcasts—*not once*."(12) Others argue that when it comes to domestic coverage, the corporate news media have a clear pro-business slant. On April 30, 1997, the front page of the *New York Times* trumpeted the following headline: "Markets Surge as Labor Costs Stay in Check." Of course, "labor costs" are the wages and benefits earned by workers, and "stay[ing] in check" is another way of saying that wages and benefits have not grown. Curiously, the article failed to quote any workers, their representatives, or labor activists about this development, but instead described the issue from businessmen and financiers' point of view.

Finally, consider the debate over healthcare in the U.S. The organization Fairness and Accuracy in Reporting (FAIR) has documented how corporate media frame the debate. The current healthcare system is referred to as "private health insurance" instead of 'corporate-run health care'. It's alternative is referred to as "socialized medicine" or "government-run healthcare." What's wrong with the oft-used phrase "government-run healthcare"? Well, the 'private health insurance' proposal would keep the same mix of mostly private doctors, clinics, and hospitals to provide care, but would pool tax revenue to create one public health insurance provider that would be governed by democratic input, unlike the health insurance companies we have now. (14)

The Internet Revolution

The Internet is a network of networks that gives people all over the globe the capability of emailing, webpage browsing, chatting, and file sharing. It grew out of the Defense Department's Advanced Research Projects Agency Network (ARPANET) and the National Science Foundation's NSFNet. Today, the **World Wide Web** has well over 4 billion regular users.



Net Neutrality Demonstrator at Verizon

In the United States, the Internet represents a classic political struggle. Telecommunication giants (AT&T, Verizon, and Comcast—who own the "pipelines" through which the emails, videos, files, and web pages flow would like to be able to discriminate usage based on economics. In other words, those who can pay for high speed and reliability receive it, and those who can not pay for more than a simple connection would be relegated to whatever slow service was leftover. As Steven Levy put it, "They would charge big companies like Google and Yahoo big fees to guarantee that their content got to customers at higher speeds. In other words, there'd be an elite toll road alongside a free but crowded interstate." (15)

An interesting coalition of consumer's groups, small businesses, and ideological groups from the left and the right argued against such a move. Through "**net neutrality**" service providers would charge basic access fees to the Internet but otherwise not discriminate between those who would post web pages, video, or email. President Donald Trump campaigned against net neutrality. Ajit Pai, Trump's pick to chair the Federal Communications Commission, casted the deciding vote and killed net neutrality in 2018.

Meanwhile, the **Internet revolution** has been transforming the face of U.S. politics in the following ways:

Campaign Mobilization and Fundraising—Howard Dean's abortive 2004 run for the Presidency was notable for its pathbreaking use of the Internet to raise large sums of money through many small donations. (16) In 2008, Barack Obama did especially well raising large amounts of money from a broad base of smaller donors and using social media sites. In 2016, Bernie Sanders concentrated his fundraising on the internet, and set up a text-to-donate system. The average contribution was $27; and in one day, he raised $8 million. (17) Between 1992 and 2016, the percentage of Americans who donated to political candidates doubled. (18)

Political Advertising—The Internet can be used as a cheap way to get the message out for a political candidate or interest group. Every candidate knows that his or her campaign needs a website to promote themselves and raise money. Campaigns generate mass emails to targeted audiences quickly and automatically. Increasingly, candidates are attempting to attract younger voters by releasing web versions of campaign commercials. Candidate and then President Donald Trump effectively used Twitter to speak directly to his supporter base. In 2020, when the coronavirus pandemic forced shutting down traditional campaign rallies, candidates turned to internet versions of fireside chats.

Blogs, Blogs, and More Blogs—Although previously in existence, web logs burst onto the political scene in a big way after the 2002 election. Candidates use them to connect to potential voters in more personal ways than they can with static web pages. John Edwards, the Democratic vice-presidential candidate in 2004 and presidential candidate in 2008, dedicated "hours each week videotaping responses to videotaped questions, the entire exchange posted on his blog." (19) Since then, candidates and politicians moved away from blogs to professionally maintained websites. But blogs are still relevant. Partisan or ideological blogs challenge politicians. Often, blogs start rumors or conspiracy theories that are then picked up by corporate media. The location of all this debate and dialogue is often referred to as the **blogosphere**.

Fake News—The blogosphere and the internet revolution have given rise to numerous conspiracy-driven sites that don't adhere to any journalistic standards and that publish stories with no real corroboration. **Fake News** stories flourish on the internet, where they sow confusion and animosity, and they undercut the news media and government's legitimacy. Did Hilary Clinton and the Democrats run a child sex ring out of a D.C. pizzeria? No. Did a routine military exercise that happened to take place during the Obama administration constitute an attempt to occupy Texas? No. Fake news stories tend to be generated more often by conservatives and who target liberal politicians. Why? Because social conservatives are simply more likely to believe unsubstantiated stories that trigger their fears. Fake news stories intended for liberal audiences just don't seem to gain the same kind of traction. (20) **Fake news** is carefully crafted, unsubstantiated false stories intended to trigger fears, stimulate anger, or spread false information to a target audience. Unfortunately, the existence of fake news allows politicians to label as "fake news" any legitimate story that they don't like.

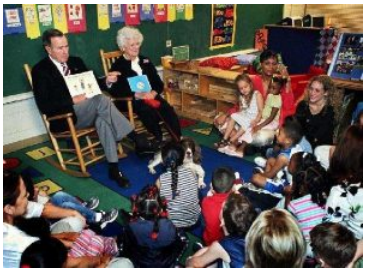
Beware of Sound Bites

A **sound bite** is a short selection of what a candidate or sitting politician says in a speech or interview. Media editors use their judgment to select such clips to represent what they believe to be the politician's most important or relevant point. Interestingly, the average sound bite in the 1960s was over forty-two seconds long, but fell to just over seven seconds in 2000 and 2004. (21) So, instead of allowing politicians to develop extensive arguments with assertions backed by evidence, the media have progressively

been selecting shorter clips that essentially equate to bumper-sticker slogans—"Read My Lips, No New Taxes," "Where's the Beef?" or "Make America Great Again." Because politicians no longer expect to be quoted at length, they now tend to pepper their speeches with these kinds of slogans. The result has been a mutually reinforcing process that has impoverished political debate.

What is a media consumer to do? Go to the candidate's website to see if the full campaign speech text is posted there. Another possibility is to read a reputable news site, which will have much more extensive coverage of a candidate's positions than you'll find in the television news. Additionally, listen to public radio or television news shows, which tend to have longer sound bites and more extensive political discussions than network or cable television news.

Pseudo-Events



President George H. W. Bush and First Lady Barbara Bush Reading to School Children

You should also be on the lookout for **pseudo-events**, which exist solely to generate media coverage and has little or no substance of their own. There are several disturbing features of pseudo-events. For one, they are treated as news by the corporate media even though they are not really news. They are "planned" news events that the media find irresistible: a politician speaking about the importance of education just after having been photographed reading to little children or a politician riding in some piece of military hardware before making a speech on the military. Media consumers are lulled into thinking that something significant is happening. A second problem is the crowding out real news coverage. Reporters have less time to report on real education or military issues. A third problem is that the imagery of pseudo-events can often be in direct contradiction to reality. The politician who poses for the cameras with disabled veterans may actually have voted to cut veteran's benefits.

Political Advertisements

Politicians run campaign commercials and organized interests run advertisements designed to push their agendas. You should not rely on these commercials for more than a tiny fraction of your political knowledge. Because of their short format, political commercials do not provide voters the real information they need to understand complex political issues and how the various candidates plan to address them.

Keep an eye out for the following **types of political ads** but remember that these are ideal types. Real advertisements often combine characteristics of the following.

Negative campaign ads seek to associate an opponent with events or actions that are portrayed as horrendous. For example, My opponent is soft on crime! My opponent coddles foreign tyrants! My opponent is sleazy! The ads are characterized by unfavorable photos of the opponent paired with a litany of bad things or bad people. They treat issues in an extremely superficial way, often using code words and images to stand in for the issue of concern. Finally, they typically end with a shining photo of the candidate with his/her family, or smiling community members, or cops, etc., and a tag line about how he will stand strong against crime, against foreign tyrants, and against sleaze.

Backfire ads use the words and images of the opponent against them. Short clips of the opponent are used to show how wrong they were, how out-of-touch they are, how silly they looked, or how they've changed positions over time. They also often feature a sarcastic voice-over to drive the point home, just in case the viewer didn't get it from the opponent's words and images.

Candidate's **biography ads** are sentimental, often sappy, reviews of the candidate's life. They often highlight how dedicated and capable the candidate is, and how she is firmly in touch with American values. The ads might also feature the candidate's family, usually with the unstated message that they are "normal" because they has a loving spouse and children. A further touch is to highlight the difficulties over which the candidate has triumphed. Candidates born into poverty or candidates who have a heroic

war record often like to highlight those aspects of their lives. These ads are often completely devoid of real issue information—they rarely talk about what the candidate would do about specific issues—but are instead designed to give the viewer a positive feeling about the candidate.

Ads featuring **endorsement** by average folks or celebrities present the viewer with real people who praise and/or endorse the candidate. Ordinary people might talk about his qualities in man-on-the-street interviews. Maybe the candidate is shown interacting with average Americans, or a series of celebrities speak about the candidate. These ads are often used to showcase the populist aspects of the candidate's personality or political program.

Political Spin

Politicians, partisans, or ideologues spin much of the information you see or hear. **Spin** refers to the biased portrayal of events that is designed to favor one set of interests over another. Such partisans are often called spin doctors, which is a derogatory term. A common spin tactic involves cherry-picking evidence—only citing evidence in favor of one's position. Another involves choosing favorable language—is it an "estate tax" or a "death tax", is it "tax relief" or a "tax cuts for the rich"? Yet another tactic spin doctors or politicians use is to employ passive language to defuse responsibility. They might say, "Mistakes have been made" instead of "I made a mistake" or "My party made a mistake." Others may suppress expectations, which accommodates exceeding expectations when the election or primary happens. Spin is also frequently marked by fallacious argumentation.

Issue Framing

Mass media is portrayed through **frames** that embed events in a particular linguistic or situational context. [(22)] For example, a politician's program might be labeled "Social Security reform" or it might be called "Social Security privatization". The choice of those labels affects how viewers ultimately perceive the issue. But this linguistic aspect of framing is fairly obvious. Pay attention to the less obvious form of framing involving the broader situational context. Specifically, the news media tends to favor an episodic frame for the news over a thematic frame.

- An **episodic frame** emphasizes individual events or cases, one after another with little history or context given to each incident. This frame predominates in television and newspaper news coverage—"Today there was a bombing, a layoff at the bicycle factory, a sex scandal, and a flood." Episodic news often focuses on the story's sensational details at the expense of asking, "Of what is this an example?" or "How is this related to that?" or "What is the broader context for this event?"
- A **thematic frame** reverses the emphasis by looking at the broader context of an issue and relationships between the day's or week's happenings. An episodic story would talk about layoffs at a bicycle factory through details such as the numbers of jobs lost, and provide tearful interviews with a selected worker or two. However, a thematic journalism would start with the context, such as deindustrialization or the effects of globalization, then add other examples of factory closures.

What If?

What if media literacy was a high school graduation requirement? What if schools from elementary through high school took it as their responsibility to ensure that students were savvy media consumers and critical skeptics of poor political media sources of information?

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7.8: Six Very Powerful Questions

"Once you have learned how to ask questions—relevant and appropriate and substantial questions—you have learned how to learn, and no one can keep you from learning whatever you want or need to know."

–Neil Postman and Charles Weingartner [1]

"What if we started asking better questions?"

–Rob Hopkins [2]

Respond to Your World with Questions

Most educated people assume a critical mindset with respect to the world, refusing to automatically accept what they are told or what they read. They may also be critical about challenging and seeking to improve the *status quo* in politics and society. ***Status quo*** basically means "the situation as it is now" in any given realm. A good education empowers people with knowledge about history, art, politics, literature, and the varieties of human experience. It also enables people to participate in the vigorous debates that sustain and enrich a republic, recognizing the limitations of the *status quo* and making things better. Above all, an educated person is one who asks questions.

What kinds of questions should we ask? Any will do, really, but a basic toolkit includes the following six very powerful questions:

How Was This Decision Reached?

Politics involves people making decisions, or non-decisions, about allocating limited resources or rights and privileges within the context of government, the economy, and society. Whenever one of those decisions is made—or not made—an educated person is as interested in *the decision-making process* as they are in the actual decision itself. Who made the decision? Were the people most affected by the decision able to participate in the process? Were they able to do so on an equal basis? If not, is there a good reason for the inequality of input? Upon what information was the decision made? Did the decision follow established rules and procedures, or did it deviate from them? Were all the decision's possible ramifications given ample consideration? Did the decision need to be made at this time?

Qui Bono? or Who Benefits?

There are inevitably winners and losers in the struggle over resources, rights, and privileges. One of the most fundamental questions a political scientist asks is *qui bono*, which is Latin for "who benefits." Who benefits if a decision is made this way? Who benefits if it is decided another way? Who benefits if no decision is made? Who benefits from the *status quo*? Does one set of interests consistently benefit at another's expense? Are the rules of the game stacked so that one set of interests is more likely to benefit? Who benefits if certain beliefs, myths, or ideas are prevalent in society?

Who Has Power?

Asking "who benefits?" leads to questions about who has power. To discover who has power, we can work backwards from a decision or action to see how the winners deployed resources, strategies, and tactics in ways that pushed political decision-makers to act in their favor. Think about who benefits and who has power when you ask the following policy questions: What is the minimum wage? How much of our national resources should go to the military and national security? Should we aggressively respond to the climate crisis? How should we educate our children?

What Is the Evidence?

Assertions should not be taken at face value, but need evidence. If you are reading someone's argument, always be scanning for sufficient evidence to warrant the author's inferences. When a politician is claiming that she would be a good representative, senator, or president, you should be asking yourself "what evidence is there to support the claim that this person would be good in that position? Is there any counter evidence?" In most cases, a little research is needed. Democracy requires much from its citizens, and one requirement is that we do not simply accept claims on faith.

Of What is *This* an Example?

In politics, as in life, many things are happening all the time. It is easy to get disoriented by the political myriad events that seem to occur in a blur—sort of like watching fence posts whiz by your side window when you're driving on a country road. But the political world is not as complicated as it initially appears, especially if you get in the habit of asking, "Of what is *this* an example?" Events repeat themselves throughout history, although they may manifest themselves differently each time. Is event A behaving like all those other events in that category? If not, what is different about it?

Take something as basic as an election. Elections come and go, and many people see them as individually distinct events that are entirely new each time—new election year, new candidates, new attack ads, new results. But if you analyze them more carefully, elections fall into patterns as well—e.g., elections with an incumbent defending his or her seat versus open-seat elections; elections in good economic times versus elections during economic downturns; elections before the invention of the Internet versus elections since; and elections during presidential years versus mid-term elections.

By first asking ourselves "Of what is *this* an example?" and doing some careful sorting, we can begin to generate interesting research questions, such as "Why is voter turnout so much higher in presidential elections than it is in mid-term elections?"

How Is *This* Related to *That*?

Of course, we are not just concerned with distinct events. We are interested in political, social, and economic relationships in all their multiple dimensions. How is this event related to that one? How is this politician related to that decision? How are underlying characteristics such as gender, race, or class related to key economic or political outcomes? How is low voter turnout related to whether certain issues are discussed, let alone how they are resolved? Often, the answer to our question will be that there is no relationship, or at least that there is insufficient evidence to support the conclusion that there is a relationship. In many other cases, though, we can be confident in our claims about relationships. By asking, "How is *this* related to *that*?" we can open another door in our search for ways in which to make sense of our world.

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CHAPTER OVERVIEW

8: Public Policy

8.1: What Is Public Policy?
8.2: Categorizing Public Policy
8.3: Policy Arenas
8.4: Policymakers
8.5: Budgeting and Tax Policy

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8.1: What Is Public Policy?

When designers engineer a product, like a car, they do so with the intent of satisfying the consumer. But the design of any complicated product must take into account the needs of regulators, transporters, assembly line workers, parts suppliers, and myriad other participants in the manufacture and shipment process. In addition, manufacturers must also be aware that consumer tastes are fickle: A gas-guzzling sports car may appeal to an unmarried twenty-something with no children; but what happens to product satisfaction when gas prices fluctuate, or the individual gets married and has children?

In many ways, the process of designing domestic policy isn't that much different. Just like auto companies, the government needs to ensure that its citizen-consumers have access to an array of goods and services. And just as in auto companies, a wide range of actors is engaged in figuring out how to do it. Sometimes, this process effectively provides policies that benefit citizens. But just as often, policymaking is muddied by the demands of competing interests with different opinions about society's needs or the role that government should play in meeting them. To understand why, we begin by thinking about the meaning of "public policy."

Public Policy Defined

Public policy is a guide to legislative action that is more or less fixed for long periods of time, not just short-term fixes or single legislative acts. Policy also doesn't happen by accident, and it is rarely formed simply as the result of the campaign promises of a single elected official, even the president. While elected officials are often important in shaping policy, most policy outcomes are the result of considerable debate, compromise, and refinement that happen over years and are finalized only after input from multiple institutions within government as well as from interest groups and the public.

Consider the example of health care expansion. A follower of politics in the news media may come away thinking the reforms implemented in 2010 were sudden, having been developed in the final weeks before they were enacted. The reality is that expanding health care access had been a priority of the Democratic Party for several decades. Even before passage of the Affordable Care Act (2010), also referred to as Obamacare, more than 50 percent of all health care expenditures in the United States already came from federal government programs such as Medicare and Medicaid. In addition, much of ACA was drawn from proposals originally developed at the state level, by none other than Obama's 2012 Republican presidential opponent Mitt Romney when he was governor of Massachusetts.[1]

Governments frequently interact with individual actors like citizens, corporations, or other countries. They may even pass highly specialized pieces of legislation, known as private bills, which confer specific privileges on individual entities. But public policy covers only those issues that are of interest to larger segments of society or that directly or indirectly affect society as a whole. Paying off the loans of a specific individual would not be public policy, but creating a process for loan forgiveness available to certain types of borrowers (such as those who provide a public service by becoming teachers) would certainly rise to the level of public policy.

A final important characteristic of public policy is that it is more than just the actions of government; it also includes the behaviors or outcomes that government action creates. Policy can even be made when the government refuses to act in ways that would change the status quo when circumstances or public opinion begin to shift.[2] For example, much of the debate over gun safety policy in the United States has centered on the unwillingness of Congress to act, even in the face of public opinion that supports some changes to gun policy. In fact, one of the last major changes occurred in 2004, when lawmakers' inaction resulted in the expiration of a piece of legislation known as the Federal Assault Weapons Ban (1994).[3]

> **Update:** On June 25, 2022, President Biden signed a new law, ending nearly three decades of gridlock over how to address gun violence in the United States. The bipartisan gun deal includes millions of dollars for mental health, school safety, crisis intervention programs, and incentives for states to include juvenile records in the National Instant Criminal Background Check System. The law does not ban any specific weapons. Source

Public Policy as Outcomes



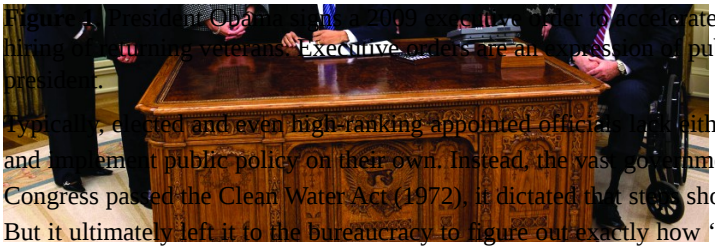


Figure 1. President Obama signs a 2009 executive order to accelerate the federal government's recruitment and hiring programming veterans. Executive orders are an expression of public policy undertaken at the discretion of the president.

Typically, elected and even high-ranking appointed officials lack either the specific expertise or tools needed to successfully create and implement public policy on their own. Instead, the vast government bureaucracy provides policy guidance. For example, when Congress passed the Clean Water Act (1972), it dictated that steps should be taken to improve water quality throughout the country. But it ultimately left it to the bureaucracy to figure out exactly how 'clean' water needed to be. In doing so, Congress provided the Environmental Protection Agency (EPA) with discretion to determine how much pollution is allowed in U.S. waterways.

Policy outcomes can be talked about in terms of winners and losers. Almost by definition, public policy promotes certain types of behavior while punishing others. So, the individuals or corporations that a policy favors are most likely to benefit, or win, whereas those the policy ignores or punishes are likely to lose. Even the best-intended policies can have unintended consequences and may ultimately harm someone. A policy designed to encourage students to go to liberal arts colleges may cause trade school enrollment to decline. Efforts to clean up drinking water supplies may make companies less competitive and cost employees their livelihood. Even something that seems to help everyone, such as promoting charitable giving through tax incentives, runs the risk of lowering tax revenues from the rich (who contribute a greater share of their income to charity) and shifting tax burdens to the poor (who must spend a higher share of their income to achieve a desired standard of living). While policy pronouncements and bureaucratic actions are certainly meant to rationalize policy, it is whether a given policy helps or hurts constituents (or is perceived to do so) that ultimately determines how voters will react toward the government in future elections.

The Social Safety Net



Figure 2. In 1937, during the Great Depression, families in Calipatria, California, waited in line for relief checks, part of the federal government's newly introduced social safety net. (credit: modification of work by the Library of Congress)

During the Great Depression of the 1930s, the United States created a set of policies and programs that constituted a social safety net for the millions who had lost their jobs, their homes, and their savings. Under President Franklin Delano Roosevelt, the federal government began programs like the Work Progress Administration and Civilian Conservation Corps to combat unemployment and the Home Owners' Loan Corporation to refinance Depression-related mortgage debts. As the effects of the Depression eased, the government phased out many of these programs. Other programs, like Social Security or the minimum wage, remain an important part of the way the government takes care of the vulnerable members of its population. The federal government has also added further social support programs, like Medicaid, Medicare, and the Special Supplemental Nutrition Program for Women, Infants, and Children, to ensure a baseline or minimal standard of living for all, even in the direst of times.

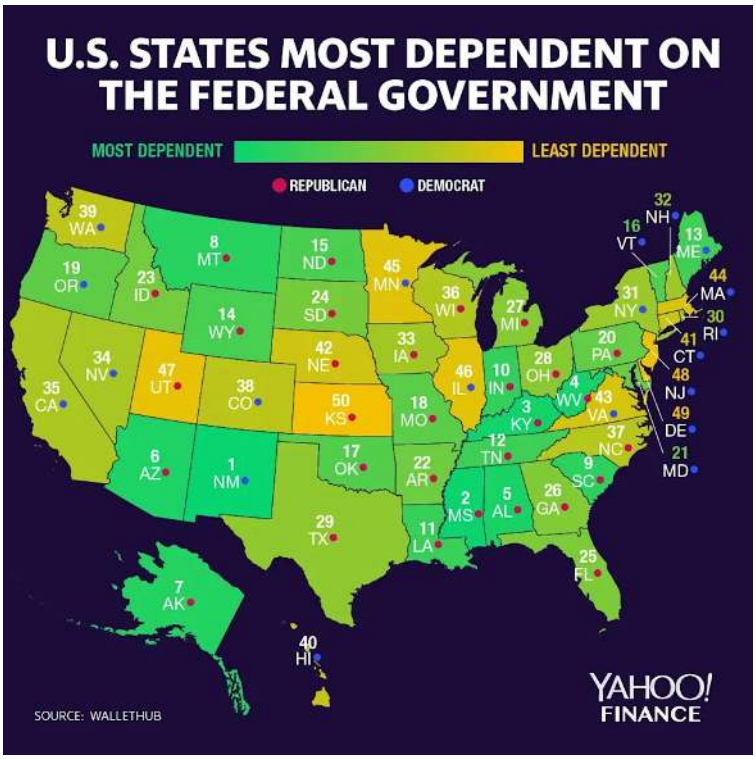
In recent decades, some people have criticized these safety net programs for inefficiency and for incentivizing welfare dependence. Critics deeply resent the use of taxpayer money to relieve social problems like unemployment and poverty; workers who may themselves be struggling to put food on the table or pay the mortgage feel their hard-earned money should not support other families. "If I can get by without government support," the reasoning goes, "those welfare families can do the same. Their poverty is not my problem."

So where should the government draw the line? While there have been some instances of welfare fraud, the welfare reforms of the 1990s have made long-term dependence on the federal government less likely as the welfare safety net was pushed to the states. With the income gap between the richest and the poorest at its highest level in history, this topic is likely to continue to receive much discussion in the coming years.

Special Report: Dependency on the Federal Government

Federal assistance to states came into the spotlight during the coronavirus pandemic, when some states received far more money per case than others from the stimulus packages. However, Americans have looked at federal assistance programs with growing scrutiny for years, and the number of people dependent on government assistance was decreasing prior to the coronavirus crisis. Regardless of overall trends, though, it is clear that some states receive a far higher return on their federal income-tax contributions than others. **To see the 2022 Report, click here.**

The **2019 Results** are shown below.



Link to Learning

Explore historical data on United States budgets and spending from 1940 to the present from the Office of Management and Budget.

Resources

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8.2: Categorizing Public Policy

Among the differences between U.S. liberals and conservatives are the policy preferences prevalent in each group. Modern liberals tend to feel very comfortable with the idea of the government shepherding progressive social and economic reforms, believing that these will lead to outcomes more equitable and fair for all members of society. Conservatives, on the other hand, often find government involvement onerous and overreaching. They feel society would function more efficiently if oversight of most "public" matters were returned to the private sphere. So why do many aspects of society come under the umbrella of public policy to begin with?

Different Types of Goods

Think for a minute about what it takes to make people happy and satisfied. In our daily lives, we experience a range of physical, psychological, and social needs that must be met. At the very least, we require food, water, and shelter. In very basic subsistence societies, people acquire these through farming crops, digging wells, and creating shelter from local materials. People also need social interaction with others and the ability to secure goods they acquire, lest someone else try to take them. As their tastes become more complex, they may find it advantageous to exchange their items for others; this requires not only a mechanism for barter but also a system of transportation. The more complex these systems are, the greater the range of items people can access to keep them alive and make them happy. However, this increase in possessions also creates a stronger need to secure what they have acquired.



Figure 1. This Library of Congress photo shows an early nineteenth-century subsistence farm in West Virginia, which once included crops, livestock, and an orchard. (credit: modification of work by the Library of Congress)

Economists use the term *goods* to describe the range of commodities, services, and systems that help us satisfy our wants or needs., such as the food you eat or the home you live in, as well as the systems of transportation or public safety used to protect them. Most of the goods you interact with are **private goods,** which means that they can be owned by a particular person or group of people, and are excluded from use by others, typically by means of a price. For example, your home or apartment is a private good reserved for your own use because you pay rent or make mortgage payments for the privilege of living there. Further, private goods are finite and can run out if overused, even if only in the short term. The fact that private goods are excludable and finite makes them tradable. A farmer who grows corn owns that corn, and since only a finite amount of corn exists, others may want to trade their goods for it if their own food supplies begin to dwindle.

A **public good** is a commodity or service that is made available to all members of a society. Typically, these services are administered by governments and paid for collectively through taxation. Examples of public goods include law enforcement, national defense, and the rule of law. Unlike private property, they are not excludable and are essentially infinite.

Forests, water, and fisheries are a type of public good called **common goods**, which are not excludable but may be finite. The problem with both public and common goods is that since no one owns them, no one has a financial interest in protecting their long-term or future value. Without government regulation, a factory owner can feel free to pollute the air or water, since he or she will have no responsibility for the pollution once the winds or waves carry it somewhere else. Likewise, someone can hunt all the migratory birds or deplete a fishery by taking all the fish, eliminating future breeding stocks that would maintain the population.

The situation in which individuals exhaust a common resource by acting in their own immediate self-interest is called the *tragedy of the commons*.

How do we trade these goods? Proponents of **free-market economics** believe that the market forces of supply and demand, working without any government involvement, are the most effective way for markets to operate. There are two general basic principles of this type of economics

- just about any good that can be privatized, the most efficient means for exchange in the marketplace. People facilitate trade by creating a currency—a common unit of exchange—so they do not need to carry around everything they may want to trade at all times. As long as there are several providers or sellers of the same good, consumers can negotiate to find a price they are willing to pay. Likewise, providers can negotiate to find a price buyers are willing to accept. If prices begin to rise too much, other sellers will enter the marketplace, offering lower prices.
- it is largely unnecessary for the government to protect the value of private goods. Farmers who own land used for growing food have a vested interest in protecting their land to ensure its continued production. Business owners must protect the reputation of their business or no one will buy from them. In short, industries have an interest in self-regulating to protect their own value. According to free-market economics, as long as everything we could ever want or need is a private good, and so long as every member of society has some ability to provide for themselves and their families, public policy regulating the exchange of goods and services is really unnecessary.



Figure 2. Air pollution billows from a power plant before the installation of emission control equipment for the removal of sulfur dioxide and particulate matter. Can you see why uncontrolled pollution is an example of the “tragedy of the commons”?

Classic Types of Policy

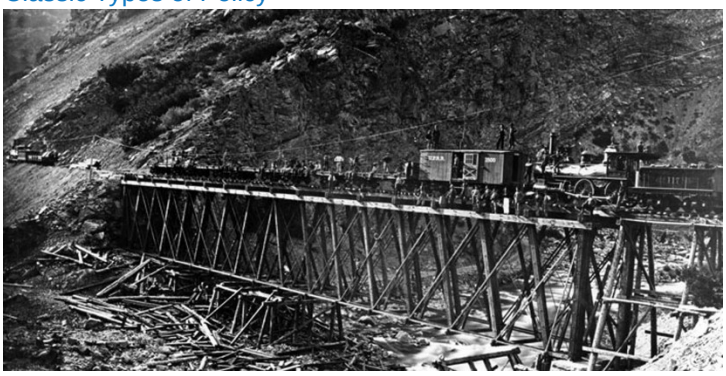


Figure 3. In an example of distributive policy, the Union Pacific Railroad was given land and resources to help build a national railroad system. Here, its workers construct the Devil’s Gate Bridge in Utah in 1869.

Public policy ultimately boils down to determining the distribution, allocation, and enjoyment of public, common, and toll goods within a society. While the specifics of policy often depend on the circumstances, two broad questions all policymakers must consider are

- who pays the costs of creating and maintaining the goods
- who receives the benefits of the goods

When private goods are bought and sold in a marketplace, the costs and benefits go to the participants in the transaction. Your landlord benefits from receipt of the rent you pay, and you benefit by having a place to live. But non-private goods like roads, waterways, and national parks are controlled and regulated by someone other than the owners, allowing policymakers to make decisions about who pays and who benefits.

There are three primary ways to categorize policies:

- **Distributive policy** tends to collect payments or resources from many but concentrates direct benefits on relatively few. Highways are an example. This policy is common when society feels there is a social benefit to individuals obtaining private goods such as higher education that offer long-term benefits, but the upfront cost may be too high for the average citizen.
- **Regulatory policy** concentrates costs and diffuses benefits. In other words, a relatively small number of groups or individuals bear the costs of regulatory policy, but its benefits are expected to be distributed broadly across society. This policy is most effective for controlling or protecting public or common resources. Among the best-known examples are policies designed to protect public health and safety, and the environment. These regulatory policies prevent manufacturers or businesses from maximizing their profits by excessively polluting the air or water, selling products they know to be harmful, or compromising the health of their employees during production.
- **Redistributive policy** redistributes resources in society from one group to another. Most redistributive policies are intended to have a sort of “Robin Hood” effect; their goal is to transfer income and wealth from one group to another such that everyone enjoys at least a minimal standard of living. Typically, the wealthy and middle class pay into the federal tax base, which then funds need-based programs that support low-income individuals and families. A few examples of redistributive policies are Head Start (education), Medicaid (health care), Temporary Assistance for Needy Families (TANF, income support), and food programs like the Supplementary Nutritional Aid Program (SNAP). The government also uses redistribution to incentivize specific behaviors or aid small groups of people. Pell grants to encourage college attendance and tax credits to encourage home ownership are other examples of redistribution.

Think it over

- Of the types of goods introduced in this section, which do you feel is the most important to the public generally and why? Which public policies are most important and why?

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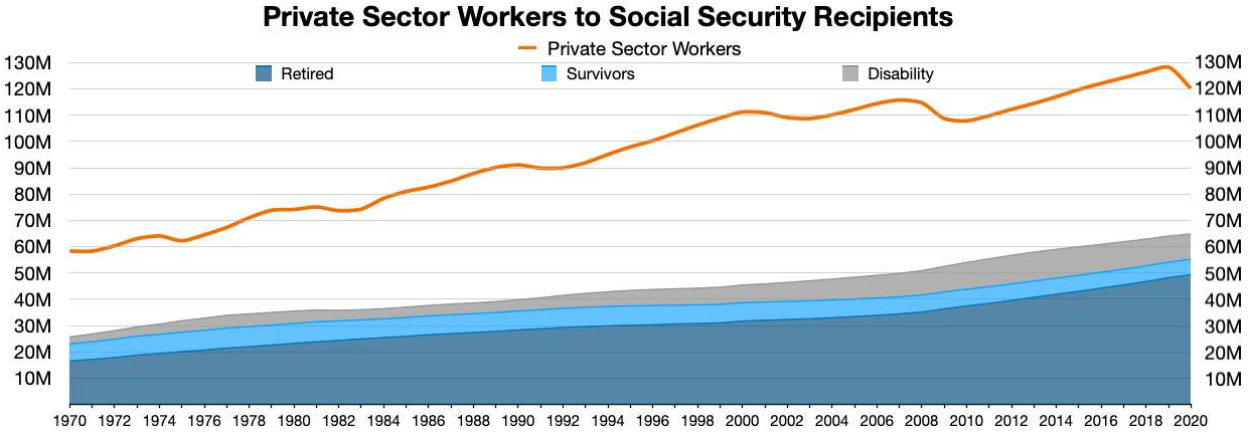
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8.3: Policy Arenas

Social Welfare Policy

Social welfare policy is designed to ensure some level of equity in a democratic political system based on competitive, free-market economics. It also creates an automatic stimulus for a society by building a **safety net** that can catch members of society who are suffering economic hardship through no fault of their own. For an individual family, this safety net makes the difference between eating and starving. For an entire economy, it could prevent an economic recession from sliding into a broader and more damaging depression.

One of the oldest and largest pieces of social welfare policy is **Social Security.** Employers and workers pay a portion of their paycheck to this fund. (In 2022, the rate was 6.20%.)



Source: Wikipedia

- Retirement benefit--After completing a minimum number of years of work, U.S. workers may claim a form of pension upon reaching retirement age. Often called an **entitlement** program it guarantees benefits to a particular group, and virtually everyone will eventually qualify for the plan given the relatively low requirements for enrollment. In 2022, the full retirement age was 66 if you were born from 1943 to 1954. The full retirement age increased gradually if you were born from 1955 to 1960. For anyone born 1960 or later, full retirement benefits were payable at age 67. A valuable added benefit is that, under certain circumstances, social security may also be claimed by the survivors of qualifying workers, such as spouses and minor children, even if they themselves did not have a wage income.
- Disability payout--The government distributes funds to workers who become unable to work due to physical or mental disability. To qualify, workers must demonstrate that the injury or incapacitation will last at least twelve months.
- Supplemental Security Income--This program provides supplemental income to adults or children with considerable disability or to the elderly who fall below an income threshold.

Many economists predict that due to slower population growth and an aging population, the amount of revenue generated from payroll taxes will no longer be sufficient to cover costs in 2033.

Two other programs are designed to provide cash payments to sustain the aged and disabled.

- Also an entitlement program, **Medicare** is intended to ensure that senior citizens and retirees have access to low-cost health care they might not otherwise have. Medicare provides three major forms of coverage: a guaranteed insurance benefit that helps cover major hospitalization, fee-based supplemental coverage that retirees can use to lower costs for doctor visits and other health expenses, and a prescription drug benefit. Medicare faces many of the same long-term challenges as Social Security, due to the same demographic shifts. In addition, health care costs are rising significantly faster than inflation.
- **Medicaid** is a formula-based, health insurance program, which means beneficiaries must demonstrate they fall within a particular income category. Individuals in this program receive a fairly comprehensive set of health benefits, although access to health care may be limited because fewer providers accept payments from the program.



Science, Technology, and Education

After World War II ended, the United States quickly realized that it had to address two problems to secure its fiscal and national security future: how to reintegrated millions of servicemen and women into the workforce, and how to rapidly develop a new, highly technical military-industrial complex to compete with the Soviet Union. To confront these challenges, the U.S. government passed several important pieces of legislation to provide education assistance to workers and research dollars to the industry. Many of these programs have evolved from their original purposes, but they still remain important pieces of the public policy debate.

Much of the nation’s science and technology policy benefits its military in the form of research and development funding for a range of defense projects. The federal government still promotes research for civilian uses, mostly through the National Science Foundation, the National Institutes of Health, the National Aeronautics and Space Administration (NASA), and the National Oceanic and Atmospheric Administration. Some politicians debate whether government funding is necessary or if private entities would be better suited. For example, although NASA continues to develop a replacement for the now-defunct U.S. space shuttle program, much of its workload is currently being performed by private companies working to develop their own space launch, resupply, and tourism programs.



Figure 3. NASA launches the space shuttle Discovery from the Kennedy Space Center in 2007. Should the private sector fund space exploration programs rather than the government? (credit: NASA)

Historically, education has largely been the job of the states. As such, the national government has never moved to create an equivalent system of national higher education academies or universities as many other countries have done. The overwhelming portion of federal education money is spent on student loans, grants, and work-study programs. In addition, resources are set aside to cover job-retraining programs for individuals who lack private-sector skills or who need to be retrained to meet changes in the economy's demands for the labor force. National policy toward elementary and secondary education programs has typically focused on increasing resources available to school districts for nontraditional programs (such as preschool and special needs), or helping poorer schools stay competitive with wealthier institutions.

Business Stimulus and Regulation

A final key aspect of domestic policy is the growth and regulation of business. The size and strength of the economy is very important to politicians whose jobs depend on citizens' belief in their own future prosperity. At the same time, people want to live in a world where they feel safe from unfair or environmentally damaging business practices. These desires have forced the government to perform a delicate balancing act between programs that help grow the economy by providing benefits to the business sector and those that protect consumers, often by curtailing or regulating the business sector.

Two of the largest recipients of government aid are agriculture and energy. Both are multi-billion dollar industries concentrated in rural and/or electorally influential states. The U.S. government has chosen to provide significant agriculture and energy subsidies to cover the risks inherent in the unpredictability of the weather and oil exploration. These costs are typically seen in groceries bills, such as lower milk prices. Government subsidies also protect these industries' profitability.

When it comes to regulation, the federal government has created several agencies responsible for providing for everything from worker safety (OSHA, the Occupational Safety and Health Administration), to food safety (FDA), to consumer protection, where the recently created Bureau of Consumer Protection ensures that businesses do not mislead consumers with deceptive or manipulative practices. Another prominent federal agency, the EPA, is charged with ensuring that businesses do not excessively pollute the nation's air or waterways. A complex array of additional regulatory agencies governs specific industries such as banking and finance, which are detailed later in this chapter.

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8.4: Policymakers

People love to debate issues in the United States. A quick Google search will return a plethora of topics that people can argue over. When it comes to policy making, there are two primary groups: policy advocates and policy analysts.

Policy Advocates

Take a minute to think of a policy change you believe would improve some conditions in the United States. Now ask yourself this: "Why do I want to change this policy?" Are you motivated by a desire for justice? Do you feel the policy change would improve your life or that of members of your community? Is your sense of morality motivating you to change the status quo? Would your profession be helped? Do you feel that changing the policy might raise your status?

Most people have some policy position or issue they would like to see altered. Most people do little more than vote or occasionally contribute to a political campaign. A few people become **policy advocates** by actively working to propose or maintain a public policy.



Figure 1. In 2010, members of PETA (People for the Ethical Treatment of Animals) demonstrate against a local zoo. As policy advocates, PETA's members often publicize their position on how animals should be treated.

Policy advocates hold a normative position on an issue, that is, they have a conviction about what should or ought to be done. In their view, the best public policy accomplishes a specific goal or outcome. Facts, evidence, and analysis are important tools for convincing policymakers or the general public of the benefits of their proposals. Private citizens often find themselves in advocacy positions, particularly if they are required to take on leadership roles in their private lives or in their organizations. The most effective advocates are usually hired professionals who form lobbying groups or think tanks to promote their agenda.

Policy Analysts

Rather than starting with what ought to happen and seeking ways to make it so, **policy analysts** try to identify all the possible choices available to a decision maker and then gauge their impacts if implemented. In other words, the goal of the analyst is to make sure decision makers are fully informed about the implications of the decisions they do make.

Understanding the financial and other costs and benefits of policy choices requires analysts to make strategic guesses about how the public and governmental actors will respond. For example, when policymakers are considering changes to health care policy, one very important question is how many people will participate. If very few people had chosen to take advantage of the new health care plans available under the Affordable Care Act (ACA) marketplace, it would have been significantly cheaper than advocates proposed, but it also would have failed to accomplish the key goal of increasing the number of insured. If all states had chosen to create their own marketplaces, the cost and complexity of ACA's implementation would have been greatly reduced.

Because advocates have an incentive to understate costs and overstate benefits, policy analysis tends to be a highly politicized aspect of government. Most businesses or trade organizations employ their own policy-analysis wings to help them understand proposed changes or even offer some of their own. Some of these try to be as impartial as possible. Most groups have a known bias toward policy advocacy. The Cato Institute is well known and highly respected policy analysis group that both liberal and conservative politicians have turned to when considering policy options. But the Cato Institute has a known libertarian bias; most of the problems it selects for analysis have the potential for private sector solutions. This means its analysts tend to include the rosiest assumptions of economic growth when considering tax cuts and overestimate the costs of public sector proposals.

Government Agencies

The RAND Corporation has conducted objective policy analysis for corporate, nonprofit, and government clients since the mid-twentieth century. What are some of the policy areas it has explored?

Both Congress and the president have tried to reduce the bias in policy analysis by creating their own theoretically nonpartisan policy branches. Authorized in the 1974 Congressional Budget and Impoundment Control Act, the Congressional Budget Office (CBO) was formally created in 1975 as a way of increasing Congress's independence from the executive branch. The CBO is responsible for scoring the spending or revenue impact of all proposed legislation to assess its net effect on the budget. In recent years, it has been the CBO's responsibility to provide Congress with guidance on how to best balance the budget. The formulas that the CBO uses in scoring the budget have become an important part of the policy debate, even as the group has tried to maintain its nonpartisan nature.

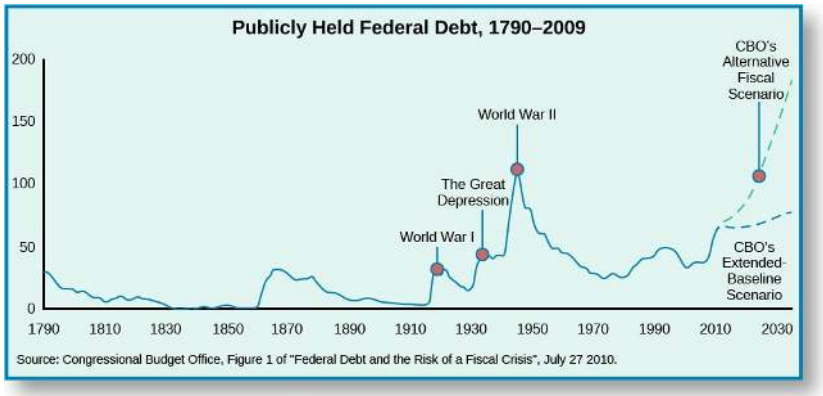


Figure 3. The Congressional Budget Office (CBO) is responsible for studying the impact of all proposed legislation to assess its net effect on the budget and tracking federal debt. For example, this 2010 CBO chart shows federal debt held by the public as a percentage of gross domestic product from 1790 through 2010 and projected to 2035. **NOTE:** These predictions occurred before the Covid-19 Pandemic. How do you think the graph might have changed?

In the executive branch, each individual department and agency is technically responsible for its own policy analysis. It's assumed that experts in the Federal Communications Commission or the Federal Elections Commission are best equipped to evaluate the impact of various proposals within their policy domain. Law requires that most regulatory changes made by the federal government also include the opportunity for public input so the government can both gauge public opinion and seek outside perspectives.

Executive branch agencies are usually also charged with considering the economic impact of regulatory action, although some agencies have been better at this than others. Critics have frequently singled out the EPA and OSHA for failing to adequately consider the impact of new rules on business. Within the White House itself, the Office of Management and Budget (OMB) was created to "serve the President of the United States in implementing his [or her] vision" of policy. Policy analysis is important to the OMB's function, but as you can imagine, it frequently compromises its objectivity during policy formulation.

THE POLICY PROCESS

Given the sheer number of issues already processed by the government, it is typically quite difficult to move a new policy all the way through the policy process. To do required four sequential stages:

- agenda setting consists of two parts:
  - problem identification identifies the issues that merit discussion. Not all issues make it onto the governmental agenda because there is only so much attention that government can pay. Thus, it's important to frame the issue in a compelling way that raises a persuasive dimension or critical need.
  - alternative specification considers solutions to fix the difficulty raised in problem identification. For example, government officials may agree that the increase in childhood obesity presents a societal problem worthy of government attention.
- policy enactment is when the elected branches of government typically consider one specific solution to a problem and decide whether to pass it. This stage is the most visible one and usually garners the most press coverage. And yet it is somewhat anticlimatic. By the time a specific policy proposal (a solution) comes out of agenda setting for a yes/no vote, it can be something of a foregone conclusion that it will pass.
- policy implementation can occur in one of two ways
  - **top-down implementation**, the federal government dictates the specifics of the policy, and each state implements it the same exact way
  - **bottom-up implementation**, the federal government allows local areas some flexibility to meet their specific challenges and needs.
- evaluation should be tied directly to the policy's desired outcomes. This step asks "How well did this policy do what we designed it to do?"

Think About It

- In the implementation phase of the policy process, is it better to use a top-down approach or a bottom-up approach on Federal policies? Why?

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8.5: Budgeting and Tax Policy

A country spends, raises, and regulates money in accordance with its values. The federal government's budget for 2022 was $6.011 trillion. The role of politics in drafting the annual budget is indeed large. In addition, policymakers make considerable effort to ensure that long-term priorities are protected from the heat of the election cycle and short-term changes in public opinion. The decision to put some policymaking functions out of the reach of Congress also reflects economic philosophies about the best ways to grow, stimulate, and maintain the economy.

Approaches to the Economy

Until the 1930s, most policy advocates argued that the best way for the government to interact with the economy was through a hands-off approach formally known as ***laissez-faire*** economics. Proponents thought private investors were better equipped than governments to figure out which sectors of the economy were most likely to grow and which new products were most likely to be successful. They also tended to oppose government efforts to establish quality controls or health and safety standards, believing consumers themselves would punish bad behavior by not trading with poor corporate citizens. Finally, laissez-faire proponents felt that keeping government out of the business of business would create an automatic cycle of economic growth and contraction. (Contraction phases in which there is no economic growth for two consecutive quarters, called **recessions**, brings business failures and higher unemployment.)

The Great Depression challenged the laissez-faire view. When President Franklin Roosevelt came to office in 1933, the United States had already been in the depths of the Great Depression for several years, since the stock market crash of 1929. Roosevelt sought to implement a new approach to economic regulation known as Keynesianism. Developed by economist John Maynard Keynes, **Keynesian economics** argues that it is possible for a recession to become so deep, and last for so long, that the typical models of economic collapse and recovery may not work. Keynes suggested that economic growth was closely tied to the ability of individuals to consume goods. It didn't matter how or where investors wanted to invest their money if no one could afford to buy the products they wanted to make. And in periods of extremely high unemployment, wages for newly hired labor would be so low that new workers would be unable to afford the products they produced.

Keynesianism counters this problem by increasing government spending in ways that improve consumption. Some of the proposals Keynes suggested were payments or pension for the unemployed and retired, as well as tax incentives to encourage consumption in the middle class. His reasoning was that these individuals would be most likely to spend the money they received by purchasing more goods, which in turn would encourage production and investment. Keynes argued that the wealthy class of producers and employers had sufficient capital to meet the increased demand of consumers that government incentives would stimulate. Once consumption had increased and capital was flowing again, the government would reduce or eliminate its economic stimulus, and any money it had borrowed to create it could be repaid from higher tax revenues.

Keynesianism dominated U.S. fiscal or spending policy for roughly 40 years. By the 1970s, however, high inflation began to slow economic growth primarily due to higher oil prices and the costs of fighting the Vietnam War. However, some economists, such as Arthur Laffer, began to argue that the social welfare and high tax policies created in the name of Keynesianism were overstimulating the economy, creating a situation in which demand for products had outstripped investors' willingness to increase production.[1] This new approach was titled **supply-side economics**. Supply-siders have argued that increased regulation and higher taxes reduce the incentive to invest new money into the economy, to the point where little growth can occur. In addition, they have advocated reducing taxes and regulations to spur economic growth.

Mandatory Spending vs. Discretionary Spending

The Keynesian goal to create a minimal level of aggregate demand, coupled with a Depression-era preference to promote social welfare policy, led the president and Congress to develop a federal budget with two broad spending categories: mandatory and discretionary.

- **Mandatory spending** is the larger category. In 2022, Mandatory spending is estimated to be $4.018 trillion, and includes entitlement programs such as Social Security, Medicare, and unemployment compensation. It also includes welfare programs such as Medicaid. Keynesians support mandatory spending, along with other elements of social welfare policy, because they help maintain a minimal level of consumption that should, in theory, prevent recessions from turning into depressions, which are more severe downturns.
- **Discretionary spending** is the funds allocated by Congress to cover the administrative expenses of executive branch agencies, congressional offices and agencies, and international operations of the government.It also covers science and technology spending, foreign affairs initiatives, education spending, federally provided transportation costs, and many of the redistributive benefits most people in the United States have come to take for granted. Defense spending is also a part of this category.

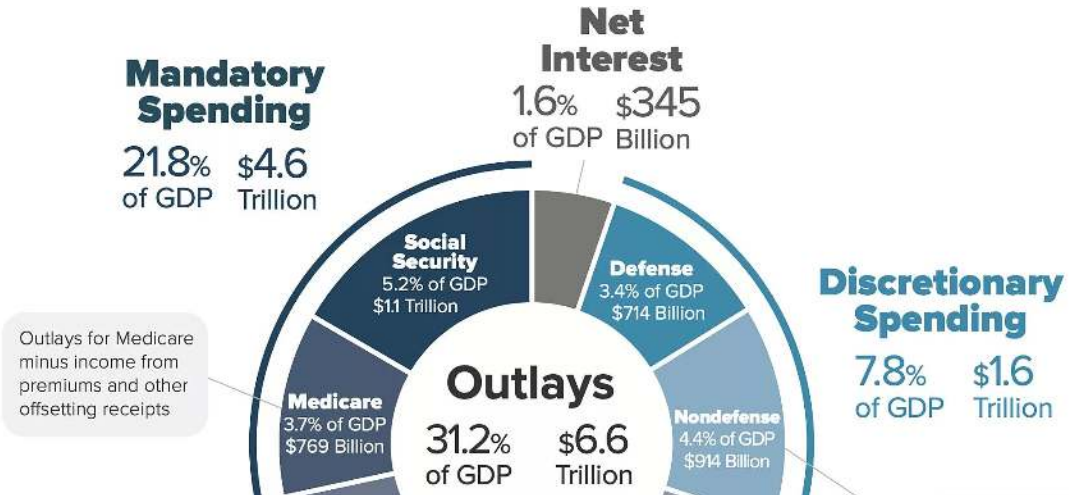


Figure 2. This graphic of the U.S. Government Spending 2020 was developed by the *Congressional Budget Office*.

Balancing the budget has been a major goal of both the Republican and Democratic parties for the past several decades, although the parties tend to disagree on the best way to accomplish the task. One frequently offered solution, particularly among supply-side advocates, is to simply cut spending. This has proven to be much easier said than done. If Congress were to try to balance the budget only through discretionary spending, it would need to cut about one-third of spending on programs like defense, higher education, agriculture, police enforcement, transportation, and general government operations. Given the number and popularity of many of these programs, it is difficult to imagine this would be possible. To use spending cuts alone as a way to control the deficit, Congress will almost certainly be required to cut or control the costs of mandatory spending programs like Social Security and Medicare—a radically unpopular step.

Tax Policy

Balancing the budget might be possible through increase revenue. The most common way is by applying some sort of tax on residents (or on their behaviors) in exchange for the benefits the government provides. Taxation comes with potential downfalls. First, the more money the government collects to cover its costs, the less residents are left with to spend and invest. Second, attempts to raise revenues through taxation may alter the behavior of residents in ways that are counterproductive to the state and the broader economy. Excessively taxing necessary and desirable behaviors like consumption (with a sales tax) or investment (with a capital gains tax) will discourage citizens from engaging in them, potentially slowing economic growth. The goal of tax policy is to determine the most effective way of meeting the nation's revenue obligations without harming other public policy goals.



Figure 4. A U.S. marine fills out an income tax form. Income taxes in the United States are progressive taxes.

Two prominent tax systems have been suggested and/or implemented:

- Keynesians prefer **progressive taxes** systems that increase the effective tax rate as the taxpayer's income increases. This policy leaves those most likely to spend their money with more money to spend. For example, in 2015, U.S. taxpayers paid a 10 percent tax rate on the first $18,450 of income, but 15 percent on the next $56,450 (some income is excluded).[5] The rate continues to rise, to up to 39.6 percent on any taxable income over $464,850. The top income earners pay a greater portion of the overall income tax burden than do those at the lowest tax brackets.
- Supply-siders prefer **regressive tax** systems, which lower the overall rate as individuals make more money. This action does not automatically mean the wealthy pay less than the poor, rather the percentage of their income they pay in taxes will be lower. The use of **excise taxes** or 'sin taxes' on specific goods or services such as alcohol, tobacco, and gasoline have a regressive quality, since the amount of the good purchased by the consumer, and thus the tax paid, does not increase at the same rate as income. The payroll tax that funds Social Security is another example. In 2015, only people making less than $118,500 were taxed at 7.65% for Social Security. Then, the overall tax rate fell as their income increased.

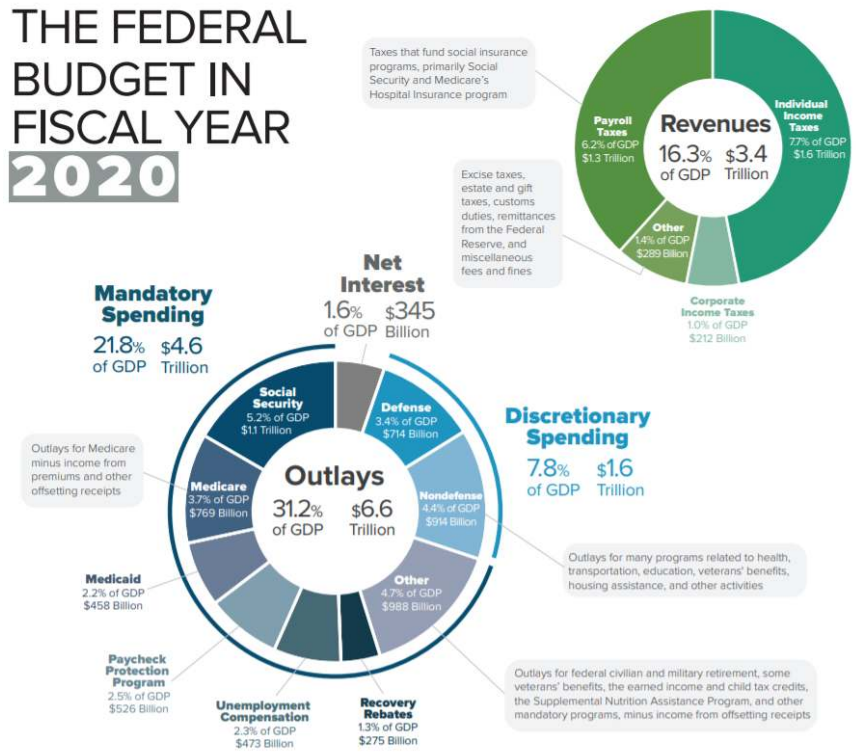


Figure 6. This image show the Outlays and the Revenue for 2020.

The Federal Reserve Board and Interest Rates

The 1913 Federal Reserve Act **created the Federal Reserve System, known simply as "The Fed."** It was implemented to establish economic stability in the U.S. by introducing a central bank to oversee monetary policy. The Fed's three original goals to promote were maximum employment, stable prices, and moderate long-term interest rates. All of these goals bring stability. Today, the Fed influenced monetary policy (the means by which the nation controls the size and growth of the money supply), supervises and regulates banks, and provides them with financial services like loans.

The Federal Reserve System is overseen by a board of governors, known as the Federal Reserve Board. The U.S. president appoints seven governors, each of whom serves a fourteen-year term (the terms are staggered). A chair and vice-chair lead the board for terms of four years each. The most important work of the board is participating in the Federal Open Market Committee to set monetary policy, like interest rate levels and macroeconomic policy. It also oversees a network of twelve regional Federal Reserve Banks, each of which serves as a "banker's bank" for the country's financial institutions.

The Role of the Federal Reserve Chair

If you have read or watched the news for the past several years, perhaps you have heard the names Janet Yellen, Ben Bernanke, or Alan Greenspan. These people have all served as the board of governors of the Federal Reserve System By raising or lowering banks' interest rates, the chair has the ability to reduce inflation or stimulate growth. The Fed's dual mandate is to keep inflation low (under 2 percent) and unemployment low (below 5 percent), but efforts to meet these goals can often lead to contradictory monetary policies.



(a) (b)

Figure 8. Economist Alan Greenspan (a) was chair of the board of governors of the Federal Reserve System from 1987 to 2006, the second-longest tenure of any chair. Janet Yellen (b) succeeded Ben Bernanke as chair in 2014, after serving as vice chair for four years. Prior to

serving on the Federal Reserve Board, Yellen was president and CEO of the Federal Reserve Bank of San Francisco. She was succeeded by Jerome Powell in February 2018.

Many of the economic events of the past five decades, both good and bad, are the results of Fed policies. In the 1970s, double-digit inflation brought the economy almost to a halt. When Paul Volcker became chair in 1979, he raised interest rates and jump-started the economy. After the stock market crash of 1987, then-chair Alan Greenspan declared, “The Federal Reserve, consistent with its responsibilities as the nation’s central bank, affirmed today its readiness to…support the economic and financial system.”[2] His lowering of interest rates led to an unprecedented decade of economic growth through the 1990s. In the 2000s, consistently low interest rates and readily available credit contributed to the sub-prime mortgage boom and subsequent bust, which led to a global economic recession beginning in 2008.

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CHAPTER OVERVIEW

9: Political Participation

9.1: What Do Political Parties Do?
9.2: The Historical Development of U.S. Political Parties
9.3: Policy Preferences of U.S. Political Parties
9.4: Why Do We Have a Two-Party System?
9.5: Campaign Finance
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9.1: What Do Political Parties Do?

"I was no party man myself, and the first wish of my heart was, if parties did exist, to reconcile them."

–George Washington [1]

The Theoretical Context of Political Parties

In 1950, a committee of the American Political Science Association (APSA) published a set of proposals to strengthen political parties in the United States. It rested on the assumption—explicitly stated—of what is known as a **theory of responsible party government**. This theory indicates that public preferences are translated into governing policy and that there is a continual process for the public to hold those policy-makers accountable when their wishes are not followed. How is this to be accomplished? Most political scientists recognize that political parties play a vital role in this mechanism. Thus, **the primary goal of a political party** is to determine government policies by having its candidates win elections and become decision makers. The APSA committee report summed up the mechanism this way: "An effective party system requires, first, that the parties are able to bring forth programs to which they commit themselves and, second, that the parties possess sufficient internal cohesion to carry out these programs." [2]

Responsible party government needs parties that develop a **political program**, which is a set of policies on the variety of issues facing the country. This program should be prominent and well-publicized, because the theory suggests that voters are rational creatures who vote for the party that best advances their interests. Voters can't do that if the parties are unclear about their political program. The party also has to be strong enough to carry out the program once it is in power. In other words, the party has to be able to control its own politicians sufficiently to guarantee that the program will be translated into bills that can pass the legislature and become policy. When parties have sufficient power and coherence to translate political programs into policy, voters can easily see which party is responsible for what policies—and this is essential information as they head into the voting booths at the next election. They will reward the politicians from the party they support and punish the politicians from the party they oppose.

The theory of responsible government runs into two important limitations. The first is

- **divided government**, which refers to the state of affairs in U.S. politics where the national-level political institutions are controlled by different parties at the same time. For example, the Republicans might control the White House and the Senate, but the Democrats have a majority in the House of Representatives. Or a Democrat might be president, but the Senate and House are controlled by Republicans. Since the early 1970's, divided government has been the norm. Typically, divided government refers to the elected institutions. However, control of the Supreme Court control is a goal for both political parties. The current conservative Court majority means that Democratic victories in congressional and presidential elections can be countered by the life appointments of six conservative justices. What does this mean for responsible party government? Divided government makes it very difficult for U.S. political parties to translate their political programs into public policy. Stalemate frustrates voters' ability to clearly reward one party and punish the other because it's so difficult to know why nothing seems to get done in Washington.
- the twin assumptions that voters are knowledgeable and rational. Voters need to understand U.S. history and current public policy choices, which includes fairly complicated things like what a single-payer healthcare system actually entails, how international trade works, how corporate governance is structured, how federal tax brackets and marginal tax rates operate, the complexities of sex and gender, and so forth. There's a great deal to know! Beyond that, voters need to be rational enough to match their interests to the political party system—i.e., which political party best represents my mix of interests? Voters actually display what is known as **bounded rationality**, meaning that voters are not fully rational due to the complexity of the decisions they have to reach, their own cognitive limitations, and the limited time and resources they have to devote to understanding politics. [4] Absent full knowledge, voters' ability to actually process all the needed information, and in the time needed to do so, results in rational decision-making short cuts.

Here is the basic dilemma at the heart of politics: We *want* politics to operate on a rational basis in which parties put forward political programs that compete in a marketplace of ideas, and we *want* voters to carefully weigh those programs to reach rational decisions about which party to support. But we *know* that people are, in the words of political scientist Christopher Achen, "doing the best they can. They just don't have a lot of information, and so they substitute guesses and views of the world that make them feel comfortable." [5] This, then, is the context in which political parties operate.

What Do Political Parties Do?

Political parties want to have their candidates win elections so they can become the decision-makers who implement public policy. With this in mind, it's fair to say that political parties perform three basic functions.



Representative Alexandria Ocasio-Cortez

Recruit political candidates—The leaders of state and national party organizations use their networking skills to recruit potential candidates for local, state, and federal offices. There is no "perfect" candidate. However, there are several **characteristics of attractive candidates**. Name recognition is important, so parties try to recruit people who are already in office to run for higher office, prominent business leaders, or people who have been active in the community. Access to money is another important characteristic, meaning candidates who can partially self-fund their campaigns or who have a plethora of connections to people who are in a position to donate to the campaign. Parties also look for candidates with a particularly appealing biography, which might include anything from being a combat veteran to being a successful entrepreneur. Candidates who get recruited by party leaders still have to face the primary or caucus nominating process.

Attempt to win elections—Political parties support their candidates in the election by engaging in four main activities.

- **political advertising**, which can involve everything from yard signs to YouTube ads, from radio spots to micro-targeted messages on social media
- **voter registration drives** by helping people from specific neighborhoods or from specific demographic groups register to vote
- **voter turnout efforts**, meaning that they make sure as many of their partisans as possible actually vote in the election. This action may entail organizing party workers to contact potential voters directly or to drive people to the polling stations
- **provide candidates with expertise and data** by working with consultants and making mailing lists and past election results available to them

Organize governance and opposition—Once elected, a party's candidates organize themselves into party groupings—in Congress or the state legislature. They elect their own leadership and meet as a group to plan their legislative strategies. They may also discipline party members who don't vote with the group, although U.S. parties are not known for engaging in that kind of discipline too often.

Party Organization

Party organization in the United States reflects the federal nature of our political system. That is, parties exist on the national, state, and local levels. If we look at parties from the top down, **national committees** conduct the party's business in between the quadrennial national conventions and are composed of prominent members of each state's party organizations. The Democratic National Committee's membership and structure are a bit more complicated than that of the Republican National Committee. Each national committee has a chairperson and a variety of other leadership posts. If the party in question has elected the President of the United States, the president typically selects the party chairperson, although the national committee officially votes him or her into the chair. He or she is responsible for the party's vitality, its fundraising, outreach, voter registration efforts, and articulating the **party platform**, which is adopted at the national convention. The platform lays out the party's position on various issues of the day.

Also, at the national level are the **Hill committees**—referring to Capitol Hill in Washington, D.C. In the House of Representatives, there are the Republican and Democratic Congressional Committees, composed of each party's various Representatives. In the

Senate, there are the Republican and Democratic senatorial committees, composed of each party's U.S. Senators. While Hill committees have been in existence for many years, the increase in congressional partisanship has elevated their importance. According to Political Scientist Sandy Maisel, "Their role has increased dramatically. Not only do they raise money for candidates, but they play critical roles in setting national campaign priorities." (6)

The larger parties have a **state organization** in each of the fifty states. State party organizations have become more institutionalized, professional organizations in the last several decades. Still, state and local parties rely on countless volunteers to get their work done. Often, state party organizations will offer a few paid positions—like an executive director—who organizes volunteers to work in capacities from treasurer to secretary, from recruitment chair to various caucus chairs. State parties provide the same help to state candidates that national parties do to federal candidates. Indeed, state party organizations "are increasingly becoming service agencies for candidates." (7)

Parties also have local units. For a time, urban political machines were key power centers in U.S. politics, particularly for the Democratic Party. The machine built by Democrat Richard Daley helped him rule Chicago from 1955 to 1976. There are still vestiges of the Daley machine in Chicago and Democratic machines in other urban areas. Across the country, power has shifted from the local level up to state party organizations. Why? In many places, it was simply more efficient to locate party centers at the state level. Reforms that instituted merit systems for hiring city workers undercut the urban machine's ability to use such jobs as patronage rewards. Government-run social welfare programs took away a mechanism for parties to use handouts to cultivate support among poor voters. And regulations requiring fair processes for awarding contracts largely eliminated the machine's ability to use those city contracts to garner key supporters.

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9.2: The Historical Development of U.S. Political Parties

"Americans want a politics they don't have to hate. And therein lies our hope: Democracies are uniquely open to change, and if citizens want politicians to move beyond false choices, it is in their power to demand it."

–E. J. Dionne, Jr. [1]

In his farewell address, President George Washington warned against political parties, particularly those based on geographic loyalties. He went on to say that partisanship "serves always to distract the public councils and enfeeble the public administration. It agitates the community with ill-founded jealousies and false alarms; kindles the animosity of one part against another; foments occasionally riot and insurrection. It opens the door to foreign influence and corruption, which finds a facilitated access to the government itself through the channels of party passion." [2] Nevertheless, political parties became entrenched in the political system.

Beginnings of the Party System

Party struggles really began within the Washington administration. Two predominate parties emerged, the Federalists and Democratic-Republicans. The Federalists initially had the upper hand in early party competition, selecting John Adams to replace Washington in 1797. But the Democratic-Republicans came charging back with Jefferson's two-term administration beginning in 1801, James Madison's two terms, and James Monroe's two terms ending in 1825. The Federalists quickly faded from the scene.

First Political Parties

Federalists	Democratic Republicans
• led by Alexander Hamilton	• led by Thomas Jefferson
• strong central government led by industry and the wealthy	• strong state governments led by the "common man"
• emphasis on manufacturing, shipping, and trade	• emphasis on agriculture "Cultivators of the earth are the most valuable citizens." – Thomas Jefferson
• loose interpretation of the Constitution	• strict interpretation of the Constitution
• favored the national bank	• opposed the national bank
• favored protective tariffs	• opposed protective tariffs
• pro-British	• pro-French

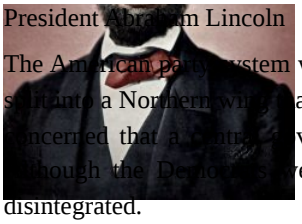
Source: UShistoryvocab

Democrats and Whigs in the Antebellum Period

With the Federalists fading, the Democratic-Republicans were the only game in town. Soon, disagreements arose and the party split into two groups: **Democrats**, which have continued to the present day, and the National Republicans, which then became the **Whig Party** that eventually dissolved over slavery in the 1850s. It was the Whigs, not the Democrats, who believed in using the central government's power to make "internal improvements" to the country such as roads and canals. The Democrats were the party of the "common man," which is still its reputation.

The Civil War Crisis




President Abraham Lincoln

The American party system was rocked by the crisis over slavery and states' rights that resulted in the Civil War. The Whig party split into a Northern wing that held on to the principles of an active central government, and a Southern wing whose members were concerned that a central government powerful enough to make "internal improvements" was powerful enough to end slavery. Although the Democrats were also split between North and South, that party survived whereas the Whig party completely disintegrated.

In the mid-1850s, northern Whigs joined some antislavery Democrats and members of the Free Soil Party to create the modern **Republican Party**. Early Republicans were mobilized when the Kansas-Nebraska Act passed, which overturned the Missouri Compromise of 1820, and allowed new territories to permit slavery if they wanted. They envisioned a land free from slavery and **wage slavery**—meaning the business exploitation of for-hire laborers. Autonomous workers were celebrated—primarily independent farmers and the self-employed. Meanwhile, capitalists feared, regardless of whether they were plantation owners in the South or factory owners in the North.

Alvan Bovay was one of the people who initiated the push to establish the Republican Party in 1854. He worked on a number of radical causes, including a "vote yourself a farm" campaign, and wrote for George Evans' *Working Man's Advocate* and *Young America* newspapers. **Abraham Lincoln**, the Republican's second presidential candidate, won the very divided election of 1860 with only 40 percent of the popular vote. The land reform that Bovay and Evans advocated in the 1850s was supported by Lincoln and became the Homestead Act of 1862, which distributed land in the West to settlers who would "improve" it. [3] With the demise of the Whig Party, the Republicans and Democrats became the pre-eminent political parties in U.S. politics to this day.

Republican Dominance

From the Civil War to the Gilded Age , Republicans dominated the presidency and often enjoyed Republican majorities in the House and Senate. The Republicans dropped any hint of "red republicanism" and evolved into a party that promoted business interests and economic growth, pushed public schools that produced the standardized graduates that business leaders needed, endorsed the gold standard that promoted price stability that business leaders wanted, and supported high tariffs on imports that protected U.S. manufacturers. During this period of Republican dominance, wealth and income inequality grew to obscene levels that were fueled by monopoly capitalism.

The Democrats maintained a stronghold in the South and strong support among Northern-city Catholic immigrants and small Mid-western farm owners. Later, the South became known as the **Solid South** because Democrats dominated until after the mid-1960s when Republicans began to rise. Populism gripped the Democratic Party in the late 1890s. But in the election of 1896, the Republicans' huge financial advantage and victories in the Electoral College-rich Northeastern states kept the Democrats out of the White House.

The spirit of progressivism infected both parties in the early 1900s, but it created the most lasting impression on the Democratic Party. In the 1912 election when Republicans split between William Howard Taft and Theodore Roosevelt, Woodrow Wilson became president, and the Democrats began to embrace many progressive ideals—using government to solve social problems, controlling the power of large business interests, and instituting social reforms such as extending the right to vote and banning child labor.

The New Deal Coalition



President Franklin Roosevelt

The Great Depression began with the stock market crash in October 1929 and marked the death knell for Republicans' long-held dominance of national politics. Many people were convinced that **President Herbert Hoover's** conservative response to the crisis was insufficient. The 1932 election brought Democrat **Franklin Roosevelt** to power–the only president to win election four times–and his administration used the government's power to alleviate suffering, regulate the economy, and put people back to work. Known as the **New Deal**, the overall policy included such features as Social Security, unemployment insurance, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Tennessee Valley Authority, the Civilian Conservation Corps, and the Works Progress Administration, among many others. The Democrats dominated national politics from 1933 to the end of the 1960s, largely because of what has become known as the **New Deal Coalition**, which included white Southerners, unionized workers, farmers, Jews, white-collar professionals, African-Americans, and urban immigrants who were predominantly Catholics. The New Deal programs were popular enough that the Republican Eisenhower administration left them in place in the 1950s, and the Democratic Johnson administration built on them in the 1960s.

Contemporary Party Struggles

The success of the Civil Rights Movement, the cultural turmoil of the late 1960s, and the stridency of the Democratic party's anti-Vietnam War wing fractured the New Deal coalition and hurt many Democratic candidates' electoral chances. By the early 1970s, the Republicans became increasingly successful in attracting support from whites opposed to racial desegregation, from men and women who were disconcerted by women's liberation, from rural voters concerned about gun control, and from voters who disdained the perception of pacifism in American foreign policy. Moreover, the *Roe v. Wade (1973)* decision legalizing abortion and the rise of the gay rights debate handed Republicans two social issues that were instrumental in courting Catholics, evangelical Protestants, and Mormons.

Beginning in the 1960s, Republicans pursued what most people call the **Southern Strategy**—a conscious and largely successful attempt to capture the South by playing on white's fears of the Civil Rights movement. This strategy linked the South with suburban and rural areas across the United States, aimed at white fears of racial integration, urban crime, and economic insecurity. The Republican party also embraced an assault on public schools at the behest of religious conservatives opposed to school integration and the teaching of evolution.

The Southern Strategy was successful. The Democrat's Solid South transformed to become a bastion of Republican office holders instead. Republicans won eight of the thirteen presidential elections from 1968 to 2016 and wrested both congressional chambers from Democrat control. Similarly, Republicans dominated state gubernatorial and legislative elections in 2010, which allowed them to gerrymander district boundary lines to their advantage. In 2020, the country was in the midst of the Covid-19 Pandemic, which also happened to be the same year that the census occurred. It's not entirely clear how accurate the counting of the population was, but the Republicans used the information to gerrymander to their advantage yet again.

Meanwhile, the Democratic party increasingly turned to the same sources as the Republicans to fund its candidates—corporations and the wealthy—and it pursued policies that were often indistinguishable from the Republicans. Still socially liberal, the Democratic party became controlled by the New Democrats, who are often referred to as the Corporate Democrats because of their connections with and deference to large corporations.

Progressive members of the Democratic Party were reignited with democratic-socialist Bernie Sanders' failed attempt to gain the Democratic presidential nomination in 2016. His candidacy in 2016 and again in 2018 underscored the deep divisions in the Democratic party between its corporate and progressive wings.

Third or Minor Parties

According to the Public Broadcast Services, there were more than 54 political parties in the United States in 2021. The Green Party, Reform Party, Libertarians, Constitution Party, and Natural Law Party represent the most active third parties currently in the United States. All of these parties have fielded presidential candidates in the last several elections.

The most successful of the third parties in any one election was the Reform Party, which in 1992 nominated Texas billionaire Ross Perot as its candidate for president. Perot ran on a platform that advocated reducing the federal budget deficit, an issue previously ignored in elections but one that would become a major part of almost every presidential campaign since. Perot received 19 percent of the vote.

Third parties often organize around a single personality or a single issue and that can lead to less popularity among voters. Current federal campaign finance laws, rules that dictate who can enter presidential debates, and a lack of media attention are elements that put these parties at a disadvantage. However, perhaps the most significant of the obstacles facing candidates is the winner-take-all system. In most states, the presidential candidate with the highest percentage of votes gets all the state's electoral votes.

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9.3: Policy Preferences of U.S. Political Parties

"The Republican Party is not, as advertised, conservative but radically oligarchical. Programmatically it exists to advance corporate economic and political interests, and to protect and promote inequities of opportunity and wealth."

—Sheldon S. Wolin [1]

"Should Democrats somehow be elected, corporate sponsors make it politically impossible for the new officeholders to alter significantly the direction of society."

—Sheldon S. Wolin [2]

How Political Scientists Analyze Parties

Political parties are complicated, and not at all easy to capture in U.S. Government textbooks. Political scientists tend to break the analytical problem down into three parts.

- **The party in the electorate** refers to the voters who support each party. People may support the Democratic or Republican parties—or one of the third parties—without formally registering as a party affiliate. Party affiliation tends to wander over time. Generally speaking, Republicans and Democrats each tend to constitute somewhere between 25-33 percent of the population, with Independents making up the rest. [4] Political scientists and survey researchers use the term **party identification** to refer to a voter's self-identification with one party or another, whether or not they are formally party members. Through survey research, political scientists can make statements about the extent to which people who identify with one party support policy A versus policy B.



Two Delegates to a Political Convention

- **The party organization** deals with people who hold offices or volunteer positions in a political party at the local, state, or national level. They tend to be quite dedicated, devoting considerable time and effort promoting the party, its policies, and its candidates. Political scientists can study this finite number of people through both qualitative and quantitative methods. For instance, scholars can study the extent to which the political views of national party convention delegates are similar to or differ from those of rank and file party members. [5]
- **The party in government** refers to elected and appointed public officials who identify with one party or another. As with party organization, this is a relatively well-defined universe of people that can be subdivided into precise groups like members of the House of Representatives or U.S. Senators. Quantitative and qualitative measures are used to study behavior. For instance, the overall partisanship of Representatives and Senators can be analyzed by looking at the percentage of congressional votes that pit a majority of Democrats on one side voting against a majority of Republicans on the other side. Individual Representatives or Senators can be given partisanship scores for how closely they adhere to the party line, and those results can be compared to the voters' views. [6]

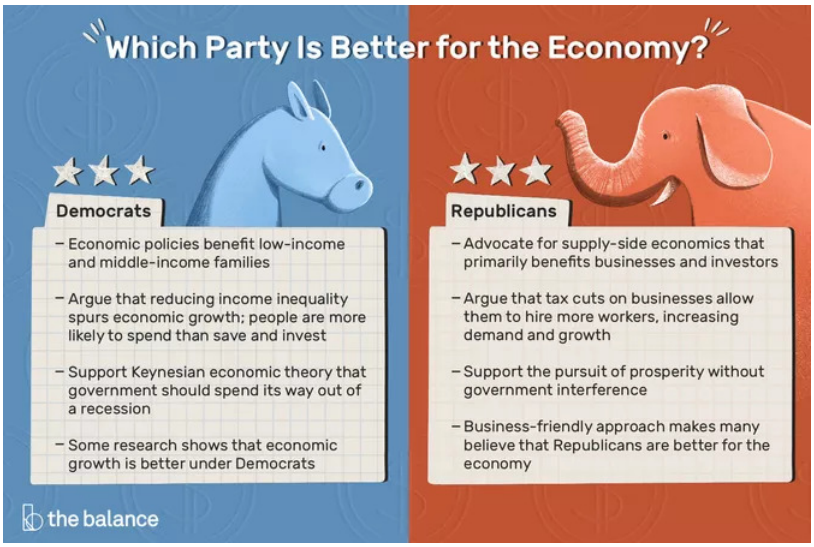
Similarities and Differences Between the Democratic and Republican Parties

This chart examines the general differences between the policies and political positions of the Democratic and Republican parties on major issues such as taxes, the role of government, entitlements (Social Security, Medicare), gun control, immigration, healthcare, environmental policy and regulation.



Political Parties and the Economy

Democrats and Republicans have widely different views on the economy. But once in power, candidates' actions don't always coincide with their party's views. That makes it difficult to determine which party is better for the economy.



The Asymmetrical Nature of American Party Politics

In the modern era, the Democratic party is best characterized as a relatively non-ideological coalition of distinct groups like women, blacks, the LGBTQ community, Hispanics, labor unions, environmentalists, and so forth. It's a "big tent" party whose constituent groups sympathize and often support each other, but who has not created a powerful ideology to animate them all. Absent an overarching liberal or progressive ideology, the "Democrats continue to address the concrete agendas of discrete social groups, preferring a governing style of technocratic incrementalism over one guided by a comprehensive value system." [7] This may explain the difficulty that Bernie Sanders had in trying to become the Democratic party presidential nominee in 2016 and 2020.

On the other hand, the Republican part is notably characterized by "movement conservatism," an ideology of individual liberty that unites and animates its members. Whenever its candidates lose, the Republican party tends to conclude that the reason for the loss was that its particular candidate in a given race was not ideologically pure enough. The Republican party unites business and religious interests under a conservative banner clearly intended to prevent any cracks in the economic or social hierarchies that have developed in the U.S. The conservative movement has shown "spectacular success in gaining control of the Republican Party." [8] When outsider Trump gained the White House and became the Republican party's *de facto* leader, conservatives either left the party to maintain ideological purity or tried to co-opt the opportunity to promote conservative ideological values in public policy and federal court nominations.

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9.4: Why Do We Have a Two-Party System?

"In our view, the ideal of popular sovereignty plays much the same role in contemporary democratic ideology that the divine right of kings played in the monarchical era. It is . . . a fiction providing legitimacy and stability to political systems whose actual workings are manifestly—and inevitably—rather less than divine."

—Christopher Achen and Larry Bartels [1]

A Two-Party System and Its Alternatives

Since the Republican Party's rise in the 1850s, all American presidents have been either Democrats or Republicans. As a result, political scientists classify the United States as a **two-party system**, even though it has many political parties. A two-party system is distinct from its alternatives: a **one-party system** in which other parties are either banned or so hobbled that they can't compete with the ruling party, or a **multi-party system** that features three or more parties with a viable shot of participating in government. Modern history is full of one-party political systems like Nazi Germany, the Soviet Union, the People's Republic of China, North Korea, Vietnam, and Cuba. Multi-party systems exist in many countries like Denmark, France, the United Kingdom, Germany, Australia, and New Zealand.

Causes of America's Two-Party System

Why is the United States a two-party system as opposed to a multi-party one? It is, after all, a very diverse country that could probably support more than two parties. In the U.S., two structural features strongly favor a two-party system as opposed to a multi-party system.

- **ballot-access restrictions**, which are any barriers to getting a candidate on the ballot so voters don't have to write in their name. Natural experiments have shown that when ballot-access restrictions were lowered, the major parties faced significantly increased competition from third party and independent candidates. [3] Many states require independent and third-party candidates to secure enough signatures on petitions in order to get on the ballot. Simply put, "The greater the share of the electorate required to sign nominating petitions, the fewer minor-party and independent candidates appear on the ballot." [4] A third party that wants to run candidates for all the House seats across the country would have to collect millions of signatures. The Democrats and Republicans are relieved of this burden. Collecting these signatures is expensive and time-consuming. Together, filing fees and signature requirements stunt electoral competition, especially races for the House of Representatives. [5]
- **winner-take-all elections,** where a candidate who gets the most votes wins the election. Here is an example. Bill receives 546 votes, Mary receives 545 votes, and Sam receives 544 votes in a U. S. House of Representatives' election, Bill wins even though he received only 33 percent of the vote. He received the most votes short of a majority, called the **plurality** of votes, and he will represent that district. The tendency for winner-take-all, single-member district systems to promote two parties is sometimes referred to as **Duverger's Law**, after the French political scientist Maurice Duverger.

How does the winner-take-all system help create a two-party system? Let's look at an example. The Blue Party pushes the interests of the common laborer but has also been somewhat environmentally friendly. The Red Party is a conservative party that pushes the interests of big business and entrepreneurs and is very unfriendly to the environment. The Green Party is very concerned about the environment, and is brand new. Here are the results of our mock election:

	Election #1		
	Popular Vote %		
Party	District One	District Two	District Three
Blue	45.9%	45%	55%
Red	45.1%	50%	45%
Green	9%	5%	0%

What happened? Blue wins two seats by getting the plurality of votes in District One and the majority of votes in District Three. Red wins one seat in District Two. Green gets nothing. The Greens have gone through all the work and expense of getting the party

started and getting on the ballot. Can the Green devotees keep the party going for two years until the next election? Maybe. Let's assume that not only do they keep it going, they actually do a little better. Here are the results for the next election two years later:

	Election #2		
	Popular Vote %		
Party	District One	District Two	District Three
Blue	40%	40%	50%
Red	46%	50%	45%
Green	14%	10%	5%

The Greens did a bit better, but what did it get them? Still nothing. It's very difficult to keep a new party going year after year if all that effort is not producing actual legislative seats. In this case, the Green party saw tremendous gains for a third party, but people want to vote for a party that stands at least some chance of winning seats.

Look what happened in that second election. Green pulled voters away from Blue and guaranteed that Red would pick up another seat even though Red's support didn't actually go up. In District One during Election #2, the Green candidate was the so-called **spoiler candidate**.

What is a Green voter to do? One choice is to keep voting Green with the hope that the Blue party will self-destruct so that the Greens will be the only real alternative to the Reds. Something like that hasn't happened in the United States since the 1850s, so its likelihood is not high.

What If?

What if we required third parties to gain enough signatures in a state once, after which they would be guaranteed ballot access in perpetuity instead of having to do it each election?

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9.5: Campaign Finance

"Money, get back
I'm all right, Jack, keep your hands off of my stack
Money, it's a hit
Don't give me that do goody good bullshit
I'm in the high-fidelity first-class traveling set
And I think I need a Learjet"

—Pink Floyd [1]

"The concentration of wealth in America has created an education system in which the super-rich can buy admission to college for their children, a political system in which they can buy Congress and the presidency, a health-care system in which they can buy care that others can't, and a justice system in which they can buy their way out of jail."

—Robert Reich [2]

The Role of Money in U.S. Politics

Money is so central to politics that political scientists and journalists often speak about the **money primary**, by which they mean "the competition of candidates for financial resources contributed by partisan elites before the primaries begin." [3] You must either have enough to finance your own campaign, come from the elite strata where you have friends, contacts, and supporters with disposable wealth to donate to your campaign, or you must ingratiate yourself to the elites who can fund your campaign.



Money and Politics

Because elections are so expensive, politicians appear to be in a never-ending race for money. It typically takes million dollars to win a race for House of Representatives or Senate. In presidential races, the candidates together spend billions of dollars—not counting outside spending by organized interests on behalf of one candidate or the other. [4] Congressional members can easily spend half their working time raising money rather than legislating. According to *Newsweek*, "A leaked PowerPoint presentation from the Democratic Congressional Campaign Committee (DCCC) revealed that an ideal daily schedule consists of *four hours* of time spent on the phone." [5] The need for money has even changed the very nature of congressional leadership. As law professor Lawrence Lessig said, "If leaders had once been chosen on the basis of ideas, or seniority, or political ties, now, in both parties, leaders were chosen at least in part on their ability to raise campaign cash. Leading fundraisers became the new leaders. Fundraising became the new game." [6]

Corporations and wealthy individuals contribute the bulk at least two-thirds of federal-election money. A 2010 *Good Magazine* analysis revealed that .26 percent of the American population made up 68 percent of the money contributed to congressional members. [7] Former U.S. Secretary of Labor Robert Reich reported that while in 1980 the richest .01 percent of Americans accounted for 15 percent of all campaign contributions, by 2016 the richest .01 percent of Americans accounted for 40 percent of all campaign contributions. [8] Some candidates such as Bernie Sanders and Elizabeth Warren did a good job crowd-sourcing their campaigns with large numbers of small donors, but they lost to other candidates in 2016 and 2018.

The candidate who spends the most money tends to win. Historically, according to the Center for Responsive Politics, the better financed House candidate wins about 90 percent of the time and the better financed Senate candidate wins about 80 percent of the

time. [10] Most congressional races are financially uncompetitive, meaning that one candidate is spending two or more times the money of the other candidate.

Money pushes politics in a conservative direction. Back in 1995, political scientist Thomas Ferguson coined the phrase the **investment approach to American party politics**, in which he argued that ordinary voters cannot afford the costs of paying attention to political issues, researching candidates, watching what they do once elected, and rewarding or punishing them if they don't pursue policies beneficial to those ordinary people. Who can afford those costs? Corporations and the wealthy invest in politics in ways that ordinary people cannot match, which pulls the entire system to the Right or conservative side of the ideological spectrum. [11]

The Supreme Court has stricken down many attempts to reign in money in American elections.

- *Buckley v. Valeo* (1976) Overall campaign spending, personal spending on one's own campaign, and independent expenditures cannot be capped.
- *FEC v. Wisconsin Right to Life* (2007) The government cannot stop outside groups from spending on political advertising in the period before an election.
- ***Citizens United v. FEC (2010)*** The government cannot place limits on the amount of outside spending, and corporations can spend directly to support or oppose campaigns.
- *Arizona's Free Enterprise Club's Freedom PAC v.* Bennett (2011) Public financing systems cannot use escalating matching funds.
- *American Tradition Partnership v. Bullock* (2012) The Court struck down Montana's ban on corporate spending on state elections that dated back to 1912.
- *McCutcheon v. FEC* (2014) A donor's overall spending on federal campaigns cannot be capped. [12]

The Federal Election Commission (FEC), charged with regulating America's election and campaign finance laws, has long been referred to as "The little agency that can't." [13] Structurally, the nature of the commission produces deadlock because the Democrats and Republicans each have the same number of commissioners. The FEC is under-funded, under-staffed, and has a perpetual backlog of cases so that candidates and organized interests have little fear of being prosecuted for alleged violations. [14] Sometimes, the FEC is given a near impossible task. Take the case of coordination: outside groups are forbidden from coordinating their expenditures with political campaigns. It's extremely difficult to prove, especially for a hobbled agency like the FEC. [15]

Attempting to Regulate Money in U.S. Elections

The U.S. has a long history of trying to regulate money in politics. The Tillman Act of 1907 banned corporations from making direct campaign contributions, and this prohibition was extended to unions in 1943. In 1971, Congress passed the Federal Election Campaign Act (FECA). Over time, laws and court decisions have created a fairly confusing medley of rules and allowances. Generally speaking, we divide campaign finance into hard money and soft money.

Hard Money	Soft Money
Regulated contributions made directly to campaigns.	Largely unregulated independent expenditures by parties and organized interests to support or oppose candidates.
Contributions to campaigns by individuals, traditional PACs, and leadership PACs.	Super PACs can raise unlimited money to spend for or against candidates, must report donors to FEC, and cannot coordinate their expenditures with campaigns.
Contributions are limited and must be reported to the FEC.	Dark money groups can raise unlimited money to spend for or against candidates, do not have to report donors to FEC, and cannot coordinate their expenditures with candidates.

The Bottom Line

Regardless of whether it's hard or soft money, the most campaign funding comes from corporations and the wealthy elite and goes to candidates who support their backers' agendas. This dynamic is likely to only be disrupted by organized and mobilized ordinary voters who demand systemic changes in America's campaign finance system.

Political Action Committee (PAC)

A **political action committee**, or **PAC**, is an FEC-recognized entity that can legally engage in campaign finance. There are different types of PACs that give directly to campaigns

- **Traditional PACs** are entities created by organized interests—corporations, unions, and interest groups—as vehicles to raise money and funnel it to candidates.
- **Leadership PAC** is established or controlled by a political candidate or a person who holds federal office to raise and give money to other politicians. Leadership PACs are separate from the candidate or office holder's election or reelection committee. Congressional members often have leadership PACs to raise money and support candidates or other congressional members with whom they share ideology, party affiliation, or policy positions.

PACs give the overwhelming majority of their money to **incumbents**, or those who are in office and are running for reelection, as opposed to challengers. There are three reasons why PACs favor incumbents. For one thing, incumbents tend to win. Second, incumbents have Washington experience and might sit on important committees. Finally, incumbents have a voting track record on national issues.

Super PACs are a new kind of organization that falls under the soft money category. Where traditional and leadership PACs donate money directly to campaigns, super PACs cannot do so. But they can spend unlimited amounts of money on behalf of one candidate or another. However, they must act independently of the candidate they are supporting, meaning they cannot coordinate their activities with the candidate's campaign. They can also raise unlimited amounts of money from corporations, unions, and individuals, but they must disclose their donors to the FEC.

A special kind of soft money is called **dark money**. Under sections 501(c)(4) and 501(c)(6) of the tax code, politically active nonprofit organizations can raise unlimited money and spend it to support or oppose candidates. "Dark" means that they don't have to disclose the sources of their money. These organizations are supposed to be primarily social-welfare groups rather than overtly political, but neither the IRS nor the FEC has cracked down on them.

What If. . . ?

What if in every election cycle, the federal government gave all voting age adults four "democracy vouchers" of $10 each that they could donate to any federal campaign or donate to no one? What if candidates for federal office could decide whether to raise

money from corporations, wealthy individuals and PACs, or they could raise money via these democracy vouchers, but not both? (19)

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9.6: The Universe of Organized Interests

"People brag about the free market. But we have central planning here. It's just not by government. It's by corporations."

—John Ikerd [1]

Theories About the Role of Organized Interests in the Political System

When the French aristocrat Alexis de Tocqueville toured the United States in the 1830s, he was struck by how well developed the "principle of association" was among average Americans. [2] Over the years, political analysts have tended to split over the question of how the U.S. political system operates. One side is well represented by de Tocqueville's insights into the vitality of political associations in the young republic. Called **Pluralism**, this theory holds that U.S. politics is marked by a rich diversity of organized interests vying with each other to see that their respective wishes are translated into government policy. [3] Ordinary Americans are free to start or join any of these groups, and the variety of possible interests makes for a more or less level playing field. In other words, no one set of interests is likely to dominate public policy. The pluralist argument is bolstered by the number and variety of interest groups, and by the fact that interests in one category often struggle with each other and fail to put up a monolithic front *vis a vis* labor or environmental groups.

Other political scientists argued that over time the U.S. transformed into something less healthy: an out of control hyper-pluralist polity. **Hyper-Pluralism** suggests that the government has essentially been captured by the demands of interest groups. Rather than being an arbiter of the struggle between organized interests, the government tries to put into effect the wishes of them all to the detriment of the country. Political scientist Theodore Lowi called this pathological process *interest group liberalism*, which is often used interchangeably with the hyper-pluralism label. [4] These theorists point to the contradictory nature of government policy. For example, subsidizing tobacco farming while spending money trying to keep people from smoking.

The third branch of disagreement is called **Elite Theory**. These theorists hold that the vision of the pluralists and the interest-group-chaos scenario of the hyper-pluralists fail to accurately show what is really going on: that a relatively small and wealthy class of individuals—the **power elite**—have power**.** [5] The power elite are either the decision-makers, or they so influence the decision-makers that the elites get their way most of the time. Elite theory highlights the power of business and military interests and points to many government policies that lavish benefits onto them. Moreover, business interests create interlocking and overlapping connections that reinforce and allow control of the political system. For example, witness how limited and overlapping memberships of corporate boards, foundation boards, and trustee positions for public and private universities, as well as corporate ownership of the media, are.

Martin Gilens from Princeton and Benjamin Page from Northwestern University found that organized interests were not particularly attuned to the interests of average Americans, or of business interests and some single-issue groups such as those concerning abortion and gun rights. According to their research, ordinary citizens have little to no influence on the course of policy. Instead, elites and organized interests—many of whom are run by elites—have a large impact on public policy making in the United States. Their support is almost essential for a policy change to pass, and their opposition means that a policy change is extremely unlikely to pass.

An offshoot of Elite Theory centers on how elites achieve their aims through the structures of corporate capitalism. According, large corporations effectively rule not only the United States, but the world as well. [9] They have the same free speech rights as individuals with one important exception: unlike real people, "corporate people" have nearly unlimited funds to broadcast their views and to give to politicians. Corporations have become "too big to fail," and so command politicians to provide taxpayer money to bail them out when they—through incompetence or malfeasance—bring themselves to the brink of economic collapse. Then, the corporations, banks, and investment houses lobby to defeat legislation that would regulate their incompetence and malfeasance in the future. When large corporations regularly flout worker safety and environmental laws, resulting in damage, injury and death, the corporate coffers pay the requisite fines, and they go about their business as though nothing had happened.

Kinds of Organized Interests

Organized interests refer to political interests that have a specific organizational unit that works to influence public policy in numerous ways short of running actual election candidates. This organizational unit requires money and staff simply to exist, plus additional money to influence policy. We can categorize organized interests as follows.

Category 1: Economic Interests–These groups convalesce around the financial interests of their members.

- **Corporations and Business Interests**—Most large corporations actively work to influence public policy. Exxon, General Motors, Microsoft, Walmart, and Verizon all maintain teams of lobbyists and spend considerable money to get what they want. Business interests are also represented by associations like the Chamber of Commerce, the Business Roundtable, and the National Small Business Association. Still, others represent specific professions such as the American Medical Association. Then there are the corporate-funded think tanks whose ideas and spokespeople get much play on corporate-owned mainstream media. These include Americans for Prosperity, the Cato Institute, the Heritage Foundation, and the Club for Growth.
- **Labor Interests**—Organized labor unions maintain professional staff dedicated to political action. They work to promote unionized workers' interests specifically, and all workers generally. The dominant labor group is the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), which is an umbrella organization that encompasses nearly a hundred distinct unions including the American Federation of Teachers, the Airline Pilots Association, and the United Mineworkers of America. Altogether, the AFL-CIO represents more than twelve million workers. Independent labor unions include the Service Employees International Union and the International Brotherhood of Teamsters.

Category 2: Citizen's Groups or Non-Economic Groups—A catch-all category that encompasses interests that are not overtly tied to the economic interests of their members.

- **Public Interest Groups**—Also known as good-government groups, they claim to represent the broad interests of all Americans. Many of these groups were started after 1960, although some are older than that. Common Cause is perhaps the most prominent. It was founded in 1970 by progressive Republican John Gardner and works on issues such as campaign finance reform, media reform, and making government more open, responsive, and ethical. Other public interest groups include the Center for Public Integrity, Citizens Against Government Waste, Citizens for Responsibility and Ethics in Washington, Public Citizen, and the Center for Responsive Politics.
- **Single-Issue Groups**—These are groups that tend to concentrate on one issue or one area of public policy. They range across the political spectrum from the Sierra Club to the National Rifle Association, from the NARAL Pro-Choice America to the National Right to Life Committee. The narrow focus of these groups tends to attract highly motivated members, which can help the group maintain its power and role in the political system. These active members can be called upon to donate money, write emails to congressmen, and show up at demonstrations.
- **Ideological Groups**—Ideological groups are interested in a variety of issues and have a clear ideological bias that governs the kind of policies the group endorses. There are a number of conservative or libertarian groups that are heavily funded by corporate interests or by religious interests, such as the Christian Coalition, the Family Research Council, Focus on the Family, Americans for Prosperity, the American Conservative Union, and the Eagle Forum. Less prominent are the liberal or progressive groups like United for a Fair Economy, the Economic Policy Institute, MoveOn, and People for the American Way.
- **Demographic Groups**—Some organized interests were created to defend or advance the interests and rights of specific demographic groups. The American Association of Retired Persons (AARP), which is a powerful lobby group with 35 million members, is a classic example. Others include The National Organization for Women (NOW), the National Association for the Advancement of Colored People (NAACP), the National Council of La Raza, and Black Lives Matter.

Category 3: Government Interests—State, city, and local government interests have coalesced into organized groups. Most states and major cities have paid lobbyists in Washington. They've also formed groups such as the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, and the National Governors Association. Since national government policy affects state and local governments, they organize to try to influence what comes out of Washington.

Corporate Dominance of the Organized Interest Universe



Walmart Store Sign

The political scientist E.E. Schattschneider once famously wrote that "The flaw in the pluralist heaven is the heavenly chorus sings with a strong upper-class accent." [10] Corporations dominate the universe of organized interests in the United States. One study suggested that business interests spent $34 on lobbying for every $1 spent on lobbying by all other interest groups and unions combined, and that over 90 percent of the largest lobbying organizations have been businesses. [11] Nearly three-quarters of the money donated to federal candidates comes from corporate political action committees (PACs). [12]

Corporate dominance serves as lucrative landing spots for politicians, congressional staffers, and executive branch officials who want to take advantage of the revolving door. They own the news channels that provide vital political information. Similarly, corporations buy advertising on media channels, and are able to pull that advertising should they disagree with viewpoints of particular shows. Corporations fund think tanks that argue for laissez-faire economic policies and tax cuts for businesses and the wealthy. As a result, corporations have an upper hand in shaping public opinion. Corporations and the wealthy can also engage in a **capital strike** by withholding capital investment or by moving money elsewhere until they get the government policies they want. A capital strike "might take the form of layoffs, offshoring jobs and money, denying loans, or just a credible threat to do those things, along with a promise to relent once government delivers the desired policy changes." [13]

Corporate dominance operates through **two primary mechanisms**.

- participating in the political system. They are, after all, artificial persons vested with rights by the Supreme Court, although not by the text of the Constitution itself. They lobby; they donate to politicians; they speak through the media that they own and support through advertising; they fund think tanks, and they operate the revolving doors to and from the government.
- cultivating fear, for fear breeds conservative responses. Fear that I might lose my job, especially if I speak up; fear that my progressive Senator or Representative feels about the possibility that jobs will be lost in the district on his watch; fear that the same politician will see his funding sources dry up because of a vote for single-payer healthcare; fear that I cannot switch jobs or start a small business because I risk my family's health coverage; fear of being transferred. Princeton professor Sheldon Wolin captured the fear that is the "constant companion" of ordinary people. [14]

What If?

What if we passed and ratified the We the People Amendment to the Constitution? [15] How would this amendment positively or negatively affect the American political system? Here's the text of the amendment:

Section 1. Artificial Entities Such as Corporations Do Not Have Constitutional Rights

The rights protected by the Constitution of the United States are the rights of natural persons only.

Artificial entities established by the laws of any State, the United States, or any foreign state shall have no rights under this Constitution and are subject to regulation by the People, through Federal, State, or local law.

The privileges of artificial entities shall be determined by the People, through Federal, State, or local law, and shall not be construed to be inherent or inalienable.

Section 2. Money is Not Free Speech

Federal, State, and local government shall regulate, limit, or prohibit contributions and expenditures, including a candidate's own contributions and expenditures, to ensure that all citizens, regardless of their economic status, have access to the political process,

and that no person gains, as a result of their money, substantially more access or ability to influence in any way the election of any candidate for public office or any ballot measure.

Federal, State, and local government shall require that any permissible contributions and expenditures be publicly disclosed.

The judiciary shall not construe the spending of money to influence elections to be speech under the First Amendment.

Section 3.

Nothing in this amendment shall be construed to abridge freedom of the press.

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9.7: Strategies of Organized Interests

"Today, most lobbyists are engaged in a system of bribery but it's the legal kind, the kind that runs rampant in the corridors of Washington. It's a system of sycophantic elected leaders expecting a campaign cash flow, and in return, industry, interest groups, and big labor are rewarded with what they want: legislation and rules that favor their constituencies."

—Jimmy Williams [1]

Lobbying



Former U.S. Senator Kay Hagan (D-NC) in the Center, Her Husband Chip, and Heather Podesta, a Lobbyist for Energy, Finance, Healthcare, Retail, Real Estate, Education, Transportation, and Weapons Industries.

All organized interests try to further their members' political interests. They choose among myriad strategies, the most obvious being lobbying. **Lobbying** takes its name from the centuries-old British House of Commons tradition where constituents petition their member of Parliament (MP) in the building's lobby. Since lobbyists cannot participate directly in work on the House or Senate floor, they interact with Representatives and Senators in the Capitol building's lobbies.

Lobbying refers to efforts to persuade legislators and executive branch officials to make decisions that favor a particular set of interests over others. In Congress, lobbyists might testify before standing committees on legislation, ply congressmen and their staff with research and other information that favors their point of view, provide congressmen and their staff with draft legislation, or invite congressmen and their staff to events sponsored by the industry or interest they represent. Lobbyists also provide information and language in the rule-making process for executive branch officials. Because of the revolving-door phenomenon, lobbyists are often former congressional members, former congressional staff, or former executive branch officials.

Campaign Financing

Another prominent strategy for organized interests is to **donate money** to political campaigns. The political action committees (PACs) must be registered with the Federal Election Commission, and donate money to political candidates who are likely to support the group's interests. Very often lobbyists concentrate on the incumbent congressional members who sit on the standing committees that write legislation on key issues of interest. And the sums of money are significant. In the 2018 election cycle, PACs in the banking, finance, and insurance sector contributed almost $90 million to political candidates across the country; PACs in the healthcare sector contributed almost $55 million; and organized labor PACs contributed almost $59 million. [2]

What do the organized interests get for their money? Critics of the U.S.'s campaign finance system argue that if such contributions are not actually buying votes, they are certainly **buying access**. That is, these groups' lobbyists are likely to have the kind of close contact with congressional members and their staff that would not be afforded to other groups that had not donated. Organized interests have complained that they aren't pressuring the politicians for votes, but that politicians are shaking them down for campaign contributions.

Rarely is the relationship between lobbying, campaign contributions, and access to politicians made explicit, but sometimes people slip up and let the cat out of the bag. For example, in 2018 Mick Mulvaney, head of the Consumer Finance Protection Bureau—the agency designed to protect financial services consumers—and a former congressional member—said the following about his standard operating procedure: "We had a hierarchy in my office in Congress. If you're a lobbyist who never gave us money, I didn't talk to you. If you're a lobbyist who gave us money, I might talk to you." [3] Then, he added that if someone from his district came to D.C. and sat in his office lobby, he would talk to them regardless of financial contribution. Still, the implication is that of all the organized interests in Washington, he preferred to speak with those who contributed to his campaign war chest.

Political science research confirms that money can buy access. In a neat experiment, Joshua Kalla and David Broockman, two Berkley graduate students, found that “Members of Congress were more than three times as likely to meet with individuals when their offices were informed the attendees were donors,” and that said meetings were more likely to include senior staff if the individuals were donors. (4)

Going Public

Organized interests often use the **going-public** strategy to further their interests. One example is **mobilizing the grassroots**, which is getting ordinary people or members of the group to write letters. If the interest group can really get thousands of people to call, write, or email their congressman all expressing one side of an issue, it tends to get legislators’ attention. This action works with executive agencies as well. Before government agencies publish regulations in the *Federal Register*, they invite all interested persons to comment, and organized interests are in a favorable position to generate significant volumes of comments. Very often, the organized interest will fake a grassroots movement by generating thousands of emails or faxes that only look like they come from ordinary people. This behavior is called **astroturf lobbying**. (5) Narrow economic interests will often employ astroturf lobbying to make it seem like they are representing large numbers of people.

Another form is to run an expensive marketing campaign involving commercials on radio and television as well as advertisements and newspaper editorials. Organized interests might also stage a march or demonstration to show decision makers how numerous and mobilized their members are. Civil rights groups staged the **March on Washington** in 1963, filling the National Mall with some 250,000 peaceful protesters. Famously, it was at that march that Dr. Martin Luther King, Jr., gave his “I Have a Dream” speech. In the spring of 2006, nearly a million people all across the country marched in demonstrations against what they perceived to be harsh anti-immigrant legislation pending in Congress. (6) Another example was the **2017 Women’s March on Washington D.C** the day after Donald Trump’s presidential inauguration. Beginning as a Facebook post by a Hawaiian grandmother the day after Trump was elected, it ballooned into what was referred to as “one of the largest and significant demonstrations for social justice in America’s . . . history.” The turnout of 500,000 people dwarfed the turnout for Trump’s inauguration itself, and altogether 2.6 million people marched in all fifty states and thirty-two countries. (7)

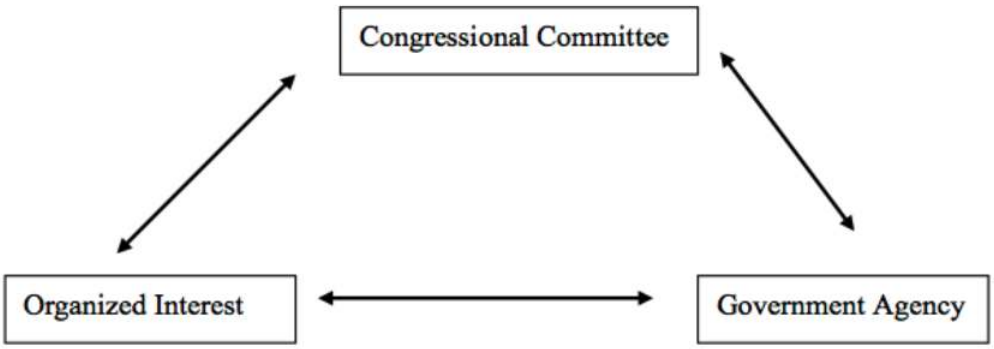
Litigation

In addition to lobbying the legislative and executive branches, organized interests frequently use **litigation**—taking the matter to court. This action can be an expensive strategy but can pay off well if they prevail in court and set precedent in their favor. The organized interest can bring the lawsuit directly, finance lawsuits brought by others, or file *amicus curiae* briefs in favor of one side in another case to which the organized interest is not a direct party. Civil rights groups, led by the NAACP Legal Defense Fund, successfully pursued litigation to strike down discriminatory laws and practices. Environmental groups often sue to halt or modify large projects that they believe violate environmental laws such as the Endangered Species Act or regulations against development in wetlands. Conservative groups have successfully used state legislation combined with litigation to chip away at *Roe v. Wade* (1973), the Supreme Court decision that legalized abortion.

> Update: On June 24, 2022, in a historic and far-reaching decision, the U.S. Supreme Court officially reversed *Roe v. Wade*, declaring that the constitutional right to abortion, upheld for nearly a half-century, no longer exists. Several states — among them Mississippi, North Carolina, and Wisconsin — still have decades-old abortion bans on their books. With Roe overturned, those states could revert to a pre-*Roe* environment. Officials in such states could seek to enforce old laws, or ask the courts to reinstate them. Another path to banning abortion involves "trigger bans," newer laws pushed through by anti-abortion rights legislators in many states in anticipation of the Supreme Court's action. Some 15 states – in the South, West and Midwest – have such laws in place.

Iron Triangles

Iron triangles are not an organized-interest strategy. Rather, the term refers to the triangular relationship organized interests form with executive agencies and congressional decision makers. Political scientists refer to this mutually reinforcing relationship as an **iron triangle**, because it often seems impervious to outside influence. The triangle seems to operate as a sub-government unto itself.



The double-arrowed lines in the diagram represent two-way supportive relationships.

The organized interest provides campaign contributions to members of congressional standing committees that deal with the organized interest's issues and concerns. The organized interest also lobbies the government agency and may even provide the governing agency vital information it needs to do its job.

The government agency administers the programs or writes the regulations that the organized interest depends on. For example, if the Pentagon doesn't purchase a new submarine, the company that makes submarines loses business. If the Food and Drug Administration writes overly stringent safety regulations for new drugs, pharmaceutical companies are going to have difficulty bringing new drugs to market. Also, government agency programs can provide important benefits to the relevant congressional committee members. For example, if the Pentagon does build the submarine, that means creating many jobs in the districts those congressmen represent. Agriculture Department subsidies tend to benefit congressional agriculture committee constituents.

Finally, the congressional committee is in a position to favorably nudge organized-interests' legislation. If the committee decides to build the new submarine, the company that makes it will benefit. If the committee decides to fund subsidies for a certain crop, the crop growers will benefit. It also provides a budget and oversight to the government agency in question. If the committee were to reduce agency funding, the agency would lose power and prestige.

Generally, iron triangles are mutually reinforcing and tend to continue the status quo despite repeated calls to reduce government's size.

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CHAPTER OVERVIEW

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10.1: The Scope and Size of the Federal Government

"Paleontologist Robert Gay's quest to find the fossilized remains of an ancient phytosaur, a primitive ancestor to crocodiles, turned into something much larger last summer when he came upon a major trove of Triassic fossils on public lands recently stripped from Utah's Bears Ears National Monument."

–Brian Maffly [1]

"While a discovery of this magnitude certainly is a welcome surprise, protecting such resources was the very purpose of Bears Ears National Monument."

–Scott Miller [2]

The federal government is quite large in both scope and size. It spends trillions of dollars each year, with operations spanning from providing Social Security to protecting fossils and archeological sites on public lands, from engaging with other countries diplomatically to funding mass transit projects.

Scope of the Federal Government

Scope refers to the range of things that the federal government does. People categorize these activities in numerous different ways.

Social Welfare encompasses programs such as Social Security, Medicare, Medicaid, and the Supplemental Nutrition Assistance Program. These types of programs are located throughout the federal bureaucracy.

War-Making—The Department of Defense encompasses the branches of the armed services (e.g., Army, Navy, Air Force) and represents the United States' ability to project armed destruction around the globe. It is also responsible for the more than 700 military bases that the Defense Department maintains in the United States and around the world.

Diplomacy—The Department of State is responsible for diplomacy and for carrying out U.S's non-military foreign policy.

Justice and Law Enforcement—The Department of Justice handles all federal criminal prosecutions and civil suits in which the U.S. government has an interest. Several agencies include the Federal Bureau of Investigation (FBI); the Drug Enforcement Agency (DEA); the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF); and the U.S. Marshall Service. The Department of Homeland Security oversees Immigration and Customs Enforcement (ICE); Customs and Border Protection; and the Federal Emergency Management Agency (FEMA); among many others.

Commerce—A number of federal agencies exist to promote commerce of one sort or another: The Commerce Department, the Department of Agriculture, and the Department of the Interior are the most prominent.

Fiscal and Monetary Issues—The Treasury Department manages the federal government's finances, manages tax collection through the Internal Revenue Service (IRS), services the federal debt, supervises financial institutions, and goes after counterfeiters. The Federal Reserve System, a quasi-public, quasi-private central banking system for the United States, is charged with stabilizing prices and maximizing employment—two functions that can be at loggerheads. These tasks can be accomplished by adjusting interest rates.

Infrastructure—The Department of Transportation promotes and regulates transportation, including the Federal Highway Administration (FHWA), the Federal Aviation Administration (FAA), and the National Highway Traffic Safety Administration (NHTSA). The Department of Energy regulates nuclear power stations and the country's national electricity grids. Finally, the Department of Housing and Urban Development (HUD) belongs in this category.

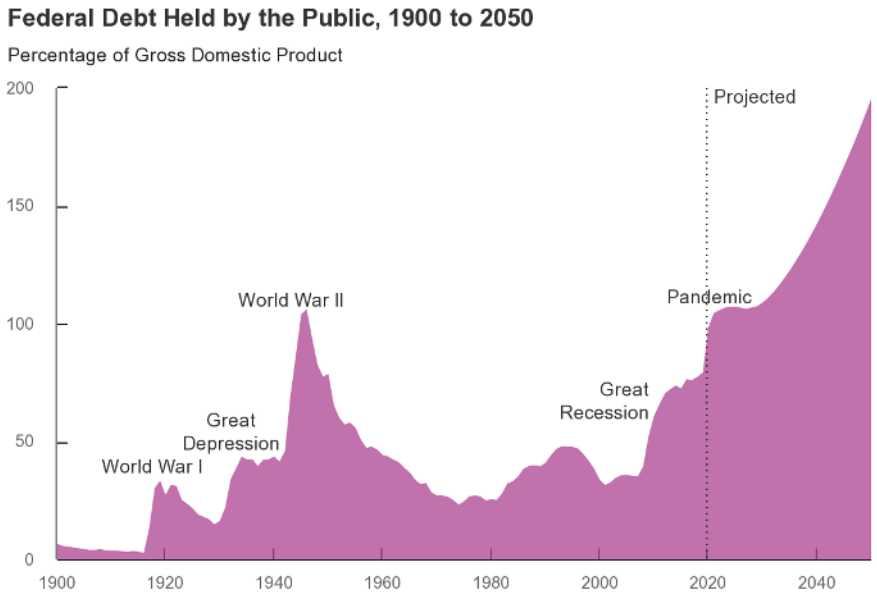
Human Services—The Department of Health and Human Services contains the Centers for Disease Control and Prevention (CDC), the National Institutes of Health (NIH), and the Food and Drug Administration (FDA). It administers Medicare and Medicaid. The Department of Education and the Environmental Protection Agency fit in this category. The Department of Veterans Affairs straddles two categories, since its expenses are a direct result of war-making. The Department of Labor deals with worker safety, compensation, and working conditions.

Another way to understand the federal government's scope and size is through a historical lens.

Department	Year Established
State	1789
Treasury	1789
Justice	1789
War/Defense	1789/1949
Interior	1849
Agriculture	1889
Commerce	1913
Labor	1913
Health and Human Services	1953
Housing and Urban Development	1965
Transportation	1966
Energy	1967
Environmental Protection Agency	1970 (elevated to cabinet-level in 1990)
Education	1979
Veterans Affairs	1987
Homeland Security	2002

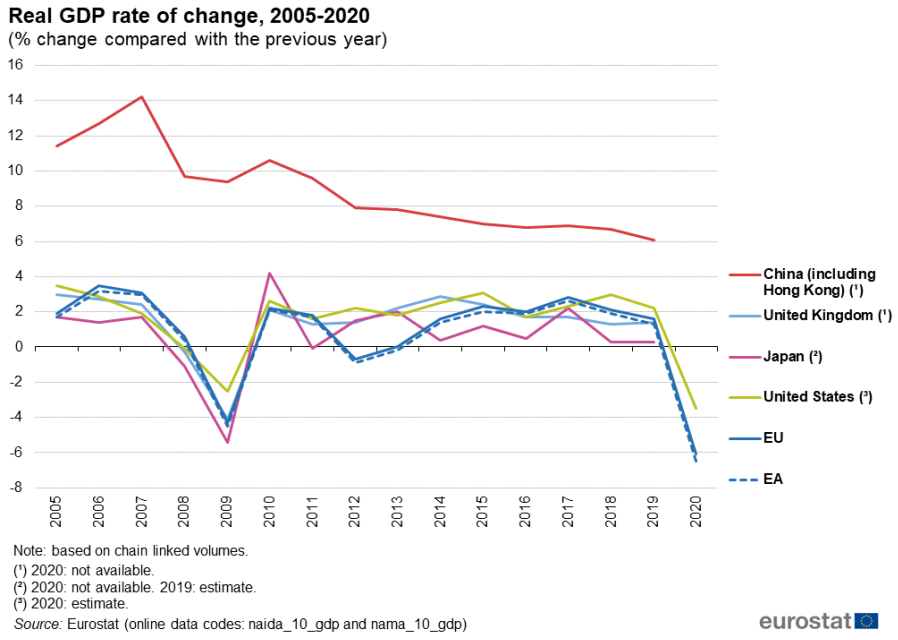
Size of the Federal Government

How much does the federal government spend? According to the Treasury Department, in 2021, the federal government spent about $6.8 trillion and took in about $4.0 trillion in revenue. The annual deficit—the shortfall between revenue and spending—is $2.8 trillion dollars. Debt held by the public is all debt owed by the federal government to those outside it such as businesses, banks, foreign governments, and individuals. This image shows how debt has changed over the past 70 years. Notice how historical events have affected debt.



Source: Wikipedia

Economists and political scientists look at the **Gross Domestic Product** (GDP)—the total value of goods and services produced in a country in one year. This information can be used and compared to other countries. Notice that in 2020, at the height of the Covid-19 Pandemic, GDP went down among many countries. (EU stands for European Union, a political and economic union of 27 member states that are located primarily in Europe. Euro area (EA) is a monetary union of 19 member states of the European Union that have adopted the euro as their primary currency and sole legal tender.)



Source: European Union

How many people does the federal government employ? According to the Office of Personnel Management, there are about 2.1 million federal government civilian employees, [(6)], and an additional 1.3 million active-duty military and Coast Guard employees. [(7)] The government conducts much work using private contractors—employing people as diverse as private sector soldiers engaged in war zones and janitors hired to maintain federal buildings. Paul Light, New York University public service professor, estimates that the federal government employs some 3.7 million private contractors, plus nearly 500,000 Postal Service employees who are

not counted in our federal civilian employee tally. [8] Altogether, 7 and 8 million people receive a federal government paycheck—out of a population of over 330 million people.

What is the size and impact of federal regulations? According to the Federal Register, the federal regulations code totaled 9,745 pages in 1950 and had grown to 185,484 pages by 2018. [9] These regulations range from the Fair Labor Standards Act requirement for companies to pay overtime for nonexempt employees who work more than forty hours per week, to the Affordable Care Act's provision banning private health insurance companies from denying coverage to people who have pre-existing medical conditions.

The U.S. tax code is several thousand pages long and so complex that the Internal Revenue Service Taxpayer Advocate publishes an annual tax system roadmap. Tax compliance is a multibillion-dollar business in the United States, compared to a country like Japan, whose government collects withholdings so precisely that most workers don't even have to file a tax return. [12] (**Tax compliance costs** refer to the time, accountants, software, lawyers, and other expenses that individuals, families, nonprofit organizations, and businesses need to complete their taxes.) Obviously, low and middle-income families who take the standard deduction have less tax compliance costs, But wealthy families and businesses go to considerable lengths to exploit the loopholes built into the tax code. That takes time and the employment specialists who know the code. In terms of time alone, U.S. tax-system compliance may run as high as 8 billion hours of work, even after the 2017 tax bill's simplifications. [13]

Historical Evolution of the Federal Government

During its first 80 years, the federal government delivered the mail, fought wars and conducted foreign policy, created its own bank, taxed imports, regulated the money supply, and granted patents. Its peacetime military was minuscule compared to the size of the country. Of course, the industrial and technological revolutions were far into the future.

Pre-Civil War-era per-capita federal government spending hovered around $30. In the years following World War I, federal government spending had risen to about $129 per person. By 2004, it had reached $7,100 per capita. [14] The federal government generally balanced its budget during peacetime until the 1930s. In other words, spending matched revenues, i.e. tax receipts. That all changed after World War II. With the exception of the Clinton administration, the budget has been out of balance and the government finances its annual deficits by selling Treasury notes to domestic and international investors.

The federal government has grown due to four main reason

- **War**--Federal spending spiked during the Civil War, World War I, World War II, the Korean War, the Cold War, the Vietnam War, and the War on Terror. Military equipment had to be built; troops trained, paid, and veterans cared for; and oil had to be purchased so that the U.S. could project power to conflict zones. (The U.S. military has long been one of the world's largest emitters of greenhouse gases.) Civil liberties were curtailed, and propaganda was used to maintain civilian morale and sufficiently demonize the enemy. To finance the war, it had to raise taxes and sell war bonds and other financial instruments. During World War I, the United States government established the War Industries Board, the War Finance Corporation, and the National War Labor Board to coordinate industrial production and labor relations—a set of government operations that didn't just fade away after the war ended. [16] Similar government economic regulations ramped up during World War II. Cold War competition with the Soviet Union stimulated everything from atomic weapons and power development to the interstate highway system, commercial airlines, GPS and weather satellites, to the internet
- **Corporate demand**--Government and businesses are in a symbiotic relationship. While businesses chafe from time to time at "too much" government regulation, on the whole, businesses benefit from the stability and predictability afforded by the government regulating the economy. For example, commercial drone regulation allowed their use in a way that was standardized, predictable, and economically viable. [17] Similar things happen with electricity, automobiles, airlines, pharmaceuticals, cellular communications, and every other large, complex industry. On a more basic level, businesses benefit from publicly financed infrastructure, including roads, bridges, schools, sanitation systems, etc.
- **Popular demand**--People have demanded national efforts to clean the water and air; to ensure that people have equal employment opportunities regardless of sex, race, religion, or national origin; to fight the scandal of old-age poverty and ill-health; to counter the monopoly power of railroads, steel companies, and internet platforms; to provide health coverage; to protect national parks and public lands; to interdict and disrupt domestic and international terrorists, etc. Government is good when it responds to problems articulated by the general population. People can argue about the government response—whether this healthcare policy is better than that or whether air pollution is best fought via specific regulations or fossil fuel taxes—

while recognizing that collective action through government is the best chance to avoid the brutal and nasty conditions of anarchy, which is literally the absence of government. Political Scientist Douglas Amy stated:

> *[B]ig government is not something that has been forced on Americans by liberal elitists and power-hungry bureaucrats. We have it because we ourselves have demanded big government to deal with the many big problems we have faced in our society. We have called for big government programs when it has been obvious that there are serious problems that cannot be solved through individual effort or by the natural workings of the free market.* [18]

- **Societal density and complexity**. For thousands of years, government size has reflected the types of societies they governed. In 1880, fully 50 percent of the U.S. population worked on farms. By 1920, only 25 percent did, with the majority of Americans living and working in urban centers. [19] According to a 2021 report by the U.S. Department of Agricultural, 83% of the U.S. population lived in urban areas and 14 percent were located in rural regions. In a society with a geographically dispersed population, people simply come into conflict with each other less often, so there is not as much need for police, courts, laws, and regulations. However, complexity and social density act together to promote bigger government because of the rising number and scope of individual and group conflicts. As anthropologist Joseph Tainter indicated, complexity in society gives rise to ever more sophisticated and robust problem-solving mechanisms and processes—most of which involve government. [20]

War, corporate demands, popular demands, and social density and complexity operate on governments all over the world, and can be found in liberal democracies and authoritarian regimes alike.

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10.2: The Work of the Federal Civil Service and Political Appointees

"A characteristic principle of bureaucracy is that it is an expression of a regularized governance with abstract rules. . . [and] regularized governance springs from a desire for 'equality before the law,' and looks at privileges as abominations. . ."

–Max Weber [1]

"The third line of work [for the Trump administration] is deconstruction of the administrative state."

–Steve Bannon [2]

"The real threat to democracy comes not from an imagined deep state, but from a weak state of hollowed-out institutions and battered and belittled public servants."

–William J. Burns [3]

Bureaucrats and the Rule of Law

Bureaucracy is marked by predictability, rationality, expertise, structure, equal treatment, documentation, and record-keeping. As much as a person may dislike the impersonal and often inflexible nature of bureaucracy, it promotes the rule of law. The **rule of law** refers to the related ideas that no one is above the law, that all people are equally subject to the laws that are made collectively together, and that decisions are reached by following pre-established procedures. Bureaucracy insists that we all follow the rules, whether it comes to obtaining a passport or declaring a federal emergency.

Aside from its insistence on following pre-established procedures, bureaucratic agencies promote the rule of law in two other important ways.

- Effective bureaucracies develop a **merit system**, meaning that people are hired and promoted to ever greater responsibilities due to their qualifications and their capabilities. A merit system contrasts with what is known as a **spoils system**, which is where the winning political party stocks the bureaucracy with their own people. In 1881 President Garfield was assassinated by Charles Guiteau, who didn't receive an expected federal spoils position after Garfield was elected. This shocking event contributed to the passing of the **Pendleton Civil Service Act** (1883), which set the federal government on the path to a merit system. The merit system provides protection to federal civil servants from being fired or punished when a presidential administration of one party takes power from an administration of a different party. Federal civil servants can only be fired "for cause," meaning that they can be fired for not adequately performing their job, but not for extraneous or political reasons. The Pendleton Act also created the United States Civil Service Commission to oversee the merit system. Through a 1978 reorganization passed by Congress, the Commission's responsibilities were devolved to the Office of Personnel Management, the Merit Systems Protection Board, and the Office of Special Counsel.
- Federal civil service employees are to be **apolitical** in their professional capacities. In 1939, Congress passed "An Act to Prevent Pernicious Political Activities," otherwise known as the **Hatch Act of 1939**. This act has been updated and amended several times over the ensuing decades, but two original provisions indicated that:
  - No person may "intimidate, threaten, or coerce, or to attempt to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the Houses of Representatives."
  - Federal employees are forbidden from using their "official authority for the purpose of interfering with or affecting the election or the nomination of any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives." [4]

Organization of a Federal Cabinet Agency





Sonny Perdue, Secretary of Agriculture in 2020, A Political Appointee.

Government agencies are very complicated, and their organizational structures have evolved over time to serve their unique responsibilities. Cabinet-level agencies are headed by a Secretary—Secretary of Labor, Secretary of State, Secretary of Defense, and so on—who is a **political appointee**, meaning that they are appointed by the president and confirmed by the Senate. These people are expected to carry out the president's program with respect to the agency. However, they are able to do so subject to the laws and regulations that have already been established with respect to that agency's work. Thus, they cannot direct civil servants to violate the law or abrogate established regulations without going through formal processes established by law.



Anonymous Civil Servant in the Forest Service, A Division of the Department of Agriculture.

Below the political appointees are the millions of **civil servants** who perform the work of the federal government. It's virtually impossible to give an adequate accounting of the wide range of people who work in the federal civil service, but imagine people such as statisticians, park rangers, geologists, epidemiologists, lawyers, tax accountants, demographers, and lead paint abatement administrators all serving to carry out the American people's wishes as reflected in congressional legislation and executive branch regulations. Most federal civilian employees do not work in the Washington D.C. area. In fact, more than 80 percent are spread around the country from Tampa to Seattle, from Boston to San Diego, and all sorts of places in between. (5)

Federal agencies also have an Inspector General office, which was established by the Inspector General Act of 1978. The agency's **Inspector General** is "an independent, non-partisan organization established within each executive branch agency assigned to audit the agency's operation in order to discover and investigate cases of misconduct, waste, fraud and other abuse of government procedures occurring within the agency." (6) For cabinet-level agencies, inspectors general are appointed by the president and approved by the Senate. For other federal entities like Amtrak, the Postal Service, and the Federal Reserve, the agency head appoints the inspector general. Inspector generals are supposed to be independent and able to conduct the internal investigations and audits they see fit. The results are given to whoever heads the agency and also to Congress within seven days. While the inspector generals are not congressional employees, the Inspector General Act put them in place "to assist Congress in its oversight role." (7)

Inspector generals often rely on **whistleblowers**, people who come forward with information about maladministration, corruption, waste, or abuse of office within the agency. The **Whistleblower Protection Act** of 1989 forbids agency leaders from retaliating against the whistleblower or threatening retaliation. The Intelligence Community Whistleblower Protection Act of 1998 extended similar protections to workers in the intelligence agencies, although these workers are forbidden from taking retaliation cases to court while nonintelligence workers can do so. According to Bradley Moss, an attorney who specializes in whistleblower cases, "The need for whistleblowers to be able to raise their concerns with confidentiality and anonymity is critical." (8)

What Do Federal Agencies Do?

Federal agencies perform two important functions that all citizens should know.

Rule-making refers to creating new regulations and revising existing regulations. The rule-making process is governed by the Administrative Procedure Act, originally passed in 1946 and amended ever since. Executive agencies are creations of Congress, and no executive agency can act unsupported by statutory authority. (9) This means that Congress must first pass a law to create the executive agency and then pass additional laws—called **enabling legislation**—to give that agency the authority to issue particular kinds of regulations to solve defined problems. Since congressional members are not experts in air pollution or highway engineering or medical-device safety, they write laws in such a way as to allow the relevant agencies to create specific regulations based on input from experts and the public alike.

- Once an agency has been given statutory authority to regulate a given issue, the first step is usually **research and data gathering**. What is the current state of the problem, whether it be particulate air pollution or rear-end collisions on U.S. highways? In the case of air pollution, what smokestack and tailpipe regulations would result in what levels of reduced pollution? What kind of scrubbers on smokestacks and emissions-control devices on automobiles will produce what levels of particulate reductions? At what cost? This research and data gathering stage of the rule-making process can take years of careful study before a sound regulation can be written.
- Once the research and data gathering stage is finished, the Administrative Procedure Act requires that the following steps be taken:
  - *Publish planning documents.* These documents are written and published as a regulatory plan so that the public and other stakeholders are alerted that the agency is writing or rewriting regulations in a particular area.
  - *Engage stakeholders.* The agency gathers feedback regarding the regulatory plan. It does so by posting an Advance Notice of Proposed Rulemaking in the Federal Register, which is a publicly available online and printed source that documents federal government behavior. In the case of air pollution, the agency may contact companies that have factories and refineries, automobile companies, and so forth.
  - *Write and publish a regulatory proposal.* Agency staff put together a regulation and publish in the Federal Register a Notice of Proposed Rulemaking that summarizes the issue and the regulation at hand, sets a date when the public comment period will end, provides a means for public comment, and includes any other relevant information like important data the agency used and the agency's take on why this rule or regulation will be beneficial.
  - *Accept public comment.* During a comment period that usually lasts thirty or sixty days, anyone is allowed to comment on the proposal. The agency may revise the regulatory proposal after the public comment period. It may also repost a new version for an additional comment period.
  - *Publish the final rule or regulation.* The agency publishes the final rule or regulation in the Federal Register and stipulates a date for when the regulation goes into effect. [10]

Enforcing congressional statutes as well as their own rules and regulations. When enforcing federal laws and ensuring compliance with federal regulations, agencies have a certain amount of **discretion** in their work. In other words, federal agency leaders can make choices about which violators to pursue, what penalties to seek, and on what areas of their responsibilities they want to concentrate their efforts. Enforcement discretion is often a function of agencies being over-worked, understaffed, and operating with limited resources. Choices have to be made. For example, the early years of the Obama administration were marked by a fairly strong approach to enforcing federal laws against marijuana production, distribution, and possession. Marijuana was still a Schedule 1 drug under the federal Controlled Substances Act. However, after more and more states began to decriminalize medical and recreational marijuana use, the Obama administration eased off. Similarly, the Trump administration said it *could* choose to go after companies and individuals who violate federal marijuana laws as they abide by liberal state laws, but it *chose* not to—presumably because such a move would have been unpopular. [11]

- One problem area is **white-collar crime** defined by the Federal Bureau of Investigation (FBI) as "*crimes..characterized by deceit, concealment, or violation of trust and are not dependent on the application or threat of physical force or violence. The motivation behind these crimes is financial—to obtain or avoid losing money, property, or services or to secure a personal or business advantage.*" [12]
  - Corporations and the wealthy are evading taxes, pushing faulty products on consumers, committing fraud, and getting their unqualified kids into elite universities in record numbers. The problem's scale is enormous—elite law breakers are much less likely to be punished than ordinary Americans. For example, the Internal Revenue Service audits poor recipients of the Earned Income Tax Credit whose average income is around $20,000 per year at twice the rate of taxpayers with income in the $200,000 to $500,000 range. [14] Tax evasion and corporate fraud cost the U.S. economy far more every year than all of the bank robberies and street crimes. Yet, the U.S. goes after street crime with a breathtaking zeal compared to how white-collar crime is treated. In 2018, around 19,000 people were sentenced in federal courts for drug crimes, but only thirty-seven people working at big corporations were federally prosecuted for white-collar crimes. [15]
  - Two main reasons why the federal government fails to prosecute white-collar crime while heavily enforcing other kinds of criminal activity.

- *Resource Imbalance.* Federal agencies like the Internal Revenue Service, the Federal Bureau of Investigation, the Security and Exchange Commission, the Consumer Product Safety Commission, the Occupational Safety and Health Administration, and the Environmental Protection Agency are outspent, out lawyered, and unable to go toe-to-toe with corporations and wealthy individuals who tie up enforcement attempts in legal knots. As a report published by the office of Senator Elizabeth Warren (D-MA) pointed out, the resource imbalance often results in the federal government accepting small settlements from corporate criminals in which they don't even have to admit guilt. [16]
- *Higher Bar for White-Collar Criminal Liability.* There is often a different standard of criminal liability for white-collar crimes than there is for other crimes. For instance, in federal drug crimes "prosecutors have to prove that a defendant should have known a crime was taking place," but in white-collar criminal cases "prosecutors have to prove that the defendants knew their actions were illegal and did them anyway." [17] Consider the implications of this. If your adult child is caught running an interstate drug ring while living in your basement, you can serve time on federal drug charges and your house can be seized—even if you didn't know this was happening—because you should have known that criminal activity was taking place. On the other hand, if you defraud investors by collecting fees for pushing an investment that was clearly worthless, you can simply claim that you didn't know that it was worthless and, certainly, that you had no intention of violating federal securities fraud statutes. Unless the prosecutors find an email written by you to a co-collaborator in which you admit that you knew your actions constituted a crime, you are likely to escape prosecution.

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10.3: Revolving Doors and Corporate Capture of Federal Agencies

"[H]igh-income individuals and big-profit businesses have rewritten the rules of the economy, "capturing" the regulatory system and using it to squeeze out their competition."

–Annie Lowrey [1]

The Revolving Door

The American system of governance is plagued by the **government-to-lobbyist revolving door.** This action occurs when people move from government positions in the legislative and executive branches to positions within the industries that need to be regulated for the public good. Why is this a problem? The consumer advocacy organization Public Citizen nicely summarized the threatens to the government's integrity:

> *"Public officials may be influenced in official actions by the implicit or explicit promise of a lucrative job in the private sector with an entity seeking a government contract or to shape public policy.*
>
> *Public officials-turned-lobbyists will have access to lawmakers that is not available to others, access that can be sold to the highest bidder among industries seeking to lobby.*
>
> *The special access and inside connections to sitting government officials by former officials-turned-lobbyists comes at a hefty price tag, providing wealthy special interests that can afford hiring such revolvers with a powerful means to influence government unavailable to the rest of the public."* [2]

The practice is quite prevalent. A recent study by Public Citizen found that "nearly two-thirds of recently retired or defeated U.S. lawmakers now working outside politics have landed jobs influencing federal policy." [3] Professors Zahra Meghani and Jennifer Kuzma point out that "high ranking ex-government workers often secure employment either in the very industries they used to regulate or at firms that provide lobbying or legal services for those businesses." [4] The revolving door is truly a two-way passage, with people spending a good portion of their careers moving back and forth between government work and work for the industries that those agencies are supposed to regulate. Here are some examples.

- Philip Cooney was a lobbyist for the American Petroleum Institute prior to being selected to be the chief of staff of the White House Council on Environmental Quality during President George W. Bush's administration. Cooney personally watered-down reports on climate change to suggest that the science on the matter was less certain than it actually was. [5] When this was revealed, Cooney resigned his position in the White House and took a job with Exxon Mobil, which has spent at least $8 million funding groups challenging the existence of global warming. [6]
- Elizabeth Fowler was the primary architect of President Obama's Affordable Care Act (aka, Obamacare) when she served as an important legislative staff member for Senator Max Baucus (D-MT). Prior to this, Fowler worked as Vice President for Public Affairs for Wellpoint, a very large health insurance company. The Affordable Care Act passed Congress and was signed into law in March of 2010. Fowler was then hired by the Obama administration as Special Assistant to the President for Healthcare and Economic Policy—primarily to oversee the implementation of the Affordable Care Act. After doing that job for approximately two years, Fowler went back to the healthcare industry as a top administrator at pharmaceutical giant Johnson & Johnson. [7] The Affordable Care Act was extremely friendly to the health insurance and pharmaceutical industries, broadened health coverage by forcing Americans to buy a policy from the private health insurance industry at the same time that it prevented people from choosing a viable public health insurance option.

Overall, President Trump named more lobbyists to cabinet-level posts in his first three years than did Presidents Obama and Bush in each of their eight years in office. [11] For example, Eugene Scalia, who was appointed Secretary of Labor, used to do legal work for corporations seeking to limit worker benefits. The son of the conservative former Supreme Court justice, he "argued on behalf of Wal-Mart against a Maryland law that would have required the retail giant to spend more health care money on its employees." [9] Andrew Wheeler, the head of the Environmental Protection Agency, used to be a lobbyist for the coal, chemical, and uranium industries and has been described by a spokesperson from the Natural Resources Defense Council as "a person who has made a career out of trying to push back against common-sense safeguards to protect the air we breathe from dangerous chemicals like mercury, arsenic and others." [10]

Rules against the revolving door are fairly weak. There is a one-year "cooling off" period for senior officials from lobbying officials in their former agencies, and other restrictions. The same is true of legislative branch employees. [12] Once the one-year probation period is over, there are no more restrictions. Indeed, former congressional members retain special access to members-only gymnasiums and restaurants. When survey researchers ask the public, they find strong majority support for a five-year cooling-off period and plurality support for banning former public officials for life from lobbying. [14] Both Presidents Obama and Trump signed executive orders to try to limit executive branch revolving doors. Nevertheless, the revolving door is alive and well.

Corporate Capture of Executive Agencies



Cartoon of Organized Big Business Interests in 1919

A federal agency's ability to fully serve the public interest is challenged by the phenomenon known as **regulatory capture**, which happens when wealthy corporations, industrial sectors, and financial interests are able to use close relationships with executive agencies to promote their own interests rather than those of ordinary Americans. Obviously, getting corporate lobbyists in government positions is one way. Capture is also facilitated by the fact that the industries being regulated often possess the data and the expertise that executive agencies need to do their work. Moreover, regulated industries cultivate allies in Congress who can put pressure on regulatory agencies to see the industry's point of view on a particular regulatory issue.

What does regulatory capture look like? Here are a couple of recent examples.

- **The Federal Aviation Administration (FAA)**. In 2019, the United States trailed forty-two other countries in deciding to ground the Boeing 737 Max, the company's newest version of its venerable 737 passenger jet. The plane had already been involved in two crashes that had killed hundreds of people. The crashes were caused by a problem with the automated flight control system that was detected and ignored during the plane's design and testing phases. How did this happen? Apparently, back in 2005, the FAA made an important decision to turn its safety certification responsibilities over to aircraft manufacturers, a move that was estimated to save the aviation industry $25 billion over the next decade. To be specific, plane safety used to be determined by FAA employees, but that job was now being done by Boeing employees and reported to the FAA. [15] In this particular case, the practice ended in tragedy.
- **The United States Department of Agriculture (USDA)**. The USDA has long been an exemplar of regulatory capture. For example, the USDA's National Organic Standard Board (NOSB) is responsible for regulating organic farming—particularly which foods get to be labeled as organic or not. Consumer and environmental advocates argue that regardless of whether Republicans or Democrats are in charge of the White House, appointments to the NSOB are "stacked" with "members from, or friendly to, corporate agribusiness interests" at the expense of small organic farmers who are more likely to hew to "true" organic practices. [16] Under the Trump administration, the Union of Concerned Scientists put forward a litany of USDA regulatory-capture instances, in which the agency deferred to the interests of agribusiness to allow the overuse of antibiotics in meat and poultry production, to loosen standards for school meals, to lessen the regulation of pesticides, to devalue the views of independent scientists over those funded by the industry, and to take the side of agribusiness giants over small farmers. [17]

Both regulatory capture and the revolving door are problems with the way the federal government operates. They undercut the government's ability to serve ordinary Americans, and they inflate the power of concentrated economic interests. Tighter regulations could limit congressional members and executive branch officials' ability to cash-in on their public service. Similarly, an approach to regulation that empowers federal agencies and makes them less dependent on industry-beholden experts might undercut the industry's ability to capture the agencies designed to regulate them.

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10.4: Defining Foreign Policy

NOTE: Domestic Policy (also known as Public Policy) sets strategies internal to the United States, and was discussed in a previous chapter.

Foreign Policy Basics

What is **foreign policy**? One definition could be "the goals that a state's officials seek to attain abroad, the values that give rise to those objectives, and the means or instruments used to pursue them." [1] Foreign policy can be intertwined with domestic policy. For example, one might talk about Latino politics as a domestic issue when considering educational policies designed to increase the number of Hispanic Americans who attend and graduate from a U.S. college or university.[2] However, as demonstrated in the primary debates leading up to the 2016 election, Latino politics can quickly become a foreign policy matter when considering topics such as immigration from and foreign trade with countries in Central America and South America.[3]



Figure 1. Domestic issues can sometimes become international ones when it comes to such topics as foreign trade. Here, President George W. Bush shakes hands with legislators and administration officials after signing the Central American Free Trade Agreement (CAFTA) Implementation Act on August 2, 2005.

What are the objectives of U.S. foreign policy? While the goals of a nation's foreign policy are always open to debate and revision, there are nonetheless four general ideas:

- The protection of the U.S. and its citizens both while they are in the United States and when they travel aboard--Related to this security goal is the aim of protecting the country's allies, or countries with which the United States is friendly and mutually supportive. In the international sphere, threats and dangers can take several forms, including military threats from other nations or terrorist groups and economic threats from **boycotts** and **high tariffs** on trade.
- The maintenance of access to key resources and markets--Resources include natural resources, such as oil, and economic resources, including the infusion of foreign capital investment for U.S. domestic infrastructure projects like buildings, bridges, and weapons systems. Of course, access to the international marketplace also means access to goods that American consumers might want, such as Swiss chocolate and Australian wine. U.S. foreign policy also seeks to advance the interests of U.S. business, to both sell domestic products in the international marketplace and support general economic development around the globe (especially in developing countries).
- The preservation of a balance of power in the world--A **balance of power** means no one nation or region is much more powerful militarily than the countries of the rest of the world. The achievement of a perfect balance of power is probably not possible, but general stability, or predictability in the operation of governments, strong institutions, and the absence of violence within and between nations may be.
- The protection of human rights and democracy--While certainly looking out for its own strategic interests in considering foreign policy strategy, the United States nonetheless attempts to support international peace through many aspects of its foreign policy, such as foreign aid, and through its support of and participation in international organizations such as the United Nations, the North Atlantic Treaty Organization (NATO), and the Organization of American States. support of and participation in international organizations such as the United Nations, the North Atlantic Treaty Organization (NATO), and the Organization of American States.



Figure 3. On June 26, 2015, then-House minority leader Nancy Pelosi (D-CA) joined UN secretary-general Ban Ki-moon, California governor Jerry Brown, and other dignitaries to commemorate the seventieth anniversary of the adoption of the UN Charter in San Francisco. (credit: modification of work by "Nancy Pelosi"/Flickr)

The **United Nations (UN)** is perhaps the foremost international organization in the world today,. The General Assembly includes all member nations and admits new members and approves the UN budget by a two-thirds majority. The Security Council includes fifteen countries, five of which are permanent members (including the United States) and ten that are non-permanent and rotate on a five two-year-term basis. The entire membership is bound by the decisions of the Security Council, which makes all decisions related to international peace and security. Two other important units of the UN are the International Court of Justice in The Hague (Netherlands) and the UN Secretariat, which includes the Secretary-General of the UN and the UN staff directors and employees. The UN's main purposes are to maintain peace and security, promote human rights and social progress, and develop friendly relationships among nations.

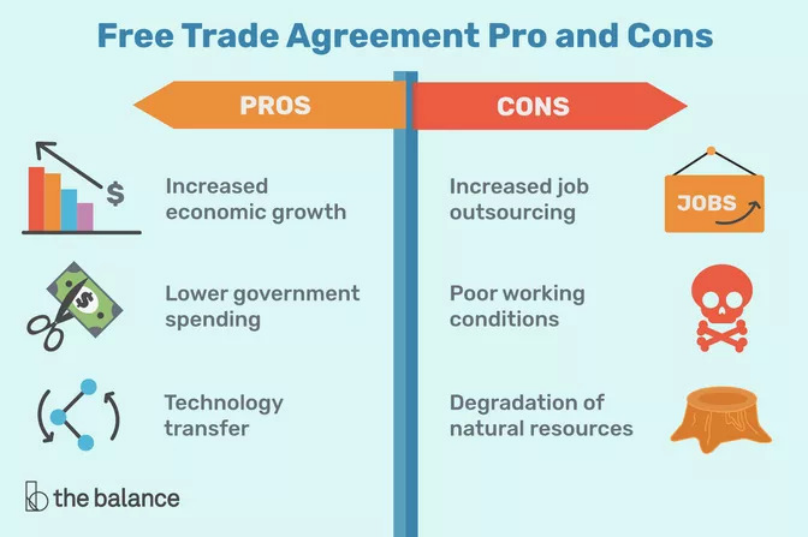
The **North Atlantic Treaty Organization (NATO)** was formed after World War II as the Cold War between East and West started to emerge. While more militaristic in approach than the United Nations, NATO has the goal of protecting the interests of Europe and the West and the assurance of support and defense from partner nations. However, while it is a strong military coalition, it has not sought to expand and take over other countries. Rather, the peace and stability of Europe are its main goals. NATO initially included only Western European nations and the United States. However, since the end of the Cold War, additional countries from the East, such as Turkey, have entered into the NATO alliance.

Besides participating in the UN and NATO, the United States also distributes hundreds of millions of dollars each year in foreign aid to improve the quality of life of citizens in developing countries. The United States may also forgive the foreign debts of these countries. By definition, developing countries are not modernized in terms of infrastructure and social services and thus suffer from instability. Helping them modernize and develop stable governments is intended as a benefit to them and a prop to the stability of the world.

Types of Foreign Policy Goals

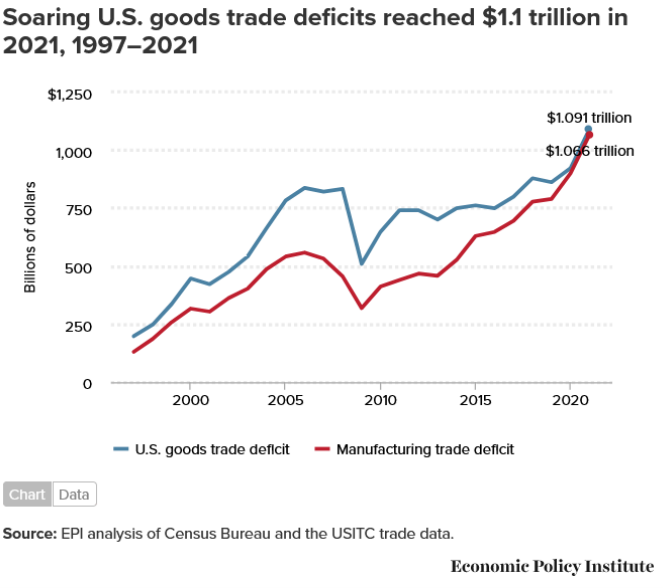
The United States pursues its four main foreign policy goals through several different foreign policy types, or distinct substantive areas of foreign policy. These types are trade, diplomacy, sanctions, military/defense, intelligence, foreign aid, and global environmental policy.

Trade policy is the way countries interact to ease the flow of commerce and goods and services. A country is said to be engaging in **protectionism** when it does not permit other countries to sell goods and services within its borders, or when it charges very high tariffs (or import taxes) to do so. At the other end of the spectrum is a **free trade** approach, in which a country allows the unfettered flow of goods and services between itself and other countries. At times the United States has been free trade–oriented, while at other times it has been protectionist. In 1991, the North American Free Trade Agreement (NAFTA) removed trade barriers and other transaction costs levied on goods moving between the United States, Mexico, and Canada. (NAFTA was replaced by the United States-Mexico-Canada Agreement (USMCA) on July 1, 2020**.)**



Source: The Balance

The **balance of trade** is the relationship between a country's inflow and outflow of goods. The United States sells many goods and services around the world, but overall it maintains a trade deficit, in which more goods and services are coming in from other countries than are going out to be sold overseas. This trade deficit has led some to advocate for protectionist trade policies.



Source: Economic Policy Institute

Diplomacy is the establishment and maintenance of a formal relationship between countries that governs their interactions on matters as diverse as tourism, the taxation of traded goods, and the landing of planes on each other's runways. Diplomatic relations are formalized through the sharing of ambassadors (country representatives who live and maintain an office known as an embassy).

To illustrate how international relations play out when countries come into conflict, consider the Hainan Island incident. In 2001, a U.S. spy plane collided with a Chinese jet fighter near Chinese airspace, where U.S. planes were not authorized to be. The Chinese jet fighter crashed and the pilot died. The U.S. plane made an emergency landing on the island of Hainan. China retrieved the aircraft and captured the U.S. pilots. U.S. ambassadors then attempted to negotiate for their return. These negotiations were slow and ended up involving officials of the president's cabinet, but they ultimately worked. Had they not succeeded, an escalating set of options likely would have included diplomatic sanctions (removal of ambassadors), economic sanctions (such as an embargo on trade and the flow of money between the countries), minor military options (such as establishment of a no-fly zone just outside

Chinese airspace), or more significant military options (such as a focused campaign to enter China and get the pilots back). Nonmilitary tools to influence another country, like economic sanctions, are referred to as **soft power**, while the use of military power is termed **hard power**.[5]

As a last resort, and when diplomacy fails, the U.S. military may wage war. (Keep in mind, only Congress can officially declare war. However, the president may commit troops as long as Congress is notified of such actions.) Some conflicts are offensive, such as the Iraq War in 2003 and the 1989 removal of Panamanian leader Manuel Noriega. Or it can be defensive, as a means to respond to aggression from others, such as the Persian Gulf War in 1991, also known as Operation Desert Storm.

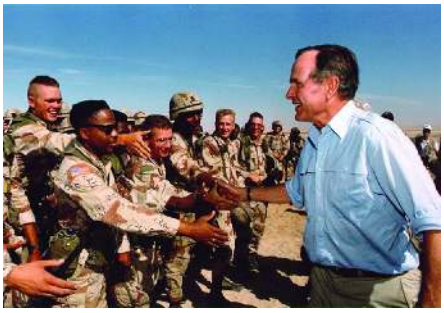
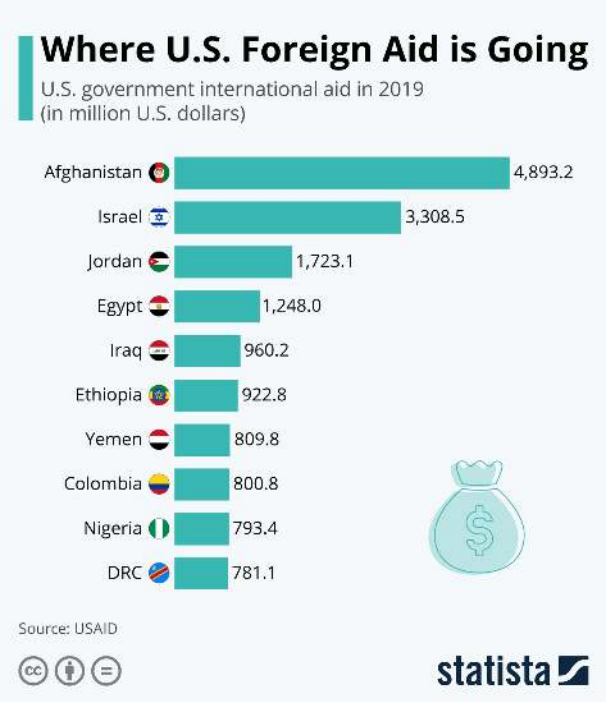


Figure 4. resident George H. W. Bush greets U.S. troops stationed in Saudi Arabia on Thanksgiving Day in 1990. The first troops were deployed there in August 1990, as part of Operation Desert Shield, which was intended to build U.S. military strength in the area in preparation for an eventual military operation.

Intelligence policy is related to defense and includes the overt and covert gathering of information from foreign sources that might be of strategic interest to the United States. The intelligence world captures the imagination of the general public. Many books, television shows, and movies entertain us (with varying degrees of accuracy) through stories about U.S. intelligence operations and people.

Foreign aid and global environmental policy are the final two foreign policy types. With both, the United States operates as a strategic actor with its own interests in mind, but also acts as an international steward trying to serve the common good. Through foreign aid, the United States provides material and economic aid to other countries, especially developing countries, in order to improve their stability and their citizens' quality of life. **NOTE:** This chart shows U.S. foreign aid for 2019. Subsequent years were skewed by the Covid-19 Pandemic.



Source: Statista

Global environmental policy addresses world-level matters, such as climate change and global warming, the thinning of the ozone layer, rainforest depletion in areas along the Equator, and ocean pollution and species extinction. The United States' commitment to such issues has varied considerably over the years. For example, the United States was the largest country not to sign the 1997 Kyoto Protocol on greenhouse gas emissions. However, it does support the Paris Accords, an international treaty on climate change adopted in 2015.

Unique Challenges in Foreign Policy

U.S. foreign policy is a massive and complex enterprise. What are its unique challenges for the country?

First, there exists no true world-level authority dictating how the nations of the world should relate to one another. If one nation negotiates in bad faith or lies to another, there is no central world-level government authority to sanction that country. Foreign relations are certainly made smoother by the existence of cross-national voluntary associations like the United Nations, the Organization of American States, and the African Union. However, these associations do not have strict enforcement authority over specific nations, unless a group of member nations takes action in some manner (which is ultimately voluntary).

The European Union is the single supranational entity with some real and significant authority over its member nations. Adoption of its common currency, the euro, brings with it concessions from countries on a variety of matters, and the EU's economic and environmental regulations are the strictest in the world. Yet even the EU has enforcement issues, as evidenced by the battle within its ranks to force member Greece to reduce its national debt or the recurring problem of Spain overfishing in the North Atlantic Ocean. The withdrawal of the United Kingdom (commonly referred to as Brexit, short for British exit) also points to its struggles.

International relations take place in a relatively open venue. When does it make sense to sign a multinational pact and when doesn't it? Is a particular bilateral economic agreement truly as beneficial to the United States as to the other party? These are open and complicated questions.

A second challenge is the widely differing views among countries about the role of government in people's lives. The hardline communist North Korean government regulates everything in its people's lives every day. At the other end of the spectrum are countries with little government activity at all, such as parts of the island of New Guinea. In between is a vast array of diverse approaches to governance. Countries like Sweden provide cradle-to-grave human services programs such as health care and education that in some parts of India are minimal at best. In Egypt, the nonprofit sector provides many services rather than the

government. The United States falls somewhere in the middle of this continuum because of its focus on law and order, educational and training services, and old-age pensions and health care in the form of Social Security and Medicare.



Figure 5. President Barack Obama (second from left) with Vice President Joe Biden (far left), Secretary of State Hillary Clinton (second from right), Secretary of Defense Robert Gates (far right), and other national security advisers in the Situation Room of the White House, watching the successful raid on Osama bin Laden's compound on May 1, 2011.

Thirdly, countries have varying ideas about the appropriate form of government, ranging from democracies on one side to various authoritarian (or nondemocratic) forms on the other. Relations between the United States and democratic states tend to operate more smoothly, based on a shared core assumption that the government's authority comes from the people. Monarchies and other nondemocratic forms of government do not share this assumption, which can complicate foreign policy discussions immensely. People in the United States often assume that people who live in a nondemocratic country would prefer to live in a democratic one. However, in some regions of the world, people often prefer having stability within a nondemocratic system over changing to a less predictable democratic form of government. Or they may just believe in a theocratic form of government.

A fourth challenge is that many new foreign policy issues transcend borders. There are no longer simply friendly states and enemy states. Terrorism, the international slave trade, and climate change originate with groups and issues that are not country-specific. They are transnational. For example, while we can readily name the enemies of the Allied forces in World War II (Germany, Italy, and Japan), the U.S. war against terrorism has been aimed at terrorist groups that do not fit neatly within the borders of any one country. Intelligence-gathering and focused military intervention is needed more than traditional diplomatic relations, and relations can become complicated when the United States wants to pursue terrorists within other countries' borders.

The fifth and final unique challenge is the varying conditions of the countries in the world and their effect on what is possible in terms of foreign policy and diplomatic relations. Relations between the United States and a stable industrial democracy are going to be easier than between the United States and an unstable developing country being run by a military junta (a group that has taken control of the government by force). Moreover, an unstable country will be more focused on establishing internal stability than on broader world concerns like environmental policy. In fact, developing countries are temporarily exempt from the requirements of certain treaties while they seek to develop stable industrial and governmental frameworks.

Summary

As the president, Congress, and others carry out U.S. foreign policy in the areas of trade, diplomacy, defense, intelligence, foreign aid, and global environmental policy, they pursue a variety of objectives and face a multitude of challenges. The four main objectives of U.S. foreign policy are the protection of the United States and its citizens and allies, the assurance of continuing access to international resources and markets, the preservation of a balance of power in the world, and the protection of human rights and democracy.

The challenges of the massive and complex enterprise of U.S. foreign policy are many. First, there exists no true world-level authority dictating how the nations of the world should relate to one another. A second challenge is the widely differing views

among countries about the role of government in people's lives. A third is other countries' varying ideas about the appropriate form of government. A fourth challenge is that many new foreign policy issues transcend borders. Finally, the varying conditions of the countries in the world affect what is possible in foreign policy and diplomatic relations.

Connecting Chapters

- What are two key differences between domestic policymaking and foreign policymaking?

Resources

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10.5: Foreign Policy Instruments

U.S. foreign policy varies from presidential directives about conducting drone strikes to the size of the overall foreign relations budget passed by Congress, and from presidential summits with other heads of state to U.S. views of new policies considered in the UN Security Council. Broadly focused decisions typically take longer to formalize, bring in more actors in the United States and abroad, require more resources to carry out, are harder to reverse, and hence tend to have a lasting impact. Sharply focused outputs tend to be processed quickly, are often unilateral moves by the president, have a shorter time horizon, are easier for subsequent decision-makers to reverse, and hence do not usually have so lasting an impact as broadly focused foreign policy outputs.

Broadly Focused Foreign Policy Outputs

Broadly focused foreign policy outputs span multiple topics and organizations, typically require large-scale spending, and take longer to implement than sharply focused outputs. In the realm of broadly focused outputs, we will consider public laws, the periodic reauthorization of the foreign policy agencies, the foreign policy budget, international agreements, and the appointment process for new executive officials and ambassadors.

- **Public Laws**, sometimes called statutes, are policies that affect more than a single individual. All policies enacted by Congress and the president are public laws, except for a few dozen each year. (P*rivate laws* require some sort of action or payment by a specific individual or individuals named in the law.) Examples of public laws that affect foreign policy are:
  - The National Security Act governs the way the government shares and stores information
  - The Patriot Act (passed immediately after 9/11) clarifies what the government may do in collecting information about people in the name of protecting the country.
  - The Homeland Security Act of 2002 authorized the creation of a massive new federal agency, the Department of Homeland Security, consolidating powers that had been under the jurisdiction of several different agencies. Their earlier lack of coordination may have prevented the United States from recognizing warning signs of the 9/11 terrorist attacks.
  - The War Powers Resolution of 1973 was passed by a congressional override of President Richard Nixon's veto. Its main feature was a requirement that presidents get approval from Congress to continue any military campaign beyond sixty days. To many, the overall effect was actually to strengthen the role of the president in war-making since many smaller-scale conflicts are over within sixty days. Before the War Powers Resolution, the first approval for war was supposed to come from Congress. In theory, Congress, with its constitutional war powers, could act to reverse the actions of a president once the sixty days have passed. However, a clear disagreement between Congress and the president, especially once an initiative has begun and there is a "rally around the flag" effect, is relatively rare. More likely are tough questions about the campaign to which continuing congressional funding is tied.
- **Reauthorization** is required every three to five years for all federal agencies dedicated to foreign policy. If not reauthorized, agencies lose their legal standing and the ability to spend federal funds to carry out programs. The reauthorization requirements create a regular conversation between the agency and its political principals about how well it is functioning and what could be improved. The foreign policy and defense budgets are part of the discretionary budget, or the section of the national budget that Congress vets and decides on each year. Foreign policy leaders in the executive and legislative branches must advocate for funding from this budget. In addition to new agencies, new cross-national projects are proposed each year to add to infrastructure and increase or improve foreign aid, intelligence, and national security technology.
- **Agreements** can range from bilateral agreements about tariffs to multinational agreements among dozens of countries about the treatment of prisoners of war. The U.S. Constitution outlines the **treaty** process in Article II.
  - The president negotiates a treaty,
  - The Senate consents to the treaty by a two-thirds vote.
  - The president ratifies it.
  - Today, over 90 percent of the international agreements into which the United States enters are not treaties but rather executive agreements.[1] Executive agreements are negotiated by the president. These **sole executive agreements** rely on neither treaty nor congressional authority to provide their legal basis. In *United States v. Pink* (1942), the Supreme Court ruled that executive agreements were legally equivalent to treaties provided they did not alter federal law.[2] Most executive agreements are not of major importance and do not spark controversy, while some, like the Iran Nuclear Agreement, generate considerable debate. (The seven-country Iran Nuclear Agreement of 2015 intended to limit nuclear development in Iran in exchange for the lifting of long-standing economic sanctions on that country.) Many in the Senate thought the Iran deal should have been completed as a treaty rather than as a sole executive agreement.

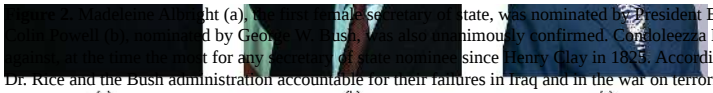


Figure 1. The ministers of foreign affairs and other officials from China, France, Germany, the European Union, Iran, Russia, and the United Kingdom join Secretary of State John Kerry (far right) in April 2015 to announce the framework that would lead to the multinational Iran Nuclear Agreement. (credit: modification of work by the U.S. Department of State)

- **Appointments**, such as the secretary of state and the various undersecretaries and assistant secretaries, as well as all ambassadors, must be confirmed by a majority vote of the Senate. Presidents seek to nominate people who know the area to which they're being appointed and who will be loyal to the president rather than to the bureaucracy in which they might work. They also want their nominees to be readily confirmed. Typically, when the party in the White House changes, more new appointments are made than when the party does not change, because the incoming president wants to put in place people who share his or her agenda. This was the case in 2001 when Republican George W. Bush succeeded Democrat Bill Clinton, and again in 2009 when Democrat Barack Obama succeeded Bush.







(a) (b) (c)

Figure 2. Madeleine Albright (a), the first female secretary of state, was nominated by President Bill Clinton and unanimously confirmed by the Senate 99–0. Colin Powell (b), nominated by George W. Bush, was also unanimously confirmed. Condoleezza Rice (c) had a more difficult road, earning thirteen votes against, at the time the most for any secretary of state nominee since Henry Clay in 1825. According to Senator Barbara Boxer (D-CA), senators wanted "to hold Dr. Rice and the Bush administration accountable for their failures in Iraq and in the war on terrorism." The confirmation of Rex Tillerson, CEO of ExxonMobil, in February 2017, received the most opposition of any secretary of state, with forty-three votes against. His successor, Mike Pompeo, was confirmed 57–42 in April 2018.

Sharply Focused Foreign Policy Outputs

Sharply focused foreign policy outputs tend to be exclusively the province of the president, including the deployment of troops and/or intelligence agents in a crisis, executive summits between the president and other heads of state on targeted matters of foreign policy, presidential use of military force, and emergency funding measures to deal with foreign policy crises. These measures of foreign policy are more quickly enacted and demonstrate the "energy and dispatch" that Alexander Hamilton, writing in the *Federalist Papers*, saw as inherent in the institution of the presidency. Emergency spending does involve Congress through its power of the purse, but Congress tends to give presidents what they need to deal with emergencies. That said, the framers were consistent in wanting checks and balances sprinkled throughout the Constitution, including in the area of foreign policy and war powers. Hence, Congress has several roles, as discussed at points throughout this chapter.

Perhaps the most famous foreign policy emergency was the Cuban Missile Crisis in 1962. With the Soviet Union placing nuclear missiles in Cuba, just a few hundred miles from Florida, a Cold War standoff with the United States escalated. The Soviets at first denied the existence of the missiles, but U.S. reconnaissance flights proved they were there, gathering photographic evidence that was presented at the UN. The Soviets stood firm, and U.S. foreign policy leaders debated their approach. Some in the military were pushing for aggressive action to take out the missiles and the installation in Cuba, while State Department officials favored a diplomatic route. President John F. Kennedy ended up taking the recommendation of a special committee, and the United States implemented a naval blockade of Cuba that subtly forced the Soviets' hands. The Soviets agreed to remove their Cuban missiles and the United States, in turn, agreed six months later to remove its missiles from Turkey.



(a) (b)

Figure 3. This low-level U.S. Navy photograph of San Cristobal, Cuba, clearly shows one of the sites built to launch intermediate-range missiles at the United States (a). As the date indicates, it was taken on the last day of the Cuban Missile Crisis. Following the crisis, President Kennedy (far right) met with the reconnaissance pilots who flew the Cuban missions (b). (credit a: modification of work by the National Archives and Record Administration)

Another form of focused foreign policy output is the presidential summit. Often held at the Presidential Retreat at Camp David, Maryland, these meetings bring together the president and one or more other heads of state to dive deeply into important issues that are not quickly solved. For example, in 1978, President Jimmy Carter, Egyptian president Anwar El Sadat, and Israeli prime minister Menachem Begin met privately for twelve days at Camp David negotiating a peace process for the two countries that became known as the Camp David Accords.



(a) (b)

Figure 4. President Jimmy Carter meets with Egypt's Anwar El Sadat (left) and Israel's Menachem Begin (right) at Camp David in 1978 (a). President George H. W. Bush (right) dines with Mikhail Gorbachev (left) at the Malta Summit in 1989 (b). (credit b: modification of work by the National Archives and Records Administration)

The military use of force is a focused foreign policy output. Since the end of World War II, all such initial uses of force have been authorized by the president. Congress has subsequently supported additional military action, but the president has been the instigator. As discussed above, the War Powers Resolution clarified these steps. One example was the U.S. role in enforcing a no-fly zone over Libya in 2011, which included kinetic strikes—or active engagement of the enemy—to protect anti-government forces on the ground. U.S. fighter jets flew out of Aviano Air Base in northern Italy.



Figure 5. One example of a sharply focused foreign policy output is the use of the U.S. military abroad. Here, the Air Force fighter jets used to enforce a 2011 no-fly zone over Libya return to a NATO air base in northeastern Italy. (credit: Tierney P. Wilson)

The final example of a focused foreign policy input is the passage of an emergency funding measure for a specific national security task. Congress tends to pass at least one emergency spending measure per year, which must be signed by the president to take effect, and it often provides funding for domestic disasters. However, at times foreign policy matters drive an

emergency spending measure, as was the case right after the 9/11 attacks. In such a case, the president or the administration proposes particular amounts for emergency foreign policy plans.

Summary

U.S. foreign policy outputs vary considerably. At one end of the continuum are sharply focused outputs such as the presidential use of military force via a specific drone strike on an enemy target, or the forging of a presidential summit with another country's president or head of state. At the other end of the spectrum are broadly focused outputs that typically bring more involvement from Congress and other world leaders, such as the process to formalize a multilateral treaty on the global environment or the process to finalize the U.S. diplomatic budget each fiscal year. Broadly focused outputs typically take more time to decide, involve more nation-states, are more expensive, and are quite difficult to reverse once in place. Sharply focused outputs are faster, tend to be led by the president, and are easier for future policymakers to undo.

Resources

1. Glen S. Krutz and Jeffrey S. Peake. 2009. Treaty Politics and the Rise of Executive Agreements: International Commitments in a System of Shared Powers. Ann Arbor, MI: University of Michigan Press. ↵
2. United States v. Pink, 315 U.S. 203 (1942). ↵

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10.6: Institutional Relations in Foreign Policy

Institutional relationships in foreign policy constitute a paradox. On the one hand, there are aspects of foreign policymaking that necessarily engage multiple branches of government and a multiplicity of actors. Indeed, there is a complexity to foreign policy that is bewildering, in terms of both substance and process. On the other hand, foreign policymaking can sometimes call for nothing more than for the president to make a formal decision, quickly endorsed by the legislative branch.

Foreign Policy and Shared Power

While presidents are more empowered by the Constitution in foreign than in domestic policy, they must seek approval from Congress on a variety of matters; chief among these is the basic budgetary authority needed to run foreign policy programs. Even a sole executive agreement often requires subsequent funding from Congress in order to be carried out, and funding calls for majority support from the House and Senate. Presidents must consult with and engage Congress on many matters of foreign policy, and delegate a great deal to the bureaucratic experts in the foreign policy agencies. Not every operation can be run from the West Wing of the White House.

This chart shows the separation of powers and authority divided among executive and legislative branches, including in the foreign policy realm.

Table 1. Roles of the President and Congress in Conducting Foreign Policy

Policy Output	Presidential Role	Congressional Role
Public laws	Proposes, signs into law	Proposes, approves for passage
Agency reauthorizations	Proposes, signs into law	Approves for passage
Foreign policy budget	Proposes, signs into law	Authorizes/appropriates for passage
Treaties	Negotiates, ratifies	Senate consents to treaty (two-thirds)
Sole executive agreements	Negotiates, approves	None (unless funding is required)
Congressional-executive agreements	Negotiates	Approves by majority vote
Declaration of war	Proposes	Approves by majority vote
Military use of force	Carries out operations at will (sixty days)	Approves for operations beyond sixty days
Presidential appointments	Nominates candidates	Senate approves by majority vote

Nearly all major outputs of foreign policy require a formal congressional role in order to be carried out. Foreign policy might be done by executive say-so in times of crisis and in the handful of sole executive agreements that actually pertain to major issues (like the Iran Nuclear Agreement). In general, however, a consultative relationship between the branches in foreign policy is the usual result of their constitutional sharing of power.

Shared power creates an incentive for the branches to cooperate. Even in the midst of a crisis, such as the Cuban Missile Crisis in 1962, it is common for the president or senior staff to brief congressional leaders in order to keep them up to speed and ensure the country can stand unified on international matters. That said, there are areas of foreign policy where the president has more discretion, such as the operation of intelligence programs, the holding of foreign policy summits, and the mobilization of troops or agents in times of crisis. Moreover, presidents have more power and influence in foreign policymaking than they do in domestic policymaking.

The Two Presidencies Thesis

When the media cover a domestic controversy, such as social unrest or police brutality, reporters consult officials at different levels and in branches of government, as well as think tanks and advocacy groups. In contrast, when an international event occurs, such as a terrorist bombing in Paris or Brussels, the media flock predominately to one actor—the president of the United States—to get the official U.S. position.

The **two presidencies thesis** suggests that there are two distinct presidencies, one for foreign policy and one for domestic policy, and that presidents are more successful in foreign than domestic policy. Let's look at the reasoning behind this thesis.

- The Constitution names the president as the commander-in-chief of the military, the nominating authority for executive officials and ambassadors, and the initial negotiator of foreign agreements and treaties. The president is the agenda-setter for foreign policy and may move unilaterally in some instances. Beyond the Constitution, presidents were also gradually given more authority to enter into international agreements without Senate consent by using the executive agreement. Laws, such as the War Powers Resolution of 1973, further promote this idea. Given all these powers, we have good reason to expect presidents to have more influence and be more successful in foreign than in domestic policy.
- The second reason has to do with the informal aspects of power. In some eras, Congress will be more willing to allow the president to be a clear leader and speak for the country. For instance, the Cold War between the Eastern bloc countries (led by the Soviet Union) and the West (led by the United States and Western European allies) prompted many to want a single actor to speak for the United States. A willing Congress allowed the president to take the lead because of urgent circumstances. In addition, the Cold War took place when the parties in Congress included more moderates on both sides of the aisle and the environment was less partisan than today. A phrase often heard at that time was, "Partisanship stops at the water's edge." This means that foreign policy matters should not be subject to the bitter disagreements seen in party politics.



(a) (b)

Figure 1. President John F. Kennedy gives a speech about freedom in the shadow of the Berlin Wall (a). The wall was erected in 1963 by East Germany to keep its citizens from defecting to West Berlin. On September 14, 2001, President George W. Bush promises justice at the site of the destroyed World Trade Center in New York City (b). Rescue workers responded by chanting "U.S.A., U.S.A.!" (credit a: modification of work by the John F. Kennedy Library)

Does the thesis's expectation of a more successful foreign policy presidency apply today? While the president still has stronger foreign policy powers than domestic powers, the governing context has changed in two key ways. First, the Cold War ended in 1989 with the demolition of the Berlin Wall, the subsequent disintegration of the Soviet Union, and the eventual opening up of Eastern European territories to independence and democracy. These dramatic changes removed the competitive superpower aspect of the Cold War, in which the United States and the USSR were dueling rivals on the world stage. The absence of the Cold War has led to less of a rally-behind-the-president effect in the area of foreign policy.

Second, beginning in the 1980s and escalating in the 1990s, the Democratic and Republican parties began to become polarized in Congress. The moderate members in each party all but disappeared, while more ideologically motivated candidates began to win elections to the House and later the Senate. Hence, the Democrats in Congress became more liberal on average, the Republicans became more conservative, and the moderates from each party, who had been able to work together, were edged out. It became increasingly likely that the party opposite the president in Congress might be more willing to challenge his initiatives, whereas in the past it was rare for the opposition party to publicly stand against the president in foreign policy.

Finally, several analysts have tried applying the two presidencies thesis to contemporary presidential-congressional relationships in foreign policy. Is the two presidencies framework still valid in the more partisan post–Cold War era? The answer is mixed. On the one hand, presidents are more successful on foreign policy votes in the House and Senate, on average, than on domestic policy votes. However, the gap has narrowed. Moreover, analysis has also shown that presidents are opposed more often in Congress, even on the foreign policy votes they win.[2] Democratic leaders regularly challenged Republican George W. Bush on the Iraq War and it became common to see the most senior foreign relations committee members of the Republican Party opposing the foreign policy positions of Democratic president Barack Obama. Such challenging of the president by the opposition party simply didn't happen during the Cold War.

During the Trump administration, there was been a distinct shift in foreign policy style. While for some regions, like South America, Trump was content to let the foreign policy bureaucracies proceed as they always have, in certain areas, the president has become quite pivotal in changing the direction of U.S. foreign policy. For example, he stepped away from two key international agreements—the Iran-Nuclear Deal and the Paris climate change accords. Moreover, in Syria, he employed bombing raids unilaterally on two occasions. This approach reflects more of a neoconservative foreign policy approach.

Therefore, it seems presidents no longer enjoy unanimous foreign policy support as they did in the early 1960s. They have to work harder to get a consensus and are more likely to face opposition. Still, because of their formal powers in foreign policy, presidents are overall more successful in foreign policy than in domestic policy.

The Perspective of House and Senate Members

Congress is a bicameral legislative institution with 100 senators serving in the Senate and 435 representatives serving in the House. How interested in foreign policy are typical House and Senate members?



(a) (b)

Figure 2. Senator Cory Booker (D-NJ) (a) serves on the Senate Committee on Foreign Relations, along with Senator Jim Risch (R-ID) (b), who chairs the committee.

Unless there is a foreign policy crisis, legislators in Congress tend to focus on domestic matters, mainly because there is not much to be gained with their constituents by pursuing foreign policy matters.[3] Domestic policy matters resonate more strongly with the voters at home. In other words, a sluggish economy, increasing health care costs, and crime matter more to them than U.S. policy toward North Korea. In an open-ended Gallup poll question from early 2016 about the "most important problem" in the United States, fewer than 15 percent of respondents named a foreign policy topic (half of those respondents mentioned immigration).[4]

Some House and Senate members ask to serve on the foreign policy committees, such as the Senate Committee on Foreign Relations, the House Foreign Affairs Committee, and the two defense committees. These members might have military bases within their districts or states and hence have a constituency reason for being interested in foreign policy. Legislators might also simply have a personal interest in foreign policy matters that drives their engagement in the issue. Finally, they may have ambitions to move into an executive branch position that deals with foreign policy matters, such as secretary of state or defense, CIA director, or even president.

For more information on the two key congressional committees on U.S. foreign policy, visit the Senate Committee on Foreign Relations and the House Foreign Affairs Committee websites.

The Many Actors in Foreign Policy

The White House staff members engaged in foreign policy are likely to have very regular contact with the president about their work.

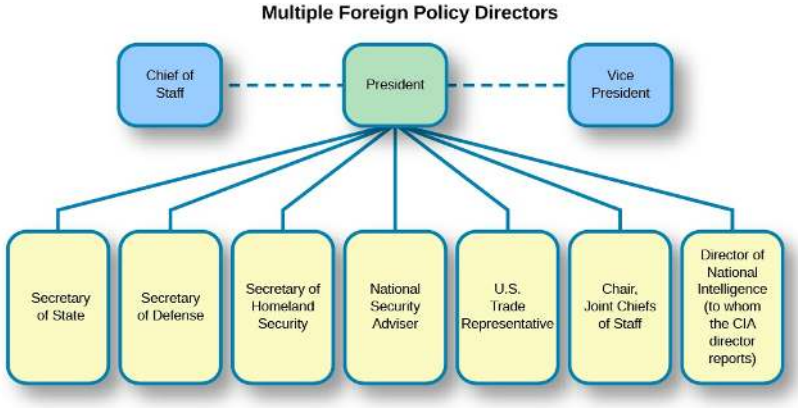


Figure 3. Several cabinet members play a key role in conducting foreign policy.

Summary

Foreign policy can at times seem fragmented and diffuse because of the complexity of actors and topics. However, the president is clearly the leader, having both formal authority and the ability to delegate to Congress, as explained in the two presidencies thesis. With this leadership, presidents at times can make foreign policymaking quick and decisive, especially when it calls for executive agreements and the military use of force.

Resources

1. Krutz and Peake. Treaty Politics and the Rise of Executive Agreements. ↵
2. Jon Bond, Richard Fleisher, Stephen Hanna, and Glen S. Krutz. 2000. "The Demise of the. Two Presidencies," American Politics Quarterly 28, No. 1: 3–25. ↵

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4. The Gallup Organization, "Most Important Problem," http://www.gallup.com/poll/1675/most-important-problem.aspx (May 12, 2016). ↵

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10.7: 10.7 Approaches to Foreign Policy

Frameworks and theories help make sense of the environment of governance in a complex area like foreign policy. A variety of schools of thought exist about how to approach foreign policy, each with different ideas about what "should" be done. These approaches also vary in terms of what they assume about human nature, how many other countries ought to be involved in U.S. foreign policy, and what the tenor of foreign policymaking ought to be. They help situate the current U.S. approach to many foreign policy challenges around the world.

Classic Approaches

A variety of traditional concepts of foreign policy remain helpful when considering the proper role of the United States in, and its approach to, foreign affairs. These include isolationism, the idealism versus realism debate, liberal internationalism, hard versus soft power, and the grand strategy of U.S. foreign policy.

- From circa 1789 to 1914, **isolationism**—whereby a country stays out of foreign entanglements and keeps to itself—was a popular stance in U.S. foreign policy. Among the founders, Thomas Jefferson thought that by keeping to itself, the United States stood a better chance of becoming a truly free nation. (Ironically, Jefferson later served as ambassador to France and president of the United States, both roles that required at least some attention to foreign policy.) Between the end of World War I and entry into World War II (1941), isolationist sentiment returned, based on the idea that Europe should learn to govern its own affairs. Then, after World War II, the United States emerged as a superpower and the military leader of Europe and the Pacific. Isolationism has never completely gone away, but operates in the background.
    - Today, **neo-isolationism** means distancing the United States from the United Nations and other international organizations that get in the way. The strategy of **selective engagement**—retaining a strong military presence and remaining engaged across the world through alliances and formal installations—is used to protect the national security interests of the United States. However, this strategy also seeks to avoid being the world's policeman.
- **Liberal internationalism** advocates a foreign policy approach in which the United States becomes proactively engaged in world affairs. Its adherents assume that liberal democracies must take the lead in creating a peaceful world by cooperating as a community of nations and creating effective world structures such as the United Nations. To fully understand liberal internationalism, it is helpful to understand **the idealist versus realist debate** in international relations.
    - Idealists assume the best in others and see it as possible for countries to run the world together, with open diplomacy, freedom of the seas, free trade, and no militaries. Everyone will take care of each other. A classic example of a liberal internationalist is President Woodrow Wilson, who sought a League of Nations to voluntarily save the world after World War I.
    - Realists assume that others will act in their own self-interest and hence cannot necessarily be trusted. They want a healthy military and contracts between countries in case others want to wiggle out of their commitments. Realism has a place in liberal internationalism because the United States approaches foreign relationships with open eyes and an emphasis on self-preservation.
- **Soft versus hard power**--Soft power, or diplomacy, is in line with liberal internationalism and idealism. By contrast, hard power allows the potential for military force, and is in the realm of realism. For example, the United States was rather isolationist in its approach to China, assuming it was a developing country that could safely be ignored. Then, President Nixon opened up China as an area for U.S. investment, and an era of open diplomatic relations (soft power) began in the early 1970s. As China modernized and began to dominate the trade relationship with the United States, many people applied the realist lens to consider whether China's behavior really warranted its beneficial most-favored-nation trading status.
    - Today, **neoconservatives** believe that rather than exercising restraint and always using international organizations as the path to international outcomes, the United States should aggressively use its might to promote its values and ideals around the world. These individuals advocate hard power.



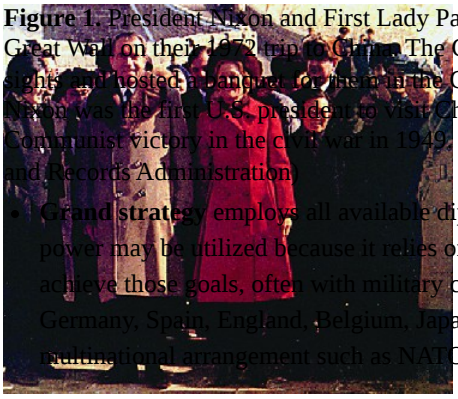


Figure 1. President Nixon and First Lady Patricia Nixon visited the Great Wall on their 1972 trip to China. The Chinese showed them the sights and hosted a banquet for them in the Great Hall of the People. Nixon was the first U.S. president to visit China following the Communist victory in the civil war in 1949. (credit: National Archives and Records Administration)

- Grand strategy employs all available diplomatic, economic, and military resources to advance the national interest. Hard power may be utilized because it relies on developing clear strategic directions for U.S. foreign policy and the methods to achieve those goals, often with military capability attached. After World War II, the United States built military bases in Italy, Germany, Spain, England, Belgium, Japan, Guam, and Korea. It still operates nearly all these, though often under a multinational arrangement such as NATO. These bases help preserve stability on the one hand, and U.S. influence on the other.

link to learning

Several interest groups debate what should happen in U.S. foreign policy, many of which are included in this list compiled by project Vote Smart.

Summary

Classic theories of foreign policy divide into the isolationist camp and the internationalist camp. In the end, the complexity of international relationships, combined with a multifaceted decision-making process and a multiplicity of actors, leads to a U.S. foreign policy approach that uses a bit of all the schools of thought. The United States is being neoconservative when drone strikes are carried out unilaterally within the boundaries of another sovereign nation. It is being internationalist when building a coalition on the Iran nuclear deal or when participating in NATO initiatives.

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