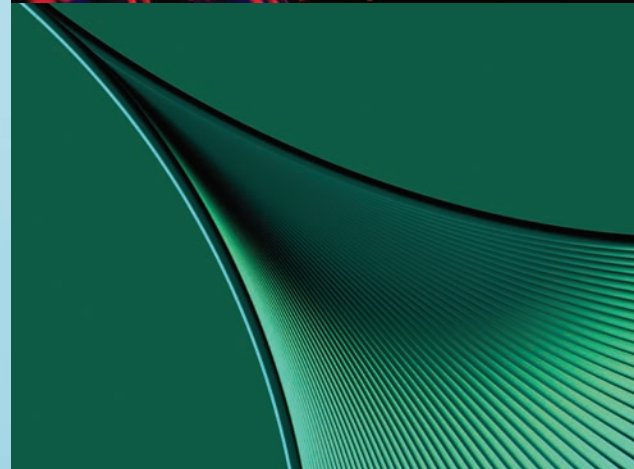


American Government

Timothy O. Lenz
and Mirya Holman



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American Government

TIMOTHY O. LENZ AND MIRYA HOLMAN

FLORIDA ATLANTIC UNIVERSITY DEPARTMENT OF POLITICAL SCIENCE

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CHAPTER 1: WHY GOVERNMENT? WHY POLITICS?



"I believe that all government is evil, and that trying to improve it is largely a waste of time"

-H.L. Mencken
(1880-1956)

"Democracy is the worst form of government except for all those others that have been tried."

-Winston Churchill
(1874-1965)

1.0 | What is Government?

Government can be defined as the institutions and processes that make and implement authoritative decisions for a society. The government unit can be a city, county, state, regional, national, or international government. The decisions, which include laws, regulations, and other public policies, are authoritative in the sense that individuals and organizations are legally obligated to obey the decisions or face some kind of sanction. In the U.S., government includes the **national** government institutions (Congress, the Presidency, the federal courts, and a broad range of federal bureaucracies), the 50 **state** governments (state legislatures, governors, state courts, and state bureaucracies), and the **local** governments (counties, cities, and other special government units such as school boards).

1.10 | Why Government

Is government necessary? Is it possible to live without government? Why do governments exist all over the world when people all over the world are so critical of government? These are old political questions that were first asked when people began thinking about life in organized societies. Questions about the need for government and the legitimate purposes of government are continually being asked because the answers reflect contemporary thinking about basic human values, including freedom, order, individualism, equality, economic prosperity, national security, morality and ethics, and justice. These values are central to government and politics in all countries although the values attached to them and their relative importance varies a great deal. Given the almost universal criticism of government, and a strong tradition of anti-government rhetoric in the United States, it is worth wondering "why government?"

One recurring theme in American government and politics is the conflict between two basic values: freedom and order. Freedom (or liberty) is highly valued in the American political tradition. Individual freedom is an essential element of democracy. Self-government requires individual liberty. In the U.S., freedom of religion, speech, press, and association are individual liberties that are guaranteed by the First Amendment to the U.S. Constitution. The language of the First Amendment, which begins with "Congress shall make no law....," reflects the most common understanding of individual liberty in the U.S. where freedom is usually defined as the absence of government limits.

Order is also a basic political value. One of the primary responsibilities of government is to create and maintain good public order. Good public order is commonly defined to include public safety (individuals are protected from crime, foreign invasions, and domestic disturbances) as well as behavior that a society considers appropriate conduct. Governments use law to create and maintain these aspects of good public order. These laws sometimes limit individual liberty in order to achieve order. Politics is often about where to strike the right balance between allowing individuals the freedom to do what they want, to live their lives without government restrictions, and giving government power to control behavior in order

to maintain good public order. In American politics, debates are often framed as freedom *versus* order because the relationship between individual freedom and government power is considered a zero-sum relationship: an increase in one means a corresponding decrease in the other. The power problem illustrates this relationship.

1.12 | *The Power Problem*

The **power problem** refers to the need to grant government enough power to effectively address the problems that people expect government to address, while also limiting power enough so that government can be held accountable. The challenge is to give government enough power so that it can address or solve the problems that people want government to solve, such as providing public safety and national security and economic prosperity, while also limiting government power so that it can be held accountable by the people. Too little power can be a problem because weak governments or “[failed states](#)” can provide havens for criminals or terrorists. Too much power can be a problem because strong governments can threaten individual rights. Creating good government requires striking the right balance between granting *and* limiting power. Doing so is difficult because people have different views about the balance point. Politics is about reconciling individual, ideological, and partisan differences of opinion about the power problem.

1.13 | *Politics*

People have different opinions about whether their political system, or the political system of another country, allows too much individual freedom or provides too little public order. People also have different beliefs about what government should be doing. The U.S. Constitution does not say very much about the specifics of where to strike the balance between rights and powers. It mostly provides general guidelines about powers and rights. The Fourth Amendment provides the people a right “against unreasonable searches and seizures,” but it does not say when a police officer’s search or seizure is unreasonable. The Eighth Amendment prohibits “cruel and unusual punishment” but does not define it. Article I, Section 8 of the Constitution grants Congress power to provide for the “general Welfare of the United States,” but it does not define general welfare.

The fact that the Constitution includes such general language means that some disputes about where the balance between government power and individual rights should be struck are more *political* than *legal*. In democratic political systems, politics is about different beliefs about how much power government should have and what government should be doing. Conservatives and liberals typically take different positions in political debates about government power, both the amount of government and its uses. Political opinions about the right balance between individual rights and government power are influenced by conditions. Is it a time of war or peace? Is the economy good or bad? Is there good public order or is it a time of crisis or disorder? These are the political conditions that determine public opinion. The Constitution does not say very much about government power during times of crisis or emergency. Article I Section 9 of the Constitution *does* provide that Congress may suspend the writ of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it.” But most questions

about striking the right balance between granting and limiting power, or the balance between individual freedom and government power, or the right size and role of government, are left for each generation to decide depending on the particular circumstances they face.

American politics is often framed as debates about the *size* of government. These debates are familiar arguments about big government versus small government. But politics is actually more likely to be about the *role* of government—the purposes and uses of government power. The “big v. small” arguments tend to distract from the disagreements about what government should be doing. Politics is about whether government is too strong or too weak, too big or too small, doing too much or too little. Politics is also about whether government is doing the right things or the wrong things, whether specific public policies should change, and whether the government has the right priorities. Many of these political questions about the right size and proper role of government are actually questions about whether a political system is a just system.

1.14 | Justice

[Justice](#) is a basic concept that is hard to precisely define. It can be generally understood to mean that an individual is treated fairly. Politically, justice usually means that an individual is treated fairly by the government. The definition of *justice as fairness* includes the belief that individuals should get what they deserve: good or appropriate behavior is recognized and rewarded; bad or inappropriate behavior is recognized and punished. There are many definitions of justice, but most include a moral or ethical component—that is, definitions of justice commonly identify a particular set of values as important.

Justice is important politically because it describes a proper ordering of things, values, and individuals within a society. The nature of a just society or political system has been the subject of human inquiry since people first thought about living a good life in an organized society. Justice is a familiar subject in works of politics, philosophy, theology, and law. The Ancient Greek philosophers Plato and Aristotle described what they believed to be the attributes of a just society and the best form of government to achieve justice. The Founders of the American political system also thought a great deal about a just society and the best form of government. The [Declaration of Independence](#) explains why the American colonists were justified in fighting the Revolutionary War against Great Britain. It includes a long list of charges that the “king of Great Britain” acted so unjustly that the colonists were justified in taking up arms and breaking their political bonds with Great Britain. The [Preamble to the U.S. Constitution](#) also declares an interest in creating a form of government that promotes justice. It explains that the Constitution was established “in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity...”

The interest in justice was not limited to the founding era. Both sides in the Civil War claimed to be fighting for justice: the North fought against slavery, among other reasons,



and the South fought for states' rights, among other reasons. The various civil rights movements of the 20th Century were also organized efforts to achieve a more just society for Blacks, women, and other minorities. Political theorists continue to explore the meaning and importance of justice. In *A Theory of Justice*, John Rawls argued that “justice is the first virtue of social institutions, as truth is of systems of thought.”¹ The argument that justice is the most important virtue for our social, political, and governmental institutions to pursue reflects the continued value placed on justice in modern thinking about government and politics—but recognizing the importance of justice is much easier than actually defining it.

Political science studies individuals (and individual behavior) and systems (and the workings of institutions). At the individual level of analysis, justice is as simple as a person's expectation that she or he will be treated fairly. In this sense, justice is an expectation that a person will get what they deserve—whether it is recognition and reward for doing well and behaving appropriately, or sanctions for not doing well or behaving inappropriately. At the system level of analysis, a just political system is one that maintains a political order where individuals are treated fairly, where the system treats people fairly as is therefore a legitimate system of governance. One factor that complicates considerations of whether an individual is treated fairly or a political system is just is that fair treatment may be a universally accepted concept but views on what fair or just treatment is in a particular situation is a subjective value judgment.

What justice means is further complicated by the fact that there are different types of justice. *Retributive justice* is concerned with the proper response to wrongdoing. Retributive justice is most relevant to the criminal justice system and the theory and practice of punishment as reflected in sentencing policy. The *law* of retribution—*lex talionis*—reflects the concept of retributive justice—the belief that punishment should fit the crime. The biblical verse “life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, wound for wound, stripe for stripe,” embodies the principle of retributive justice. However, there is no consensus that the “an eye for an eye” principle of retributive justice should be interpreted literally to mean that justice requires taking an eye for an eye, a hand for a hand, a tooth for a tooth, or a life for a life. The alternative to this literal reading of retributive justice is the metaphorical interpretation. The metaphorical interpretation requires proportionality—a punishment that fits the crime. A just punishment must be proportionate to the crime, but justice does not require that punishment be identical to the crime.

A second type of justice is *restorative justice*. Restorative justice is also relevant to the criminal justice system. However, unlike retributive justice, which is primarily concerned with punishing an offender, restorative justice emphasizes the importance of restoring the victim (making the victim whole again) and rehabilitating the offender.

A third type of justice is *distributive justice*. Distributive justice is concerned with the proper distribution of values or valuables among the individuals or groups in a society. The valuables can be things of material value (such as income, wealth, food, health care, tax breaks, or property) or non-material values (such as power, respect, or recognition of status). Distributive justice is based on the assumption that values or valuables can be distributed equitably based upon merit. Political debates about economic inequality, a fair tax system, access to education, and generational justice (whether government policies

benefit the elderly more than the young) are often conducted in terms of distributive justice: who gets what and who should be getting what.

1.2 | The State of Nature: Life Before or without Government

One of the most important concepts in western political thought is “the state of nature.” The state of nature is used to explain the origin of government. The 17th Century English political philosopher Thomas Hobbes (1588-1679) believed that life in a state of nature (that is, without government), would be “solitary, poor, nasty, brutish, and short” because human beings are self-interested actors who will take advantage of others. Hobbes believed that it is simply human nature for the strong to take advantage of the weak. The competition for economic and political advantage results in a constant “war of all against all” that makes an individual’s existence precarious. Hobbes and other social contract theorists believed that individuals who are living a precarious existence in the state of nature decide to enter into a social contract that



creates a government with enough power to maintain order by controlling behavior. The terms of the social contract include trading some of the individual freedom in the state of nature for order, security, justice, or other political values. His classic work *Leviathan* (1651) describes a strong government with power to create and maintain order. The word Leviathan comes from the biblical reference to a great sea monster—an image that critics of modern big government consider appropriate.

All ideologies include a view of human nature. Some ideologies are based on a negative view of human nature—one that describes humans as basically self-interested or even quite capable of evil. Some ideologies are based on a more positive view of human nature—one that describes humans as basically public-spirited or even benevolent. Ideologies with a more positive view of human nature assume that individuals are capable of getting along well without government, with minimal government, or with government that is much weaker than a Leviathan. For a view of human nature as capable of good or evil, that stresses the importance of education and socialization to develop the better instincts and moral conscience, read President [Abraham Lincoln’s First Inaugural Address](#), which appeals to Americans to be guided by “the better angels of our nature.”

1.21 | John Locke (1632-1704)

In *An Essay Concerning the True Original, Extent and End of Civil Government*, the English political philosopher [John Locke](#) described life in the pre-government “state of nature” as a condition where “all men” are in “a state of perfect freedom to order their actions and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.”²

Locke did not mean that “perfect freedom” gave individuals license to do whatever they wanted. The law of nature mandated that “no one ought to harm another in his life, health, liberty, or possessions.” According to Locke, the natural state of man is to live free from oppression and the will of man—“living together according to reason without a common superior on earth” and “to have only the law of Nature for his rule.” However, history teaches that some individuals inevitably gain power over others, and use their power to harm them. The use of power or might without right—the fear that might makes right—is one reason why individuals decide to leave the state of nature and live under government.

1.22 | *Jean-Jacques Rousseau*

In *The Social Contract*, Jean-Jacques Rousseau (1712-1778) wondered why people were born free but everywhere lived with government: “Man is born free, and everywhere he is in chains.” The American political tradition of criticizing government raises the question whether government is necessary. *To govern* means to control. Government control is intended to create and maintain order. Why is government necessary to create order? In the history of western political thought, the alternative to government is life in what political philosophers call a *state of nature*. Life without government in a “state of nature” created problems or conditions that caused individuals to believe that living with government would be an improvement.

1.23 | *Influences on the American Founders*

John Locke believed that individuals decided to leave the state of nature and live under government because government offered greater protection of their rights including the right to life, liberty, and property. This natural rights-based understanding of the purposes of government greatly influenced the writers of the Declaration of Independence. The Declaration of Independence explained and justified the American Revolution as a necessary act—the right and duty of a free people to assert their natural or “unalienable Rights” to “Life, Liberty, and the Pursuit of Happiness” when confronted with tyrannical government. Some of the most important words and ideas in the Declaration of Independence can be traced to the writings of Locke. Natural rights are those that individuals have because they are human beings or because they are God-given rights. Natural rights are not created by human beings or government. Natural rights contrast with positive rights, which are created by an act of government.

1.24 | *The Social Contract Theory of Government*

Hobbes, Locke, Rousseau, are classical political philosophers who are [social contractarians](#). They advocate a social contract theory that provides a justification for creating government and operating it as acts of self-government. According to social contract theory, people create governments by entering into written or unwritten agreements to live together under a particular form of government. The agreement is a *contract* because it binds the parties to specific rights (or benefits) an obligations, duties, and responsibilities. The agreement is *social* because it involves the members of a community or society deciding to create a binding agreement to live together under a

form of government. In the U.S., the social contract is a written document: the Constitution. The terms of this social contract include individual rights and responsibilities as well as government powers and responsibilities. The people have a duty to obey the law. The government has a responsibility to provide safe streets, national security, and other public goods.

Social contract theory is identified with self-government because it is based on popular sovereignty. Popular sovereignty is the belief that the people are sovereign, that the people are the ultimate source of governing authority. Popular sovereignty describes political authority—the legitimate use of government power—as based on the consent of the governed. Government is based on the consent of the people; government is not imposed on the people. Social contract theory explains why it is rational for an individual to voluntarily give up the freedom of living in the state of nature and agree to live under a government that can tell them what they can and cannot do. The social contract explains why it is rational for an individual to accept a government with the power to take a person's life, liberty, and property.

John Stuart Mill elaborated on social contract theory in works that described liberal democracy as the major political development or advance of the 19th Century. His classic book *On Liberty* elevated the importance of individual liberty as a political value and advocated for stronger protection of individual liberty from restrictions by government and the rule of the majority. Mill is remembered today for his articulation of the *Harm Principle* as a way to determine the proper use of government power to limit individual freedom. The Harm Principle held that the only legitimate reason for using law to limit an individual's freedom was to prevent one person from harming another. The Harm Principle is considered a libertarian principle because it was developed in order to limit government power to restrict individual liberty. The Harm Principle is libertarian in the sense that it considers laws that are passed to prevent a person from harming themselves inappropriate—which means that paternalistic legislation such as laws requiring the wearing of seatbelts or motorcycle helmets or prohibiting the use of drugs would be considered inappropriate. The Harm Principle is also libertarian insofar as it considers moral regulatory policies (e.g., legislating morality) inappropriate use of government power.

The contract theory of government remains a strong influence on thinking about government. In *A Theory of Justice* (1971), the political philosopher John Rawls explains why it makes sense for individuals to give up their individual preferences (or personal freedom to do as they please) and agree to live under a government where they submit to the judgment, authority, or power of other members of the political community. Like Locke and Mill, Rawls believes that people create governments because they believe that life under government will more just, fairer, than life without government.

The idea of government based on a social contract has an especially strong appeal in the U.S. The enduring appeal is rooted in politics and economics. Its appeal can be traced to the fact that social contracts were part of both the **colonial** experience (e.g., the Mayflower Compact of 1620 and the Massachusetts Bay Charter of 1629) and the **founding** experience (e.g., the Constitution). Social contract theory remains politically appealing because it is based on the democratic idea of popular sovereignty, the belief that government power comes from the people and must be based the consent of the governed. The social contract theory of government is also influential because the U.S. is

a capitalist country with an economic system that is based on individuals entering into private contracts with one another to provide a broad range of goods and service. A people familiar with using contractual agreements to order private affairs are likely to consider social contracts a legitimate way to order public affairs.

1.3 | Modern Government

Despite today's widespread and strong criticism of government, few people argue that government is unnecessary. Few people are anarchists. Anarchism is the political philosophy that believes government is unnecessary *and* that government power is illegitimate because it is based on force or compulsion. The term anarchism derives from a Greek word meaning without bosses. Anarchism is often considered chaos or extreme disorder. Anarchists do not advocate chaos, they simply believe that individuals can freely and voluntarily organize their lives to create social order and justice without being compelled or controlled by government. Anarchists have a positive or optimistic view of human nature. They believe that the human capacity for reason makes it possible for individuals to realize the benefits of voluntarily working together, and to voluntarily accept some controls on their behavior. Anarchists believe that the private sector can provide the goods and services, as well as the good public order that most people have come to expect from the government.



The widespread acceptance of government as necessary—or at least a necessary evil—does not mean there is consensus on the size and role of government. American politics includes lively debates about the right size of government and the appropriate role for government—what government should be doing. From the founding era, to the development of the American political system, and continuing today there have been debates about the size, scope, and purposes of government. Criticism of government is one of the familiar themes of American politics. We love to hate government because we think the government is doing things it should not be doing, or not doing things that we think it should be doing. Which raises the question, what should government do? What are the criteria for determining whether government provides a good or service rather than having it provided by the private sector?

1.31 | Market Failures

Governments everywhere are expected to maintain good public order, provide national security, maintain public safety, and provide material prosperity and economic stability. In the U.S., how do we decide what the government (federal, state, or local) should do and the private sector should? In a political system based on limited government, and an economic system based on a market economy, there is a preference for goods and services to be provided by the private sector. The Subsidiary Principle is that wherever possible decisions should be made by the private sector rather than the government, and wherever possible decisions should be made by the lower level of government (local) rather than the higher level of government. The Subsidiary Principle does not mean that all government action is inappropriate, but it indicates that government action should be

limited to situations where the private marketplace is unable to efficiently and equitably provide a good or service. One reason for government intervention in the market is when there is a market failure. The following aspects of market failures are discussed below: public goods, monopolies, externalities, information asymmetries, and equity.

A public good is one that, once provided, cannot be limited to those who have paid for it. Clean air, clean water, safe streets, and national security are often cited as examples of public goods. The government provides national security because it is hard to limit the benefits of being safe from foreign attacks or terrorism to those who have been willing to pay the costs of providing the benefits of national security. The government also acts to provide clean air (i.e., regulating air pollution) because it is hard to limit the breathing of clean air to those individuals who have voluntarily paid for the clean air. The fact that it is hard or even impossible to limit a good or a service to those who have paid for it raises the free rider problem: individuals have an economic incentive to enjoy the benefit without paying the cost. Clean air and national security are considered public goods because they are provided by the public (the government) through taxes or regulation.

A second market failure is **externalities**. In a perfect market, an economic transaction (the buying/selling of a good or service) will include the total cost of the good or service so there is no need for government intervention or regulation of a market transaction that does not affect parties other than the buyer and seller. Government intervention in the marketplace can be justified where market transactions have externalities. An externality occurs when a market transaction affects individuals who are not a party to the transaction. There are **positive externalities** and **negative externalities**. An example of a negative externality is the pollution that is caused by making or using a product but which is not reflected in its price. The price of a gallon of gasoline, for example, does not include the environmental degradation caused by using a gallon of gas to run a lawnmower or drive a car. The purchase price of a plastic toy or a steel car does not include the cost of the air pollution or water pollution that is caused by the manufacture or use of the toy or car because the factory may have been able to allow some of the cost of production to go downstream (if the plant is located along a river) or into the Jetstream (the high smokestacks at a steel plant can disperse air pollution into the atmosphere). The manufacturer and the consumer are not paying for all of the costs of production and consumption when water and air pollution are not included in the price of a good. Individuals who live downstream or downwind pay the price of dirtier air or dirtier water. These are negative externalities because the producer and consumer agree on a purchase price that negatively affects third parties to the market transaction.

Examples of positive externalities include education, vaccination, and crime control. Education can benefit an individual, and it could be limited to those who actually pay for it. But the benefits of education are not necessarily limited to the student (who pays the tuition and receives the education) and the school (which receives tuition). The third party benefits (the positive externalities) include employers who have a qualified workforce and society because democracy is presumed to require an educated citizenry. These have historically been arguments for public education.

Another example of a market failure is a **monopoly**. Free-market economic theory is based on competition. If a single business has a monopoly in a particular sector of the market, the lack of competition will result in market inefficiency or failure. In the

absence of competition, there is no incentive to set a fair price or otherwise provide consumers with good service. In a small town or an urban neighborhood with two independent grocery stores, competition will keep prices in check because neither store can greatly increase the price of flour without losing customers to the other store. However, if one of the stores closes, the remaining store can charge higher prices and provide lower services because customers have no choice but to pay the higher price and put up with the level of service. Congress passed the Sherman Antitrust Act in 1890, which prohibited monopolies (or restraints of trade), because the industrial revolution resulted in sugar, steel, and monopolies that limited competition. The Standard Oil Company, for example, controlled about 90% of the oil refining in the U.S. “Big” government was used to keep “big” business in check where monopolies emerged in various sectors of the industrial economy. More recently in the information-based economy, the federal government (and, in fact, the European Union) has challenged Microsoft’s domination of the software market.

A final market failure issue is **equity**. Markets are about economics. Politics can be about equity—the assurance that everyone in a society has fair access to certain goods and services that are available in the private market and public goods. Collective goods (or social goods) are those that *could* be delivered in the private sector based solely on a person’s ability to pay for the good or service, but which are often provided by the government or subsidized by taxes as a matter of public policy. Public utilities such as water and sewage and electricity and telephone service, for example, could be provided by the private sector solely on the basis of an individual’s ability to pay for them, but the political system considers these goods and services, including basic education and perhaps health care, social goods.

1.4 | Why Politics

Government obviously involves politics, and it is hard to talk about government without talking about politics, but government is not the same thing as politics. Politics exist wherever people interact with one another. Politics occurs in families, religious organizations, educational institutions, organized sports and entertainment, and the workplace. Political scientists focus on certain kinds of politics, the kinds that involve government and public policy, for example.

1.41 | What is Politics?

There are many different definitions of politics. The political scientist Harold Lasswell defined politics as the determination of “who gets what, when, how.”³ This definition focuses on politics as the authoritative allocation of scarce resources such as money, land, property, or wealth. David Easton defined politics as “the authoritative allocation of values for a society.”⁴ This definition of politics as the allocation of scarce resources is sometimes



thought to refer only to **material values** such as taxes or government benefits provided by education, health care, job training, veterans, or social welfare programs. However, politics is not limited to the authoritative allocation of scarce material valuables. Politics is also about values. Politics includes authoritative statements about non-material or **spiritual values**, which is why politics is often about religion, morality, values, ethics, patriotism, civics, honor, and education.

Politics includes government actions or policies that subsidize certain behaviors or values that are considered desirable and worthy of support in order to promote them: for example, marriage, child rearing, education, work. Politics also includes government actions or policies that regulate certain values or behaviors that are considered undesirable in order to control them or to discourage them: idleness; smoking or other tobacco use; consumption of alcohol; and gambling (although the discouragement of gambling is diminishing as governments rely on taxes from gambling). Politics also includes government actions or policies that prohibit certain behaviors or values by making them illegal: for example, drug usage; prostitution; or hate crimes.

In addition to material and spiritual values, politics includes the processes by which decisions are made. Process politics includes campaigns and elections, interest groups lobbying, voting behavior of individual citizens, the decision making of government officials in the legislative and executive branches of government, and even the decision making of judges. The following provides basic definitions and explanations of some of the terms that are essential to understanding American government and politics.

1.42 | *What is Political Science?*

[Political Science](#) is the branch of the social sciences (e.g., economics, sociology) that systematically studies the theory and practice of government. It includes the description, analysis, and prediction of the political behavior of individuals and organizations (such as political parties and interest groups) as well the workings of political systems. The discipline of political science has historical roots in moral philosophy, political philosophy, political economy, history, and other fields of study that traditionally examined normative (or value-based) beliefs about how individuals *should* live a good life in a good society. Modern political science is less normative and more “scientific” in the sense that it emphasizes the systematic study of government and politics. It examines empirical evidence or data on government and politics.

1.5 | Political Values

Politics and government are not limited to material values or valuables such as money, property, or other forms of wealth and possessions. Government and politics are also concerned with values. Some of the most important political values include individual rights such as freedom and equality, social order, public safety, ethics, and justice.

1.51 | *Personal Liberty (Individual Freedom)*

Freedom has become an especially important value in modern government and politics. Contemporary politics in the U.S. and elsewhere emphasizes individual liberty more than in the past when other values, such as maintaining good moral order, were

relatively more important. Individual liberty is generally considered an individual's right to make decisions about his or her own life without government restrictions, limits, or interference. In this respect, individual liberty is an aspect of self-determination or personal autonomy where individuals are free to decide how to live their lives. There are, however, two broad concepts of liberty: a negative concept of liberty and a positive concept of liberty.

In *On Liberty*, John S. Mill differentiated between liberty as the freedom to act and liberty as the absence of coercion. Mill was describing the difference between negative liberty—the absence of constraints—and positive liberty, an individual's freedom to live life as he or she wants. In this sense, *negative* means the absence of legal limits and *positive* means the opportunity (to do something). In *Two Concepts of Liberty*, Isaiah Berlin elaborated on this distinction between positive liberty and negative liberty. Negative liberty refers to the condition where an individual is protected from (usually) governmental restrictions. Positive liberty refers to having the means, the resources, or the opportunity to do what one wants or to become what one wants to become, rather than merely not facing governmental restraints. The negative concept of liberty is the dominant concept in the American political and legal tradition in the sense that individual liberty is generally considered the absence of government restraints. The negative concept of liberty is reflected in the language of the Bill of Rights. For example, the First Amendment provides that “Congress shall make no law” restricting freedom of religion, speech, or press. The civil liberties guaranteed in the Constitution do not, as a rule, give individuals a right, they place limits on the government's power to limit individual freedom.

This distinction between negative and positive liberty is important. One reason why the U.S. Constitution has fallen out of favor as a model for other countries is because of the modern expectation that Constitutions guarantee positive rights and liberties.⁵ Section 2 of The [Canadian Charter of Rights and Freedoms](#) provides that everyone has fundamental freedoms of “thought, belief, opinion and expression, including freedom of the press and other media of communication.” [South Africa's Constitution](#) provides that everyone has the right to “freedom of artistic expression,” human dignity, the right to life, and freedom from all forms of violence and torture. [Germany's Constitution](#) guarantees everyone the right “to the free development of his personality” and “the right to life.” (Art.1(1))

Think About It!
Should Constitutions guarantee positive liberty?

1.52 | Social Order

Order is an important political value because one of the major responsibilities of government is to create and maintain good social order. The public expects government to fight crime, manage public demonstrations and protests, and prevent social unrest including civic disturbances, riots, or even domestic rebellions, and national security from foreign threats. The government's role in providing these aspects of physical order or conditions is less controversial than its role in providing good social order as it relates

to standards of moral, ethical, or religious behavior. Moral regulatory policy can be very controversial because it involves values about which people may strongly disagree. The term culture wars refers to ideological battles over values related to public policies concerning issues such as abortion, gay rights, the definition of marriage, welfare, religion in public life, and patriotism.

1.53 | *Justice*

Justice is a basic concept that is central to most assessments of the legitimacy of a society. While it is hard to precisely define justice or a just society or political order, the concept of justice as fair treatment is a universal value shared by people everywhere. Justice means being treated fairly or getting one's just deserts whether they are rewards for doing well or sanctions for inappropriate behavior or punishment for illegal behavior.

1.54 | *Equality*

Equality is an important value in democratic political systems. Equality is an essential element of democracy. However, equality is actually a complicated and controversial concept whose meaning and significance has been debated from the founding era until today. Equality does not mean that everyone must be treated the same, or that it would be a good thing if everyone were treated the same. The words of the *Declaration of Independence* assert that we are all created equal and endowed by our creator with certain unalienable rights. But this has never been understood to mean that everyone is the same (in terms of abilities, for example) and should be treated the same as everyone else (regardless of merit). The natural inequality of age and ability, for instance, are contrasted with the political equality that is expressed by references to egalitarian principles such as “one person one vote” or equality under the law. This concept of political and legal equality is expressed in the Fourteenth Amendment, which prohibits the state governments from denying to any person within their jurisdiction the “equal protection of the laws.” The Fourteenth Amendment was initially intended to prohibit racial discrimination, but its scope has been broadened to include prohibition against legal discrimination on the basis of gender or age. Government can treat people differently, but it cannot discriminate against individuals, which means inappropriately treating individuals differently.



1.55 | *Political Power, Authority, and Legitimacy*

Power, authority, and legitimacy are important concepts that are central to the study of politics and government.

Power can be defined as the ability to *make* another person to do what you want, to force others to do what you want. Power is using coercion or force to make someone comply with an order. Power is independent of whether it is proper or legitimate to demand that another person obey an order. A gunman has power to make a person

comply with an order or demand to give up a wallet, for example, but this power is not considered legitimate.

Authority can be defined as the right to make other people do what you want. A person is authorized to make another comply with their demands. The authorization could be based upon a person's position as a duly elected or appointed government official. The word *authority* derives from the Latin word "auctoritas." In modern usage, authority is a particular type of power, *power which is recognized as legitimate, justified, and proper*. The sociologist Max Weber identified three types of authority: traditional, charismatic, and rational-legal. Traditional authority is based on long-established customs, practices, and social structures and relationships. Tradition means the way things have always been done. Power that is passed from one generation to another is traditional authority. Traditional authority historically included the hereditary right to rule, the claim of hereditary monarchs that they had a right to rule by either blood-lines (a ruling family) or divine right. The concept of a ruling family is based on traditional authority. The rise of social contract theory, where government is based on the consent of the governed, has undermined traditional authority and challenged its legitimacy. Democracies generally require something more than a ruler's claim that their family has, by tradition, ruled the people.

The second type of authority is charismatic authority. Charisma refers to special qualities, great personal magnetism, or the distinct ability to inspire loyalty or confidence in the ability to lead. Charismatic authority is therefore personal. In politics, charismatic authority is often based on a popular perception that an individual is a strong leader. The Spanish word *caudillo* refers to a dynamic political-military leader, a strong man. Charismatic leadership is sometimes associated with the cult of personality, where neither tradition nor laws determine power.

The third type of authority is rational (or legal) authority. Rational-legal authority depends on formal laws for its legitimacy. A constitution or other kind of law gives an individual or an institution power. A government official has power by virtue of being duly elected or appointed to office. Most modern societies rely upon this kind of legal-rational authority to determine whether power is legitimate. In the U.S., for example, the power of the presidency is vested in the office, not the individual who happens to be president.

Legitimacy refers to the appropriate ability to make others do what you want, the legal right to make others comply with demands. It is a normative or value-based word that indicates something is approved of. Political legitimacy is the foundation of governmental authority as based consent of the governed. The basis of government power is often subject to challenges to its legitimacy, the sense that the action is authorized and appropriate. Authority remains a contested concept because, while the conceptual difference between authority and power is clear, the practical differences may be hard to identify because of disagreements about whether a law is legitimate. In the U.S., the tradition of civil disobedience recognizes that individuals have some leeway to refuse to comply with a law that they consider illegitimate.

1.6 | Citizenship

A citizen is a member of the political community. Certain rights, duties, and obligations are attached to an individual's status as a citizen. Citizenship can be bestowed in a variety of ways. In some societies, one becomes a citizen by being born on the territory of the country or via parents who are citizens. Such citizenship is automatic in the United States (also known as *jus soli* or the 'right of soil'). There are also other forms of citizenship. You can choose to be a citizen, called naturalization, by learning about a political system, meeting some form of residency requirement, and taking an oath. In Germany – until the 1990s – citizenship was by blood (or 'right of blood'). Your parents had to be ethnically German for you to receive citizenship. There was no method by which a non-German could become a citizen until the late 1990s, when the law on citizenship was changed to allow naturalization. Other countries require citizens to pass certain economic requirements to become citizens.

Citizens have responsibilities as active members of a polity. Citizens are expected to obey the laws, vote, pay taxes, and if required submit to military service. Citizens also have rights and freedoms. Subjects, those subjected to the rule of the few or the one, have neither rights nor freedoms and their sole responsibility is to do what they are told. The actions of governments are binding on all citizens. One reason why individuals worry about government power is because the government can use its criminal justice powers to take a person's life or liberty (e.g., a sentence of death or imprisonment), and the government can use its civil justice powers to take a person's property (e.g., fines and eminent domain). Citizen vigilance is necessary to guard against government abuse of its substantial powers.

1.7 | The Forms of Government

One subject of interest to political science is the different forms of government. A simple description of the different forms of government is that there is government of the one, the few, and the many. Each of these three forms of government has a good variation and a bad variation.

Table 1.7 The Forms of Government

Form of Government	Good Variation	Bad Variation
The One	Monarchy	Tyranny/Autocracy
The Few	Aristocracy	Oligarchy (rich or powerful)
The Many	Polity/Democracy	Democracy (tyranny of majority)

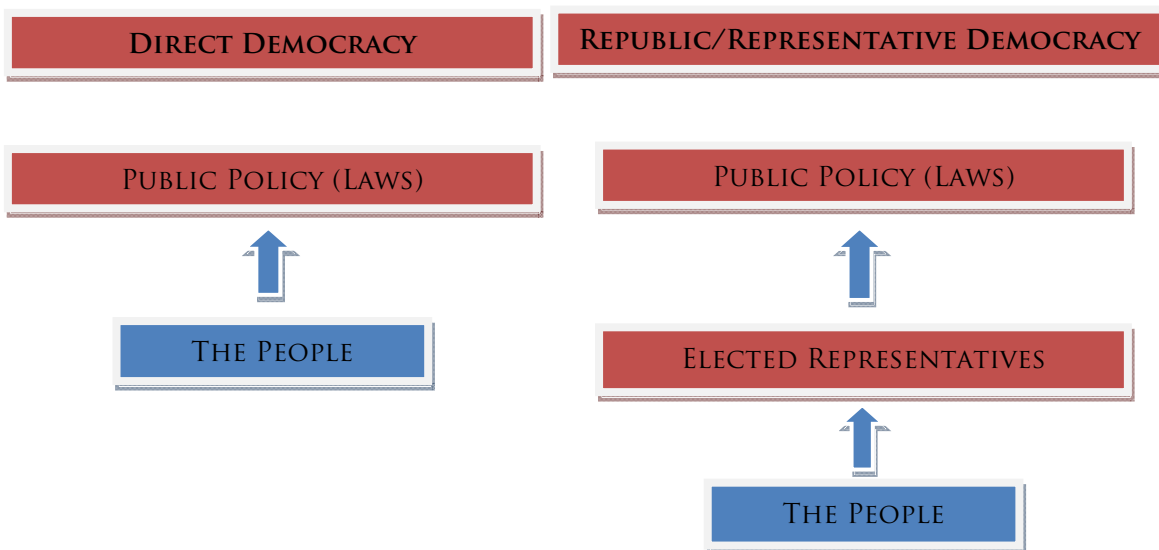
The three forms of government refer to the basic system of government, the government institutions that are established by a political community. The U.S. system of government was intended by its founders to be a mixed form of government because it includes elements of all three forms: monarchy (the presidency); aristocracy (the Senate, the Electoral College, and the Supreme Court); and democracy (the House of Representatives; elections). The founders created a mixed form of government as part of the institutional system of checks and balances.

The system of checks and balances was designed to create a political system where institutions and political organizations provided a measure of protection against corruption and abuse of power. The Founders thought that the mixed form of government was the best way to avoid what historical experience seemed to indicate was inevitable: the tendency of a political system to become corrupt. The Founders were acutely aware of the historical problem of corruption, and the tendency of governments to become corrupt over time. History provided many examples of power corrupting individuals and governments. The awareness of corruption caused the Founders to worry about centralized power. Their worries were succinctly expressed by the 19th Century Italian-British figure, Lord Acton (1834-1902), whose famous aphorism warned: “Power tends to corrupt; absolute power corrupts absolutely.”

The Founders believed the power problem of corruption could be avoided by dividing power so that no one person or institution had complete power. The Founders also realized that each form of government tended to become corrupt or decay over time. A monarchy (which might be a good form of government of one) was apt to turn into tyranny. An aristocracy (which might be a good form of government of the few best and brightest) was apt to turn into oligarchy (government of the rich or powerful). And a democracy (government of the many) was apt to decay into mobocracy, tyranny of the majority, or rule by **King Numbers**. So they created a mixed form of government.

The roots of American thinking about democracy can be traced to Classical (or ancient) Greece and the Roman Republic, the Age of Enlightenment, the Protestant Reformation, and colonial experiences under the British Empire. The ancient Greeks in the city-state Athens created the idea of the democratic government, practiced as a kind of democracy. The Romans developed the concept of the representative democracy, one where citizens elect representatives to act on their behalf.

The United States is a republic. A republic is a **representative democracy**. The diagram below describes the difference between direct and representative democracy.



In a republic, individuals do not directly govern themselves. Voters elect representatives who, as government officials, make laws for the people. This contrasts with a **direct democracy**, where voters choose public policies themselves. Today,

however, the term democracy is used generically to include direct and indirect democracy (or republican systems of government). The Constitution's original design provided for only limited democracy in the way the national government worked. The members of the House of Representatives were directly elected by the people, but the members of the Senate were selected by state legislators, the president was chosen by the Electoral College (not by popular vote of the people), and federal judges were nominated by the president and confirmed by the Senate to serve life terms. And only a small percentage of citizens (white male property owners) were originally allowed to vote in elections. The Constitution provided only limited popular control over government because the Founders were skeptical of direct democracy. Over time, the Constitution, the government, and politics become more democratic with the development of political parties, the direct election of senators, and an expansion of the right to vote.

1.8 | Summary: Why government and politics?

Government and politics occur almost everywhere because they are one of the ways that individuals organize themselves to achieve individual goals such as wealth, public safety, and education. Government and politics also help achieve shared social goals such as a sense of belonging to a community, national security, and the establishment of a just society. These material and non-material goals can be provided by, or protected by government. But they can also be threatened by government or even taken by it. Government can, for instance, take a person's life, liberty, or property. The fact that government can protect or threaten important values is one of the reasons why government and politics are almost continually debated and argued and sometimes even fought over. Individuals and groups have different ideas about government should be doing, and are willing to fight for control of government so that their ideas and beliefs can be acted upon or implemented in public policy.

1.9 | Other Resources

1.91/ *Internet*

The Library of Congress: <http://memory.loc.gov/ammem/index.html>

For more information on the political theory of Thomas Hobbes and John Locke: <http://www.iep.utm.edu/hobmoral/> and <http://www.iep.utm.edu/locke/>

The Declaration of Independence: http://avalon.law.yale.edu/18th_century/declare.asp

The U.S. Constitution: http://avalon.law.yale.edu/18th_century/usconst.asp

U.S. Government: <http://www.usa.gov/>

The Center for Voting and Democracy has links to articles related to elections and democracy, and links to organizations and ideas related to reforming the electoral system, and analysis of electoral returns. www.fairvote.org/

1.92 | In the Library

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Rousseau, Jean-Jacques. 1762. *The Social Contract*.

Weber, Max. 1958. "The three types of legitimate rule." *Berkeley Publications in Society and Institutions*, 4 (1): 1-11. Translated by Hans Gerth.

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KEY TERMS

Public Good

Power

Authority

Legitimacy

Government

Politics

Citizen

Justice

Social Contract

Direct Democracy

Representative

Democracy

Oligarchy

Monarchy

Polity

Tyranny

Aristocracy

Personal Liberty

1.0 | STUDY QUESTIONS

- 1.) What are the basic questions to be asked about American (or any other) government?
- 2.) Why do governments exist everywhere if governments everywhere are widely criticized?
- 3.) What is politics?
- 4.) What is meant by *power*?
- 5.) *What is political power?*
- 6.) Explain the concepts authority, legitimacy, justice, and democracy.
- 7.) Distinguish among the three concepts of democracy mentioned in the chapter, explaining in which of these senses the textbook refers to American government as *democratic*.

¹ John Rawls. 1971. *A Theory of Justice*. Cambridge, MA: Belknap Press of Harvard University Press.

² Locke, John. 1689. *Second Treatise of Civil Government*. “Chapter 2: Of the State of Nature.”

³ Harold Dwight Lasswell. 1935. *Politics Who Gets What, When and How*. Gloucester, MA.: Peter Smith Publisher Inc.

⁴ *The Political System*. 1953. New York: Knopf, p.65.

⁵ Law, David S., and Versteeg, Mila. 2012. “The Declining Influence of the United States Constitution.” 87 *New York University Law Review* 3(June):762-858. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1923556

CHAPTER 2: THE U.S. SYSTEM OF CONSTITUTIONAL GOVERNMENT



Image courtesy of www.blueridge.edu

2.0 | The Constitution and Constitutional Government

This chapter examines the U.S. Constitution and the system of constitutional government. The primary goals are to describe the origin and development of the Constitution, explain the functions of a constitution, and describe and explain the contemporary workings of

the U.S. system of constitutional government. In order to accomplish these goals, the chapter explores the political theory of the Constitution and the practical politics of governance with special emphasis on comparing how the constitutional system was intended to work with how it actually works today. The chapter's main theme is the tension between the American commitment to the Constitution and the enduring ideals embodied in it, and the pressures to adapt to political, economic, social, technological, and scientific change. The tensions between *continuity* (remaining true to basic principles) and *change* (meeting contemporary needs) exist in all political systems, but the tensions between the desire to stay the same and the forces of change are especially strong in the U.S. because Americans have an especially strong commitment to the Constitution as a foundational or fundamental document. This commitment to basic constitutional values is especially strong during times of great change and challenges, when it expressed as political appeals to return to the nation's founding values and the original understanding of the Constitution. This is a recurring theme in the American politics of the Constitution.

"We are under a Constitution but the Constitution is what the Court says it is."

-Charles Evans Hughes

"For as in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other."

Thomas Paine,
Common Sense
(1776)

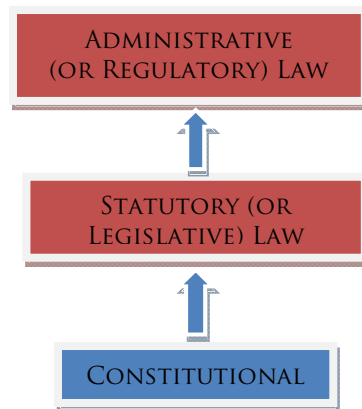
2.1 | The Constitution and Constitutional Government

A constitution is a governing document that sets forth a country's basic rules of government and politics. Constitutions are today almost universally recognized as an appropriate foundation for a political system, therefore most countries have a constitution. The expectation that a modern political system will have a constitution originates from the political belief that constitutional government is a good form of government—that constitutional government is a legitimate, rightful, or appropriate form of government. Constitutions are closely associated with government legitimacy because constitutions are considered one of the best ways to achieve the rule of law. The rule of law supports government *legitimacy* by requiring that government action be authorized by law, thereby making it possible to hold government officials legally accountable for their actions. The rule of law is one of the ways to achieve and maintain political legitimacy, the acceptance of a government as the appropriate authority. Political legitimacy increases compliance with the law because people are more willing to obey the law if they consider it legitimate.

Constitutional government is *government according to the rule of a basic or fundamental law*. Constitutional government is not merely government based on the rule of law. It is government based on a particular kind of the rule of law: the rule of a basic or fundamental law. The constitution provides the foundation for the system of government. Political systems based on constitutional government have a legal hierarchy of laws. In the U.S. system of constitutional government, the hierarchy of laws includes constitutional law, legislative or statutory law, and administrative or regulatory law. The legal hierarchy means that not all laws are created equal. Constitutional law trumps the other kinds of laws. Legislation (statutes passed by congress or a state legislature) cannot conflict with the Constitution. Administrative regulations, rules which are created by administrative or bureaucratic agencies, must be consistent with the legislation that created and authorized the administrative agency *and* regulations must not conflict with the

Constitution. The Constitution establishes the basic framework of government, allocates government powers, and guarantees individual rights. These basic aspects of government and politics are considered so important that they are provided for in the Constitution. One of the most important features of constitutional government is the fact that the Constitution cannot be changed by majority rule. The Constitution cannot be changed by *ordinary* laws—legislation passed by majority vote. Constitutional amendments require super majority votes. Diagram 2.1 below illustrates the hierarchy of laws in the U.S.

Diagram 2.1
*The Hierarchy
of Laws in the United
States*



2.2 | The Rule of Law

The rule of law is defined as the principle that governmental authority is exercised only in accordance with public laws that are adopted and enforced according to established procedures. The principle is intended to be a safeguard against arbitrary governance by requiring that those who make and enforce the law are also bound by the law. Government based on the rule of law is contrasted with government according to the rule of man. The rule of man describes a political system where government officials determine their own powers without reference to pre-existing laws.

The idea of government according to the rule of law has ancient roots. One source is classical Greek and Roman political thought. The writings of the ancient Greek political philosophers Plato and Aristotle described and analyzed different forms of good and bad government. Plato believed that the best form of government was the rule of man, specifically rule by a philosopher-king. He described a philosopher-king as a wise and good ruler—think of someone like Solomon, a wise person who not only *knew* what to do but was a *good* person who could be trusted to do what is right. Plato believed that rule by such a philosopher-king was the best form of government because the wise and good leader would be free to do what was right without being limited by laws or other government institutions with which power was shared.

Aristotle described a good form of government as one with institutions and laws. His description of a good form of government is more closely identified with the modern concept of government according to the rule of law. For example, Aristotle's good government was less dependent on a leader's character. He described a system of government that did not depend on getting a leader as good and wise as Solomon. Aristotle made government power less personal and more institutional: a leader's power

was based on the authority of the office held rather than personal attributes such as physical strength, charismatic leadership, heredity or blood-lines, or some other personal attribute.

Western thinking about the rule of law also includes English and French political philosophers. The English political philosopher Samuel Rutherford's *Lex, Rex* (1644) advocated using law (*Lex*) to control the power of a monarch or other ruler (*Rex*). The English political struggles to bring the king under the law influenced American thinking about good government. The French political philosopher Montesquieu's *The Spirit of the Laws* (1748) provided the American Founders with specific ideas about how to create a system of government that guarded against the abuse of power. [Montesquieu's](#) main contribution to the U.S. system of constitutional government is the principle of the separation of powers—dividing government into three branches (the legislative, the executive, and the judicial branches).

During the colonial and revolutionary eras, [Thomas Paine's](#) *Common Sense* (1776) drew upon these sources for inspiration about how law could be used to control the power of the king, and indeed all government power. In this sense, Paine's political theory reflected the development of the rule of law to displace the rule of man. According to Paine,

. . . the world may know, that so far as we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law OUGHT to be King; and there ought to be no other.

The bold assertion that the king was not the sovereign ruler—a claim that the king was not above the law but rather subject to it—earned Thomas Paine a deserved reputation as a political radical. Remember that such statements could not only be considered treason, for which the penalty could be death, but they challenged the English monarchy's claims to the divine right to rule. One of the best statements of what the rule of law meant to the Founders is John Adams' statement in [The Constitution of the Commonwealth of Massachusetts](#):

“In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”

(The Constitution of the Commonwealth of Massachusetts, Part The First; Art. XXX)

Support for the rule of law continued to develop during the 19th century. The legal scholar Albert Venn Dicey's *Law of the Constitution* (1895) how it meant that everyone was under the law and no one was above it:

“... every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. [Appointed government officials and politicians, alike] ... and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person.” (at 194)

2.3 | Is the Rule of Law Part of the American Creed?

The rule of law has become so important in American thinking about government that it is considered part of an “**American Creed**.” A creed is a statement of beliefs. It is usually meant to refer to a statement of religious beliefs or faith but the American *political* creed refers to the widely-shared set of political beliefs or values about the best way to form and administer good government. The American Creed consists of the country’s basic governing principles: the rule of law, popular sovereignty, checks and balances (principally the separation of powers and federalism), individual rights, and judicial review.

In fact, most governments today are at least officially committed to the rule of law—even if they do not live up to the ideal. The importance of the rule of law is reflected in the fact that non-governmental organizations (NGOs) such as the World Bank consider the rule of law an essential condition for political, social, and economic development. The World Bank’s [Law & Development/Law and Justice Institutions Programs](#) link the rule of law with these important aspects of a nation’s development. The almost worldwide acceptance of the rule of law as a basic principle of governing has made law one of the factors determining whether government power is legitimate. The distinction between power and authority is based on the difference between the illegitimate use of power or coercion and the legitimate use of power or coercion. When political power is exercised appropriately, based on the rule of law, it is considered authority. In Western political development, law has displaced older or traditional sources of authority such as heredity, divine right, or personal charisma.

2.31 | *Constitutional Democracy*

The U.S. is commonly called a democracy or a republic but it is actually a [constitutional democracy](#) or constitutional republic. The *constitutional* limits the *democracy*! The Constitution limits democracy as defined as majority rule. Congress may pass popular

laws that ban flag burning or punish radical political speech or prohibit certain religious practices but even laws that have widespread public support can be declared unconstitutional. In the U.S. legal hierarchy, the Constitution trumps statutes (even if they are popular). Democratic politics may be about popularity contests and majority rule but constitutional law. The Bill of Rights protects individual rights from majority rule. In fact, the Constitution is a counter-majoritarian document in the sense that it cannot be changed by a simple majority vote. Changing the Constitution requires extra-ordinary majorities. A constitutional amendment requires a two-thirds vote to propose an amendment and a three-quarters vote to ratify it.

2.32 | *Three Eras of Development*

American government can be divided into three eras or stages of political development: the founding era; the development of the system of government; and the emergence of the modern system of government.

- The *founding* era includes the colonial experience culminating with the Declaration of Independence and the Revolutionary War; the Articles of Confederation, which was the first form of government; and the creation of the republican system of government in 1787.
- The *development* stage is not as clearly defined as the founding era. It extends from the early years of the republic to the Progressive Era (from 1890 to the end of World War I). It includes the early 1800s when the Marshall Court (1801-1835) issued landmark rulings that broadly interpreted the powers of the national government; the post-Civil War constitutional amendments abolishing slavery, prohibiting denial of the right to vote on account of race, and prohibiting states from denying equal protection and due process of law; and the Progressive Era policies regulating monopolies and working conditions (e.g. enacting child labor laws, workplace safety laws, and minimum wage and maximum hours laws. These developments changed the system of government and politics that was established by the Constitution. Political parties were organized. The powers of the president and the national government expanded. The public expected broader participation in politics and greater popular control over government.
- The *modern* era of American government is usually traced to the 1930s. The [Great Depression](#) was a national—indeed, an international—economic problem that the American public expected the national government to address. The development of a national economy further strengthened public expectations that the national government, more than the state governments, were responsible for the state of the economy. The public began to look to the federal government for solutions to problems. Organized crime was perceived as a national problem that required federal action. World War II and the subsequent Cold War also increased the power of the national government, which has primary responsibility for foreign affairs and national defense. The creation of a social welfare state and a national security state changed politics and governance. It altered the distribution of power between the national and state governments. It also

expanded the power of the presidency and the rise of the administrative state—the expansion of the federal bureaucracy that Americans love to hate.

The following sections examine the founding era. The development and modern eras are examined in greater detail in the chapters on congress, the president, the judiciary, and federalism.

2.4 | The Founding Era

2.41 | *The Colonial Era*

People came to the new world primarily from England and Europe for a variety of reasons. Some came looking for greater political freedom. Some came for economic opportunity with the promise of free land. Some were entrepreneurs who saw the New World as a place to make money. Some were seeking a new start in life. Some fled religious persecution in their home land and were searching for freedom to practice their religion. In the 16th and 17th centuries, English joint-stock companies were formed under charters from the crown to promote commercial and territorial expansion in North America. The Virginia Company of London founded the Jamestown settlement in 1607. In New England, the Massachusetts Bay Company charter described explicitly religious political purposes. The First Charter of Virginia (1606), [The Mayflower Compact](#) (1620) and The Charter of Massachusetts Bay (1629) are documentary evidence of the colonial era belief that politics and government had explicitly religious purposes.¹ The colonial experience with charters creating communities also provided colonists with personal experiences creating or “constituting” governments. These experiences are one reason why the social contract theory of government has been so influential in shaping American thinking about government.

2.42 | *The Spirit of Independence*

Several factors fostered a spirit of independence in the colonies. The first factor is the **character** of the people who came to “the New World.” In the seventeenth century, crossing the Atlantic Ocean was a long, difficult, and dangerous undertaking. The people who made the trip tended to be the hardier, more adventurous, or more desperate individuals, so the colonies were populated with people who had an independent streak. A second factor is **geography**. The large ocean between the rulers and the ruled created conditions that allowed a sense of colonial identity to develop. King James I (1600-1625) increased the independent spirit by allowing the colonists to establish assemblies such as the Virginia House of Burgesses. Each of the 13 colonies had a constitution. These conditions fostered expectations of individual liberty in self-government, religious practices, and economic activity. By the mid-1700s, local traditions and distance weakened colonial ties to the Crown. A third factor is **ideas**. The political philosophy of the Age of Enlightenment included an emphasis on reason, self-government, liberty, and equality. These ideas appealed to the colonists’ and were used to challenge British imperial power in the New World.

A fourth factor is **economics**. The colonial economies differed from the British economy. Changes in the economic ties between England and the colonies increased

support for political independence. During the colonial era the British economic policy was mercantilist. **Mercantilism** is the theory that the government controls and directs economic activity, particularly foreign trade, in order to maximize the state's wealth. The British controlled colonial industries and trade to increase imperial wealth. The British prohibited their colonies from trading with other imperial powers like the Dutch to ensure that British colonial gold and silver stayed within the empire. The American colonies initially benefited economically from this mercantilist arrangement. They had a buyer for the raw materials and other goods produced by the colonies. The American colonies produced wood for ships for the British fleet as well as tobacco, cotton, rice, and sugar for export. In return, the colonists could buy finished products like ships and rum. Mercantilism was responsible for the **triangle** trade: slaves were brought to America from Africa; sugar, cotton, and tobacco were exported to England; and manufactured goods, textiles, and rum were sent to Africa to pay for slaves.

This mercantilist arrangement changed as the colonial economy developed. The colonies started chafing against mercantilist policies as they believed they were no longer receiving competitive prices for their goods. Furthermore, as the New England economy developed into a manufacturing and trade economy, New England started taking England's place in the trade triangle, thereby reducing the need for the British Empire.



2.43 | Trade and Taxation

Despite the complaints about trade policies, the colonists were generally content with British governance until the **Seven Years War** (1756—1763). The long and expensive war with the French and Indians ended with the British in control of most of North America. The colonists thought this

would open up even more cheap frontier land for them to settle but the British had other ideas. The Crown decreed in 1763 that there would be no further westward movement of British subjects because the Crown did not want to pay to defend settlers against Indians. The British Parliament taxed the colonists to pay for the very expensive war. **The Sugar Act** of 1764 taxed sugar, wine, coffee, and other products commonly exported to the colonies. The colonists resented these taxes and began to cry “no taxation without representation!”

Parliament further angered the colonists by passing **the Stamp Act** in 1765, which required all printed documents to bear a stamp. The printer had to pay for the stamp. In the same year, the Parliament passed the **Mutiny (Quartering) Act** that forced colonists to either provide barracks for British soldiers or house them in their homes. The colonists, who were already mad about paying taxes, started protesting that they have to pay for

soldiers to live in their homes. The Sons of Liberty, which were organized by Samuel Adams and Patrick Henry to act against the Crown, looted the Boston tax collectors home. Violence spread throughout the colonies and the stamp act became virtually unenforceable.

In 1767, Parliament enacted **the Townshend Acts** that imposed duties on many products including tea. The Sons of Liberty started a boycott which prompted the British to send troops to Boston. When British soldiers fired on a crowd of protesters, killing five people, the event was depicted as the Boston Massacre. Paul Revere's portrayal of the British captain ordering the troops to fire on the crowd inflamed colonial passions.



Paul Revere's engraving of the Boston Massacre

In 1772, still upset by the tea tax, Samuel Adams suggested the creation of Committees of Correspondence to improve communication among colonists. By 1774, twelve colonies had formed such committees which organized protests prior to the revolution and coordinated actions during the revolution. Despite colonial opposition, Parliament passed another tax on tea in 1773 and, consistent with mercantilist economic policy, granted a monopoly to the East India Company. The colonists responded by dumping tea into Boston Harbor. The "Boston Tea Party" enraged King George, who declared that it was time to force the colonies to fall into line. The King persuaded Parliament to pass **the Coercive Acts** or the Intolerable Acts, which allowed Britain to blockade Boston harbor and placed 4,000 more soldiers in Boston. These actions increased resentment on both sides of the Atlantic. All but one colony (Georgia) agreed to send delegates to a new continental congress to present a united message to the King.

2.44 | *The First and Second Continental Congresses*

The First Continental Congress that met in Philadelphia in September and October 1774 consisted of 56 delegates from every colony except Georgia. They [adopted a statement of rights and principles](#), including colonial rights of petition and assembly, trial by peers, freedom from a standing army, and the selection of representative councils to levy taxes. The statement provided that the Congress would meet again in May 1775 if the King did not agree with their requests. King George refused the request of the Continental Congress. A second Continental Congress called a meeting in May of 1775, but before the delegates could meet fighting broke out at Lexington and Concord, Massachusetts. When the delegates at the Second Continental Congress convened on May 10, 1775 the atmosphere was more hostile toward Britain. King George sent 20,000 more troops. The Revolutionary War had begun in earnest.

Think About It!

Anti-war movements in the Revolutionary Era? Not everyone in the colonies supported the Revolutionary War. And not everyone in Britain thought it was a good idea to send troops to put down colonial rebellions. See the British political cartoon from 1775 describing King George's decision as being lead by obstinacy and pride:

<http://www.loc.gov/pictures/item/97514880/>

2.45 | *The Declaration of Independence (1776)*

The Declaration of Independence was written to justify the colonists' taking up arms to overthrow an existing political system. It is a philosophical defense of the right of

revolution. Thomas Jefferson, a Virginia farmer and lawyer, was the main author of the Declaration of Independence. The language that Jefferson used in the Declaration reflected John Locke's words and ideas about natural or God-given rights, popular sovereignty, the social contract theory of government based on the consent of the governed, and even a people's right to revolt against an unjust government. The following language from the Declaration of Independence explains these ideas:

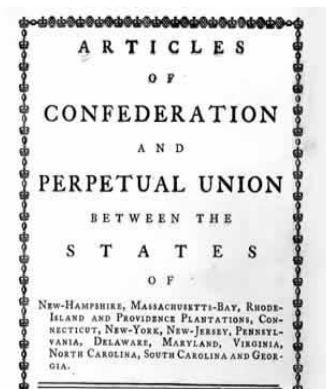
“When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to 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....”

The Declaration acknowledges that people should not be quick to revolt against a government. It is only after “*a long train of abuses*” intended to reduce the people to despotism that “*it is their right, it is their duty, to throw off such government, and to provide new guards for their future security...*” The Declaration listed the King's actions that aimed to establish “absolute tyranny” over the states. It then declared “***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...***”

2.5 | The Articles of Confederation

The first American form of government was the [Articles of Confederation](#). The Continental Congress approved the Articles of Confederation and they took effect in 1781 upon ratification by all thirteen states. A confederation is a loose association of sovereign states that agree to cooperate in a kind of voluntary “league of friendship.” The Second Article of Confederation provided that “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.” The Third Article provided that “The said States hereby severally enter into a firm league



of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.”

In a **confederation**, political power is decentralized because the central (or national) government is weak and the state or regional governments are strong. The Articles of Confederation had major defects which were exposed during the Revolutionary War. The defects became more apparent after the Revolutionary War when the states no longer felt the need to work together to face the threat of the common enemy. The Articles had five major defects related to taxing power, an executive official, commerce, amendment, and the power to maintain domestic order.

- **Taxing.** The national government did not have the power to tax, which meant that congress (the main institution of the national government) had to beg the states to pay for the war and other government functions. It is hard today to imagine a government without the power to tax.
- **Executive.** The Articles did not provide a chief executive. The Revolutionary War was fought against a monarchy (an executive figure), and the natural reaction of the Founders was to create a new political system which did not have a single leader or executive figure who could become a monarch. The Declaration of Independence lists the colonists’ grievances against King George. The Revolutionary War was fought against a monarch who was accused of tyrannical abuse of power. It was logical for the Founders to create a form of government where a representative body, a legislative institution more closely identified with democratic government, had the most power.
- **Commerce.** The Articles did not give the national government power much economic power. The states had power to regulate interstate and foreign commerce. Some states enacted laws which benefited economic interests in their state and discriminated against out of state or foreign business interests. These kinds of economic protectionist legislation limited trade. States could also coin money. Critics eventually saw state power over commerce and economics as a barrier to the development of a national economy and advocated giving the national government power over interstate and foreign commerce.
- **Amendment.** One of the most important challenges facing any political system is how to provide for change in response to different economic, social, or political circumstances. The Articles could be amended only by unanimous consent of congress and the state legislatures. This made it very difficult if not impossible for the government to adapt to circumstances that it faced.
- **Domestic Order.** Because power was decentralized, the national government did not have power to act to ensure domestic tranquility and order. Maintaining good public order is one of basic responsibilities of any government. The national government’s ineffectual response to domestic disturbances such as Shays’

Rebellion and secessionist movements in some parts of the country exposed the weakness of the national government under the Articles.

The most famous of these domestic threats to public order were armed marches in Massachusetts. In the fall of 1786 and winter of 1787, Daniel Shays, a Revolutionary War veteran, led around 1500 supporters on an armed march to stop mortgage foreclosures. Economic conditions were bad. High state taxes and high interest rates caused farmers to face bankruptcy and mortgage foreclosures. Shays and his supporters marched on the government to demand that it provide them with some relief from the bad economic conditions. The State of Massachusetts appealed to the national government for help in putting down [Shays' Rebellion](#), but the national government could not act without the consent of the other states, which rejected the request for money to establish a national army. Order was finally restored when the governor of Massachusetts called out the state militia.



A scene at Springfield, during Shay's Rebellion, when the mob attempted to prevent the holding of the Courts of Justice
—E. Benjamin Andrews, 1895

Shays' Rebellion alarmed government officials and political leaders who believed the national government needed to be given more power to respond to such threats to good public order. A constitutional convention was held in the summer of 1787 to "revise" the Articles of Confederation to correct its defects. However, the delegates to the convention decided to abolish the Articles of Confederation and create a new form of government. After lively debate, the delegates drafted a new constitution which created a new system of government, a federal republic with a stronger national government. Modern Americans tend to forget the central role that Shays' and other "unruly" individuals played in the creation of the republic. (Holton 2007) Radical popular action has been a part of the American political experience and tradition from the founding of the republic, through the civil war fought to preserve the union, to modern efforts to create a government that is responsive to the people.

2.5 | The U.S. Constitution

Although the delegates to the Constitutional Convention met in secret, the records of the convention debates reveal lively debates about what form of government to create. The convention debates and the subsequent debates over ratification of the new constitution were generally organized as a debate between the Federalists and the Anti-federalists. The Federalists supported ratification because they believed that the country needed a stronger national government. Their arguments for ratification were made in a series of famous essays written by James Madison, Alexander Hamilton, and John Jay called [The Federalist Papers](#). The Anti-federalists opposed ratification of the Constitution because they believed that it gave the national government too much power. They preferred a political union where the states had more power. The Anti-federalists tend to be overlooked because they lost the argument. The Constitution was ratified. But the [Anti-federalist Papers](#) are worth reading in an era when American politics includes criticism of the size of the federal government.



The Declaration of Independence and the Constitution were written for two very different purposes. The Declaration is a philosophical defense of a people's right to overthrow an unjust government. The Constitution is a practical, working document that was written to create a more effective form of government. The Preamble of the Constitution states that "We, the people..." establish the Constitution "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..." The Constitution created a new form of government, a "more perfect Union" that was more capable of accomplishing the things that the people expect government to do. Alexander Hamilton explained this purpose in *Federalist Number One*:

AFTER an unequivocal experience of the inefficiency of the subsisting federal government, you are called upon to deliberate on a new Constitution for the United States of America. The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world.

Considering the passionate motives of those who supported or opposed the new Constitution, Hamilton worried that a spirit of self-righteous passion would make compromise and cooperation difficult, and that the intolerant spirit would tempt one side to attempt to dominate the other side by physical force rather than the force of argument.

In *To Secure These Rights: The Declaration of Independence and Constitutional Interpretation* (1995), Douglas Gerber argues that the purpose of the Constitution was to effectuate or make possible the Lockean liberal principles that were asserted in the *Declaration of Independence*. The *Declaration* asserted the existence of certain unalienable or natural rights; the Constitution created a system of constitutional government that provided the means to achieve the rights and protect them.

The main body of the Constitution establishes the basic framework of government. It provides for a republican system of government; elections and representation; and it grants and limits the powers of government. Article I provides the powers of the legislative branch. Article II provides the powers of the executive branch. Article III provides the powers of the judicial branch. The first ten amendments to the Constitution, commonly referred to as the Bill of Rights, provide for individual rights. The Bill of Rights includes important limits on the powers of government.

2.51 | *The Three Functions of the Constitution*

The U.S. Constitution does three things. It establishes the basic framework of the government; it allocates government powers; and it declares or guarantees individual rights.

Establish the basic framework of government. The Constitution creates a **republican** form of government, a **federal** system of government, and a system of government with the **separation of powers**. A republic is a type of democracy. It is an indirect democracy. Elected representatives make public policy for the people. The people control government by electing government officials.

A federal system is a two-tiered system of government where power is divided between a central government (the national or federal government) and the regional or state governments. [Federalism](#) is a *geographic* division of power between the national government and the state governments. The actual division of powers is specific in some areas of public policy (e.g., the national government has exclusive power over interstate commerce, coining money, and foreign affairs) but general in others (e.g., both national and state governments make crime, education, environmental, and tax policy). Furthermore, the division has changed over time. The federal government is involved with more areas of public policy than originally intended because the Founders intended to create a state-centered political system. Federalism is an important part of the Madisonian system of institutional checks and balances whereby the national and state governments check one another's powers.

The [separation of powers](#) is a functional division of power among the legislative, executive, and judicial branches of government. The separation of powers serves two purposes. First, it is part of the Madisonian system of checks and balances designed to prevent the concentration of power in the hands of one individual or one institution. Second, it contributes to good governance.

The checks and balances purpose is directly related to the intention to limit government power. In fact, it is sometimes considered evidence that the Founders intended to create an inefficient system of government. The separation of power's role in the system of checks and balances is to distribute power among three separate but interdependent branches to prevent any one individual or institution from getting too

much power. The separation of powers is one of the Constitution's basic governing doctrines even though it is not specifically mentioned in the Constitution.

The three branches were not intended to be completely independent of one another. The French political philosopher Montesquieu, who was the main inspiration for the tripartite separation of powers, believed that each branch had to be sufficiently independent of the others so that one branch could not create, or abolish, any other branch. Separation of powers does not mean that each branch's powers are completely separate from the others. In fact, the system of institutional jealousy depends on some overlap so that each branch will guard against another branch poaching on its turf. Congress' power to enact laws can be checked by the president's veto. The president's veto can be overridden by a two-thirds majority vote in both houses of congress. The president is delegated power as commander-in-chief, but only congress has the power to declare war and to raise and support an army. The president has the power to nominate federal judges, ambassadors, and other high government officials, but the nominations must be confirmed by the Senate. And the Supreme Court has final authority to strike down both legislative and presidential acts as unconstitutional. The president nominates federal judges but they must be confirmed by the Senate. Congress determines the federal judiciary's budget and the organization of the federal court system. Over time, the president has become a very important participant in the legislative process. It is commonplace today to refer to *the administration's budget*, for instance, or *the administration's bill* in congress. Presidential legislation and judicial policy making are part of the modern vocabulary of government and politics.

The second reason for the separation of powers is that it contributes to good governance. The argument that the separation of powers contributes to good governance is based on the belief that each branch of government has a special institutional competence, and that good governance requires all three special competencies. The legislative branch's competence is representation (of districts, states, and interests), deliberation, and ultimately compromise to make laws for the nation. The executive branch's competence is action (the ability to act swiftly when needed) and administration (to justly administer the laws passed by congress). The executive is to ensure that the laws passed by Congress are uniformly applied, not enforced selectively against the minority party, racial or ethnic minorities, or the political opponents of the people who made the laws. The judiciary's competence in a political system with a tradition of individualized justice is dispute resolution: to conduct trials where laws are applied to individuals, and to interpret the laws when there are legal disputes about what the laws mean. The Founders thought that the separation of powers was a modern, political scientific contribution to good government. In *Federalist 47*, Madison praised the "celebrated" Montesquieu for popularizing the "invaluable precept in the science of politics." In contrast to the checks and balances purpose of the separation of powers, the good governance purpose emphasizes government efficiency/effectiveness more than inefficiency/limited government.

The Founders intended the legislative branch to make laws, the executive to carry them out, and the judicial branch to interpret the laws. But this is not exactly the way the system works. The modern national government does have three separate institutions but they actually share *law making* power. For instance, the terms *presidential legislation* and *legislating from the bench* are commonly used to describe what the modern

presidency and judiciary actually do. Descriptions of how the modern government works typically include legislative policymaking, executive policymaking, and judicial policymaking.

The separation of powers is not essential for democracy. Modern democracies include presidential government and parliamentary government. The separation of powers is more common to presidential systems than parliamentary systems, which typically fuse legislative and executive powers. The prime minister, the executive figure, may be an elected member of the legislative body, the parliament. In parliamentary systems, one institution, the elected legislature or parliament, is the supreme governing body; the other institutions (the prime minister or the courts) are inferior to it. In separation of powers, each branch is largely independent of the other branches in the sense that the other branches are not created by, or dependent on, another branch for its existence. Congress cannot abolish the judiciary; the president cannot abolish congress. Accordingly, in a fusion of powers system such as that of the United Kingdom, the people elect the legislature, which in turn selects the executive (who is usually called the prime minister. The fact that a prime minister is selected by the legislative body, and is an elected member of that body, means that parliamentary systems fuse rather than separate institutional powers.

In the U.S., the separation of legislative and executive power is evident in the fact that Congress does not select the president, and the president is not a member of congress. The president is selected independent of Congress. In a parliamentary system, the tenure of a prime minister selected by a legislature is likely to end when the term of the legislature ends and a new parliament selects a new executive. In a presidential system the executive's term may or may not coincide with the legislature's term. However, legislative and executive powers can be informally fused when the president's party controls Congress. Party loyalty (to a president of the same party) can weaken a member of congress' institutional loyalty. The fusion can create problems. Party loyalty can undermine the institutional checks and balances if the majority party in congress supports the president.

Allocate Power. The second function of a Constitution is to allocate power. The Constitution *both grants and* limits government powers. The main grants of power to the national government are provided in Article I (legislative), Article II (executive), and Article III (judicial). Article one I, Section 8 provides a list of powers delegated to Congress. The main limits on the power of the national government are provided in the Bill of Rights. The challenge when writing a constitution is to strike the right balance between granting and limiting government power: a government that is too weak can be ineffectual or result in a failed state; a government that is too strong can threaten individual liberty.

Guarantee Individual Rights (or Freedoms). The third function of a constitution is to provide for individual rights. The U.S. Constitution, the 50 state constitutions, and the constitutions of other countries include provisions declaring or guaranteeing rights. In the U.S. Constitution, the Bill of Rights provides for freedom of speech, religion, and press, as well as providing protection against unreasonable search and seizure, due process of law, the right to a trial by jury, and protection against cruel and unusual

punishment. These constitutionally protected rights are sometimes called civil liberties. Civil liberties are distinct from civil rights, which is a term that usually refers to individual rights that are provided in legislation rather than the Constitution.

Civil Liberties are the constitutional rights that limit the government's power to restrict individual freedom. Civil liberties are often called individual rights or individual liberties because they limit government power over individuals. Civil liberties include the First Amendment guarantees of freedom of religion, speech, and press; the Second Amendment right to keep and bear arms; the Fourth Amendment right against unreasonable search and seizure; the Fifth Amendment guarantee of due process of law; the Eighth Amendment prohibition against cruel and unusual punishment; and the Fourteenth Amendment guarantee of equal protection of the laws. Some of the most important civil liberties provisions are described in very general language: the protection against unreasonable search and seizure; the guarantee of due process of law; and the prohibition against cruel and unusual punishment. The meanings of these vague words are not precise. People disagree about their meaning. As a result, conflicts between individuals who claim a civil liberties freedom from government restriction and government claims that they have the power to restrict the freedom are often decided by the Supreme Court.

The term *civil rights* is often used generically to refer to individual rights and individual liberties. But there are two significant differences between civil liberties and civil rights. First, civil rights are statutory rights. They are provided in legislation, not the Constitution. Second, civil rights protect individuals against discrimination. Civil rights laws promote equality by prohibiting discrimination on the basis of race, gender, religion, ethnicity, or some other status or characteristic. Two examples of landmark civil rights laws are the 1964 Civil Rights and the 1965 Voting Rights Act.

2.52 | *The Bill of Rights*

When the Constitution was submitted to the states for ratification, it did not include a provision declaring or guaranteeing individual rights. The Federalists, who supported the Constitution, argued that a bill of rights was unnecessary because the powers of the newly formed national government were so carefully limited that individual rights did not have to be specifically mentioned in the Constitution. In fact, some Federalists argued that adding a bill of rights could actually be dangerous because listing specific individual rights that the government could *not* limit would inevitably be interpreted to mean that the government *could limit* any rights that were not actually mentioned in the bill of rights. Nevertheless, legislators in some states threatened to withhold ratification of the Constitution unless a bill of rights was added to the document.

The Anti-federalist George Mason, a constitutional convention delegate from Virginia, opposed the new constitution because it did not include a bill of rights. The Anti-federalist worries that the new constitution created a stronger national government but did not include a bill of rights threatened the ratification of the Constitution. In order to ease Anti-federalist worries, a bill of rights was proposed to limit the power of the national government. The first ten amendments were based on Mason's [*Virginia Declaration of Rights*](#). In 1789, the First Congress of the United States adopted the first ten amendments to the Constitution. These amendments were ratified by the required

number of states in 1791. The following is an edited version of the first ten amendments to the Constitution (the Bill of Rights):

First Amendment: *“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of the speech, or of the press.....”*

Second Amendment: *“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.”*

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....”*

Fifth Amendment: *“No person shall...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.”*

Sixth Amendment: *“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.....and to have the assistance of counsel for his defence.”*

Seventh Amendment: *“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...”*

Eighth Amendment: *“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”*

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

Tenth Amendment: *“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”*

Until 2008, the Supreme Court had interpreted the Second Amendment as guaranteeing the states the power to maintain a well-regulated militia. As such, the Second Amendment was read as a *federalism* amendment: it protected the states from the federal government—particularly its military power. In [*District of Columbia v. Heller*](#), the Supreme Court ruled that the Second Amendment guaranteed an individual right to keep and bear arms. As a result, the right to keep and bear arms has now been added to the list of civil liberties that individuals and organizations, such as the National Rifle Association, can use to challenge gun control and other regulatory policies enacted by the federal, state, or local governments.

Most of the provisions in the Bill of Rights apply to criminal justice. They list specific rights. The Ninth Amendment is different. It was added to the bill of rights to ease Anti-federalist worries that *not* listing a right mean that the right did not exist. What if the men who made up the list forgot to include a basic right? What if a future generation considered a right a fundamental right? The Ninth Amendment was intended as a statement that the Bill of Rights should not be read as an exhaustive list.

2.53 | *Civil Rights and Civil Liberties*

The relationship between religion and politics is one of the most controversial issues in American politics. During the colonial era, government and politics had explicitly religious purposes. The *First Charter of Virginia* (1606), the *Mayflower Compact* (1620), and *The Book of the General Lawes and Libertyes Concerning the Inhabitants of the Massachusetts* (1648), for example, describe government and politics as organized efforts to make people moral—as defined by organized religious beliefs. Some colonies had an established church—an officially recognized and government supported church. Massachusetts established the Congregational Church as the official church and some southern colonies established the Anglican Church as the official religion. Over time, the colonies moved away from establishing an official denomination and toward establishing Christianity or Protestantism.

The Constitution changed the relationship between church and state—or at least the relationship between religion and the federal government. Article VI of the Constitution provides that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” More important, the First Amendment prohibits Congress from making any law “respecting an establishment of religion or prohibiting the free exercise” of religion. The First Amendment guarantees freedom of religion, which includes the right of individuals and organizations to actively participate in politics, but it limits government support for religion. Political and constitutional debates involve providing public aid to religious schools, policies allowing or requiring organized prayer in public schools, religious displays of the Ten Commandments or crèches in public places, laws related to the teaching of evolution or creation science, and legislating morality. Civil liberties claims have been made to challenge the constitutionality of using law to promote morality by regulating obscenity, to prohibit certain sexual behavior, and to define marriage as a relationship between one man and one woman.

2.6 | **Constitutionalism**

This chapter began with an acknowledgement that having a constitution is today almost universally accepted as the best form of government. But having a document called a constitution does not mean that a political system is committed to constitutional government. Constitutionalism refers to the public and government officials’ commitment to the values that are expressed in the Constitution. Without the commitment, a constitution is merely paper or words without much to back them up. With the commitment, a constitution acquires real political and legal force. Americans have an especially strong commitment to the Constitution. Support for the Constitution remains strong even in tough times of economic hardships, domestic disorder, or national security threats. In contrast, public support for the government varies a great deal, and in fact support for government institutions has declined over time. The enduring appeal of the Constitution and the belief in the founding values that are embodied in it (e.g., freedom; limited government; equality) remain a political constant even in times of great political change, conflict, and even turmoil. What explains the enduring appeal of the Constitution?

One explanation is that the enduring public support reflects a general commitment to the Constitution or to constitutional government rather than support for specific provisions of the Constitution or particular interpretations of them. This explanation is supported by studies of public opinion that reveal consistently low levels of knowledge about what is actually in the Constitution. A [public opinion survey conducted by the Constitution Center](#) revealed startlingly low levels of public knowledge about the Constitution: less than five percent of the American public could correctly answer even basic questions about the constitution.

The consistently high levels of public support for the Constitution do not mean there is general consensus about *what* specific provisions of the Constitution actually mean. In fact, the general consensus supporting the Constitution masks political conflict about what specific provisions of the Constitution mean and how to interpret them. For instance, both conservatives and liberals profess support for the Constitution and the values embodied in it. But they consistently disagree about the government's criminal justice powers, its economic regulatory powers, its moral regulatory powers, and its war powers. For instance, both sides in the debates about the role of religion in American government and politics appeal to the Constitution as supporting their side of the debate about school prayer.

Liberals and conservatives also disagree about *how* the Constitution should be interpreted. A [Pew Research survey of public opinion about the Constitution](#) revealed major differences between conservatives and liberals, an ideological divide that was so wide that it was described as a chasm. Conservatives believe the Constitution should be interpreted according to the original meaning of the words or the original intentions of those who wrote them. Liberals believe that the Constitution should be interpreted according to contemporary societal expectations. These differences reflect the tension between continuity and change, between adhering to certain beliefs and changing with the times. Particularly during hard times or times of crisis, conservatives are apt to blame political problems on departing the republic's political and constitutional founding values, and to call for a return to them as the solution to the problems.

2.61 | *The Relationship between the Constitution and the Government*

The relationship between the political system that was established by the Constitution and modern governance is both interesting and complicated. Public opinion reflects such strong support for the Constitution *and* such strong criticism of the government that it could be said that Americans love the Constitution but hate the government (that it created). Although it may seem surprising, venerating the Constitution can create governance problems. Reverence for the Constitution can create problems. Take, for example, constitutionalists. Constitutionalists believe the Constitution should be strictly or literally interpreted. Some religious constitutionalists believe that the Constitution was a divinely-inspired document. The belief that a document is divinely-inspired makes reasoned political analysis, including assessment of the problems of modern governance, difficult. Secular constitutionalists merely believe that the Constitution should be strictly interpreted. Some of the individuals who call themselves constitutionalists are advocates of the Tenth Amendment. The motto of these "[Tenthers](#)" is "*The Constitution. Every Issue. Every Time. No Exceptions, no Excuses.*" These constitutionalists believe the solution to the nation's problems is to return to the *original* Constitution, not the

Constitution as it has come to be understood. This is one of the main points of the Tea Party movement.

Political and legal scholars disagree about whether the nation's problems can be solved by returning to the original understanding of the Constitution and how the government was intended to work. Appeals to return to "the" Founders views are misleading insofar as it presumes that there was one, single, unified voice. At a minimum there were basic differences between the Federalists and the [Anti-federalists](#).

The bicentennial of the Constitution in 1987 produced a number of scholarly works that identified governance problems that could be traced to the Constitution, and recommended constitutional reforms to create "a more workable government."² Constitutionists and some conservatives reject the argument that the constitutional design of government is flawed or that modern challenges require modernizing the Constitution. Those who advocate change write in the Jeffersonian tradition.

2.62 | *Should Laws, Like Food Products, Have Expiration Dates?*

Thomas Jefferson argued that laws, including the Constitution, should have sunset provisions. He thought that laws should last only twenty years—the lifespan of a generation—because one generation should not bind a succeeding generation. No society "can make a perpetual constitution, or even a perpetual law," because just as the earth "belongs always to the living generation," people are masters "of their own persons, and consequently may govern them as they please." The constitution and laws "naturally expire at the end of 19 years," the life span of a generation. Laws that are enforced longer are enforced as "an act of force, and not of right." Jefferson did not think that the problem of one generation binding another could be solved by claiming that each succeeding generation's decision not to repeal a law was tacit consent to it. This tacit consent might apply if the form of government "were so perfectly contrived that the will of the majority could always be obtained fairly and without impediment." But no form of government is perfect. Representation is likely to be "unequal and vicious," various checks limit proposed legislation, factions control government bodies and bribery corrupts them, and personal interests cause government officials lose sight of "the general interests of their constituents." So practically speaking, "a law of limited duration is much more manageable" than one that needs to be repealed.³

One contemporary critic of the constitutional design of American government, Sanford Levinson, thinks that venerating the founding era and the system of government created by the Constitution is, ironically, not in keeping with the founding values of the republic. In "[Our Imbecilic Constitution](#)," Levinson reminds us that the authors of the *Federalist Papers* advocated ratification of the new Constitution by "mock[ing] the 'imbecility' of the weak central government created by the Articles of Confederation." Levinson scolds those who call the modern American political system "dysfunctional, even pathological" for failing to even mention the Constitution's role "in generating the pathology." According to Levinson, slavery, the Senate system of providing equal representation to North Dakota and California, the Electoral College, and the separation of powers, all created problems but "the worst single part of the Constitution...is surely Article V, which has made our Constitution among the most difficult to amend of any in the world." Amendment is so difficult that the mere discussion of possible reforms is considered a waste of time. He considers it unfortunate that "most contemporary

Americans” have lost the ability to “think seriously” about whether the Constitution’s provisions for governance still serve us very well” and instead “envelope” the Constitution “in near religious veneration.”

Levinson blames the modern dysfunctional government on the decision to make the Constitution so hard to amend. Most of the 50 state constitutions are much easier to amend. He notes that fourteen states give the voters the opportunity call a constitutional convention at regular intervals. There have been more than 230 state constitutional conventions, and “each state has had an average of almost three constitutions.” Levinson describes the framers’ “willingness to critique, indeed junk, the Articles of Confederation” truly admirable, and he thinks that “we are long overdue for a serious discussion about [the Constitution’s] own role in creating the depressed (and depressing) state of American politics.”

2.63 | *Continuity and Change*

The U.S. Constitution is distinctive in at least two respects. First, it is the world’s *oldest* continuing governing document. Second, the Constitution is a very *brief* document. The Constitution’s brevity and longevity are related. The Constitution has lasted as long as it has partly because it is such a short document. It is a short document that is filled with general phrases describing government and politics. The Preamble declares its purpose as “to form a more perfect Union” and “establish Justice.” creating “a more perfect Union.” Article I gives Congress power to use whatever means “necessary and proper” to accomplish the things that Congress has power to do. The Bill of Rights has especially memorable but flowery phrases. The 5th Amendment prohibits government from denying any person **due process of law**. The 4th Amendment prohibits **unreasonable searches and seizures**. The 8th Amendment prohibits **cruel and unusual punishment**. These general provisions of the Constitution allow for, or perhaps require, interpretation to give them concrete meaning, interpretation to determine how they are to be applied in specific instances. Interpretation is a way to informally change the meaning of the Constitution—to accommodate change without requiring formal amendment or an entirely new constitution. The short and general Constitution has endured for more than 200 years with only 27 amendments—and the first ten amendments were adopted as the bill of rights in 1791. This means that the Constitution has undergone only minimal formal changes despite more than two centuries of major political, economic, social, technological, and scientific changes.

Which raises a question: Is the Constitution, an Eighteenth Century document, still relevant to Twenty-first Century government and politics? It is. But the informal accommodation to reflect change means that it is no longer possible to read the Constitution to understand how modern American government and politics actually work. The following are just some of the major political developments that are not even mentioned in the Constitution.

- **Political Parties.** The Constitution does not say anything about political parties even though parties play a central role in politics and government. Parties have also changed the way the Electoral College works.

- **Corporations.** The Constitution does not say anything about corporations even though they are important economic organizations that the Supreme Court has said are “persons” for the purposes of the Fourteenth Amendment.
- **The Fed.** The Constitution does not say anything about the Federal Reserve Board even though “the Fed” is a very important government body with control over monetary policy.
- **The Fourth Branch.** The Constitution creates three branches of government but the development of the federal bureaucracy has created a fourth branch of government.
- **Presidential Government.** The Founders created a system based on legislative government but presidential power has expanded greatly over time and the system developed in presidential government.
- **Presidential Legislation.** This term applies to, among other things, executive orders and executive agreements.
- **Judicial Review.** The Constitution does not explicitly give courts the power of judicial review, but this implied power to review the acts of other government officials to determine whether they are constitutional has greatly expanded the power of courts.
- **The Congressional Committee System.** It is impossible to understand how Congress works without describing the committee system and the party leadership system.
- **The Sole Organ Doctrine.** This doctrine is one of the key concepts for understanding the modern president’s role in foreign affairs and national security policy.
- **A National-centered System.** The Founders created a state-centered political system, but the government has developed into a national-centered system.

Think About It!

Can a person read the Constitution to get a good understanding of how American government and politics work today?

Act on It!

Contact a local, state, or national government official (e.g., your member of Congress), and ask them whether they support any constitutional amendments.

2.7 | Continuity

One way to better understand the U.S. Constitution is to compare it to other constitutions. The constitutions of the 50 states are very different than the U.S. Constitution. Among

other things, the state constitutions are much younger, longer and more detailed than the U.S. Constitution. The [constitutions of other countries](#) are even more varied. The ready electronic access to the constitutions of other countries makes it easy to compare the constitutions of the countries of the world. Reading a country's constitution to determine what form of government the country has, and to determine what civil rights and liberties it includes, provides insights into the political history of a nation. It is especially interesting to compare the civil rights and liberties provisions in the newer constitutions with those of older constitutions such as the U.S. Constitution because the U.S. played an important role in writing the constitutions of Germany and Japan after World War I and, more recently, the constitutions of Iraq and Afghanistan.

2.8 | Summary

This chapter examined the origins and development of the U.S. system of constitutional government. It includes the various factors that fostered colonial independence and the subsequent development of American government and politics. The primary theme is the distinctive tension in American political culture between continuity (preserving the original understanding of the Constitution and the founding era values) and change (adapting to the political, social, economic, and technological conditions of the times). One aspect of self-government is thinking about the system of government and politics so that, as informed citizens, we can answer two basic questions. How is it working for us? How can we help to form “a more perfect Union?”

2.9 | Additional Resources

2.91 | INTERNET SOURCES:

Primary documents are available at

<http://www.loc.gov/rr/program/bib/ourdocs/Constitution.html>

Montesquieu. *The Spirit of the Laws*. <http://www.constitution.org/cm/sol.htm>

Paine, Thomas. 1776. *Common Sense*

<http://www.ushistory.org/paine/commonsense/singlehtml.htm>

Rutherford, Samuel. 1644. *Lex Rex: Law Is King, or The Law & The Prince*.

<http://www.lonang.com/exlibris/rutherford/>

The Constitution of the Commonwealth of Massachusetts

http://www.netstate.com/states/government/ma_government.htm

The First Charter of Virginia (1606)

<http://www.lonang.com/exlibris/organic/1606-fcv.htm>

KEY TERMS:

Constitutions
 Rule of Law
 Mercantilism
 The triangle trade
 Seven Years War
 The Sugar Act
 The Stamp Act
 Mutiny Act
 The Townshend Acts
 The Coercive Acts
 Confederation
 Shays' Rebellion
 A republican system
 of government
 Federalism
 Separation of powers
 Checks and balances
 The Bill of Rights

The Mayflower Compact (1620)

http://avalon.law.yale.edu/17th_century/mayflower.asp

The Charter of Massachusetts Bay (1629)

http://avalon.law.yale.edu/17th_century/mass03.asp

The Lawes and Libertyes of Massachusetts (1648)

<http://www.commonlaw.com/Mass.html>

The National Constitution Center:

<http://www.constitutioncenter.org/>

The constitutions of countries of the world:

www.constitution.org/cons/natlcons.htm

2.92 | IN THE LIBRARY

Amar, Akhil Reed. 2005. *America's Constitution: A Biography*. New York: Random House.

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Ketcham, Ralph. 2003. *The Anti-Federalist Papers and the Constitutional Convention Debates*. Signet Classics.

Kyvig, David E. 1998. *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776- 1995*. University Press of Kansas.

Maier, Pauline. 1997. *American Scripture: Making the Declaration of Independence*. New York: Knopf.

¹ A repository of these historical documents is available at <http://avalon.law.yale.edu/>

² See, for example, *A Workable Government? The Constitution after 200 Years*. 1987. Ed. by Burke Marshall. New York: W.W. Norton & Company; *Reforming American Government: The Bicentennial Papers of the Committee on the Constitutional System*. 1985. Ed. by Donald L. Robinson. Boulder, CO: Westview Press.

³ Letter to James Madison," (September 6, 1789) In *The Papers of Thomas Jefferson*, Edited by Julian P. Boyd, et al. Princeton: Princeton University Press. 1950.
<http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html>

CHAPTER 3: CONGRESS



3.0 | Congress

Is Congress the Broken Branch of Government? Congress *is* the government institution that everyone loves to hate. Congress has been called the broken branch of government because nothing seems to make the Congress less capable of action than the need for action. Why? In the 19th Century, the Senate was considered the greatest deliberative body in the world. Today, Congress still debates issues but the quality of the debates

rarely rises to the level of greatness. And congressional speeches are often delivered to an empty chamber—but one with a camera focused on the speaker. The way the modern Congress works, or does not work, exposes Congress to the charge that it is a perfectly good 19th Century institution!

The main purpose of this chapter is to explain the role Congress plays in the modern system of government. The chapter focuses on the following issues:

- The **Power** Problem with Congress: more accountability than effectiveness?
- The **Functions** of Congress. How Congress's role has changed over time.
- The **Organization** of Congress. How bicameralism, the committee system, and the party structure, affect the congressional decision making processes.

Information about the functions of Congress, the organization of Congress, and the members of the House of Representatives and the Senate is available at the following website: <http://www.usa.gov/Agencies/Federal/Legislative.shtml>

3.1 | The Power Problem

The power problem is the need to **grant** government enough power to effectively address the problems that people expect government to solve, while also **limiting** power so that it can be held accountable. A successful government is one that strikes the right balance between granting and limiting power. The main power problem with Congress is effectiveness: Congress is often unable to get anything done. Congress has been called “the broken branch” of government because the public (and many political scientists) consider it an inefficient or ineffective institution. Congress has plenty of critics. Public opinion polls generally reflect that the public does not hold Congress in very high regard because Congress does not seem to be making much headway toward solving the nation's problems. Public confidence in Congress as an effective institution is not high. The reasons for this criticism of Congress can be traced to its organization and operation. Congress is not designed to be an especially effective institution. It is designed as a representative institution where different interests and perspectives are represented, and decision-making requires negotiating, bargaining, and compromise. These democratic values (representation, bargaining, and compromise) are sometimes at odds with effective or decisive action.



GALLUP 2010 Confidence Poll; “Now I am going to read you a list of institutions in American society. Please tell me how much confidence you, yourself, have in each one -- a great deal, quite a lot, some, or a little.

Are members of Congress smarter than tenth graders? A study of congressional speeches on the floor of the House and Senate concluded that the level of speech was at the tenth grade level— *and declining!* Descriptions of “sophomoric” talk do not instill public confidence in Congress.

Think about it! Are members of Congress sophomoric? Are they smarter than a 5th grader? Analysis shows they *talk* like 10th graders.
<http://www.npr.org/blogs/itsallpolitics/2012/05/21/153024432/sophomoric-members-of-congress-talk-like-10th-graders-analysis-shows>

3.2 | Change over Time

Congress’ role in the U.S. system of government has changed a great deal over time. Congress does not play the same role that it did during the founding era. The Founders made Congress **the** law-making branch of the federal government. Article I Section I of the Constitution provides that “all legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” Congress was intended to be the *first branch* of government in the sense that it was intended to be the primary branch of the federal government. Congress was the most powerful (and therefore also the most dangerous) branch of government.

The political experiences of the Founders made it logical for them to create a political system where the legislative branch was most powerful. The Revolutionary War was

fought against a monarchy. Many of the Founders remained wary of executive power. And the Founders believed that the legislative branch was more democratic, that it was a republican or representative institution during a time when republican or representative government seemed to be the wave of the future. Representative government was considered modern, one of the then-recent advances in the “science” of good government.

The Founders did not create three branches of government with equal power. The legislative, executive, and judicial branches were created equal in the sense that they have the same constitutional status. The Founders created a system of legislative government, not executive government or judicial government. But as the U.S. political system developed, the presidency accumulated a great deal of power in absolute terms and relative to Congress. Congress is still the **first** branch but it is not necessarily the **primary** branch of government. The modern system has developed into a political system based on executive governance rather than legislative governance.

This change has occurred over time. The 19th Century was the golden age of representative assemblies as governing bodies. The 20th Century was not kind to representative assemblies which lost favor to executive government—particularly parliamentary systems headed by prime ministers—in most countries of the world. The decline of congressional power relative to the president is certainly one of the most important changes in the way the U.S. system of government works. Congress is no longer “the central institution” of the national government.¹ Congress is still a powerful institution. Compared to the representative assemblies in many other countries, Congress is a powerful institution because it plays both a lawmaking and a representative role. In most modern parliamentary systems, the representative body (the parliament) is largely limited to representation, with a prime minister who actually governs the country and makes policy for the nation.

Congress still performs many important functions, but its primary role, to be the lawmaker for the nation, has diminished. The modern Congress focuses less on making laws for the nation and more on **representation** and **oversight** of the administration. Representation of constituents (i.e., individuals in the district or state) and organized interests is a very important function of individual members of Congress and Congress as an institution. The importance of legislative oversight of the administration (and the bureaucracy) has increased as Congress has delegated more and more power to the president and the size of the federal bureaucracy has increased. But the president has taken the lead in many areas of public policy making—particularly global affairs such as national defense and foreign policy but also areas of domestic policy such as fiscal policy (the setting of budget priorities).

Congress lost power relative to the executive for a broad range of reasons. One of the general reasons is related to the nature of power in the U.S. system of government. Power is dynamic, not static. It is not a solid or fixed quantity. It is more like a liquid that flows to wherever it seems to be most effective. Power will flow to whichever *level* or government (national or state) seems more effective at addressing the problems facing the nation. And power will flow to whichever *branch* of government (legislative, executive, or judicial) which seems most effective. Or power will flow to the private sector if the public considers the private sector more effective at solving a problem than the public sector. Today, the general public sees the president as the nation’s leader because the presidency seems to be a more effective institution.

3.3 | The Separation of Powers

In order to describe the way Congress works today, and to understand its current role, it is necessary to understand how the separation of powers works today. The separation of powers doctrine does not provide for a watertight separation of legislative, executive, and judicial powers. Although the Constitution delegates to Congress *all* legislative powers, Congress is not the only government body that makes laws. According to the [Congress website](#), “The legislative branch is the law making branch of the government made up of the Senate, the House of Representatives, and agencies that support Congress.” Congress is the only source of federal statutes or legislation, but there are other kinds of law, including executive orders, executive agreements, administrative regulations, and even case law. Presidents *make law* when they sign executive orders. The Supreme Court *makes law* when it interprets what the Fourth Amendment prohibition against “unreasonable searches and seizures” actually means when police officers are investigating individuals who are suspected of crimes. And administrative agencies such as the [Federal Communications Commission](#) and the [Internal Revenue Service](#) *make laws* through rulemaking actions that define indecency or determine whether a religious organization should be granted tax exempt status.

Just as the executive and judicial branches have some lawmaking powers, Congress also has powers over the other branches. The House of Representatives controls **appropriations** or the budget. Without funding, the other branches – particularly the executive branch – are hamstrung in their ability to act. The House also has the power of **impeachment**, or the formal charging of a government official with treason, bribery, other high crimes and misdemeanors. The Senate then acts as a court for the impeachment, with the Chief Justice of the Supreme Court presiding. The Senate also has the power to approve (or fail to approve) the most important of the presidential appointments, including federal judgeships, ambassadorships, and cabinet level posts. The Senate also approves all treaties. Congress also has the power to declare war.

3.4 | Constitutional Powers

Congress has two types of constitutional powers: enumerated powers and implied powers. **Enumerated powers** are those that are specifically mentioned. Enumerated powers are sometimes called delegated powers because they are powers that the Constitution actually delegates to government. **Implied powers** are those that are not specifically mentioned but which can be logically implied to flow from those that are enumerated.

3.41 | *Enumerated Powers*

The following are some of the enumerated powers granted in Article I, Section 8:

“The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions; ... And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”

Think about it!

Presidential nominees must be confirmed by the Senate. When was the last time the Senate rejected a presidential nominee to head an executive department? Or a Supreme Court nominee?

<http://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm>

3.42 | Implied Powers

Article I Section 8 is a list of Congress’s enumerated powers. The list of specifically mentioned powers ends with the **necessary and proper** clause. (See above). The necessary and proper clause has been interpreted to mean that Congress can make “all laws which shall be necessary and proper” to achieve its enumerated powers. In effect, the necessary and proper clause gives Congress power to choose the means it considers necessary to achieve its legislative ends. For example, Congress has the enumerated power to raise an army, and the implied power to use a military draft to raise the army. Congress has enumerated power to regulate commerce and coin money, and the implied power to create the Federal Reserve System and the Department of the Treasury to perform these functions. The necessary and proper clause is sometimes called *the elastic clause* because it has been interpreted very broadly to allow Congress to choose the best means to accomplish its specifically mentioned powers.

The Supreme Court established the precedent for broadly interpreting the necessary and proper clause to give Congress implied powers in *McCulloch v. Maryland* (1819). This landmark case involved a legal challenge to Congress' power to charter a national bank. Congress created a national bank. Maryland taxed the Baltimore branch of the national bank. The Supreme Court was asked to decide whether Congress had the power to create a national bank and whether a state could tax a branch of the bank. Chief Justice John Marshall ruled that the power to create a national bank was an implied power that flowed from Congress' delegated powers, including the power to regulate commerce. Congress could decide whether a national bank was a "necessary and proper" way to regulate commerce. Marshall, incidentally, was a prominent member of the Federalist Party, which supported a strong national government to promote economic development. The *McCulloch* ruling established a precedent that the Court would broadly interpret the powers of Congress. As a result, Congress today legislates on many areas of public policy that are not actually mentioned in the Constitution as grants of power.

3.5 | What Does Congress Do?

Congress has four main roles or functions:

- **Lawmaking** for the nation (Legislating)
- **Representation** (of Constituents and Interests)
- **Legislative Oversight** (Investigating)
- **Constituency service** (Solving Constituent Problems)

3.51 | *Law-making for the nation*

The Constitution delegates all legislative power to Congress. It therefore is the only branch of government that can "make laws." Both the House and the Senate must pass a bill for it to become a law but they have different roles in the law making process. For instance, tax bills must originate in the House of Representatives. This provision of the Constitution reflects the Founders' belief that decisions to tax the people should originate with the government institution that was closest to the people. The members of the House are closer to the people than members of the Senate. Members of the House are directly elected by the people to serve two-year terms. The members of the Senate were originally chosen by state legislatures and served six-year terms.

3.52 | Representation

Congress is a representative institution. The members of the House and Senate are elected representatives of the people. Congress is institutionally designed to represent geographic districts. In the House of Representatives, the legislative districts are 435 geographic areas with about 650,000 people in each district. In the Senate, the districts are the 50 states. Representation is not limited to geography. Members of Congress also

represent individuals and organized interests. In a large, populous nation such as the United States, representative institutions increase *political efficacy*. Political efficacy is the belief that it is possible for a person to participate effectively in government and politics. Representative institutions are one of the ways that government is designed to be responsive to public demands and interests. Efficacy is related to the belief that individuals and organizations can have an impact on government. In the U.S. system of republican government, congress is the institution that is designed to represent the people, deliberate on public policy options, and enact make laws for the nation.

There are three theories of representation: the **delegate** theory; the **trustee** theory; and the **politico** theory. The delegate theory is that members of Congress *should* act as instructed delegates of their constituents. According to this theory, elected representatives are not free agents: representatives have a political obligation to do what their constituents want. A legislator who votes on bills based strictly on public opinion polls from the district, for example, is acting as a delegate. The trustee theory is that members of Congress *should* do what they think is in the best interest of their constituents. According to this theory, elected representatives are free agents: they can vote according to what they think is right or best regardless of public opinion in the district. A trustee uses his or her judgment when deciding how to vote on a bill, for example. A trustee does not feel obligated to vote based on public opinion polls from the district.

Studies of Congress indicate that legislators are not typically either delegates or trustees. The **politico** theory of representation suggests that representatives *are* rational actors whose voting behavior reflects the delegate or trustee theory of representation depending on the situation.

Members of Congress are expected to represent their districts. The representation of districts includes representing individuals and organized constituents such as business interests that are located in the district. Members from agricultural districts are expected to represent agricultural interests. Members from urban districts are expected to represent urban interests. Members from manufacturing districts are expected to represent manufacturing interests, and members from districts where mining, forestry, or other natural resource interests are located are expected to represent those interests. Where one industry is especially important to a district, particularly in the House of Representatives, when one interest is the dominant interest in a district, a representative may be strongly identified with that single interest. For example, [Congressman Norm Dicks](#) represents Washington State's 6th Congressional District. The 6th District includes Tacoma's port district, the Puget Sound Naval Yard and other military installations, and a number of defense contractors. One of the companies, [Boeing](#), which is the world's largest aerospace manufacturer, was headquartered in Washington State until it relocated to Chicago.

Representative Dicks serves on three key House Appropriations Subcommittees dealing with defense, Interior and the Environment, and Military Construction/Veterans. Representative Dicks' name came to be called "[The Representative from Boeing](#)" because of his strong advocacy for Boeing. His representation of American Defense Contractors included strong opposition to the U.S. military's decision to award a major defense contract to build the new generation of airplane refueling tankers to a European and American consortium of airplane builders.

The third congressional role is related to representation. Constituency service is helping constituents solve problems that they may have with the government. All the Web sites of the members of the House of Representatives prominently list constituency service as one of the things that the member of congress does for the individuals or organizations in the district. Members of Congress maintain offices in their districts to help solve constituent problems: getting government benefits such as Social Security checks; getting Veteran's services; problems with government regulations of business; or who have kinds of problems or issues that constituents have with the government. This constituency *casework* often involves helping individuals or organizations cut through government red tape or bureaucratic procedures.

Act on It!

Contact a member of congress, your representative, or one of your senators and ask them about a political issue of concern to you. How can you find a member of congress?

Go to the www.usa.gov

Click on Legislative Branch

Select House of Representatives or Senate

Go to the Home Page and enter your zip code.

3.54 | Legislative Oversight

The fourth congressional role is oversight. Congress's oversight role consists of two primary functions:

- Oversight of the Laws
- Investigation of Scandals



The first oversight function is oversight of the laws being administered or executed by the President and the bureaucracy. The oversight of the laws is important because although Congress passes laws, the executive branch or the bureaucracy administers or carries out or implements the laws. This means that the body that makes the laws does not actually implement them. Congress oversees the administration of the laws by conducting hearings to determine how public policy is being implemented, to determine whether the president is implementing the laws the way Congress intended, or to determine

whether the law needs to be changed based on information about how it is working, especially whether it is working well or not. The main method of legislative oversight is

through congressional hearings at which members of the executive branch or independent regulatory agencies may be called to testify about how they are carrying out the laws passed by Congress.

Congressional hearings are the principal formal method by which committees collect and analyze information in the early stages of legislative policymaking. But there are other kinds of hearings as well: confirmation hearings (for the Senate, not the House), legislative hearings, oversight hearings, investigative hearings, or a combination of them. Hearings usually include oral testimony from witnesses, and questioning of the witnesses by members of Congress.

There are several types of congressional hearings. Congressional Standing (or Policy) committees regularly hold legislative hearings on measures or policy issues that may become public law. Agriculture committees hold hearings on proposed legislation related to agriculture policy. Banking and financial services committees hold hearings on bills related to the financial services sector of the economy. The armed services committees hold hearings on legislative proposals related to national defense and the military. The health, education, and labor committees hold hearings on bills related to these aspects of domestic policy. Sometimes a committee holds hearings on several bills before deciding on one bill for further committee and chamber action. Hearings provide a forum where witnesses from a broad range of backgrounds can appear to provide facts and opinions to the committee members. The witnesses include members of Congress, other government officials, representatives of interest groups, academics or other experts, as well as individuals directly or indirectly affected by a proposed bill. Most congressional hearings are held in Washington, but field hearings are held outside Washington.

Oversight hearings are intended to review or study a law, a public policy issue, or an activity. Such hearings often focus on the quality of federal programs and the performance of government officials. Hearings are also one way for Congress to ensure that executive branch is implementing laws consistent with legislative intent. A significant part of a congressional committee's hearings workload is dedicated to oversight. Committee oversight hearings might include examination of gasoline price increases, lead paint on toys imported from China, the safety of the food supply in the wake of e. coli contamination, indecent programming broadcast over the television or radio airwaves, the government's response to natural disasters, terrorism preparedness, Medicare or Medicaid spending or access to health care, or matters related to crime policy.

The second oversight function is investigation of scandals. Investigative hearings are similar to legislative hearings and oversight hearings, but they are specifically convened to investigate when there is suspicion of wrongdoing on the part of public officials acting in their official capacity, or suspicion of private citizens whose activities or behavior may warrant a legislative remedy. Congress might conduct investigative hearings to get additional information about use of steroids in



professional sports such as baseball, or to determine whether tobacco companies are “spiking” the nicotine content in cigarettes or whether [tobacco company executives think nicotine is addictive](#). Congress has broad power to investigate and it has used it since the earliest days of the republic. Some of its most famous investigative hearings are benchmarks in American political history:

- The [Teapot Dome Scandal](#) in the 1920s
- The Army-McCarthy Hearings during the Red Scare in the 1950s
- The [Watergate](#) scandal in the 1970s
- The [Church Committee Hearings](#) on the CIA and illegal intelligence gathering in the 1970s
- The Iran-Contra Affair Hearings in 1987
- The National Commission investigating the 9/11 terrorist attacks
- The National Commission investigating the financial crisis

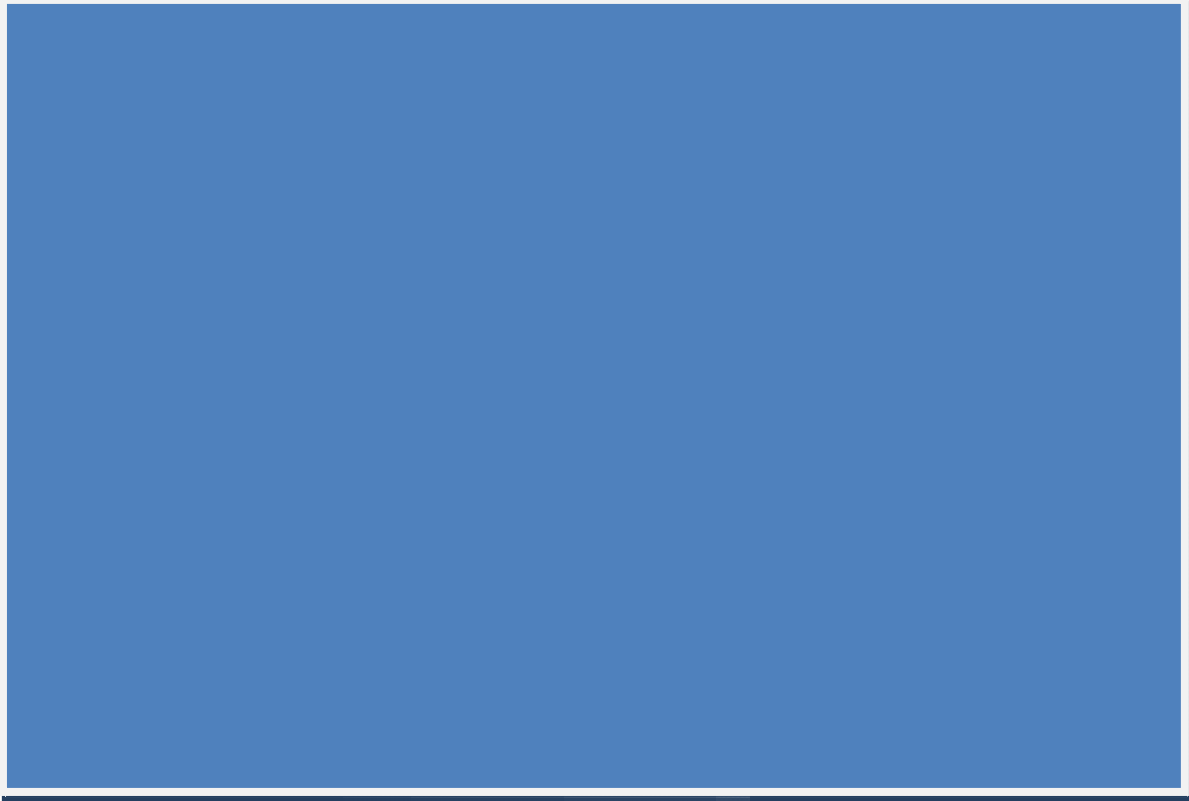
Investigative hearings gather information and issue reports that are often used to pass legislation to address the problems that the hearings examined. The National Commission on Terrorist Attacks Upon the United States was created to “investigate the facts and circumstances” relating to the terrorist attacks. The [National Commission’s Report](#) was used to increase coordination of intelligence about terrorism. The [Financial Crisis Inquiry Report](#) submitted by the National Commission on the Causes of the Financial and Economic Crisis in the United States in January 2011 included among its recommendations regulation of certain financial transactions.

Confirmation hearings on presidential nominations are held in fulfillment of the Senate’s constitutional role to “advise and consent.” Senate committees hold confirmation hearings on presidential nominations to executive and judicial positions within their jurisdiction. When the President nominates the head of an executive agency—such as the Secretary of State, Interior, Department of Homeland Security, or Defense—the Senate must confirm the nomination. The Senate also must confirm the president’s nominees for federal judgeships.

Confirmation hearings offer an opportunity for oversight into the activities of the nominee’s department or agency. The vast majority of confirmation hearings are routine, but some are controversial. The Senate may use the confirmation hearing of a nominee for Attorney General to examine how the Administration has been running the Department of Justice and provide some guidance on how the Senate would like the Department to function. The Constitution also requires that the Senate consent to the ratification of treaties negotiated by the executive branch with foreign governments. Arms control treaties have historically been controversial. Recently, the Senate used the ratification of the Strategic Arms Reduction Treaty between the U.S. and Russia to exert power over the executive branch and to influence the foreign policy choices of the President.² Therefore, hearings provide an opportunity for different points of view to be expressed as a matter of public record. So confirmation hearings are one of the ways that the Senate performs its constitutional responsibilities in an important area of public policy.

One of Congress’ implied powers is the power to issue subpoenas and to hold individuals in contempt of Congress for not complying with demands to testify or provide requested information. Most of the time individuals welcome an invitation to testify

before Congress because it can be a valuable opportunity to communicate, publicize, and advocate their positions on important public policy issues. However, if a person declines an invitation, a committee or subcommittee may require an appearance by issuing a subpoena.



Committees also may subpoena correspondence, books, papers, and other documents. Subpoenas are issued infrequently, and most often in the course of investigative hearings. The subpoena power is an implied power of Congress. Congress has the enumerated power to legislate, and hearings and subpoenas are implied powers that are logically related to Congress' need for information related to legislation it is considering. But when Congress requests records from the executive branch, the president cite executive privilege as a constitutional power to refuse to give Congress the information it requests during an oversight investigation. In 2012, the [House Oversight and Government Reform Committee](#) demanded records related to Operation "Fast and Furious," a Bureau of Alcohol, Tobacco, Firearms and Explosives sting operation that was intended to track illegal gun running on the Mexican border. The operation lost track of guns that it had provided, and the guns ended up in the possession of a Mexican drug cartel. Congress demanded information about the program and how it went wrong.

House Oversight of Operation "Fast and Furious"

http://www.pbs.org/newshour/bb/law/jan-june12/holder_06-20.html

3.6 | Lawmaking, Representation, or Oversight?

Today, Congress devotes more time to representation and oversight and less time making laws for the nation. This shift has occurred more in some areas of public policy than in others. In foreign affairs and national security, for example, Congress generally follows the president's lead in formulating public policy. In domestic affairs, Congress typically exerts more influence over public policy. As individual members of Congress pay more attention to representation, oversight, and constituency service, they pay less attention to law making for the nation. As a result, Congress as an institution also focuses less on its traditional lawmaking role. This change is reflected in the congressional work schedule. Today's Congress spends much less time in session. For an interesting perspective by a member of the House of Representatives who left Congress and then returned after 33 years, listen to Congressman Rick Nolan's (Democrat-Minnesota) thoughts about why Congress no longer works (well).

Think About It! How does Congress work?

<http://www.npr.org/2013/02/12/171837291/congressman-returning-after-33-years-says-congress-works-and-cooperates-less-now>

3.7 | The Internal Organization of Congress

How an institution is organized affects *what* it does. The three most important aspects of the way Congress is organized are bicameralism, the committee system, and the party system.

3.71 | Bicameralism

Congress is a bicameral or two-house body. [Bicameralism](#) is part of the system of checks and balances and part of the functional differences in legislative governance. The House of Representatives and the Senate have different sizes, roles, and rules of operation. The House is larger and therefore has more formal rules of operation to govern debate. The Senate is smaller and relies more on informal rules, a tradition of open debate (including the infamous filibuster), and personal relationships. In order for a bill to become a law it

must pass both houses of Congress—a fact that makes lawmaking in bicameral bodies much more complicated than in unicameral bodies.

3.72 | *The Committee System*

The key to understanding how Congress works is the committee system. Congress does most of its work in committees. The committee system is a form of division of labor. Most modern organizations operate with a system of division of labor where individuals are assigned different tasks in order to take advantage of specialization or expertise. The standing committees in Congress are an example of specialization. The jurisdiction of congressional committees such as the House of Representatives committee on agriculture, the committee on education and labor, the committee on financial services, and the committee on foreign affairs reflects their area of legislative expertise and authority. There are four basic kinds of committees: **standing committees**, **joint committees**, **conference committee**, and **select or special committees**. The [House of Representatives committee system](#) and the [Senate committee system](#) are similar but each body creates its own committee system.

- **Standing** committees are the most prominent of the committees. These are the permanent committees that focus on specific area of legislation, such as the House Committee on Homeland Security or the Senate Committee on Armed Forces. The majority of the day-to-day work in Congress occurs in these standing committees. Generally, sixteen to twenty members serve on each committee in Senate and thirty-one members serve on committees in the House. The majority party determines the number of committee members from each party on each committee, which ensures that the majority party will have the majority of committee members. Standing committees also have a variety of **subcommittees** that cover more precise subsections of the legislative issues addressed by the committee. Generally, subcommittee members have considerable leeway in shaping the content of legislation.
- **Joint** committees have members from the House and the Senate and are concerned with specific policy areas. These committees are set up as a way to expedite business between the houses, particularly when pressing issues require quick action by Congress.
- **Conference** committees are created to reconcile differences between the House and Senate versions of a bill. The conference committee is made up of members from both the House and the Senate who work to reach compromises between similar pieces of legislation passed by the House and the Senate.
- **Select** or special committees are temporary committees that serve only for a very specific purpose. These committees conduct special investigations or studies and report back to whichever chamber established the committee.

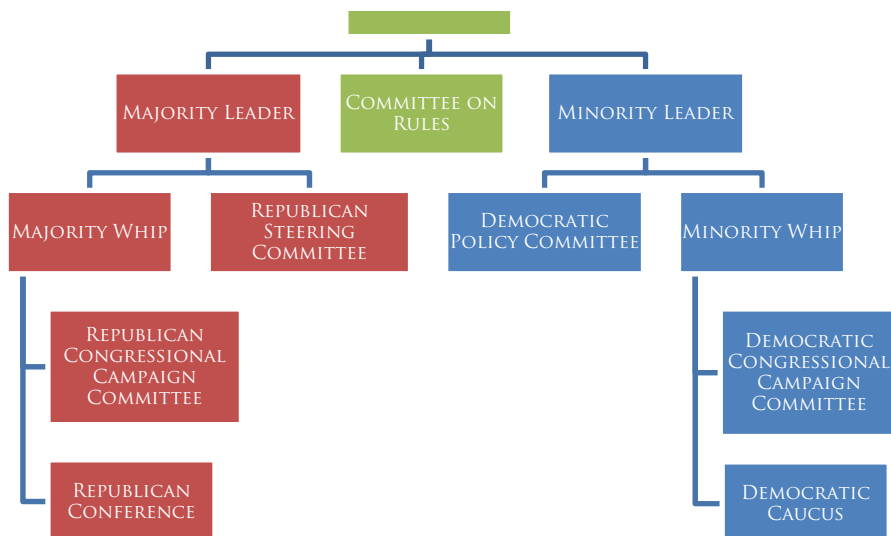


Senate Committee Hearing on the Banking Industry Subprime Mortgage Crisis

3.73 | *The Political Party System*

The third organization characteristic that is essential for understanding how Congress operates is the party system. The House and the Senate are organized differently but both houses have party leadership structures. The **majority party** is the party with the most seats; the **minority party** is the party with second number of seats. The majority party in each house organizes the sessions of Congress and selects its leadership. The majority party in the House of Representatives selects the Speaker of the House and the majority party in the Senate chooses the Majority Leader. The [House of Representatives leaders](#) are chosen by the members of the House. The [Senate leaders](#) are chosen by the members of the Senate.

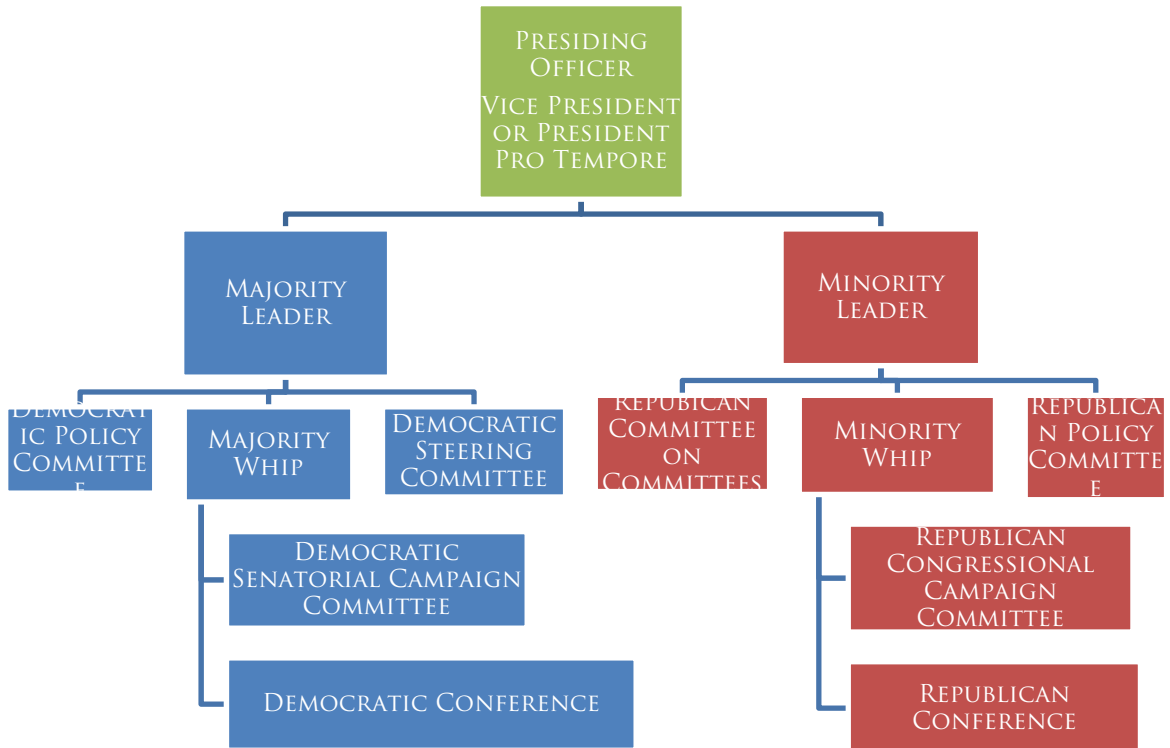
Leadership in the House of Representatives



The House is a much larger body than the Senate therefore the House relies more heavily on formal rules to function. Loyalty to the party organization, party leadership, and voting along party lines are also all more common in the House than in the Senate. The most powerful position in the House of Representatives is the **Speaker of the House**, which is the only leadership position in the House that is created by the Constitution. The Speaker is a member of the majority party and is elected by their party to oversee House business, interact with the Senate and the President, and is the second in line of presidential succession. In addition to the Speaker, the House leadership includes majority and minority leaders; majority and minority whips; party policy committees that the Republicans call a Steering Committee and Democrats call a Democratic Policy Committee; Republican and Democratic congressional campaign committees; and the Republican Conference and Democratic Caucus.

The Senate's presiding officer is determined by the Constitution, which sets forth that the vice-president of the United States is the ranking officer of the Senate. The vice-president is not a member of the Senate, so he votes only in the case of a tie. The **president pro tempore**, or the official chair of the Senate, is a largely honorary position awarded to the most senior senator of the majority party. The leader with power in the Senate is the majority leader, who is elected to their position by their party. The Senate, with far fewer members than the House, is a more casual organization that relies much less on formal structures of power for organization. As such, the majority party leader in the Senate has less power than the Speaker of the House. The Senate also lacks a rule committee, but has a largely similar structure to the House, in terms of the positions of power within each party.

LEADERSHIP IN THE SENATE



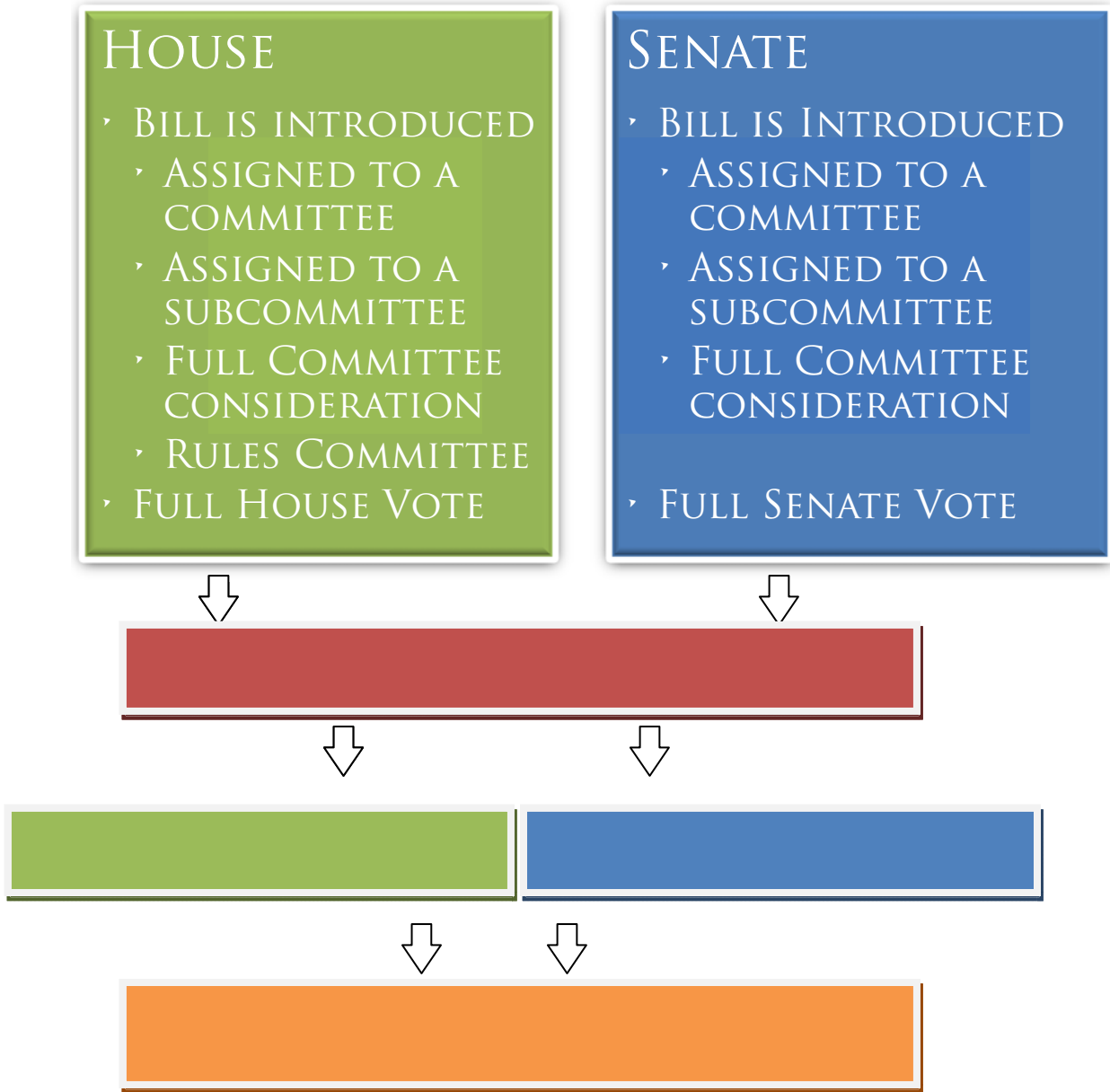
Party Leadership in Congress

Historical: [Different Time Periods](#)

Current:

- Who is the current Speaker of the House?
- Who is the current Majority Leader in the House?
- Who is the current Majority Leader in the Senate?
- Who is the current Minority Leader in the Senate?

3.8 | How a Bill Becomes a Law



The process by which Congress makes legislation is complex and drawn out, involving a series of procedural steps that have been institutionalized overtime. The first formal step in either the House of Representatives or the Senate is to introduce the bill for consideration in the legislative body. The bill is introduced and assigned to a committee for consideration; once in the committee, the bill is assigned to an appropriate subcommittee. The subcommittee will study the bill, hold hearings for those individuals and interest groups concerned with the bill, and debate and edit provisions of the bill. The subcommittee sends the bill back to the full committee, who votes on whether to send the bill to the full House or Senate for consideration. In the House (and *only* in the House),

the bill is then sent to the House Rules committee, where the rules governing debate and amendments on the bill are decided. Both the House and the Senate debate and vote on the bill. If the bills considered by the House and Senate differ, the bills are sent to a Conference committee, which crafts a single bill that both houses of Congress will find acceptable. The bill from the Conference committee is then sent back to both the House and the Senate for a final vote. If the bill passes both houses, the legislation is sent to the president for either approval (through signing) or a veto. If the president vetoes a bill, a two-third vote by both the House and the Senate can override the veto.

3.81 | *Sessions of Congress*

A term of Congress is divided into two sessions, one for each year. Congress has occasionally also been called into an extra or special session. A new session commences on January 3 (or another date, if Congress so chooses) each year.

Think the Senate doesn't have a sense of humor? Senate history, art, and political cartoons are available at the Senate website:
http://www.senate.gov/pagelayout/art/g_three_sections_wit_h_teasers/exhibits.htm

3.82 | *Finding Legislation*

How can I find a federal law? Congress legislates on an extremely broad range of subjects ranging from domestic policy (clean air, clean water, obscenity or indecency on radio or television or the Internet, crime, health care) to foreign affairs (international trade, defense policy). One way to find a federal law is through <http://thomas.loc.gov/>. Select Multiple Previous Congresses; select Bill Summary Status; select Congress (of your choice); select Advance Search; type in search phrase (e.g. Venezuela, for legislation related to that country); select date, or date range; and hit search.

3.9 | **Additional Resources**

3.91 | *INTERNET RESOURCES*

A user friendly website for information about Congress is <http://www.opencongress.org/>

In order to get a sense of how important constituency service is to members of Congress, visit the website of your congressional representative or the site of another member of the House of Representative: <http://www.house.gov/house/MemberWWW.shtml>

Information about the organization, functions, and workings of Congress is available at <http://www.usa.gov/Agencies/Federal/Legislative.shtml>, <http://www.house.gov/house/MemberWWW.shtml>, and <http://www.senate.gov/>

The first C-SPAN coverage of the Senate occurred on June 2, 1986. The video, “Twenty-five Years of C-SPAN2 Coverage,” is available at <http://www.c-spanvideo.org/videoLibrary/blog/?p=834>

The *Washington Post*’s “Today in Congress” section including committee hearings and votes. www.washingtonpost.com

3.92 | IN THE LIBRARY

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TERMS:

Appropriations
Impeachment
Enumerated powers
Implied powers
Necessary and proper Clause
Delegate
Trustee
Politico
Majority party
Minority party
Speaker of the House
President pro tempore
Standing committees
Joint committees
Conference committee
Select or special committees
Legislative oversight
Constituency service

STUDY QUESTIONS

- 1) Discuss the powers of Congress and the differences between the House and Senate.
- 2) What are the constitutional powers of Congress?
- 3) What roles do political parties play in the organization of Congress?
- 4) To what extent do the various leadership positions in the House and Senate make some leaders more powerful than others?
- 5) Describe a typical day of a member of Congress.
- 6) How representative is Congress? Discuss both the theories of representation and the demographic make-up of Congress. How has this changed over time?
- 7) What is the traditional process by which a bill becomes a law?
- 8) How can Congress exercise oversight of the executive branch? Have recent congresses taken this responsibility seriously enough?

¹Theodore J. Lowi and Ginsberg, Benjamin (1996). *American Government*. Fourth Edition. New York: W.W. Norton & Company. p. 153.

²<http://dosfan.lib.uic.edu/acda/treaties/salt2-1.htm>

CHAPTER 4: THE PRESIDENCY



4.0 | Introduction

When the American public thinks of the presidency, they think of the President—the person whose name, face, character, and personality are prominently featured during the presidential campaign, and the person who upon taking office dominates media coverage of the federal government. The President *personifies* the government. The personal nature of the Presidency is reflected in the fact that Article II of the Constitution provides that “The executive Power shall be vested in a President of the United states of America.” The modern President personifies the federal government. But the modern presidency is actually a vast institution that consists of a large number of offices, executive departments, and agencies. The presidency consists of an *individual* and an *office*. Understanding the role of the presidency in modern American government and politics requires learning about both the *President*, the individual who happens to occupy the Office of the President of the United States, and the *presidency*, the institution.

“The whole government is so identified in the minds of the people with his personality that they make him...responsible for society itself.”

William H. Taft
27th President of the United States

“All the president is, is a glorified public relations man who spends his time flattering, kissing, and kicking people to get them to do what they are supposed to do anyway.”

Harry S. Truman
33rd President of the United States

This chapter examines three main issues that are central to the presidency:

- The power problem: Accountability.
- The increase in presidential power: Presidential government?
- Management of the executive branch: Controlling the bureaucracy.

4.1 | The Power Problem

The power problem is the difficulty of striking that delicate balance between granting government enough power to be effective while also limiting power so that the people can hold government accountable. The power problem for Congress is on the effectiveness side of the scale. Congress is institutionally designed for representation of interests and deliberation; it is not designed for decisive, effective action. The power problem for the presidency is on the accountability side of the scale. The concentration of executive power in the hands of one individual or office may increase effectiveness, but the nature of modern presidential power makes it hard to hold presidents legally accountable for their use of power. The nature of the presidency,



George Washington
1st President of the United States
(1789-1797)

the discretionary nature of presidential power, and the fact that much of a President’s political power is *personal* make it hard to hold a President legally accountable for the use of government power.

4.12 | *Is the Presidency Imperial or Imperiled?*

The rule of law is a principle that is so widely accepted as the appropriate standard for evaluating government that it is considered part of the American “creed.” Virtually all civics courses and introductions to American government contrast political systems based on the rule of law with those based on the rule of

man. The rule of law is defined as the principle that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedure. The rule of law principle is intended to be a safeguard against arbitrary governance by requiring that those who make and enforce the law are also bound by it. As the following description of presidential power indicates, the modern exercise of presidential power is difficult to reconcile with this principle.

4.13 | INCREASED POWER



<i>Best Presidents</i>	<i>Worst Presidents</i>
1. Lincoln	1. Buchanan
2. F. Roosevelt	2. A. Johnson
3. Washington	3. Pierce
4. T. Roosevelt	4. Harding
5. Truman	5. W. Harrison

Source: C-SPAN Survey of Historians on Presidential Leadership

The power of the president has greatly increased over time, and that the increased power of the president has presented some challenges. The modern presidency is much more powerful than the Founders intended it to be. For example, Abraham Lincoln did not aspire to be president. His ambition was to serve in the Senate. The great leaders of the day, men like Henry Clay, Daniel Webster, and John C. Calhoun, served in the Senate which was then the “greatest deliberative body in the world.” The antebellum presidency was by contrast “a mundane administrative job that offered little to a man of Lincoln’s oratorical abilities.”¹ The modern president is not only more powerful than the president was in the early years of the republic but the modern president is more powerful relative to Congress. The Founders created a system of government that was based on legislative governance in the sense that Congress was intended to be the primary branch of government. The modern system of government has actually developed into a political system that works more like presidential or executive government. The presidency has become the primary branch of government, the most powerful branch of government with more authority over more areas of public policy than was the case when the country was founded. Presidential power increased for a variety of reasons. One reason is crises, both domestic and foreign, wars, and other threats to national security, concentrated power in the presidency because it was designed to act with greater speed than the other branches of government.

The increased power of the president has caused political scientists to regularly take the pulse of the presidency to determine whether it is too strong, too weak, or just about right. The term **Imperial Presidency** is used to refer to presidents who are too strong, too powerful for our own good. The term **Imperiled Presidency** is used to refer to presidents who are too weak, not powerful enough to govern effectively. In the 1960s, the increased power of the presidency caused some concern. The term Imperial Presidency was coined to describe a presidency that had grown too powerful, and resembled a monarchy insofar as it was becoming hard to control.² The Imperial label was initially applied to the presidencies of Lyndon Johnson (1963-1968) and Richard Nixon (1969-1974).

The Imperiled Presidency label was initially applied to the presidencies of Gerald Ford (1973-1976) and Jimmy Carter (1977-1980). President Ford seemed incapable of responding effectively to the economic crises caused by the OPEC oil embargo. The Organization of the Petroleum Exporting Countries oil embargo caused energy price increases and inflation.³ The Ford administration’s response to the threat included distributing “WIN” buttons, but the Whip Inflation Now buttons seemed a pathetically weak response to the economic threat of gas shortages. President Carter seemed incapable of responding effectively to national security threats. The Soviet invasion of Afghanistan in 1978 and the anti-American Iranian Revolution of

1979, which included taking of American hostages in Iran created the impression that the presidency had become too weak to respond strongly to these international threats.



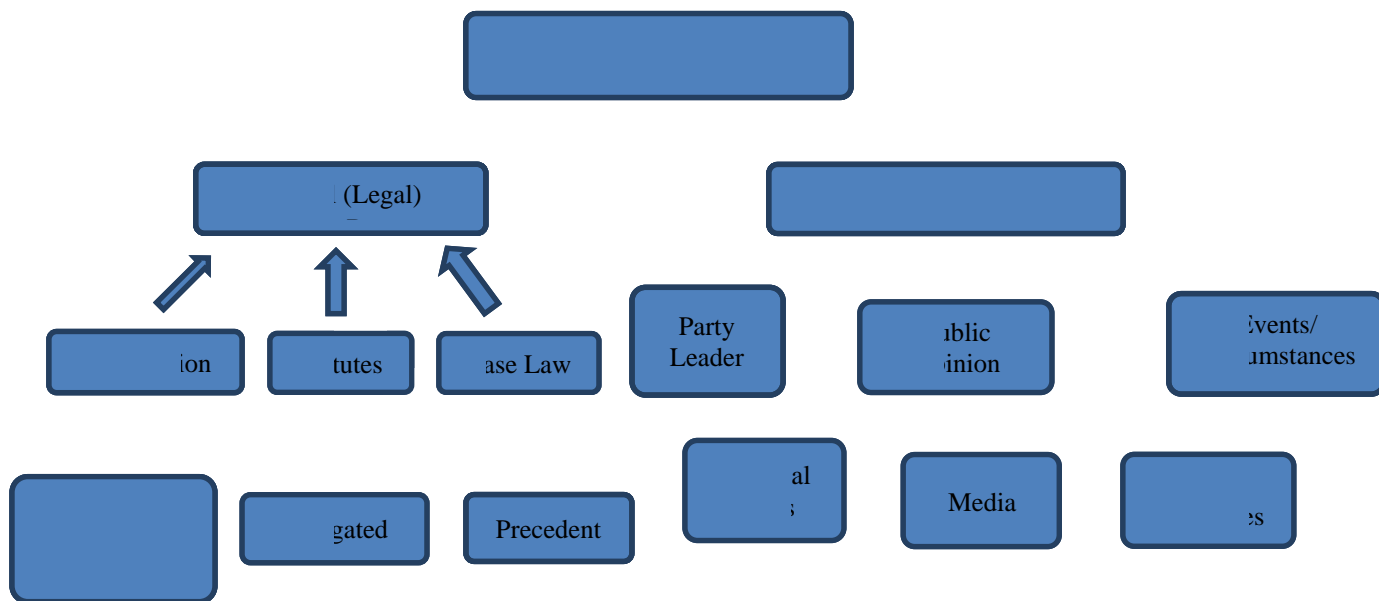
40TH

Ronald Reagan campaigned for the presidency pledging to return to a stronger presidency, and his election as president (1981-1988) marked a return to a strong presidency with confidence in American leadership in foreign affairs and national security. However, Reagan’s successor, George H. W. Bush (Bush the Elder or “41”), who served from 1989 to 1992, renewed concerns about an imperiled presidency. Ironically, Bill Clinton’s tenure in office (1993-2000) raised questions about both an imperial and an imperiled presidency. Since the 9/11 terrorist attacks, President George W. Bush’s (the Younger, “43,” 2001-2008) tenure has renewed questions about an imperial presidency. The fact that presidential power seems so dynamic, subject to so much fluctuation, and evaluated so differently in terms of whether a strong president is good or bad, illustrates the difficulty assessing the role the modern president plays in the U.S. system of government.

4.2 | Presidential Power

One of the main questions debated during the constitutional convention of 1787 was whether the new government should have a single executive official. The recent memory of the Revolutionary War fought against monarchy made delegates to the constitutional convention wary of executive power. But the constitutional convention was called to remedy defects in the Articles of Confederation, one of which was the lack of an executive figure. The extended debate over executive power concluded with the creation of an executive office with considerable power and considerable checks and balances.

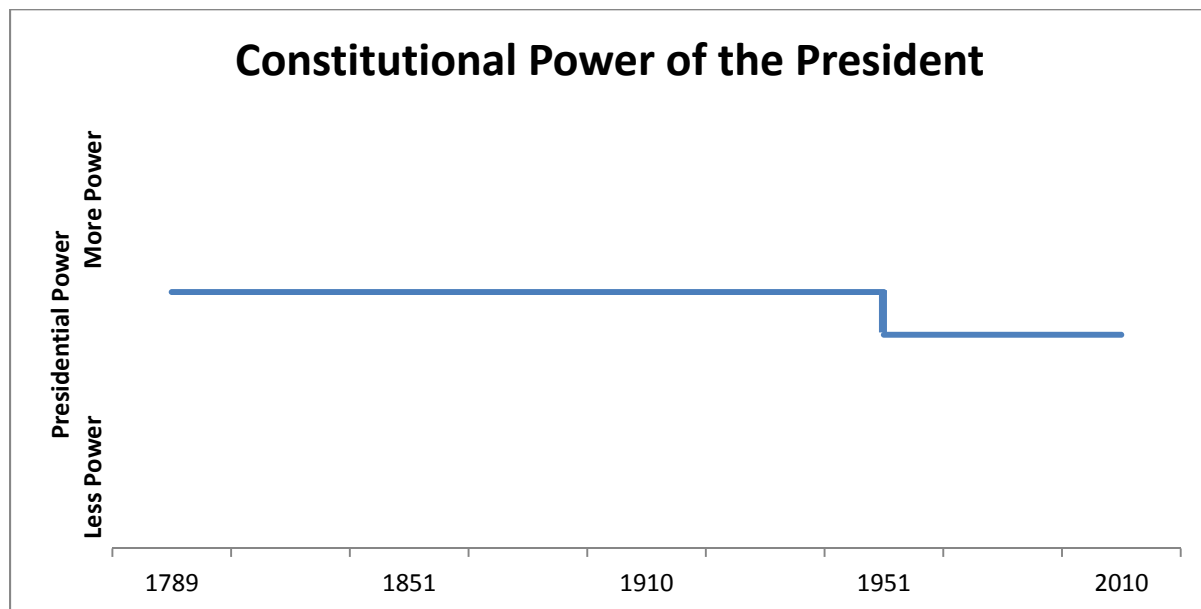
The president has both *legal* (or formal) powers and *political* (or informal) powers. The following is a diagram of presidential powers.



The legal powers are provided in the Constitution, statutes, and case law. The president's *constitutional* powers are set forth in [Article II](#). Compared to Article I, which sets forth congress' powers, Article II is a short and general article. The statement that “the executive Power shall be vested in a President” is followed by brief descriptions of how the president is selected, who is eligible to serve as president, a statement that the president is commander-in-chief, and a description of the president's appointment and treaty making powers. The president's *statutory* powers are extensive. As described below, congress has delegated broad powers to the president which greatly supplement the president's constitutional powers. The president's *case law* powers are based on court rulings, primarily Supreme Court precedents. One of the most intriguing aspects of presidential power is the fact that the president's formal constitutional powers have changed very little since the founding of the republic but presidential power has changed a great deal. The major changes have occurred in the president's statutory powers, case law powers, and in the political powers.

4.21 | *The Legal Sources*

In order to understand the presidency, it is very important to recognize the difference between legal and political powers. In fact, the difference is one of the keys to explaining the modern presidency. The President's constitutional powers have remained surprisingly constant (or steady) for more than 200 years. In fact, the major amendment affecting presidential power is the 22nd Amendment and it actually reduced presidential power by limiting a president to serving two full terms in office—thereby making a President a lame duck as soon as the second term begins.



But presidential power has increased a great deal since the founding of the republic, *and* presidential power fluctuates considerably from one president to another. What does the static

nature of the president's constitutional powers and the dynamic nature of presidential power say about presidential power? It suggests that the key to understanding changes in presidential power are developments in statutory and case law as well as politics.

4.22 | *The Article II Constitutional Power*

Presidents claim three kinds of constitutional powers: enumerated, implied, and inherent powers. The delegated powers are the least controversial. **Enumerated** powers are those that are actually mentioned or enumerated in the Constitution in Article II. The enumerated powers make the president the chief executive and Commander in Chief; give the president power to veto legislation, grant pardons, and make treaties and appoint ambassadors and other government officials including Supreme Court justices; and provide that the president shall from time to time report to Congress on the state of the union as well as to “*take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.*”

Some of these enumerated powers are shared with Congress. Treaties must be ratified by the Senate. Supreme Court appointments (and some other high level executive appoints such as the secretaries of the executive departments) must be confirmed by the Senate. The power of appointment provides a president with an extremely important role in the administration of the federal government. The President nominates the heads of the 15 Executive Departments, federal judges, and other government officials such as the head of the Federal Reserve Board. The Senate, however, must confirm a nominee in order for the person to be appointed as Secretary of Defense, Secretary of State, Attorney General, or Supreme Court Justice.

Implied powers are those that are not actually mentioned in the Constitution, but which are logically related to them. Implied powers are more controversial than enumerated powers because they are not actually mentioned, but merely implied. The following are examples of implied powers of the president.

- Firing. If the president has the enumerated power to appoint an official, then it is implied that the president also has the power to fire that official. The power to fire is considered a power that is logically related to the chief executive responsibility to manage the executive branch.
- Executive Privilege. [Executive privilege](#) is a president's power to refuse to disclose communications with his subordinates. The Supreme Court has recognized that this power exists in order to ensure that a president receives candid advice about public policy matters. Executive privilege limits the power of Congress or the courts to compel the president or his subordinates or advisors to disclose communications.
- Executive Agreements. [Executive Agreements](#) are international agreements between the leaders of countries. Executive agreements function like treaties but they do not require senate ratification, therefore the president' control over executive agreements is greater than control over treaties. The Supreme Court has ruled that the president's constitutional power over foreign affairs implies the power to enter into executive agreements.
- Executive Orders. An [executive order](#) is a presidential directive, usually issued to an executive branch official, which provides specific guidelines on how a policy is to be implemented. Executive orders are a way for the president to manage the executive

branch. In effect, executive orders are a form of law or policy making by the executive branch.

The most controversial kind of presidential power is **inherent** power. Inherent powers are not actually mentioned in the Constitution or even implied from enumerated powers. Inherent powers are powers that Presidents claim as inherent in the office, powers that the President has simply because the President is the President. Presidents have historically claimed that they have the power to do something (e.g., use military force) simply because they are President. The argument for inherent powers is that certain powers are inherent in the office and therefore do not require any specific legal authorization.⁴ The inherent powers doctrine is controversial because it is practically impossible to hold Presidents legally accountable if they can claim that their actions do not need legal authorization.

4.23 | *Statutory Powers*

The president's powers are not limited to those that can be traced to the Constitution. The president also has statutory powers. Congress has delegated a broad range of powers to the president to act in domestic policy and foreign and national security affairs. Congress began delegating policy making powers to the president in the early years of the republic. During the 20th Century, Congress delegated so much policy making power to the president that political scientists refer to the modern president as the “chief legislator” because of the important role the president plays in the legislative process. The following list of statutory delegations to the president is merely a short list of congressional delegations of power to the president that shows how Congress has delegated to the president broad policymaking power in a broad range of areas.

4.24 | *Statutory Delegations*

Hostage Act of 1868. This 19th Century Act authorized the president to take “all actions necessary and proper, not amounting to war, to secure the release of hostages.” It provided that the president may act quickly to secure the release of “any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government.” Furthermore, the president has the duty to attempt to secure the release of any hostage and can “use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the president to Congress.”⁵

Employment Act of 1946. This Act declared that it was the federal government's responsibility to manage the economy. It also delegated to the president the power “to foster and promote free competitive enterprise, to avoid economic fluctuations or to diminish the effects thereof, and to maintain employment, productivity, and purchasing power.”⁶ The Act was passed because of the significant increase in unemployment in the early 1930s and the perceived “planlessness” of economic policy.

Gulf of Tonkin Resolution (1964). This Act authorized the president “to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.” Congress gave the president a “blank check” to fight the war in Vietnam.⁷

Economic Stabilization Act of 1970. This Act authorized the president “to stabilize prices, rents, wages, and salaries by issuing orders and regulations he deems appropriate.”⁸

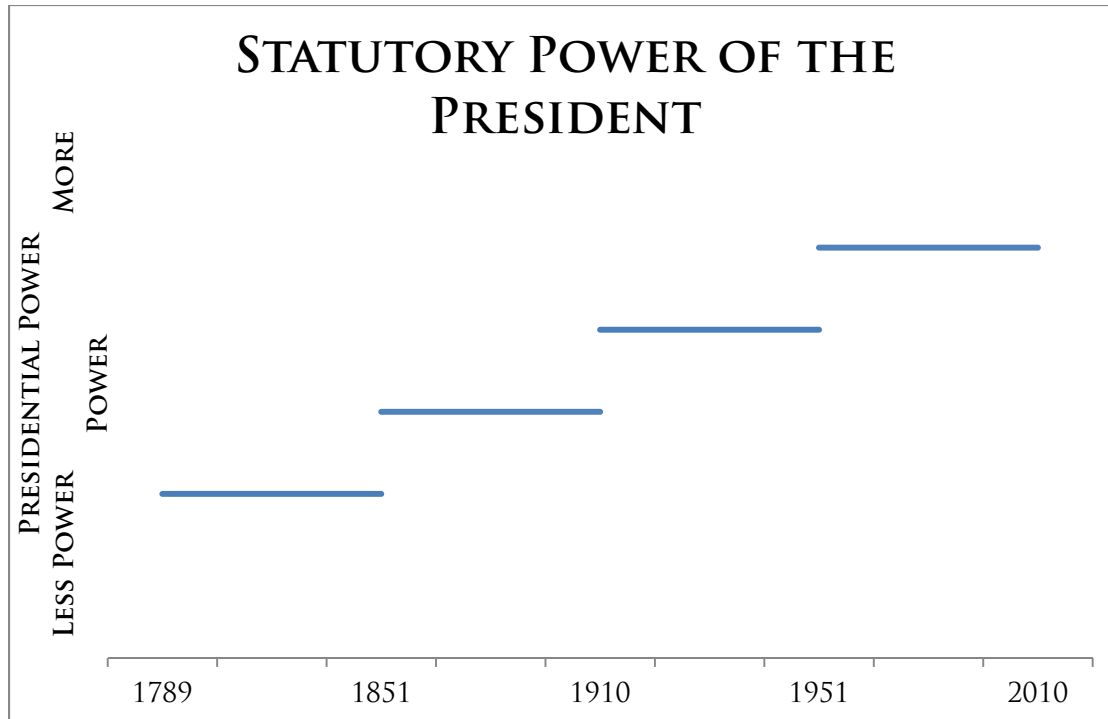
Emergency Economic Stabilization Act of 2008. This Act authorized the president, acting through the secretary of the treasury, to spend up to \$700 billion dollars to “rescue” or “bailout” distressed financial institutions.⁹

Authorizations for the Use of Military Force in Afghanistan and Iraq (2002) In response to the terrorist attacks on September 11, 2001, Congress authorized the president “to use all means that he deems appropriate, including the use of military force, in order to enforce the UN resolutions, defend the national security interests of the United States against the threat posed by Iraq, and restore international peace and security in the region.”¹⁰

The cumulative effect of congressional delegations has been a great increase in the statutory powers of the president. Modern presidents have much more statutory power than early presidents. The chart below, “Statutory Powers of the President Over Time,” describes the statutory powers of the president over time. The stepped increases indicate the statutory delegations of power.

Think about it!

Is it a good idea to give a president power to do “whatever he deems necessary” to solve a problem?



4.24 | Case Law Sources of Presidential Power

A third legal source of presidential power is case law. Court rulings in cases involving presidential power are an important source of presidential power. The Supreme Court’s rulings in cases involving national security and emergency powers are an especially important source of presidential power because the Court has generally supported an expansive reading of presidential power in these two circumstances. As a result, there is a large body of case law that supports presidential power. One of the most important case law precedents is [*U.S. v. Curtiss-Wright Export Corporation*](#) (1936). The case involved a major U.S. company in the business of selling weapons that challenged the President’s power to issue an executive order banning companies from selling arms to two warring South American countries. The Court upheld the president’s powers, and used the case to write into constitutional law the **Sole Organ** doctrine. The sole organ doctrine holds that the President is the sole organ of the nation in foreign affairs. The doctrine originates from a statement that Representative John Marshall made in the House of Representatives in 1799: “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”¹¹

Presidents have relied on the Court’s expansive reading of presidential power in national security and foreign affairs. World War II, the Cold War, and the War on Terror provided presidents with many opportunities to use the sole organ doctrine to assert control over foreign affairs—particularly when challenged by Congress. The Court has generally upheld presidential claims, citing the sole organ doctrine. The enemy combatant cases that the Supreme Court decided in 2002, 2004, and 2008 were unusual, and controversial, precisely because they placed some limits on the President’s power as commander-in-chief to decide how best to wage the war on terror.

4.3 | Political Sources of Presidential Power

4.31 | *The Party Leader*

The emergence of political parties has fundamentally changed politics and government. Political parties changed government by making presidents the de facto political leader of the party to which they belong. The Republican and Democratic Parties have official leaders, but the President is the most politically visible member of a party and the party's highest elected official. Presidents use the political party as an asset to build public support for issues, to build political support for administration policies, and to organize support for electoral campaigns.

[President Andrew Jackson](#) was the first President to use a mass membership party as a base of support. He served during the time when political parties changed from caucuses (meetings of like-minded government officials) to mass membership organizations (parties with whom members of the public identified). The development of political parties created a new source of power for the president among the public and other government officials. For example, party loyalty is one reason why members of Congress will support legislation for a president who shares their political party. Not all presidents have been willing or able to use the party as a base of support. President Rutherford B. Hayes was a Republican but he did not consider himself beholden to either public opinion or the Republican Party. The Republican Party apparently felt the same way about President Hayes: “Almost without exception, party leaders were contemptuous of the Puritan President and they boycotted his wineless White House functions.”¹²

In one important respect, party loyalty undermines the Madisonian system of institutional checks and balances. James Madison is the Founder who is most strongly identified with the argument that political power could be held accountable by a system of institutional checks and balances. The separation of powers into the legislative, executive, and judicial branches was supposed to make it harder for power to be abused because each branch would jealously guard its turf from poaching by another branch. Congress would protect its power from the executive or judicial branch; the President would protect executive power from encroachment by the congress or the courts; and the courts would protect their power from Congress or the President. Party loyalty can undermine the system of institutional checks: party loyalty can trump institutional loyalty. Members of Congress may support a president of their party more than Congress, and members of the courts might support a President who shares their ideology or policy beliefs. For instance, Republican members of Congress supported the expansion of presidential power during the tenure of Republican President George W. Bush. Diminished institutional loyalty to Congress has enabled the expansion of presidential power.

4.32 | *Personal Skills*

The fact that the Constitution vests the executive power in one person means that a President's power will depend, to some extent, on his or her personal skills, intelligence, experience, character, leadership, and management styles. The executive branch is a huge institution, and a president cannot assume that everyone will automatically do what he wants. A president can also be effective getting government officials, and members of Congress, to do what he wants by persuading them, by influencing them. Personal skills vary from one incumbent to another, which is one reason why presidential power fluctuates even though constitutional power remains constant.

4.33 | *Inaugural Addresses and Annual Messages*

There are several formal opportunities for the President to communicate with Congress and the American people, including inaugural addresses and the State of the Union. The President's inaugural address is an opportunity for a President to tell Congress, the American public, and the rest of the world what he intends to do as President. The State of the Union address originates from the constitutional requirement that the President



ANNUAL STATE OF THE UNION ADDRESS

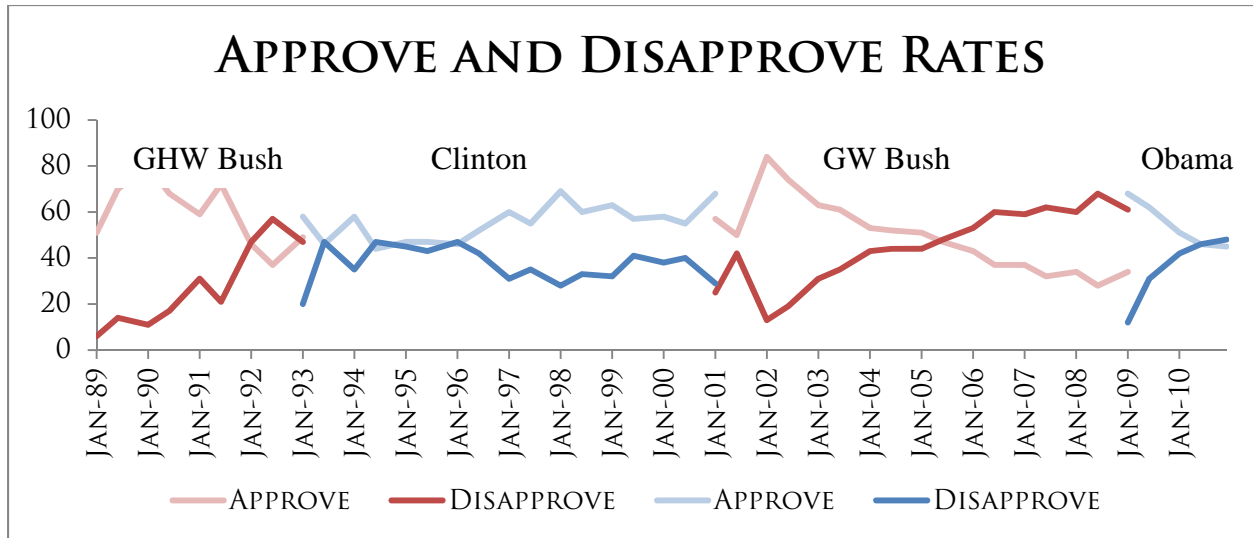
“shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.” The State of the Union has changed over time, moving back and forth from a spoken to a written and back to a spoken address. The address focuses on what the president feels have been the highlights of the preceding year, as well as his goals for the year to come.

4.34 | *Events, Circumstances, Conditions*

Presidential power is also affected by the political events, circumstances, and conditions facing the nation. A President whose political party also controls Congress is usually in a better position than one who has to deal with a Congress controlled by the other party. Divided control of the federal government sometimes produces “gridlock,” an inability of the House of Representative, the Senate, and the President to agree on public policies.

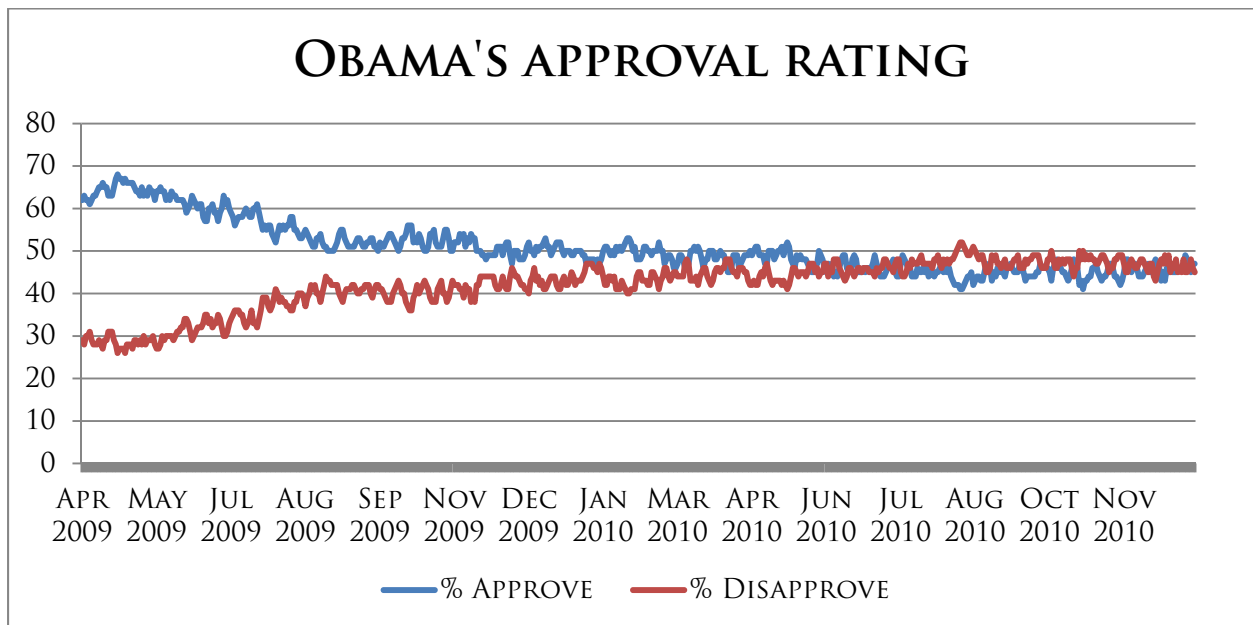
Crises have historically resulted in an increase in presidential power. In times of crisis, the public and other government officials look to the President for leadership and give him leeway to select the appropriate policy responses to the crisis. Wars and other threats to national security, economic crises, and other emergency conditions have also tended to increase presidential power. The Great Depression of the 1930s created an expectation that the national government respond to a national economic emergency. The President became the person held responsible for maintaining economic prosperity. The modern president who does not appear to be acting decisively to address problems is likely to suffer a loss of political support or public approval.

Public opinion polling records the effects of events or circumstances on public approval of the president. George W. Bush is a good example of the impact of events on presidential popularity. He began his tenure in office with approval ratings of around 50%. Immediately after the 9/11 terrorist attacks, his approval rating soared to nearly 90%. Since then, his approval rating has sunk to historic lows. When he left office, his approval rating was around 34%.



4.35 | Public Opinion

In a democracy, public opinion can serve as an important source of presidential power or an important limit on it. Strong public support adds to a President’s formal powers, while weak public support subtracts from it. One of the most widely reported measures of public opinion about the president is the regular survey of job approval ratings. The President’s popularity as measured by job approval is regularly measured and widely reported as a kind of presidential report card.¹³ Unlike the constitutional and statutory powers, which are fairly constant, public opinion is dynamic.



For example, Obama’s approval ratings have followed the traditional pattern of high initial approval, with eventual declines in approval ratings and increases in disapproval ratings. The

changes in approval ratings have resulted in Obama having less power when he pursues his policy agenda.

4.36 | *The Media*

Presidents typically have a love-hate relationship with the media. Presidents love to use the media to get their message out, and Presidents love favorable coverage of themselves and their administration. But Presidents also hate *bad press*, any critical media coverage of them or their administration. The *love* side of the relationship is evident in the eagerness of any administration to provide favorable photo opportunities that reinforce the image of presidential leadership. The *hate* side of the relationship is apparent in statements by presidents from Thomas Jefferson to Richard Nixon. [*President Jefferson's Second Inaugural Address*](#) (March 4, 1805) includes strong condemnation of press coverage of his administration:

“During this course of administration, and in order to disturb it, the artillery of the press has been levelled against us, charged with whatsoever its licentiousness could devise or dare. These abuses of an institution so important to freedom and science, are deeply to be regretted, inasmuch as they tend to lessen its usefulness...[T]hey might, indeed, have been corrected by the wholesome punishments reserved and provided by the laws of the several States against falsehood and defamation; but public duties more urgent press on the time of public servants, and the offenders have therefore been left to find their punishment in the public indignation....No inference is here intended, that the laws, provided by the State against false and defamatory publications, should not be enforced; he who has time, renders a service to public morals and public tranquillity, in reforming these abuses by the salutary coercions of the law; but the experiment is noted, to prove that, since truth and reason have maintained their ground against false opinions in league with false facts, the press, confined to truth, needs no other legal restraint; the public judgment will correct false reasonings and opinions, on a full hearing of all parties; and no other definite line can be drawn between the inestimable liberty of the press and its demoralizing licentiousness. If there be still improprieties which this rule would not restrain, its supplement must be sought in the censorship of public opinion.”

(Courtesy of *The Presidency Project*, John Woolley and Gerhard Peters)

Richard Nixon had a difficult relationship with the media during his entire political career. President Nixon's relationship with the press became especially difficult when the press began investigating criminal activity related to Watergate and then reported on the widening scandal. The following excerpt from President Nixon's News Conference on Oct. 26th 1973 reveals his disdain for the press corps:

Q. Mr. President, you have lambasted the television networks pretty well. Could I ask you, at the risk of reopening an obvious wound, you say after you have put on a lot of heat that you don't blame anyone. I find that a little puzzling. What is it about the television coverage of you in these past weeks and months that has so aroused your anger?

THE PRESIDENT [to Robert C. Pierpoint, CBS News]. Don't get the impression that you arouse my anger. [Laughter]

Q. I'm afraid, sir, that I have that impression. [Laughter]

THE PRESIDENT. You see, one can only be angry with those he respects.

(Courtesy of The American Presidency Project: www.presidency.ucsb.edu
<http://www.presidency.ucsb.edu/ws/index.php?pid=4022#ixzz1sa7xTDeJ>)

4.4 | The Office: The Organization of the Executive Branch

The [executive branch](#) is organized around the various functions of the office of the presidency. The President is the head of the executive branch, with the vice-president and the white house staff under his direct supervision. The [Executive Office of the President](#) consists of the individuals who serve as the president's policy advisors. These individuals also manage the various policy offices that are located in the executive branch. The final component of the president's circle of advisors is the cabinet. The cabinet is an informal name for the heads of the fifteen [executives departments](#)—e.g., the Secretaries of State, Defense, Treasury and so on.

The growth of the executive branch has included what is commonly called the bureaucracy or the administrative state. As the chief executive officer, the president has a great deal of control over the administrative apparatus that produces regulations.

<i>Department Head</i>	<i>Year</i>	<i>Responsibilities</i>
Secretary of State	1789	Foreign policy
Secretary of the Treasury	1789	Government funds and regulation of alcohol, firearms, and tobacco
Secretary of Defense	1789	National defense, overseeing military
Attorney General	1870	Represents the U.S. government in federal court; investigates and prosecutes violations of federal law
Secretary of the Interior	1849	Natural resources
Secretary of Agriculture	1889	Farmers, food-quality, food stamps and food security
Secretary of Commerce	1903	Business assistance and conducts the Census
Secretary of Labor	1913	Labor programs, labor statistics, enforcement of labor laws
Secretary of Health and Human Services	1953	Health and income security
Secretary of Housing and Urban Development	1965	Urban and housing programs
Secretary of Transportation	1966	Transportation and highway programs
Secretary of Energy	1977	Energy policy and research
Secretary of Education	1979	Federal education programs
Secretary of Veterans Affairs	1989	Programs for veteran's assistance
Secretary of Homeland Security	2002	Issues relating homeland security

4.41 | *The Origins of the Office of the Presidency*

The [Treaty of Paris](#) (1783) that ended the Revolutionary war left the United States independent and at peace but with an unsettled governmental structure. In 1777, during the war, the Second Continental Congress had drawn up the Articles of Confederation, a voluntary league of

friendship among the states. The Articles government had inherent problems, which became increasingly apparent with the end of the war and the defeat of the common enemy (Great Britain).



“President of the United States of America in Congress Assembled.” This title was often shortened to “President of the United States.” But these individuals had no important executive power. The Congress appeared institutionally incapable of functioning as a lawmaker for the nation, which was a barrier to the nation-wide development of commerce and economic development.

The constitutional convention was convened in 1787 to reform the Articles of Confederation, but the members decided to create an entirely new system of government. While most of the delegates agreed upon the need for an executive there was a long and lively debate about the nature and power of the office. The debates about executive power revealed the power problem: how to give government enough power to be effective while also limiting power so that it could be held accountable. The creation of the executive was shaped both the colonial experiences under the British monarchy, which made delegates wary of executive power, and the weakness of the Articles of Confederation, which made delegates think executive power was necessary. They ultimately created a government with an executive with considerable power but sufficient limits with a legislative-centered system of government so that the executive was made safe for republican government.

4.42 | *Washington Thwarts a Threat*

At the close of the Revolutionary War, a perilous moment in the life of the fledgling American republic occurred as officers of the Continental Army met in Newburgh, New York, to discuss grievances and consider a possible insurrection against Congress. They were angry over the failure of Congress to honor its promises to the army regarding salary, bounties and life pensions. The

During the economic depression that followed the revolutionary war, the viability of the American government was threatened by political unrest in several states, most notably Shays’ Rebellion in Massachusetts. The Articles had created a weak federal government, one that consisted of a Congress but no president. The lack of an executive office was one of the perceived weaknesses of the Articles of Confederation. Individuals who presided over the Continental Congress during the Revolutionary period and under the Articles of Confederation had the title



officers had heard from Philadelphia that the American government was going broke and that they might not be compensated at all.

On March 10, 1783, an anonymous letter was circulated among the officers of General Washington's main camp at Newburgh. It addressed those complaints and called for an unauthorized meeting of officers to be held the next day to consider possible military solutions to the problems of the civilian government and its financial woes. General Washington stopped that meeting from happening by forbidding the officers to meet at the unauthorized meeting. Instead, he suggested they meet a few days later, on March 15th, at the regular meeting of his officers. Meanwhile, another anonymous letter was circulated, this time suggesting Washington himself was sympathetic to the claims of the disgruntled officers. On March 15, 1783, Washington's officers gathered in a church building in Newburgh. The fate of the American experiment with republican government may have been in their hands. General Washington unexpectedly showed up. Although he was not entirely welcomed by his men, he personally addressed them and appealed to their sense of responsibility to protect the young republic. See the Appendix, "George Washington Prevents the Revolt of the Officers." The fate of a nation plagued by a political military and a political commander in chief as president was avoided.

4.5 | Qualifications for Office



The constitutional qualifications to become president include being a natural-born citizen of the United States, at least thirty-five years old, and a resident in the United States for at least fourteen years. The Twenty-second Amendment also limits a president to serving two terms in office. The "natural-born" qualification means that some prominent individuals and successful politicians such as California Governor Arnold Schwarzenegger are not eligible to be president. And members of the "[birther](#)" movement question President Barack Obama's eligibility to serve as president. There is some discussion today of whether the requirement that a president be a natural-born citizen should be changed so that

naturalized citizens who have lived in the country for a long time would be eligible to become president.

The informal, political requirements include having some government experience. The majority of presidents had prior experience as vice presidents, members of Congress, governors, or generals. Thirty-one of forty-two presidents served in the military. President [Ulysses Grant](#)'s Civil War service as General-in-Chief and [President Eisenhower](#)'s distinguished military career as Allied Commander during WWII are examples of how military service is seen as a political qualification for the presidency. During presidential campaigns government experience, or in an anti-government political climate, the lack of government experience is presented as a political qualification for office. Membership in one of the two major political parties is also an informal political qualification. Candidates usually must receive the backing of either the Republican Party or the Democratic Party because the U.S. has a two-party system which makes it hard for

third or minor party candidates to be successful. In 1992, third-party candidate Ross Perot received nearly 19% of the popular vote.

4.6 | Selection of the President

Although people commonly refer to the **election** of the president, the president is actually **selected** by the Electoral College. The way the president is chosen is very complicated and involves both election (popular votes cast in the fifty states) and selection (Electoral College votes). The United States is a republic (or indirect democracy), but the voters do not directly elect the President. Presidents are chosen indirectly by the [Electoral College](#). This process is complicated and has been criticized for years.



4.61 | ELECTIONS

Elections take place every four years on the Tuesday after the first Monday in November. Many states do provide early and absentee voting several weeks before election day. The U.S. does not have a single, national election for President. Presidential elections are actually 50 separate elections because each state conducts an election for President.

4.62 | The Campaign

The modern presidential campaign begins before the primary elections. A **primary election** is an election to determine who will be the political party's candidate for office. The two major political parties use primary elections to clear the field of candidates in advance of their national nominating conventions. In the 2012 presidential campaign, the incumbent President Obama did not face any Democratic Party challengers therefore he did not have to run in primary elections,



From L to R: Ronald Reagan (40st), Gerald Ford (38th), Jimmy Carter (39th), and Richard Nixon (37th)

but the [Republican Party held primary elections](#) and caucuses as part of the process to determine who would receive the Republican Party nomination. Each party's nominating convention actually selects the party's nominee for president. The party's presidential candidate chooses a vice presidential nominee and this choice is rubber-stamped by the convention. The party also establishes a platform on which to base its campaign. Although nominating conventions

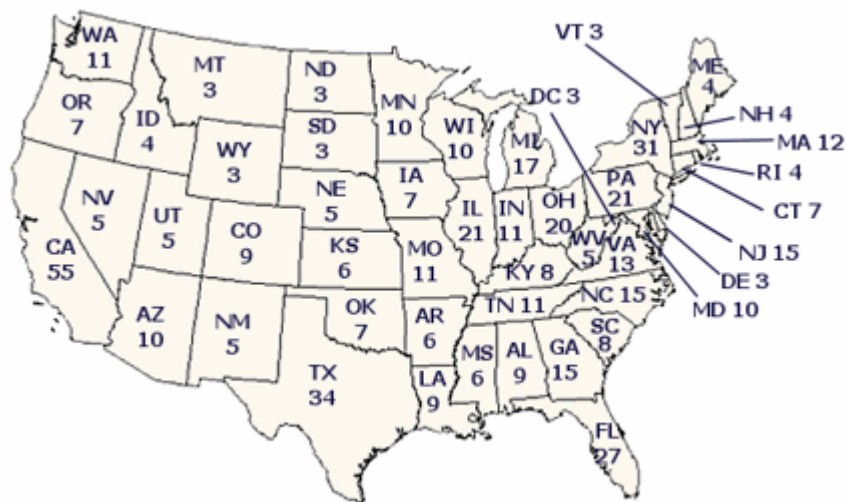
have a long history in the United States, their importance in the political process has greatly diminished. The fact that primaries determine which candidate has the most delegates to the party convention means that modern conventions usually merely ratify the results of the primary elections, rather than actually choosing the party's nominee. However, the national party conventions remain important as a way of energizing the parties for the general election and focusing public attention on the nominees.

Nominees participate in nationally televised debates that are sponsored by the [Commission on Presidential Debates](#). The Commission negotiates the terms of presidential debates, including setting the rules for determining which candidate are allowed to participate in the debates. The rules typically exclude candidates other than the nominees of the two major parties. But Ross Perot was a third party candidate who was allowed to participate in the 1992 debates. Modern presidential campaigns rely heavily on the media. Radio and television campaign ads show how candidates and parties “package” and “sell” themselves to the general public. The [Museum of the Moving Image](#) shows campaign ads from the 1952 presidential campaign between Republican Dwight Eisenhower and Democrat Adlai Stevenson until today. Examining campaign ads shows how parties and candidates present themselves, and they show how campaigns have changed over time.

4.63 | *The Electoral College*

The [Electoral College](#) may be the least-known and most misunderstood government institution in the American political system—except perhaps for the Federal Reserve Board which is another famously obscure government institution. The Founders agreed on the need for a president, but disagreed on the way to select one. While some favored national popular vote; others wanted Congress to choose the president.

The Electoral College was created by the Founders because they did not trust people enough to allow them to directly elect the president. In a time of limited public education, limited communication, and a fear of sectionalism in American politics, the Founders believed that the average voter lacked the information to be an informed, unbiased judge



of candidates for the presidency. Consequently, they thought that the Electoral College would serve as a kind of council of wise elders who would choose the best person from among those who received the most popular votes in the presidential election. The College would review the people's choices and then decide for itself which of their preferences would be best. However, the Electoral College no longer performs this role because of the development of political parties.

Think about it!

This satirical news report on the Electoral College is accurate. Is this any way to select a President?

<http://www.youtube.com/watch?v=BkqEdlRDKfo>

Although the Constitution would allow state legislators to select the members of the Electoral College, the states have provided for the members of the Electoral College to be chosen by popular vote. At state party conventions, the state political parties choose party loyalists to serve as members of the Electoral College. Whichever party's candidate wins the most popular votes in the state gets to have its members cast the state's Electoral College votes. Because the members of the Electoral College are chosen by the parties, they usually cast their votes for their party's candidate for president.

Voters in each of the states cast their votes for president, but the Electoral College actually selects the President. Each state has the same number of Electoral College votes as it has members in the Congress. There are 535 members of Congress, so the Electoral College consists

of 535 members plus three for the District of Columbia for a total of 538. When citizens cast their votes, the names of the presidential and vice presidential candidates are shown on the ballot. The vote, however, is actually cast for a slate of electors chosen by the candidate's political party. In most states, the ticket that wins the most votes in a state wins all of that state's electoral votes, and thus has their slate of electors chosen to vote in the Electoral College. Maine and Nebraska do not use this method. They give two electoral votes to the statewide winner and one electoral vote to the winner of each congressional district. Neither state has split electoral votes between candidates as a result of this system in modern elections.

The winning set of electors meets at their state's capital on the first Monday after the second Wednesday in December, a few weeks after the election, to vote, and sends a vote count to Congress. The vote count is opened by the sitting vice president, acting in his capacity as President of the Senate, and read aloud to a joint session of the incoming Congress, which was elected at the same time as the president. Members of Congress can object to any state's vote count, provided that the objection is supported by at least one member of each house of Congress. A successful objection will be followed by debate; however, objections to the electoral vote count are rarely raised.

In the event that no candidate receives a majority of the electoral vote, the House of Representatives chooses the president from among the top three contenders. However, each state delegation is given only one vote, which reduces the power of the more populous states.

4.64 | *Is It Time for a Change?*

The Constitution originally provided that the U.S. Electoral College would elect both the President and the Vice President in a single election. The person with a majority would become President and the runner-up would become Vice President. The elections of 1796 and 1800



From L to R: George H.W. Bush (41st), Barack Obama (44th), George W. Bush (43rd), William (Bill) Clinton (42nd), and Jimmy Carter (39th)

exposed the problems with this system. In 1800 the Democratic-Republican plan to have one elector vote for Jefferson and not Aaron Burr did not work; the result was a tie in the electoral votes between Jefferson and Burr. The election was then sent to the House of Representatives, which was controlled by the Federalist Party. Most Federalists voted for Burr in order to block Jefferson from the

presidency. The result was a week of deadlock. Jefferson, largely as a result of Hamilton's support, ultimately won. The Twelfth Amendment (ratified in 1804) required electors to cast two distinct votes: one for President and another for Vice President. It explicitly precluded from being Vice President those ineligible to be President: people under thirty-five years of age, those who have not inhabited the United States for at least fourteen years, and those who are not natural-born citizens.

The Electoral College remains controversial today because it is inconsistent with the general principles of democracy. The Electoral College system does not provide citizens with a constitutional right to vote for president. Furthermore, the candidate who gets the most popular votes can lose the Electoral College vote. This is what happened in 2000, when Al Gore received the most popular votes but George Bush received the most Electoral College votes. And the Electoral College is biased in favor of less populous states and against more populous states. For example, the largest state by population, California, only has about one electoral vote for every 660,000 residents, while the smallest, Wyoming, has an electoral vote for about every 170,000. This means that a vote cast in one state is worth much more than a vote cast in another state. So how much is a vote for president worth? It varies a great deal depending on the state. *The New York Times* article, "[How Much is Your Vote Worth?](#)" describes why a vote for President cast in a state with a small population (i.e., Wyoming or North Dakota) is worth much more than a vote cast in a state with a large population (i.e., California, New York, or Florida).

One of the more innovative ways to think about using technology to change the way we elect the President is the creation of an electronic national primary election. The [Americans Elect](#) organization thinks that the current party politics does not serve people, and that the solution is to create an electronic, national primary election that gives voters more control over the selection of candidates and the political parties less control. What do you think of the idea?

Think About It!

What is the best way to choose a leader? Are there differences between "insiders" who are promoted up through the organizational ranks and "outsiders?" Is it a good idea to "roll the dice" with an outsider?

<http://www.npr.org/2012/10/25/163626172/decision-time-why-do-some-leaders-leave-a-mark>

4.7 | The Bureaucracy

One component of the federal government that requires some explanation is the federal bureaucracy. Much of the federal bureaucracy is located within the executive branch. The following provides a brief definition of bureaucracy, a description of the federal bureaucracy, and explanation of who controls the federal bureaucracy.

4.71 | What is a Bureaucracy?

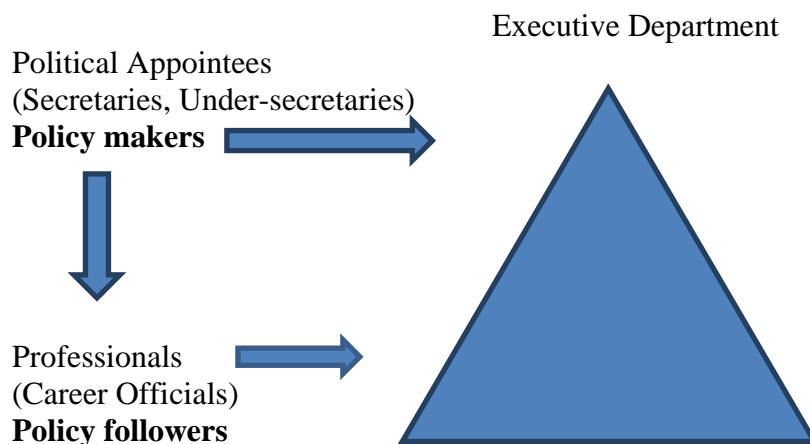
A bureaucracy is a large organization whose mission is to perform a specific function or functions. Bureaucracies are organizations with three distinctive characteristics:

- **Hierarchy.** A bureaucracy structured hierarchically. It has a chain of command. At the top of the hierarchy are the policy makers. At the bottom of the hierarchy are the policy followers. Individuals in organizations have supervisors with higher ranks within the chain of command.
- **Division of Labor.** A bureaucracy is based on the division of labor. Individuals perform specific tasks rather than having everyone do everything the organization does. The division of labor allows organizations to develop expertise.
- **Rules.** A bureaucracy works according to written rules and regulations that determine what tasks individuals are assigned. An organization that is overly bureaucratic, which has too many strict rules and regulations, is sometimes said to have too much “red tape.” Too many rules and regulations can limit an organization’s performance of its mission.

It is important to note that this definition of a bureaucracy is not limited to government. Bureaucracy is the most common way of organizing individuals to perform functions in the private sector and the public sector. Corporations in the for-profit sector and the non-profit sector are bureaucracies. Political parties and interest groups are private sector bureaucracies.

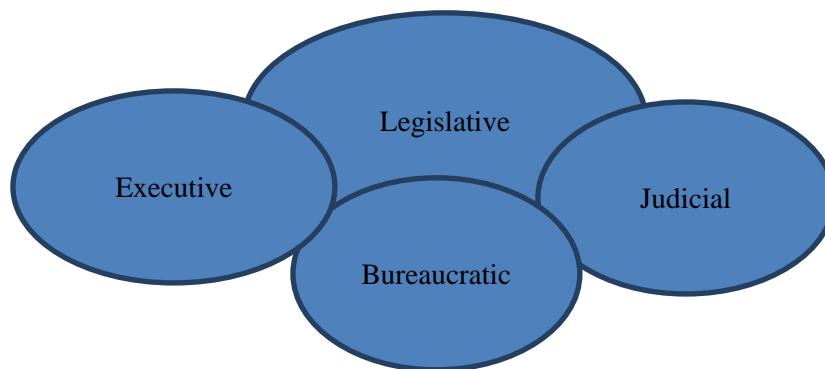
In the public sector (i.e., government), the bureaucracy is the term for some of the officials who are responsible for administering the laws. The elected officials (the president and members of Congress) are not considered members of the federal bureaucracy. The political appointees that run the 15 executive departments (e.g., the departments of state, treasury, commerce, defense, and justice) are not the bureaucracy. The federal bureaucracy is the professionals or career officials who work in the mid and lower tiers of an organization. These individuals are not elected or appointed: they typically receive their jobs based on civil service tests. The federal bureaucracy consists of the people who carry out the organization’s policies that are made by the upper management levels are the political appointees. Click on the [organizational chart of any of the 15 executive departments](#) to see the bureaucratic structure of the department.

The following figure represents a typical executive department bureaucratic organization.



4.72 | *Controlling the Bureaucracy*

Controlling the bureaucracy is an important political issue for two reasons. First, the increase in the size of the federal government (the problem of big government) is measured largely in terms of the bureaucracy. We still have only one president and the size of Congress has been fixed at 535 for around a century. Big government is measured primarily in terms of the increased number of administrative departments and agencies and bureaus and independent regulatory commissions, the increased number of federal government employees, and the increased number of federal regulations. Second, the bureaucracy is an unelected “fourth branch” of government with policy making (or rule making) power. The bureaucracy does not fit easily into the tripartite separation of powers into the legislative, executive, and judicial branches. The following diagram illustrates how the bureaucracy makes “laws.” Government agencies such as the Federal Communications Commission do not make legislation, but the agency (like all the executive departments and other regulatory commissions) has a rule making process and the rules that they make are legally binding and therefore have the same legal effect as laws passed by Congress.



So who controls the bureaucracy? Congress creates the bureaucracy (the departments and agencies and commissions) and it can abolish bureaucracies. Congress also determines the budgets of the agencies, and the appointments of the heads of the 15 executive departments and the independent commissions must be confirmed by the Senate. The president plays an important role in controlling the federal bureaucracy. Article II of the Constitution vests the executive power in the president, and provides that the president has, with the advice and consent of the Senate, the power to appoint the heads of departments. These constitutional provisions make the president the chief executive with responsibility for managing the federal bureaucracy. Presidents use their power of appointment to control the federal bureaucracy.

4.8 | Conclusions

The development of the U.S. system of government from a congress-centered system to a president-centered system is one of the most important changes that have occurred over the more than 200 years of the existence of the republic. The increased power of the president, and the personal nature of modern presidential power, makes the power problem with the presidency even more important. The challenge is to find ways to hold executive power accountable. The

personal and political nature of presidential power, and its roots in events, character, personal skills, and public opinion, presents a challenge for a system of government committed to the rule of law.

4.8 | Additional Resources

4.81 | Internet Resources

For a brief biography of your favorite or least favorite President, go to <http://www.whitehouse.gov/about/presidents/georgewashington>

The inaugural addresses of the presidents are available at the Avalon Project <http://www.yale.edu/lawweb/avalon/presiden/inaug/inaug.htm> and at The Presidency Project <http://www.presidency.ucsb.edu/>

The Annual Messages to Congress and the American Public are available at http://avalon.law.yale.edu/subject_menus/sou.asp.

The official Website of the White House is <http://www.whitehouse.gov/government/cabinet.html>

An electronic source of information about the presidency and presidential campaigns is available as an online class: <http://www.ithaca.edu/looksharp/mcpcweb/unit5.php>

The University of North Carolina site offers biographies of the presidents and first ladies including links to presidential libraries. www.metalab.unc.edu/lia/president/
The National Portrait Gallery's Hall of Presidents has information about and portraits of Presidents: www.npg.si.edu/exh/hall2/index.htm

4.82 | In the Library

- ABBOTT, PHILIP. 2008. *ACCIDENTAL PRESIDENTS: DEATH, ASSASSINATION, RESIGNATION, AND DEMOCRATIC SUCCESSION (THE EVOLVING AMERICAN PRESIDENCY)*. PALGRAVE MACMILLIAN.
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- DIONNE, E.J. AND WILLIAM KRISTOL (EDS). 2001. *BUSH V. GORE: THE COURT CASES AND THE COMMENTARY*. BROOKINGS INSTITUTION.
- SAUER, PATRICK. 2000. *THE COMPLETE IDIOT'S GUIDE TO THE AMERICAN PRESIDENTS*. ALPHA BOOKS.
- SCHLESINGER, ARTHUR M. 2004. *WAR AND THE AMERICAN PRESIDENCY*. NORTON, W. W. COMPANY, INC.
- TARANTO, JAMES AND LEONARDO LEO (EDS). 2004. *PRESIDENTIAL LEADERSHIP: RATING THE BEST AND THE WORST IN THE WHITE HOUSE*. THE FREE PRESS.

WOODWARD, BOB. 2002. BUSH AT WAR. SIMON AND SCHUSTER.

TERMS

The rule of law
Imperial
Presidency
Delegated powers
Implied powers
Electoral College
Primary elections

STUDY QUESTIONS

1. Discuss how the relative powers of Congress and the presidency have changed over time.
2. What is the role of the president in the legislative process?
3. What situations have resulted in expansion of presidential powers?
4. How has the president's role as commander in chief of the military changed over time?
5. How do the president's cabinet and staff assist the president in exercising his duties and achieving his goals?
6. How does public opinion affect the presidency? How does the president use public opinion to achieve his policy goals?
7. If you were redesigning the Constitution from scratch, what existing presidential powers would you retain, which would you get rid of, and which would you modify? Why?

¹ Stephen B. Oates, 1994. *Abraham Lincoln: The Man Behind the Myths*. New York: HarperPerennial, p.76.

² Arthur M. Schlesinger, Jr. 1973. *The Imperial Presidency*. Boston and New York: Houghton Mifflin.

³ <http://www.opec.org/aboutus/history/history.htm>

⁴ Louis Fisher provides an excellent description of presidential claims of inherent powers. See <http://loc.gov/law/help/usconlaw/pdf/Inherent-March07.pdf>

⁵ Quoted in *Dames & Moore v. Regan*, 453 U.S. 654 (1981). The Hostage Act was codified at 22 U.S.C. Sect. 1732 (1976).

⁶ http://research.stlouisfed.org/publications/review/86/11/Employment_Nov1986.pdf

⁷ http://avalon.law.yale.edu/20th_century/tonkin-g.asp

⁸ <http://www.presidency.ucsb.edu/ws/index.php?pid=3273>

⁹ http://www.house.gov/apps/list/press/financialsvcs_dem/press092808.shtml

¹⁰ <http://www.gpo.gov/fdsys/pkg/PLAW-107publ243/content-detail.html>

¹¹ See *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

<http://supreme.justia.com/us/299/304/case.html>

¹² Wilfred E. Binkley. 1951. *American Political Parties*. Second Edition (New York: Alfred A. Knopf), p. 321.

¹³ See <http://www.presidency.ucsb.edu/data/popularity.php>

CHAPTER 5: THE JUDICIARY



5.0 | The Judiciary

All countries have courts. Courts are considered an essential element of good government because of their role in the administration of justice and their role in upholding the rule of law. But courts do not play the same role in all countries. In some countries courts have a very limited role relative to the political institutions. In other countries courts have a broad role. Courts play a broad role in American government and politics—a role that has been controversial from the earliest days of the republic to current events. Today courts today rule on everything from “A” (abortion and agriculture and airlines) to “Z” (zoning and zoos). The Supreme Court’s most controversial decisions on matters such as abortion, the death penalty, school prayer, obscenity and indecency, and sexual behavior have made the Court one of the primary targets in the **culture wars**. The term culture war refers to the political conflicts over values rather than economics. Courts and trials certainly have captured the public’s imagination. The nation’s history is marked by famous “[trials of the century](#).” And judges are prominent in popular culture as indicated by the number of TV Judges (e.g., *The People’s Court*; *Judge Judy*; Judge Joe Brown; Judge Mathis; Judge Alex; and even Judge Wapner’s *Animal Court*).

This chapter describes the role that courts play in the U.S. system of government and politics. It focuses on three main issues:

- The power problem for the federal courts is legitimacy: the legitimacy of judicial power in a democratic system of government.
- The increased power of the judiciary: the judiciary was originally called the “least dangerous” branch of government but court critics now refer to an “imperial judiciary.”
- The courts as government institutions: the relationship between law and politics.

The primary focus is on the U.S. Supreme Court but some attention is paid to organization and operation of the federal court system. The state court systems are only briefly mentioned. Information about the Supreme Court is available at <http://www.supremecourt.gov/>. Information about the federal court system is available at <http://www.uscourts.gov/Home.aspx> and the [Federal Judicial Center](#).

5.1 | The Power Problem for the Federal Courts

The power problem for Congress is effectiveness: the modern Congress is not a particularly effective institution. The power problem for the presidency is accountability: it is difficult to hold presidents legally accountable for their actions. The power problem for the federal courts is **legitimacy**. Legitimacy has been an issue throughout the nation’s history. The problem is that in democratic political systems there is a preference for policy making by elected government officials but federal judges are appointed to life terms. This makes the federal judiciary an undemocratic government institution. This is not necessarily a problem. But it is a problem if the courts have policy making powers.

“Presidents come and go, but the Supreme Court goes on forever.”
President William Howard Taft

“It is emphatically the province and duty of the judicial department to say what the law is.”
Chief Justice John Marshall in *Marbury v. Madison*

The federal courts are not the only non-elected government institution with policy making power. The Federal Reserve Board is a non-elected government body with substantial power to make economic policy related to inflation and employment. When assessing the legitimacy of judicial power it is important to remember that the U.S. is not a pure democracy. It is a constitutional democracy. The Constitution actually places a number of very important limits on majority rule. In fact, the Constitution (particularly the Bill of Rights) is a counter-majoritarian document. The fact that courts interpret the Constitution means that courts sometime perform a counter-majoritarian role in the constitutional democracy. Much of the controversy surrounding the role of the courts in the U.S. system of government and politics is about the legitimacy of courts making policy. Judicial policymaking or legislating from the bench is considered inappropriate in a political system where the elected branches of government are expected to have the primary policymaking power. The power problem for the courts is about the boundaries between the political system and the legal system, the separation of politics and law. Keeping law and politics separate is complicated by the fact that the judiciary is expected to have some degree of independence from the political system so that courts can perform one of their most important roles: enforcing basic rule of law values in a constitutional democracy.

The C-SPAN presentation “Legal Scholars Examine the Role of Courts in Democracy” discusses the relationship between the courts and democracy: <http://www.c-span.org/Events/Legal-Scholars-Examine-the-Role-of-Courts-in-Democracy/10737430324-1/>

5.2 | The Political History of the Supreme Court

Judicial power is also controversial because courts have historically taken sides in many of the most important and controversial issues facing the nation. The Supreme Court has had four distinct eras based on the kinds of issues the Court decided during the era: the Founding Era (1790-1865); the Development Era (1865-1937); the Liberal Nationalism Era (1937—1970); and the Conservative Counter-revolution (since 1970). Although the specific issues that the Court decided during these four eras changed, what has remained the same is that the Court has addressed many of the major political controversies and issues of the day. The [Supreme Court Timeline](#) marks some of these eras and issues. The Supreme Court is usually referred to by the name of the Chief Justice who presided over it.

5.21 | *The Founding Era (1790-1865)*

During the Founding Era the Court was concerned with issues related to the way the new system of government actually worked, particularly issues related to the separation of powers and federalism. In fact, the Supreme Court took a side in the debates between the Federalists, who supported the national government, and the Anti-federalists, who supported state governments, by broadly reading the powers of the national government. The Marshall Court (1801-1835) established the power of the national government in a series of rulings that broadly interpreted the powers of the national government. It established the power of judicial review in [Marbury v. Madison](#) (1803). Judicial review is the power of a court to review the actions of government officials to determine whether they are constitutional. In *Marbury*, the Court declared a part of the Judiciary Act of 1789 unconstitutional. The Marshall Court also ruled that Congress had complete power over interstate commerce in [Gibbons v. Ogden](#). This ruling meant that a state government could not regulate commerce among the states. The Marshall Court also established the precedent for broadly interpreting Congress' power under the Necessary and Proper Clause in [McCulloch v. Maryland](#) (1819).

Chief Justice Marshall was succeeded by Chief Justice Roger B. Taney. The Taney Court (1836–1864) is remembered mainly for rulings that upheld the powers of the states rather than the national government. Taney wrote opinions that supported the idea of **dual federalism**, the idea that the national and state governments had power over different areas of public policy, and that each level of government was supreme in its field. According to dual federalism, the national government is supreme in matters of foreign affairs and interstate commerce, for example, and the state governments are supreme in matters of public policy including interstate commerce, education, the regulation of morality, and criminal justice. So the Marshall Court emphasized national supremacy, and the Taney Court emphasized dual federalism. The Taney Court's ruling in [Dred Scott v. Sandford](#) (1857) contributed to the sense that the Civil War was inevitable because the Court limited Congress' power to limit the spread of slavery. In the years leading up to the Civil War, slavery was an issue that threatened the union. In *Dred Scott* the Court struck down the [Missouri Compromise of 1820](#), a law passed by Congress to limit the spread of slavery in the territories.

5.22 | *Development and Economic Regulation (1865-1937)*

This Supreme Court era is noted for cases challenging the government's power to regulate the economy. In response to problems caused by the Industrial Revolution, the government increased regulation of business during the [Progressive Era](#) (roughly 1890 to WWI) and the [New Deal Era](#) (1930s). The regulations included anti-trust legislation, child labor laws, minimum wage and maximum hour laws, and workplace safety regulations. During this era the Court saw its role as protecting business from government regulation, and it used the power of judicial review to strike down laws that regulated business. The Court did not strike down all of these laws but in 1934 and 1935 it did declare unconstitutional many of the major provisions of the Roosevelt Administration's New Deal. The conflict between the national political system that supported increased government regulation of business and social welfare policies that were intended to end the Great Depression and provide a greater measure of income security, and a Court that ruled many of these policies unconstitutional, came to a head in the latter 1930s. The

Supreme Court's rulings limiting the government's power to regulate economic activity placed the Court in the middle of the most controversial issues of that era.

One reason for the New Deal era conflict between the political branches and the Court was an accident of history. President Franklin D. Roosevelt was unlucky in that he did not have the opportunity to appoint a member of the Supreme Court during his entire first term in office. Political change occurs regularly with the election calendar: every two years. But because the Justices are appointed to life terms, vacancies occur with retirements or death, so legal change occurs irregularly. President Roosevelt and congressional Democrats saw the election of 1932 as a critical election that gave them a mandate to govern. They became increasingly frustrated with Supreme Court rulings where a conservative majority (often by 6-3 or 5-4 margins) struck down major New Deal programs in 1935 and 1936. Roosevelt eventually proposed legislation to add another member to the Court for every sitting justice over the age of seventy, up to a maximum of six more members—which would have increased the size of the Court from nine to 15 members. This proposal was very controversial, because it was obviously an attempt to get the Court to change its rulings by “packing” the court with new Justices who would support New Deal policies of economic regulation. Although the Court's rulings striking down New Deal policies were unpopular, [President Roosevelt's court packing plan](#) was considered an inappropriate attempt to exert political control over the Court. The proposal died in Congress.

However, in 1937 the Court abruptly changed its rulings on economic regulation and began to uphold New Deal legislation. The Court announced that it would no longer be interested in hearing cases challenging the government's power to regulate the economy. The Court indicated that it would henceforth consider questions about the government's power to pass economic regulations matters for the political branches of government to decide. The Court also announced that in the future it was going to take a special interest in cases involving laws that affected the political liberties of individuals. In effect, the Court announced that it would use judicial restraint when laws affected economic liberties but judicial activism when laws affected political liberties. The Court further explained that it was especially interested in protecting the rights of “discrete and insular” minorities. This 1937 change is called **the constitutional revolution of 1937** because it was such an abrupt, major change in the Court's reading of the Constitution and its understanding of its role in the system of government and politics.

5.23 | *The Era of Liberal Nationalism (1937-1970)*

In the middle years of the 20th Century, the Court participated in debates about civil liberties and civil rights by assuming the role of protector of individual liberties and promoter of equality. The Court's interest in civil liberties cases marks the beginning of the Court's third era. It began protecting civil liberties in cases involving freedom of expression (including freedom of religion, speech, and press); the rights of suspects and criminals in the criminal justice system; racial and ethnic minorities to equal protection of the laws; and the right to privacy. The Warren Court (1953-1969) is remembered for its judicial activism on behalf of civil liberties. Chief Justice Earl Warren presided over the Court's important civil liberties cases supporting individual freedom and equality in both **civil** law and **criminal** law. In the 1950s and 1960s, the Court's civil liberties rulings

ordering school desegregation put the Court in the middle of debates about racial equality.

The Warren Court's civil law rulings included the landmark school desegregation case *Brown v. Board of Education* (1954), and landmark right to privacy cases such as *Griswold v. Connecticut* (1965). In *Griswold v. Connecticut* the Court held that the U.S. Constitution included an implied right to privacy that prohibited states from passing laws that made it a criminal offense to disseminate information about birth control devices—and by implication, the implied right to privacy limited government power to regulate other aspects of sexual behavior. The Warren Court also issued rulings that affected the freedom of religion. In *Engel v. Vitale* (1962), the Court ruled that it was unconstitutional for government officials to compose a prayer and require that it be recited in public schools. The prayer was “Almighty God, we acknowledge our dependence upon Thee, and beg Thy blessings upon us, our teachers, and our country.” In *Abington School District v. Schempp* (1963) the Court held that mandatory Bible reading in public schools was unconstitutional.

The Warren Court's criminal law rulings were no less controversial than its civil law rulings. The Court broadened the rights of suspects and convicted offenders in the state criminal justice systems. *Gideon v. Wainwright* (1963) broadened the right to the assistance of counsel by holding that anyone charged with a felony had a right to be provided an attorney if he or she could not afford to pay for one. *Mapp v. Ohio* (1961) held that the Exclusionary Rule applied to state courts. The Exclusionary Rule prohibited the use of evidence seized in violation of the Constitution in order to obtain a conviction. *Miranda v. Arizona* (1966) may be the most famous of the Warren Court rulings on criminal justice. It required police officers to notify suspect of their constitutional rights before questioning them. These rights include the right to remain silent, the right to have the assistance of counsel, and notified that anything said can be used in a court of law against them.

These Warren Court rulings, and the Burger Court's ruling in *Roe v. Wade* (1973) that the right to privacy included the right to an abortion, put the Court in the middle of “the culture wars”—the political conflicts over value as opposed to economics. Judicial decisions about state laws defining marriage continue the tradition of judicial participation in the leading controversies of the day.

5.24 | *The Conservative Counter-Revolution*

One indication that the era of liberal nationalism has ended is the fact that today's Court has a different agenda than the Warren Court. Today's Court is conservative and the Justices are interested in different issues than the Warren Court. President Nixon's election in 1968 marked the beginning of the rightward change in the country's *political* direction. His appointment of four Justices marked the beginning of the rightward change in the Court's *legal* direction. The 1968 presidential campaigns made crime a national issue. Candidate Nixon portrayed judges as being soft on crime and he pledged that as president he would appoint judges who would get-tough-on-crime. President Nixon appointed four members of the Court, including Chief Justice Warren Burger. The Burger Court (1969–1986) changed the Court's ideological direction, most immediately in the area of criminal justice where President Nixon's appointment of four get-tough-on-crime Justices had an immediate impact on the Court's rulings. Crime policy is a good

place to see the relationship between politics and the law because crime is one of the basic responsibilities of governments everywhere. People expect government to protect individuals from threats to their lives and property. Americans expect the government to provide safe streets, subways, and parks, and to ensure that people are secure in their homes. Preventing crime, investigating crimes, and arresting, prosecuting, and punishing those convicted of criminal acts is part of the national, state, and local government functions.

The election of conservative Republican presidents (Nixon, Ford, Reagan, Bush 41 and Bush 43), and even conservative Democratic presidents (Carter and Clinton) solidified the Court's rightward movement. Because the Justices are appointed by political figures through a political process (the President nominates a Justice and the Senate must confirm the nominee), it is not surprising that political changes are reflected on the Court. The selection of federal judges is an obvious contact point between law and politics, between the legal system and the political system.

The Rehnquist Court (1986–2005) was also a conservative court. The conservative bloc of Justices had a working majority on the Court. In civil law, some of the Rehnquist Court's rulings on federalism reflected the conservative backlash against the liberal expansion of the powers of the federal government. Politically, conservatives advocated New Federalism during the Nixon Administration. Legally, the conservatives on the Court revived the concept of federalism as a constitutional framework for allocating the powers of the national and state governments. Its rulings in *U.S. v. Lopez* (1995) and *U.S. v. Morrison* (2004), for example, limited Congress's use of the Commerce Clause power to regulate the possession of guns near schools and violence against women. In *Lopez*, the Court struck down the Gun Free School Zones Act of 1990. In *Morrison*, the Court struck down provisions of the Violence Against Women Act of 2000.

The Roberts Court (2005–present) has also established a record as a conservative Court. Chief Justice Roberts and Justice Samuel Alito were nominated in part because they had judicial records of supporting business interests. Since the late 1930s, business interests were overshadowed by all the attention paid to higher profile, hot-button issues such as abortion, school prayer, affirmative action, and the death penalty. Business cases are now an important part of the Supreme Court's docket and the Court has issued a number of rulings that are favorable to business interests. For example, the Roberts Court's 2010 ruling striking down major parts of the federal laws regulating independent campaign contributions ([Citizens United v. Federal Election Commission](#)) eased restrictions on corporate campaign contributions. The Roberts Court is also more supportive of the *Accommodationist* reading of the Establishment Clause of the First Amendment, which allows much more government support of religion than the *Wall of Separation* reading favored by the liberal Justices. And on matters of national security, including the war on terror, Justices Roberts and Alito reflect the conservative Justices support for broadly interpreting presidential power as Commander-in-Chief.

5.3 | The Increased Power of the Courts: Going from Third to First?

In the U.S., the judiciary is called the third branch of government for two reasons. First, the judiciary



is provided for in Article III of the Constitution. Second and more important, the legislative and executive branches were intended to be more powerful than the judiciary. The judiciary was intended to be the weakest of the three branches of government.

Courts have always played an important role in American society. In *Democracy In America*, Alexis de Tocqueville (1835) famously said that “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.” But the power of the judiciary has increased over time, and modern courts play a much more important role in government and politics than the Founders intended. The increase in judicial power is reflected in the fact that the courts were originally described as the “least dangerous” branch of government (by Alexander Hamilton in *Federalist No. 78*) but now critics of the court attach the label “imperial judiciary” to the courts. As with Congress and the Presidency, the Supreme Court has changed over time as institutional norms and practices and customs became established. Hamilton thought the judiciary was the least dangerous third branch because the courts had neither the power of the purse (Congress controlled the budget) nor the power of the sword (the executive branch enforced the laws). However, over time, the Court has gained power in our political system. The following describes how that change occurred.

5.31 | The Early Years

In the early years of the republic the Court initially lacked power or prestige. Early presidents had a hard time finding Justices who were willing to serve on the Court because no one really knew what the Court would do, it was not considered an important or prestigious institution, and one of the Justices’ duties (riding circuit to travel through the circuit courts) was very difficult during a period of this country’s history when frontier travel was difficult and uncomfortable.

The Supreme Court first met in February 1790 at the Merchants Exchange Building in New York City, which then was the national capital. When Philadelphia became the capital city later in 1790 the Court followed Congress and the President there. After Washington, D.C., became the capital in 1800 the Court occupied various spaces in the U.S. Capitol building until 1935, when it moved into its own building.

The Court became a more prestigious institution during the Marshall Court Era. In *Marbury*, Chief Justice John Marshall argued that it was logical to read the Constitution to give the courts the power to interpret the laws. The Constitution is a law. In fact, the Constitution is the supreme law of the land. Therefore, the courts have the power to interpret the Constitution. This power of judicial review is a major source of the judiciary’s power. It gives the courts the power to declare unconstitutional laws passed by Congress, executive orders or other actions of the President, administrative regulations enacted by bureaucracies, lower court judges, laws passed by state legislatures, or the actions of state governors, county commissioners, city officials, and school board policies. Courts have used judicial



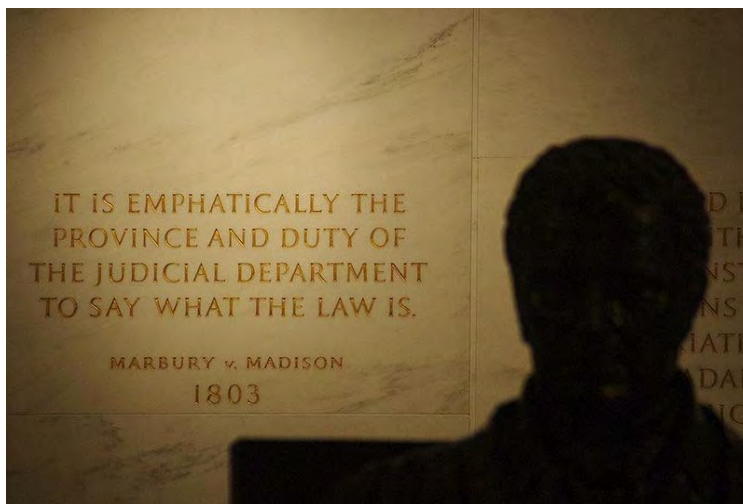
Old Supreme Court Chambers

review to declare unconstitutional a federal income tax law, presidential regulations of the economy, state laws requiring that black children be educated separate from white children in public schools; public school policies supporting organized prayer; and laws defining marriage as a relationship between one man and one woman.

The Marshall Court ended the practice of each judge issuing his or her own opinion in a case and began the tradition of having the Court announce a single decision for the Court. This change created the impression that there was one Court with one view of what the Constitution meant, rather than a Court that merely consisted of individuals with differing points of view. Thus the Marshall Court enhanced the Court's prestige as an authoritative body with special competence to interpret the Constitution when disputes arose over its meaning. But the main reason for the expansion of the power of the courts is the power of judicial review.

5.32 | Judicial Review

Judicial review is the power of courts to review the actions of government officials to determine whether they are constitutional. It is a power that all courts have, not just the Supreme Court, and it is a power to review the actions of *any* government official: laws passed by Congress; presidential actions or executive orders; regulations promulgated by administrative agencies; laws passed by state legislatures; actions of governors; county commission decisions; school board policies; city regulations; and the rulings of lower courts. The Constitution does not explicitly grant the courts the power of judicial review. Judicial review was established as an implied power of the courts in the landmark case [*Marbury v. Madison*](#) (1803), where the Court for the first time ruled that a law passed by Congress was unconstitutional. The case was a minor dispute. President John Adams



Statute of John Marshall in the foreground, shadowed, quotation from *Marbury v. Madison* (written by Marshall) engraved into the wall. United States Supreme Court Building.

signed a judicial appointment for William Marbury. His commission was signed but not delivered when a new President (Thomas Jefferson) took office. When the new administration did not give Marbury his appointment, Marbury used the Judiciary Act of 1789 to go to the Supreme Court asking for an order to deliver his commission as judge. Chief

Justice John Marshall's ruling in *Marbury v. Madison* used syllogistic

reasoning to explain why it was logical to read the Constitution as implying that courts have the power to review laws and declare them unconstitutional if they conflicted with the Constitution. Syllogistic logic is a form of reasoning that allows inferring true conclusions (the “then” statements) from given premises (the givens or “if” statements). Marshall structured the logical argument for judicial review as follows:

[If] the Constitution is a law,
 [and if] the courts interpret the laws,
 [then] the courts interpret the Constitution.

Marshall further reasoned that courts have the power to declare a law unconstitutional:

[If the] Constitution is the supreme law of the land,
 [and if] a law, in this case the Judiciary Act of 1789, conflicts with the Constitution,
 [then] that law is unconstitutional.

Judicial review gives courts the power to review and declare unconstitutional laws passed by Congress, executive orders or other actions of the President, administrative regulations enacted by bureaucracies, lower court judges, laws passed by state legislatures, or the actions of state governors, county commissioners, city officials, and school board policies. Judges have used judicial review to declare unconstitutional a federal income tax law, presidential regulations of the economy, state laws requiring that black children be educated separate from white children in public schools, school board policies requiring the recitation of organized prayer in public schools, and laws making flag burning a crime.

Some of the Founding Fathers, particularly Federalists such as Alexander Hamilton, accepted the notion of judicial review. In *Federalist No. 78* Hamilton wrote: “A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute.” The Antifederalists (e.g., Brutus in *Antifederalist #XV*) feared the judicial power would be exalted above all other, subject to “no controul,” and superior even to Congress. Nevertheless, judicial review has become a well-established power of the courts.

5.33 | *Limits on Judicial Power*

Does judicial review make the courts more powerful than the legislative and executive branches of government because the courts can rule presidential and congressional actions unconstitutional? The courts do have the power to strike down presidential and congressional actions, which critics say makes the judiciary the most powerful, not the least powerful, branch of government. But there are limits on judicial power. The courts cannot directly enforce their rulings. Judges rely on individuals or other government officials to enforce their rulings. Judges cannot expect automatic compliance with their rulings. Opposition to desegregation of public schools after the 1954 *Brown v. Board of Education* was widespread. For example, in 1957 the Florida Legislature passed an [Interposition Resolution](#) that asserted that the U.S. Supreme Court did not have the authority to order states to desegregate public schools therefore Florida government officials did not have to comply with the Brown ruling.

Interposition is a doctrine that asserts the power of a state to refuse to comply with a federal law or judicial decision that the state considers unconstitutional. Compliance with the Court’s rulings outlawing organized prayer in public schools has also been mixed. And police officer compliance with Court rulings on search and seizure is not automatic. The courts depend on compliance by executive branch officials, such as school board members, teachers, and police officers.

5.34 | *Two Concepts of Judicial Role: Restraint and Activism*

The legitimacy of judicial power is usually described in terms of two concepts of the appropriate rule for the judiciary: judicial restraint and judicial activism. **Judicial restraint** is defined as a belief that it is appropriate for courts to play a limited role in the government, that judges should be very hesitant to overturn decisions of the political branches of government, and that judges should wherever possible defer to legislative and executive actions. **Judicial activism** is defined as a belief that it is appropriate for courts to play a broad role in the government—that judges should be willing to enforce their view of what the law means regardless of political opposition in the legislative or executive branches. There are three main elements of judicial restraint.

- **Deference to the Political Branches of Government.** Judicial deference to legislative and executive actions is a hallmark of judicial restraint. When judges are reluctant to overturn the decisions of the political branches of government they are exercising judicial restraint. Judges who bend over backwards to uphold government actions are exercising judicial restraint. Judicial activists are less deferential to the political branches of government. Activist judges are more willing to rule that the actions of government officials—whether the president, the Congress, lower court judges, the bureaucracy, or state government officials—are unconstitutional.
- **Uphold Precedent.** Precedent is a legal system where judges are expected to use past decisions as guides when deciding issues that are before the court. Precedent means that judges should decide a case the same way that they have decided similar cases that have previously come before the court. When judges decide cases based on established precedent, they are exercising judicial restraint. Judges who rely on “settled law” are using judicial restraint. Activists are not as committed to uphold precedent. They are more willing to overturn precedents or create new ones that reflect changes in contemporary societal attitudes or values. Activist judges are less bound by what has been called the “dead hand of the past.”
- **Only Legal Issues.** Courts are institutions that are designed to settle legal disputes. Advocates of judicial restraint believe that courts should only decide legal questions, that courts should not become involved with political, economic, social, or moral issues. One indicator of judicial restraint is when a court limits its cases and rulings to legal disputes. It is not always clear, however, whether an issue is a legal or a political issue. Cases that address campaigns, voting, and elections, for instance, involve both law and politics because voting is considered

a right, rather than merely a political privilege. Judicial activists are less concerned about getting the courts involved with cases or issues that affect politics, economics, or social issues. They are willing to issue rulings that affect politics because they don't necessarily see a bright dividing line between politics and law.

5.35 | *Ideology and Roles*

It is important to note that the above definitions of restraint and activism do not mention ideology. Judicial restraint and activism are not intrinsically conservative or liberal even though restraint is often considered conservative and activism is often considered liberal. Sometimes the Supreme Court's activism is conservative. The Marshall Court was a conservative activist court. During the 1930s the Court was a conservative activist court. In fact, during most of the Supreme Court's history its activism has been primarily politically conservative. During the period 1937-1970 the Court's activism was generally liberal—which is why activism is today most often associated with liberalism. However, the Court has once again become a primarily conservative activist Court. The Rehnquist Court has been a conservative activist Court using federalism and the separation of powers to strike down federal legislation such as the Violence Against Women Act and the Gun Free School Zones Act and provisions of the Brady Handgun Control Act. And with its ruling in *Bush v. Gore* (2000), the Rehnquist Court intervened in the 2000 presidential election dispute in Florida to ensure that George W. Bush became President despite receiving fewer votes than Al Gore. The Roberts Court has continued the trend toward conservative activism. Its rulings have most notably ignored established precedent to overturn existing campaign finance laws and to create a new individual right to keep and bear arms.

5.4 | Courts as Government Institutions

A court can be defined as a government body designed for settling legal disputes according to law. In the U.S. courts have two primary functions: **dispute resolution** and **law interpretation**.

Dispute Resolution. The dispute resolution function of courts is to settle disputes according to law. This is a universal function associated with courts. Courts provide a place and a method for peaceably settling the kinds of disputes or conflicts that inevitably arise in a society. These disputes or conflicts could be settled in other ways. They could be settled by violence, vendettas, feuds, duels, fights, war, vigilantism, or political power. One justice problem with these methods of dispute resolution is that the physically strong, or the more numerous, or the more politically powerful will generally prevail over the physically weaker, the less numerous, or the less politically powerful. These alternative methods of dispute resolution tend to work according to the old maxim: Might makes right. The modern preference for settling disputes peaceably according to law rather than violence or political power has made the dispute resolution function of courts a non-controversial function because they are associated with justice.

Dispute resolution is the primary function of trial courts. A trial is a fact-finding process for determining who did what to whom. In a civil trial, the court might determine whether one individual (the respondent) did violate the terms of a contract to provide another individual (the plaintiff) with specified goods or services, or whether a doctor's treatment of a patient constituted medical malpractice, or whether a manufacturer violated product liability laws. In a criminal trial, the court might determine whether an individual (the defendant) did what the government (the prosecution) has accused him of doing. These are all examples of the dispute resolution function of courts.

The dispute resolution function of courts is familiar to most people as a courtroom trial where the lawyers who represent the two sides in a case try to convince a neutral third party (usually a jury) that they are right. In one sense, a trial is nothing more than a decision making process, a set of rules for making a decision. But a trial is a distinctive decision making process because it relies so heavily on very elaborate procedural rules. The rules of evidence (what physical or testimonial evidence can and cannot be introduced) are very complicated. The rules of evidence are important because the decision (the trial verdict) is supposed to be based solely on the evidence introduced at trial. Trials have captured the political and cultural imagination so much so that famous trials are an important part of the political culture of many countries including the U.S.

Law Interpretation. The second function of courts is law interpretation. Law interpretation is deciding what the law means when there is a disagreement about what a law means, conflicting provisions of a law, or even conflicts between two laws. An example of law interpretation is when courts decide whether a police officer's search of a person's car constitutes a violation of the Fourth Amendment's prohibition against "unreasonable search and seizure." Courts are asked to determine the meaning of "unreasonable." Another example of law interpretation is when courts decide whether the death penalty (or imposing the death penalty on minors or mentally handicapped persons with an I.Q. below 70) is unconstitutional because it violates the Eighth Amendment prohibition against "cruel and unusual punishment."

Law interpretation is primarily the function of *appellate courts*. Appeals courts do not conduct trials to determine facts; they decide the correct interpretation of the law when a party appeals the decision of a trial court. Law interpretation is a much more controversial function than dispute resolution because it involves judges making decisions about what the law means. The Supreme Court "makes" legal policy when it decides whether police practices related to search and seizure or questioning suspects are consistent with the Fourth Amendment warrant requirements or the Fifth Amendment due process of law. It makes legal policy when it decides whether the death penalty constitutes cruel or unusual punishment. It makes policy when it decides whether laws restricting abortion violate the right to privacy. It makes policy when it reads the Fourteenth Amendment Equal Protection Clause to require "one person, one vote." It also makes policy when it decides whether the traditional definition of marriage as the union of one man and one woman deprives gays and lesbians of the Equal Protection of the laws. The law interpretation function is often political and often controversial because it gets the courts involved with making policy.

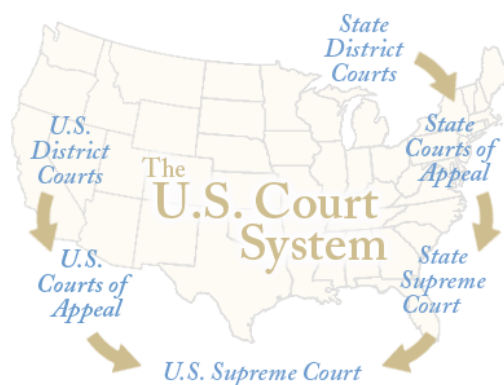
The dispute resolution function is not very controversial. There is broad public support for the idea of government creating courts to peaceably settle conflicts according

to law. Law interpretation is the controversial function of courts because it gets courts involved with policy making.

5.5 | The U.S. Court System

5.51 | *The Organization of the Federal Court System*

The U.S. has a federal system of government that consists of one national government and fifty state governments. It is sometimes said that the U.S. has two court systems: the federal court system and the state court systems. But it can also be said that the U.S. has 51 courts systems and 51 systems of law because each state has substantial autonomy, as



an aspect of state sovereignty, to create its own court system and its own system of criminal and civil laws.

The Federal Court System consists of one Supreme Court, 13 Courts of Appeals, 94 District Courts, and some special or legislative courts (including a court of claims, a court of veterans appeals, and Foreign Intelligence Surveillance Courts).

5.52 | *The Supreme Court of the United States*

The Supreme Court (SCOTUS) is the highest court in the United States. It is also the head of the judicial branch of the federal government and as such has administrative and legal responsibilities for managing the entire federal court system. The Supreme Court consists of nine Justices: the Chief Justice and eight Associate Justices. The Justices are nominated by the President and confirmed with the “advice and consent” of the Senate to serve terms that last a lifetime or during “good behavior.” Federal judges can be removed only by resignation, or by impeachment and subsequent conviction.

The Supreme Court is the only court established by the Constitution. All other federal courts are created by Congress. Article III of the Constitution provides that:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

5.53 | *The Supreme Court Jurisdiction*

The term *jurisdiction* refers to a court’s authority to hear a case. The Supreme Court’s jurisdiction is provided in the Constitution, statutes, and case law precedents.

Constitutional. Article III provides that judicial power “shall extend to all Cases...arising under this Constitution, the Laws of the United States, and Treaties....” The Court has both original and appellate jurisdiction, but the Court is primarily an appellate court. The Court’s original jurisdiction (that is its authority to sit as a body hearing a case for the first time, as a kind of trial court) is limited to cases “affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party...” The Founders gave the Supreme Court original jurisdiction over cases where states are parties in order to remove the case from the geographic jurisdiction of a state. They believed it served the interests of justice to have a legal dispute between two states be decided by a federal court that was not physically located in a state. In all other cases, the Court has appellate jurisdiction; that is, it reviews the decisions of lower courts.

Statutory. Congress also has statutory authority to determine the jurisdiction of federal courts. The Federal Judicial Center lists “[Landmark Judicial Legislation](#)” related to the organization and jurisdiction of the federal courts from the Judiciary Act of 1789 to the creation of the federal circuit in 1982. Congress has attempted to prohibit the courts from hearing controversial issues by passing *court stripping* laws that prohibit federal courts from hearing cases involving flag burning or school prayer for instance. The Detainee Treatment Act limited the jurisdiction of courts to hear cases involving habeas corpus application of a Guantanamo Bay detainee.¹ The Constitution specifies that the Supreme Court may exercise original jurisdiction in cases affecting ambassadors and other diplomats, and in cases in which a state is a party. In all other cases, however, the Supreme Court has only appellate jurisdiction. The Supreme Court considers cases based on its original jurisdiction very rarely; almost all cases are brought to the Supreme Court on appeal. In practice, the only original jurisdiction cases heard by the Court are disputes between two or more states.

The power of the Supreme Court to consider appeals from state courts, rather than just federal courts, was created by the [Judiciary Act of 1789](#). Under Article III, federal courts may only entertain “cases” or “controversies” which means federal courts are not supposed to hear hypothetical disputes.

Case Law Precedents. The Supreme Court also has authority to determine the jurisdiction of the federal courts. Its case law rulings and its administrative rules describe the kinds of cases or issues that federal courts hear. The Court’s Rule 10 provides that a petition for certiorari should be granted only for “compelling reasons.” One such reason is to resolve lower court conflicts. A lower court conflict occurs when different courts interpret the same law differently. An example of lower court conflict is the rulings upholding and striking down the Affordable Care Act. Other compelling reasons to accept an appeal are to correct a clear departure from judicial procedures or to address an important question of law. A writ of certiorari is a request to a higher court to review the decision of a lower court. The Court receives around 7,000 petitions each year, but issues only 75 or so decisions each year, so the Court has an elaborate screening process for

determining which writs will be accepted. After the Court grants the writ of certiorari, the parties file written briefs and the case is scheduled for oral argument. If the parties consent and the Court approves, interested individuals or organizations may file *amicus curiae* or friend of the court briefs which provide the Court with additional information about the issues presented in a case.

5.54 | *The Supreme Court Term*

The Supreme Court meets in the United States Supreme Court building in Washington D.C. Its annual term starts on the first Monday in October and finishes sometime during the following June or July. Each term consists of alternating two week intervals. During the first interval, the court is in session, or “sitting,” and hears cases. During the second interval, the court is recessed to consider and write opinions on cases it has heard. The Court holds two-week oral argument sessions each month from October through April. Each side has half an hour to present its argument—but the Justices often interrupt them as you can tell when listening to the [Oyez](#) audio recordings.

After oral argument, the Justices schedule conferences to deliberate and then take a preliminary vote. Cases are decided by majority vote of the Justices. The most senior Justice in the majority assigns the initial draft of the Court’s opinion to a Justice voting with the majority. Drafts of the Court’s opinion, as well as any concurring or dissenting opinions, circulate among the Justices until the Court is prepared to announce the ruling.²

5.6 | The Selection of Federal Judges

Article II grants the President power to nominate federal judges, whose appointments must be confirmed by the Senate. The individual Justices and the Court as an institution are not political like Congress and the President. Partisanship, for example, is less apparent. But individual Justices and the Court are described in political terms primarily as conservative, moderate, or liberal rather than as members of a political party. Media accounts of the Court refer to the right wing, the left wing, and the swing or moderate Justices. Presidents nominate individuals who share their ideological views, and Senators also consider ideology when considering whether to ratify a nominee. Presidents generally get Justices who vote the way they were expected to vote but there are some prominent examples of Justices voting contrary to the expectations of the President who nominated them: Oliver Wendell Holmes disappointed President Theodore Roosevelt; Chief Justice Earl Warren disappointed President Eisenhower who expected Warren to be a traditional conservative but he presided over the most liberal Court in the Court’s history; Justice Harry Blackmun became more liberal than President Nixon expected him to be; and Justice David Souter’s voting record was more liberal than President George H. W. Bush expected.

The Constitution does not provide any qualifications for federal judges. A member of the Court does not even have to be a lawyer. The President may *nominate* anyone to serve and the Senate can reject a nominee for any reason. But most members of the Court have been graduates of prestigious law schools and in recent years, individuals who have had prior judicial experience.

5.61 | *Demographics*

In addition to political factors such as party and ideology, and legal factors such as legal training, the Court's membership is examined in terms of demographic factors such as race, ethnicity, age, gender, and religion. The Court is not a representative institution. For the first 180 years, the Court's membership almost exclusively white male Protestant. In 1967 Thurgood Marshall became the first Black member of the Court. In 1981, Sandra Day O'Connor became the first female member of the Court. But it is interesting to note that the liberal Marshall was replaced by a conservative, Clarence Thomas, and the two female members of the Court did not share an ideological perspective. Justice Brandeis became the first Jewish Justice in 1916. In 2006 Samuel Alito became the fifth sitting Catholic Justice, which gave the Court a Catholic majority.



The Supreme Court of the United States, 2010

5.62 | *Senate Hearings*

As the courts have played a broader role in our system of government and politics, the confirmation process has attracted more attention from interest groups, the media, political parties, and the general public. One form of participation in the confirmation process is lobbying senators to vote to confirm or to reject a nominee. The Senate Judiciary Committee conducts hearings, questioning nominees to determine their suitability. At the close of confirmation hearings, the Committee votes on whether the nomination should go to the full Senate with a positive, negative or neutral report.

The practice of a judicial nominee being questioned by the Senate Judiciary Committee began in the 1920s as efforts by the nominees to respond to critics or to

answer specific concerns. The modern Senate practice of questioning nominees on their judicial views began in the 1950s, after the Supreme Court had become a controversial institution after the *Brown v. Board of Education* decision and other controversial rulings. After the Senate Judiciary Committee hearings and vote, the whole Senate considers the nominee. A simple majority vote is required to confirm or to reject a nominee. Although the Senate can reject a nominee for any reason, even reasons not related to professional qualifications, it is by tradition that a vote against a nominee is for cause. It is assumed that the President's nominee will be confirmed unless there are good reasons for voting against the nominee. And so rejections are relatively rare. The most recent rejection of a nominee by vote of the full Senate came in 1987, when the Senate refused to confirm Robert Bork. A President who thinks that his nominee has little chance of being confirmed is likely to withdraw the nomination.

5.63 | *Vacancies*

The Constitution provides that Justices “shall hold their Offices during good Behavior.” A Justice may be removed by impeachment and conviction by congressional vote. Only one Justice (Samuel Chase in 1805) has been impeached by the House and he was acquitted by the Senate. His impeachment was part of the era's intense partisan political struggles between the Federalists and Jeffersonian-Republicans. As a result, impeachment gained a bad reputation as a partisan measure to inappropriately control the Court rather than as a legitimate way to hold judges accountable as public officials. Court vacancies do not occur regularly. There are times when retirement, death, or resignations produce vacancies in fairly quick succession. In the early 1970s, for example, Hugo Black and John Marshall Harlan II retired within a week of each other because of health problems. There are other times when a great length of time passes between nominations. Eleven years passed between Stephen Breyer's nomination in 1994 Justice O'Connor's retirement in 2005. Only four Presidents have been unable to appoint a Justice: William H. Harrison, Zachary Taylor, Andrew Johnson, and Jimmy Carter.

The Chief Justice can give retired Supreme Court Justices temporary assignments to sit with U.S. Courts of Appeals. These assignments are similar to the senior status, the semi-retired status of other federal court judges. Justices typically strategically plan their decisions to leave the bench so that their successor will be appointed by a President who is most likely to nominate a person who will share their partisan or ideological views of the role of the Court. This is possible because the Justices have lifetime appointments. They decide when to retire, usually because of age and infirmity.

5.64 | *The Size of the Supreme Court*

The Constitution does not specify the size of the Supreme Court. Congress determines the number of Justices. The Judiciary Act of 1789 set the number of Justices at six. President Washington appointed six Justices—but the first session of the Supreme Court in January 1790 was adjourned because of a lack of a quorum. The size of the Court was expanded to seven members in 1807, nine in 1837, and ten in 1863. In Judicial Circuits Act of 1866 provided that the next three Court vacancies would not be filled. The Act was passed to deny President Johnson the opportunity to appoint Justices. The Circuit

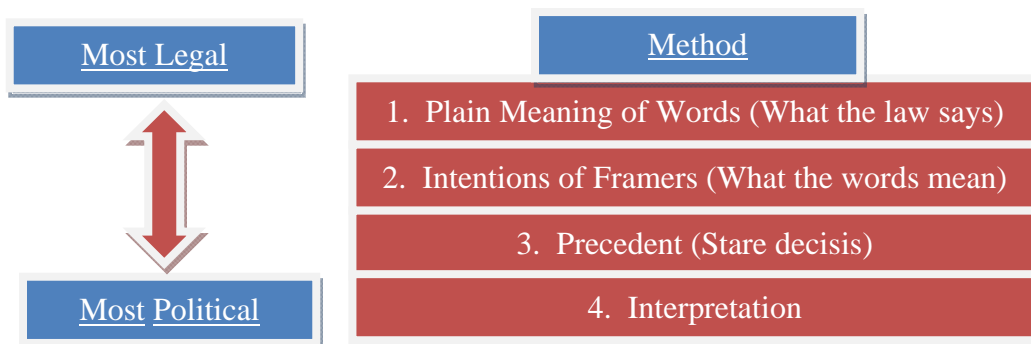
Judges Act of 1869 set the number at nine again where it has remained ever since. In February of 1937 President Franklin D. Roosevelt proposed the Judiciary Reorganization Bill to expand the Court by allowing an additional Justice for every sitting Justice who reached the age of seventy but did not retire (up to a maximum Court size of fifteen). The Bill failed because members of Congress saw it as a court packing plan. Roosevelt was in office so long that was able to appoint eight Justices and promote one Associate Justice to Chief Justice.

5.7 | Deciding Cases: Is it Law or Politics?

One of the most frequently asked questions about the courts is whether judges decide cases based on law or politics. This question goes to the heart of the legitimacy problem. To answer the question let's look first at the Supreme Court as an institution. The Supreme Court has almost complete control over the cases that it hears. The Supreme Court [controls its docket](#). It decides only 80-90 of the approximately 10,000 cases it is asked to decide each year. This means that the Court decides which issues to decide and which issues not to decide. This is, in a sense, political power.

The role of law and politics in an individual Justice's decision making is of more direct interest. Legal scholars identify a variety of influences or factors that explain judicial decisions. But there are two general models of judicial decision making: a legal model and a political (or extra-legal) model. The legal model of deciding cases explains judicial decisions as based on legal factors (the law and the facts of the case). The political model explains decisions as based on behavioral factors (demographics such as race, gender, religion, ethnicity, age), attitudinal factors (political, ideological, or partisan), or public opinion. The legal methods include the plain meaning of the words, the intentions of the framers, and precedent. The most political method is interpretation, where judges decide cases based on their own beliefs about what the law is or should be, or contemporary societal expectations of justice.

5.71 | Understanding the Methods of Deciding Cases



In a system of government based on the rule of law, it makes sense to expect that judges would decide cases based on the written law, whether it is the Constitution, a statute, or an administrative regulation. The following is a logical order in which judges decide cases.

5.72 | *Plain Meaning of the Words*

This method of deciding a case entails a judge reading the law to determine whether case can be decided by the plain meaning of the words. Sometimes the meaning of the law is plain. The Constitution requires that a President be 35 years old and a native born citizen. But some provisions of the Constitution are ambiguous. The Fifth Amendment provides that “No person shall be... deprived of life, liberty, or property, without due process of law...” The Eighth Amendment prohibits “cruel and unusual punishments.” It is impossible to read the phrases “due process” or “cruel and unusual punishment” and arrive at a plain meaning of the words. Judges must use other methods to determine the meaning of these general provisions of the Constitution.

Statutes can present a similar problem. The Communication Decency Act of 1996, for instance, made it a felony to “knowingly” transmit “obscene or indecent” messages to a person under age 18. It is easy to determine whether a person who was sent a message was under age 18; it is virtually impossible to define with any precision the meaning of “indecent,” therefore the meaning of the word requires interpretation.

5.73 | *Intentions of the Framers*

If the plain meaning of the words (what the words say) is not clear, then a judge can rely on another method of deciding a case: the intentions of those who wrote the law. This method relies on determining the intentions of the framers, what the individuals who wrote the law intended the words to mean. In order to determine what the words of the Constitution mean, a judge could examine the Records of the Constitutional Convention, the writings or letters of the delegates to the Constitutional Convention of 1787, the Federalist Papers (a series of essays by James Madison, Alexander Hamilton, and John Jay supporting the adoption of the new Constitution), or the writings of the Anti-federalists (authors who opposed the ratification of the new constitution). In order to determine the meaning of the words in a constitutional amendment, a judge might examine the Congressional Record for evidence of the intentions of the framers. The congressional debates surrounding the adoption of the 13th, 14th, and 15th Amendments, for example, can provide a better understanding of the purposes of these three post-Civil War Amendments.

5.74 | *Precedent*

The U.S. legal system is based on **precedent** or *stare decisis*. *Stare decisis* is Latin for “let the previous decision stand.” The system of precedent means a judge is expected to decide a current issue the way a previous issue was decided. Although precedent may seem like a legalistic way to decide cases, it is actually based on a common sense expectation of justice: an expectation that an individual will be treated the way other similarly situated individuals were treated. In this sense, precedent is a basic element of fairness.

Precedent is a system where the past guides the present. But courts cannot always decide a case by looking backward at how other courts decided a question or legal issue. Sometimes a judge may think it is inappropriate to decide a current question the same

way it was decided in the past. Attitudes toward equality and the treatment of women for example may have changed. Or attitudes toward corporal punishment may have changed. Rigidly adhering to precedent does not readily allow for legal change. And sometimes courts are presented with new issues for which there is no clearly established precedent. Advances in science and technology, for instance, presented the courts with new issues such as patenting new life forms created in the laboratory or the property rights to discoveries from the Human Genome Project. When the plain meaning of the words, the intentions of the framers, and precedent do not determine the outcome of a case, then judges sometimes turn to another method: interpretation.

Think about it!

Should judges make policy?

What does Justice Antonin Scalia say about reading the law?

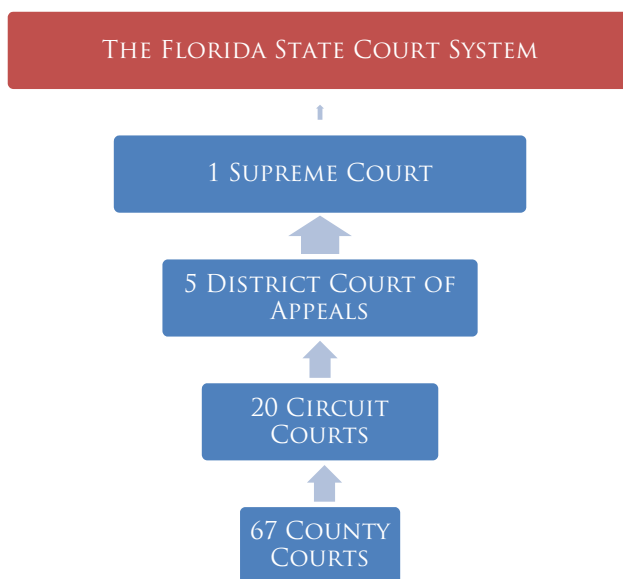
http://www.pbs.org/newshour/bb/law/july-dec12/scalia_08-09.html

5.75 | Interpretation

Interpretation is defined as a judge deciding a case based on her or his own understanding of what the law should mean, or modern society's expectations of what the law should mean. Take, for example, the problem of deciding what the Eighth Amendment's prohibition against "cruel and unusual punishment" means. Should it refer to what people thought was cruel in the 18th Century, or should the standards of modern or civilized society be used to interpret what punishment is prohibited? Interpretation is controversial because it gives judges a great deal of freedom to decide what the law means. Interpretation is also called political decision-making, legislating from the bench, or activism because

judges determine what the law means rather than those who wrote the law. This is sometimes called legislating from the bench, or judicial activism. Judicial restraint usually means judicial deference to the other branches of government, upholding precedent, and deciding only legal (not economic, social, or political) issues.

5.7 | The 50 State Court System



The U.S. system of federalism gives each state substantive power to establish its own court systems and its own system of civil and criminal laws. Therefore the U.S. does not have two court systems (one federal and one state). It has fifty-one systems: one federal and 50 separate state court systems.

The Florida Supreme Court has responsibility for the administration or management of the entire state court system. These responsibilities include budgeting and allocation of judicial resources. The Supreme Court also has to hear

appeals from death penalty sentences, cases in which a defendant receives capital punishment.

5.8 | Additional Resources

5.81 | *Internet Resources*

Landmark Supreme Court cases are available at www.landmarkcases.org

A gallery of famous trials (e.g., Socrates, Galileo, the Salem Witch Trials, John Peter Zenger, and the Oklahoma City Bomber) are available at <http://www.law.umkc.edu/faculty/projects/ftrials/ftrials.htm>

Information about the organization and functions of the federal court system, including a court locator to find the federal courts in your area or information about serving as a juror, is available at <http://www.uscourts.gov/>

The full text and summaries of Supreme Court opinions, as well as audio recordings of the oral arguments before the U.S. Supreme Court are available at the Oyez Project: <http://www.oyez.org/>

Videos of the Justices explaining their views on how they see their individual job as Justices and the Court's role as an institution in their own words are available at the C-SPAN Web site: <http://supremecourt.c-span.org/Video/TVPrograms.aspx>

Information about the 50 state court systems is available at The National Center for State Courts: <http://www.ncsconline.org/>

For information about Florida's death row, a virtual tour of a prison cell, or other information about convicted offenders on the death row roster is available at the My Florida Web site (click Government, Executive Branch, Department of Corrections): www.myflorida.gov The link to death row fact sheets is <http://www.dc.state.fl.us/oth/deathrow/>

Additional information about the Supreme Court is available at <http://www.pbs.org/wnet/supremecourt/educators/lp4b.html> and <http://www.pbs.org/wnet/supremecourt/educators/lp4c.html>

Demographic information about the Supreme Court Justices is available at <http://www.fas.org/sgp/crs/misc/R40802.pdf>

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5.83 | TERMS

Legitimacy
Judicial restraint
Judicial activism
Judicial review
dispute resolution
law interpretation
precedent

5.84 | DISCUSSION QUESTIONS

1. Discuss the importance of the Marshall Court.
2. Explain *stare decisis* and the role it plays in the American judicial system. What did William Rehnquist mean when he called *stare decisis* “a cornerstone of our legal system” but said that “it has less power in constitutional cases?” Do you agree with him?
3. Describe the racial, ethnic, and gender makeup of the federal courts. Does it matter that some groups are underrepresented and other groups are overrepresented? Why?
4. Discuss the criteria for nominating Supreme Court justices and the process by which the nominees are confirmed. How has the process changed in recent years?
5. Discuss the advantages and disadvantages of judicial activism and judicial restraint.
6. Compare and contrast the attitudinal, behavioral, and strategic models of judicial decision making. Explain which of these models most accurately captures how judges make their decisions.
7. What factors affect the implementation of court rulings? Should courts be given additional power to implement decisions?

¹ <http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php>

² The Court's annual case schedule and docket are available at <http://www.supremecourtus.gov/>

CHAPTER 6: FEDERALISM



OUT OF MANY, ONE.

6.0 | Why Federalism?

What is federalism? Why have a federal system of government? How does the U.S. system of federalism work today? These are some of the questions that will be answered in this chapter. The chapter

- Defines federalism.
- Explains the logic of the U.S. system of federalism.
- Describes how the U.S. system of federalism works today, and
- Examines the power problem with federalism.

The general public does not think about federalism very much and therefore does not have much to say one way or another about federalism itself.¹ The average voter has stronger opinions about criminal justice policy, education, abortion, immigration, or national security policy than opinions about federalism. Federalism tends to be considered a technical matter of interest to government officials or political insiders more than the general public. Americans do, however, have strong opinions about “big government”—and opinions about big government are often directly related to federalism because “big government” is a euphemism for the federal government of “Washington.” In fact, political opinion about public policies related to crime, education, abortion, the environment, health care, and immigration is usually related to opinions about federalism because they include opinions about whether the policies should be state or national government policies.

Federalism is a two-tiered system of government in which power is divided between a national (or central) government and subnational units (states, provinces, or regional governments). Therefore federalism is a geographic division of power. In the U.S., power is distributed between the national government and state governments. The number of states has grown from the original 13 to 50 today with the addition of Hawaii in 1959. In other countries with federal systems (e.g., Argentina, Australia, Canada, Germany, and India) the regional governments are called provinces. Constitutional federalism means that neither the national nor the state governments can abolish one another because both levels of government are the creatures of the constitution. A state such as Alabama or Vermont or Wyoming is not a creature of the national government or a mere local administrative unit of the national government. In the U.S. system of federalism, both the national and state governments are sovereign political entities. Federalism is based on the concept of dual sovereignty: both the national and state governments have sovereignty. Sovereignty is defined as having the ultimate or highest authority. Is it possible to have two sovereigns with authority over the same geographic area and people? The idea of dual sovereigns does seem to conflict with the concept of sovereignty as ultimate government authority. In fact, this is the source of the power problem with federalism. The image below depicts political fighting over federalism in Australia, which is analogous to the 50 states fighting with one other in the U.S.

The **power problem with federal systems** of government is the need to strike the right balance of power between the state governments and the federal government. The Constitution provides for a federal system but with a few notable exceptions, such as the power to coin money and the power to regulate interstate commerce, which are exclusively federal powers, the Constitution does not specify what powers each has. As a

"The question of the relation of the States to the Federal Government is the cardinal question of our constitutional system. At every turn of our national development, we have been brought face to face with it, and no definition either of statesmen or of judges has ever quieted or decided it."

Woodrow Wilson,
28th President
of the United
States

result, American politics has historically included debates about which level of government should do what, and whether the federal government is getting too big. Finding the right balance of powers is both a legal (or constitutional) matter *and* a political matter. It is about law and politics. In fact, federalism is a good example of the challenge of adapting a Constitution that is more than 200 years old to modern times, the challenge of maintaining continuity with the federal system established by the Constitution while accommodating major economic, political, technological, scientific, and social changes.



Federalism is not the most common type of political system in the world. Most of the world's approximately 190 countries have unitary systems of government (that is one unit), not federal systems. So why does the U.S. have a federal system? The answer to this question is provided in the very origins of the word *federalism*. The word federalism comes from the Latin *foedus*, or covenant, where individuals or groups agree to join a political union with a government body to coordinate their interests and represent them. In the American political experience, the colonists had strong attachments to their colonial governments, just as people now have attachments to their state governments. The colonists were wary of giving too much power to a central government. Federalism was a way for government power to be divided between the states and a national government as part of the system of checks and balances.

Federalism serves three main purposes. First, it is part of the system of institutional checks and balances that was designed to control government power by dividing it between two levels of government. Second, creates a political system where interests can be represented in the national government. Members of Congress represent states and districts within states. Third, federalism creates a governance system where the states can serve as "laboratories of experimentation." If one or more states try a policy (e.g., education reform or health care reform) that works, the successful policy experiment can be adopted by other states. If one state's policy experiment fails then the costs are limited to one state—unlike what happens when the national government adopts a policy that fails.

6.1 | Comparing Systems of Government

One way to better understand federalism is to compare it with other types of government. There are three basic types of systems of government: unitary systems, confederal systems, and federal systems.

6.11 | *Unitary Systems*

A **unitary system** is, as the term suggests, a political system with one level of government. Power concentrated in one central government. The central government has sovereignty or the highest governing authority. The central government may create local or regional units to help govern but these units are “creatures” of the national or unitary government. They are created by the national government and they can be abolished by the national government—and the national government also can determine how much power the local units have because the local units do not have sovereignty.

In France, for example, the national government can abolish local governments or change their boundaries. This kind of national control over state governments does not exist in the United States, because the Constitution created a federal system where both the federal (national) government and the state governments have independent constitutional status. The Constitution provides for both a national government and state governments. The American states, however, are unitary systems. The states can create, alter, or abolish local governments such as cities, counties, school districts, port authorities, as well as the other kinds of special governments that states create.

Canada has a federal system that divides power between the federal parliament and provincial governments. Under the Constitution Act, Section 91 of the [Canadian Constitution](#) provides for federal legislative authority and Section 92 provides for provincial powers. One difference between Canadian and U.S. federalism is that the Canadian system provides that the provincial governments have specifically delegated powers and all the national government retains all residual powers. In the U.S. the national government has specifically delegated powers and the states retain all residual powers. All federal systems have political conflicts over which level of government has power over which areas of policy. Areas of Canadian conflict include legislation with respect to regulation of the economy, taxation, and natural resources. The actual distribution of powers evolves over time. The Australian system of federalism resembles the U.S. system in terms of the division of power between the national and state governments but Australia has a parliamentary system rather than the separation of powers.

6.12 | *Confederal Systems*

A **confederal system** (or a confederation) is a political system where the constituent units (the states, provinces, or regional governments) are more powerful than the central (or national) government. Power is decentralized. The central government is comparatively weak, with fewer powers and governing responsibilities than the units.

6.13 | *American Federalism*

The Founders decided to create a federal system rather than a unitary or confederal system because of their political experience. The Revolutionary War was fought against the British monarchy, a unitary system with power concentrated in the national government. And the first U.S. form of government, the Articles of Confederation, was a confederal system that was widely viewed as flawed because it left the national government with too little power to address the problems facing the new nation. They considered federalism a form of government that was between the extreme centralization of a unitary system and the extreme decentralization of a confederation.

6.2 | **The Articles of Confederation**

The first U.S. government after the colonial era was a confederation: The Articles of Confederation. Congress adopted The Articles of Confederation in 1777 and they became effective upon ratification by the states in 1781. The following are some of the most important provisions of the [Articles of Confederation](#).

Articles of Confederation

“To all to whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting.

Articles of Confederation and perpetual Union between the states of New Hampshire, Massachusetts-bay Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

I. The Stile of this Confederacy shall be “The United States of America.”

II. Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.

III. The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.”

X. [Authorizes a committee of the states to carry out the powers of Congress when Congress is in recess.]

The above language from the Articles of Confederation describes a union where most power resides with the constituent units, the states. It specifically refers to the political system as a union of states that join together in “a league of friendship.” It stipulates that each state retains its “sovereignty, freedom, and independence.” Article X authorizes a committee of the states to act for Congress when Congress is in recess. The language of

the Articles suggests that each state that joined the Confederation remained free to decide whether to leave the Confederation. Slavery and the nature of the union, specifically whether states could leave it, were the two main causes of the Civil War.

6.21 | *The Second Confederation*

Eleven southern states believed that secession was one of the powers retained by the states as sovereign and independent entities in the federal system created by the Constitution. The Constitution created a federal system, but it did not define whether states could leave the union. Political divorce was not mentioned. The North argued that the union was permanent—that once a state decided to join *the* United States the marriage was permanent. The South argued that the states retained the power to decide to leave the union. Their view of federalism left more power in the hands of the states which were united as *these* United States,” a term that reflects their belief that federalism left considerable power with the states.

The Confederate States of America (1861-1865), or the Confederacy, was the government formed by eleven southern states. The United States of America (“The Union”) believed that secession was illegal and refused to recognize the Confederacy as a legal political entity. The North considered the South a region in rebellion. The end of the Civil War in the spring of 1865 began a decade-long process known as [Reconstruction](#). This “second civil war” involved extensive efforts to exert federal control over the states of the confederacy. Political resistance against federal authority was quite strong, and the struggle for the civil rights of newly freed slaves and Black citizens continued into the 20th Century as part of the civil rights movement. Determining the appropriate balance of power between the national and state governments remains a controversial political and legal issue.

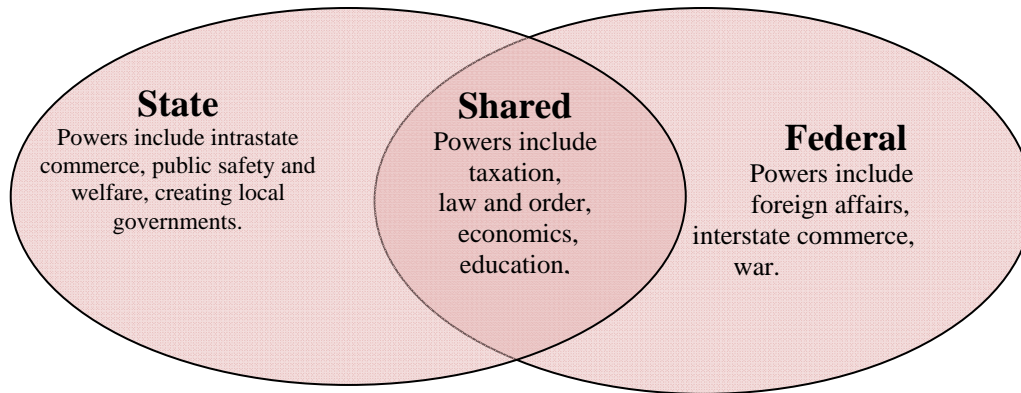
6.3 | Federalism and the Constitution

The Constitution created a federal government with more power than the national government had under the Articles of Confederation. Specific powers were **delegated** to the national government. Article I, Section 8 of the Constitution lists powers granted to Congress. The list of powers delegated to Congress includes the power to coin money, tax, regulate interstate commerce, and raise and support armies.

The Constitution also took some powers that had belonged to the states under the Articles of Confederation and gave them to the federal government. The states were specifically prohibited from coining money and regulating interstate commerce because the Founders—principally the Federalists—believed that the national government had to direct the nation’s economic development. Then there is the infamous Supremacy Clause, which provides that federal laws “shall be the supreme Law of the Land.” The Supremacy Clause does not prohibit states from having laws that differ from the federal laws, but it does prohibit states from passing laws that conflict with federal laws.

All other powers—those not delegated to the national government, or prohibited to the states—were to be reserved (or left with) the states or the people. These are the **reserved** powers. The reserved powers are dictated by the 10th Amendment: “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.” The language of the 10th

Amendment reflects the fact that there was some uncertainty about exactly which powers the Constitution delegated to a stronger national government. The Anti-Federalists worried that the new Constitution betrayed the Revolutionary War cause of fighting against a monarchy or strong central government. The Constitution did significantly increase the power of the national government. The 10th Amendment reassured the Anti-federalists that the states retained their traditional powers.



The first U.S. government after the colonial era was a confederation: The Articles of Confederation. Congress adopted The Articles of Confederation in 1777 and they became effective upon ratification by the states in 1781. The following are some of the most issues related to federalism.



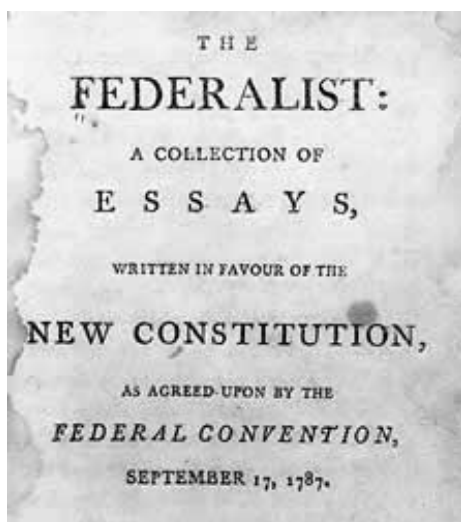
The Constitution does not define or explain federalism because the states were pre-existing units of government. The Constitution also did not define the nature of the union, whether the union was permanent or states could decide to secede. The Constitution also did not provide specifics on the actual division of power between the national and state governments. The balance of power between the national and state governments was left to be determined by politics and by subsequent generations. In fact,

the balance of power between the national and state governments has historically been determined more by politics than by the actual language of the Constitution. This is apparent in the way that federalism has been an important aspect of political events throughout the history of the United States. Federalism was a central element of the Civil War; the Civil Rights movements; the expansion of the rights of suspects and prisoners in the criminal justice system; the controversy over the right to privacy as it applies to abortion policy; and most recently, federalism has been an underlying issue involving the controversy over the definition of marriage.

6.4 | Why Federalism?

Federalism is part of the Madisonian system of institutional checks and balances. In *Federalist No 51*, Hamilton explained how dividing power between two levels of government in a “compound republic” checked government power:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other at the same time that each will be controlled by itself.



Hamilton was an ardent Federalist. He believed that one of the lessons of history was that threats to good public order came from a government that was too strong to hold government officials accountable and from government that was too weak to create or maintain good public order. Hamilton believed that federalism solved some of the problems of a weak national government under the Articles of Confederation, weaknesses that were exposed by Shays’ Rebellion and other domestic disturbances by creating a stronger national government. Federalists also supported a strong national government to direct economic

development. In [Federalist Number Nine](#), Hamilton wrote:

A FIRM UNION WILL BE OF THE UTMOST MOMENT TO THE PEACE AND LIBERTY OF THE STATES, AS A BARRIER AGAINST DOMESTIC FACTION AND INSURRECTION. IT IS IMPOSSIBLE TO READ THE HISTORY OF THE PETTY REPUBLICS OF GREECE AND ITALY WITHOUT FEELING SENSATIONS OF HORROR AND DISGUST AT THE DISTRACTIONS WITH WHICH THEY WERE CONTINUALLY AGITATED, AND AT THE RAPID SUCCESSION OF REVOLUTIONS BY WHICH THEY WERE KEPT IN A STATE

OF PERPETUAL VIBRATION BETWEEN THE EXTREMES OF TYRANNY AND ANARCHY....[THE CRITICS OF REPUBLICAN GOVERNMENT] HAVE DECRIED ALL FREE GOVERNMENT AS INCONSISTENT WITH THE ORDER OF SOCIETY....THE SCIENCE OF POLITICS, HOWEVER, LIKE MOST OTHER SCIENCES, HAS RECEIVED GREAT IMPROVEMENT. THE EFFICACY OF VARIOUS PRINCIPLES IS NOW WELL UNDERSTOOD, WHICH WERE EITHER NOT KNOWN AT ALL, OR IMPERFECTLY KNOWN TO THE ANCIENTS. THE REGULAR DISTRIBUTION OF POWER INTO DISTINCT DEPARTMENTS; THE INTRODUCTION OF LEGISLATIVE BALANCES AND CHECKS; THE INSTITUTION OF COURTS COMPOSED OF JUDGES HOLDING THEIR OFFICES DURING GOOD BEHAVIOR; THE REPRESENTATION OF THE PEOPLE IN THE LEGISLATURE BY DEPUTIES OF THEIR OWN ELECTION: THESE ARE WHOLLY NEW DISCOVERIES, OR HAVE MADE THEIR PRINCIPAL PROGRESS TOWARDS PERFECTION IN MODERN TIMES.

Think About It!

Do you agree with Hamilton's analysis of the threats to freedom in Federalist No.8, "The Consequences of Hostilities Between the States"?

http://thomas.loc.gov/home/histdox/fed_08.html

Hamilton's call for a national government with enough power to create and maintain good public order as well as to promote economic development stands in sharp contrast with the Anti-federalists. The [Anti-federalists](#) were a loosely-organized group of individuals who advocated for what would today be called states' rights. They believed that the powers of the national government should be limited and that the states should be the primary political unit within the American system of federalism.

6.5 | The Political Effects of Federalism

Federalism has two principal effects on government and politics. First, it creates a large number of governments. Second, complicates government and politics.

6.51 | *The Surprisingly Large Number of Governments*

Although federalism is a two-tiered system of government, the U.S. actually has a large number of governments: one national government; 50 state governments; and thousands of local governments.

<i>The Number of Governments in the United States</i>	
Type	Number
Federal Government	1
States	50
Counties	3,043
Municipalities	19,372
Townships or Towns	16,629
School districts	13,726

*Think About It! What's in a name?
Does it matter whether a
municipality is a city or a town?
Yes, it does.*

*Niagara Falls in Danger of Losing
Status as City, Aid"*

<http://www.npr.org/2012/10/25/163653935/niagara-falls-in-danger-of-losing-city-status-aid>

Act on it!

*One good thing about having a
large number of governments is
the increased access to
government. Contact a local
government official and ask a
question about a public policy
issue of interest to you.*

Special Districts*	34,683
<ul style="list-style-type: none"> • Mosquito Control • Child Protective Services • Port Authority • Airport • Beach Taxing • Health Care • F.I.N.D (Florida Inland Navigation District) 	
TOTAL NUMBER OF GOVERNMENT UNITS:	87,504
*Examples of Special Districts in Palm Beach County, Florida	

Source: U.S. Department of Commerce, Statistical Abstract of the United States, 2003 (Washington, D.C.: U.S. Government Printing Office, 2003), 261

6.52 | *Complicated Government and Politics*

Federalism also complicates American government and politics. In unitary political systems, political debates focus on the substance of public policy. The debates focus on *what* public policy should be concerning foreign affairs, economics, crime, education, the environment, moral regulatory policy, or religion. All countries debate public policy on these controversial issues. In the U.S., federalism means that political debates are about *what* public policy should be and about *who* should be making public policy. We debate whether abortion should be legal, whether there a right to die, whether global warming exists and what public policy should be, whether the death penalty should be used for sentencing, whether organized prayer be allowed in public schools. We also debate who should be making the policy, whether the national or state governments should be making public policy. The U.S. system of federalism makes American politics doubly complicated: we debate what policy should be and who should make it.

Federalism has means that politics includes running debates about the proper distribution of power over public policy. Federalism and the distribution of power between the national and state governments have been part of many of the nation's most important political events: the Civil War; Progressive Era debates about social policy; the Great Depression of the 1930s; and the 20th Century Civil Rights movements. Federalism is also one of the issues that inspired the modern conservative movement in the latter 1960s as a reaction against the New Deal and Great Society expansions of national government power over domestic policies.

Debates about federalism are actually debates about one aspect of the **power problem**: how much power to centralize in the national government and how much power to leave decentralized with the states. The Constitution does not solve the power problem in the sense that it does not specify, except for certain areas such as coining money and regulating interstate commerce, whether the national government or the state governments have power to act in an area of public policy. The federalism dimension of the power problem has been dynamic. The actual distribution of power between the national and state governments changes depending on conditions and circumstances.

Crises usually result in centralization of power in the national government. Shays' Rebellion, the Great Depression; World War II and the Cold War, and terrorist threats to national security were all crises that resulted in increased power for the national government.

6.6 | Federalism is Dynamic

The balance of power between the national and state governments is dynamic. It is

The PEW Center on the States provides data on economic mobility in the states. <http://www.pewstates.org/research/data-visualizations/economic-mobility-of-the-states-interactive-85899381539>

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tilting toward the national government and sometimes tilting toward the states. But modern federalism does not work the way the Founders intended. The Founders created a political system where most government power was left in the hands of the states and the national government's powers were limited. It was a state-centered system. Over time, however, the powers of the national government expanded, and expanded relative to the states. The following describes the major historical changes in federalism.

6.61 | Dual Federalism

The first era of federalism is described as dual federalism. **Dual federalism** is a theory of federalism that describes both the federal government and the state governments as co-equal sovereigns. Each is sovereign in its respective areas of policymaking. The Supreme Court endorsed this understanding of federalism in an early case *Cooley v. Board of Port Wardens* (1851). The question in this case was whether a state government could require that ships entering or leaving the Philadelphia harbor hire a local pilot. The Constitution gives the national government exclusive power to regulate commerce among the states. The Philadelphia Port traffic involved more than one state, so it was interstate commerce. The Court developed the **Cooley Doctrine** to decide whether a matter was for local or national regulation. According to the Cooley Doctrine, subjects that are "in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to...require exclusive legislation by Congress." Subjects that are not national and require local diversity of regulation are left to the states. The Cooley Doctrine assumes that the national and state governments have separate areas of responsibility. For example, the national government would have exclusive power over interstate commerce, national security, and foreign affairs, while the state governments would have exclusive power over schools, law enforcement, and road building.

The Cooley Doctrine still serves as a guide for determining whether the national or state governments have power to regulate, but it does not provide specific answers to questions about whether something required a single, uniform system of regulation. In

fact, as both the national and state governments shared responsibility over more areas of public policy, debates about highway speed limits, legal drinking ages, educational policy, the regulation of airports, and immigration issues have challenged the idea that each level of government is supreme in its respective field.

6.62 | *Cooperative Federalism*

Cooperative federalism describes the national and state governments as sharing power over areas of public policy. Dual federalism is an outdated concept in the sense that there are so few areas of public policy that are exclusively either state or national, and so many areas of public policy where the federal government now acts. For example, all levels of government are involved in education, economics, transportation, crime, and environmental policy. The term **intergovernmental relations** is useful for understanding how modern federalism works because it captures how the national, state, and local governments interact with one another to make and administer policy.

One way to better understand the forces of change in the American political system is to examine economics. Economic changes have prompted the expansion of the federal government. The Industrial Revolution in the mid-19th Century fundamentally changed the American economy. The emergence of large national corporations created support for national government action to regulate these new centers of private power. During the Progressive Era (1890s until the World War I) the national government began to regulate industries such as the railroads, steel, banking, and mining. The federal government also passed social welfare legislation including child labor laws and minimum wage and maximum hour laws. In fact, today the federal government redistributes resources from wealthier states to poorer states. In today's economy, population mobility, the ability to relocate to states where the jobs are is an important economic indicator.

6.63 | *Expansion of Federal Power*

One measure of big government is the increased size and influence of the national government relative to the state governments. As the country changed from a local economy to a national economy, where businesses made and sold products and services across the country, public opinion shifted toward seeing the national government as the appropriate level of government to regulate business. During the 20th Century the power of the national government continued to expand relative to the states. The modern era of the U.S. political system began in the 1930s partly in response to an economic crisis. The

Great Depression created popular support for national government activism to remedy the problem of the economic depression. The trend toward centralizing power and responsibility for maintaining material prosperity has accelerated with the further development of a global economy, where businesses buy and sell in a world economy.

A second source of expansion of federal power is civil rights. The Civil War Amendments—the 13th, 14th, and 15th Amendments—expanded the federal government’s role in promoting racial equality. The Fourteenth Amendment, which was ratified in 1868, prohibits a state from denying to any person within its jurisdiction the equal protection of the laws. This Amendment was intended to protect the rights of newly freed slaves from state laws that discriminated against them on account of race. The Fourteenth Amendment gave Congress power to pass “appropriate legislation” to enforce



the provisions of the Amendment. Congress used this power to pass civil rights legislation such as the Civil Rights Act of 1875 which outlawed racial discrimination in public accommodations. However, in the *Civil Rights Cases* (1883), the Supreme Court declared the law unconstitutional because it regulated private behavior—the decisions of owners of hotels and restaurants not to serve Black customers. According to the Court, the Fourteenth Amendment, which was the basis for the Act, prohibited state action. The Court’s landmark ruling in *Plessy v. Ferguson* (1896) also limited the scope of federal civil rights laws by upholding state laws that required racial segregation.

The Civil Rights Movement of the 1950s and 1960s also relied on federal efforts to secure the civil rights of individuals who were the victims of discrimination. Some of these efforts relied on Congress, which passed laws such as the 1964 Civil Rights Act and the 1965 Voting Rights Act. Some of the efforts relied on the United States Supreme Court. Decisions in landmark cases such as *Brown v. Board of Education* (1954) made state actions supporting racial discrimination in public schools unconstitutional. In many parts of the country the use of federal power to enforce equal protection of the laws prompted strong resistance. The constitutional argument against this use of federal power to promote equality, particularly racial equality, was the states’ rights argument.

Federalism was part of the background of the civil rights movement. The U.S. Supreme Court rulings in cases such as *Brown v. Board of Education*, in which they outlawed racial segregation in public schools, prompted a political backlash in the states, particularly in the South. The principal reason for the backlash was opposition to



integration. However, there was also a strong **states' rights** opposition to integration. States' rights can be defined as a belief that a policy is the responsibility of a state government not the national or federal government. Florida was one of the southern states that cited states' rights reasons for opposing court-ordered

desegregation. In 1957, the Florida Legislature passed an [Interposition Resolution](#) in response to *Brown v. Board of Education*. **Interposition** is a political doctrine that a state can interpose itself between the people of the state and the federal government when the federal government exceeds its authority. The Interposition Resolution declared that the U.S. Supreme Court exceeded its power when it declared racially segregated public schools unconstitutional.

Advocates of states' rights opposed the use of federal power to achieve greater racial equality in state politics, government, and society. George Wallace is an important political figure in the states' rights movement. He was a precursor of the modern conservative movement's criticism of big government, by which he meant a federal government with the power to order states to change their laws regarding race relations. He is a good example of how thinking about federalism is interwoven with thinking about civil rights in the U.S. Wallace was a forceful and articulate spokesperson for the conservative belief that the federal government's powers were limited to those specifically enumerated. He gave impassioned campaign speeches defending states' rights against a civil rights movement that relied heavily on "outside agitators" to bring about change. The outsiders were the federal government in general and the courts in particular.

Think About It!
 Listen to one of Governor George Wallace's states' rights speech against the civil rights movement:
<http://www.youtube.com/watch?v=QW6ikSCDaRQ&feature=endscreen&NR=1>



A third reason for the expansion of federal power is criminal justice policy. The development of a national economy made state borders less relevant for legitimate business and economic activity because goods were no longer made, marketed, and sold entirely within one state. Illegitimate businesses were also organized nationally. Organized crime, in particular, did not operate exclusively within a single state. The rise of organized crime presented a challenge to law enforcement which was historically state and local law enforcement. The rise of nationally organized criminal enterprises provided one of the justifications for the creation of the Federal Bureau of Investigation (FBI). The FBI has jurisdiction across the country, unlike local law enforcement whose jurisdiction (or legal authority) is geographically limited. Historically, criminal justice has been one of the areas of public policy reserved to the states under the U.S. system of federalism. The rise of organized crime, the war on crime, and the war on drugs made crime and policing a national political issue to be addressed by the federal government. Congress responded by passing more and more anti-crime legislation—a trend toward federalizing crime that continued throughout the 20th Century and into the 21st Century.

Think about it! Why does the U.S. have a federal law enforcement agency? The FBI tells the story of its creation and expansion in “A Brief History of the FBI.” <http://www.fbi.gov/about-us/history/brief-history>

A fourth reason for the expansion of federal power is national security, national defense, and foreign policy. World War II and the Cold War increased the power of the national government. Threats to national security have historically been considered the primary responsibility of the federal government. The war on terror has continued to shift power to the national government relative to the states. For instance, the federal government increasingly uses the resources and information on local governments to find and track terrorist suspects. Terrorism is often an international threat—its support networks, funding, and training involve other countries, and terrorists seek to move easily across national borders—therefore the threat of terrorism typically increases the power to the federal government.

The economy, civil rights, national security, and crime are not the only reasons for the expansion of federal power. In environmental policy, Congress has passed major legislation such as the Clean Air Act and the Clean Water Act and established bureaucratic agencies the Environmental Protection Agency to implement the new federal environmental policies. In educational policy, Congress passed the No Child Left Behind Act. The Act increased the federal government’s role in an area of public policy that was traditionally left to the states. In health care, President Obama signed the Patient Protection and Affordable Health Care Act on March 23, 2010. Twenty-eight states filed lawsuits claiming that parts of the Act, which critics called Obamacare, were unconstitutional because they exceeded the federal government’s power. The Supreme Court upheld most provisions of the Act, including the mandate that individuals buy health insurance or pay a penalty/tax, in [National Federation of Independent Business v. Sebelius](#) (2012), but ruled that state sovereignty protected the states from certain provisions of the law that required states to adopt certain health care policies or lose federal Medicaid funding.

6.7 | The Conservative Backlash: New Federalism

Beginning in the latter 1960s, conservatives began criticizing the expansion of the federal government and the idea of cooperative federalism. Their criticism of “big government” included calls for returning some power to the states. Their advocacy of states’ rights was intended primarily as a check on the expansion of the national government’s power in domestic affairs. The Nixon administration’s policies to support returning some powers to the states were called [New Federalism](#).

The political support for New Federalism was also reflected in changes in the Supreme Court’s rulings. The Court began to limit the powers of the federal government. From 1938 until 1995, the Court did not invalidate any federal statute on the grounds that the law exceeded Congress’ power under the Interstate Commerce Clause. But in [United States v. Lopez](#) (1995), the Court ruled that some provisions of the Gun-Free School Zones Act, a federal law enacted in 1990 to curb gun violence, exceeded Congress’s commerce powers and infringed on the states’ reserved powers to provide safe schools. A conservative majority on the Rehnquist Court issued a number of important rulings that enforce constitutional provisions that limit congressional power in fields of public policy where the states have power to act. These rulings are based on the political conservative belief that federalism is a legal arrangement that protects the states and is part of the system of checks and balances that protects individual freedom.

The challenge is to adapt a more than 200 year old system of federalism to a

modern environment that has experienced a great deal of political, economic, technological, and social change. Take, for example, economic change. The U.S. economy has changed from local to state to national and now, with globalism, international trade. How does a global economy affect the distribution of power between the national and state governments? How has the U.S. assumption of the role as the world’s policeman, the Cold War, and the war on terror affected the distribution of power between the national and state governments? These economic and national security developments have increased federal power—

Think about it!

*Do we still need states?
In a global economy, are
political boundaries such as
states merely an additional
business expense?*

an increase that sometimes, but not always, means a decrease in state powers.

Federalism is one aspect of the conservative backlash against the liberal centralization of power that occurred during the New Deal and Great Society eras. The backlash has not been inspired by opposition to big government in general. Conservatives supported big government for national security purposes, getting tough on crime, and moral regulatory purposes (e.g., sexual behavior, marriage, obscenity and indecency, and the definition of marriage). Even in economic policy, business groups with ties to conservative and Republican politics such as the U.S. Chamber of Commerce and the National Association of Manufacturers lobbied for the passage of federal laws that explicitly preempt state tort laws. Tort laws govern wrongful injury lawsuits such as product liability and medical malpractice litigation. The states traditionally had primary responsibility for tort laws as part of their reserved powers. The tort reform movement, of which the Chamber of Commerce and the National Association of Manufacturers are

prominent supporters, advocates taking cases out of the state courts and into the federal courts. This is evidence that liberal and conservative attitudes toward federalism tend to be strategic rather than principled. A principled position is one that is taken regardless of whether it produces a preferred outcome. A strategic position is one that is taken because it produces a preferred outcome. Liberals tend to think that policies should be decided in the states when they think the state political systems will produce liberal policy outcomes. Conservatives tend to think that policies should be decided in the states when they think the state political systems will produce conservative policy outcomes. If a liberal (or a conservative) thinks the federal government will produce a preferred policy outcome, they are likely to think that the policy should be decided by the federal government rather than the states.

6.71 | *Immigration Policy*

Immigration is one of the issues that illustrate the potential conflict between national and state policy. Controlling undocumented immigrants is a pressing issue in some states, particularly states bordering Mexico and states with large numbers of undocumented immigrants. The key constitutional doctrine for understanding whether states have the power to act in an area or policy field is **preemption**. Federal law can preempt or trump state law. The preemption doctrine is based on the [Supremacy Clause](#), Article VI of the Constitution, which provides that the Constitution, federal laws, and treaties shall be the “supreme Law of the Land.” The Supremacy Clause guarantees national union. When deciding whether a state law conflicts with a federal law the Court does a “preemption analysis” consisting of three questions. Did Congress expressly state that federal law preempted state law? Does the state law conflict with federal law? Has Congress so extensively regulated the area of policy to have “occupied the field?” If Congress has enacted a comprehensive and unified federal policy in a field, then Congress has assumed responsibility for that field and left little or no room for state action. States can experiment with health care reform, education reform, and many other reforms in other areas of public policy.

Immigration policy is a special case because it has national security implications. Illegal immigration became a political issue when some states thought the federal government was unwilling or unable to enforce immigration laws. States adopted a variety of laws that were intended to discourage illegal entry and to discourage employment of illegal immigrants or undocumented aliens. Arizona, which shares a border with Mexico, is one such state. In 2010 it passed SB1070 an immigration control law that, among things, required Arizona police officers to determine the citizenship or immigration status of a person who was lawfully detained. SB1070 served as a model for other states including Alabama, Georgia, Indiana, South Carolina, and Utah. The Arizona law was challenged on the grounds that it was preempted by federal law. In [Arizona v. U.S.](#) (2012), the Supreme Court upheld one provision of the law and struck down three provisions.

The stated purpose of SB1070 was to use state resources to help the federal government enforce its immigration laws. The law 1) required law enforcement officers to check the immigration status of persons who they have a “reasonable suspicion” are in the country illegally; 2) required the warrantless arrest of individuals that law enforcement official have probable cause to believe have committed a crime for which

the person could be deported; 3) made it a crime to not carry immigration papers in the state; and 4) made it a crime for illegal immigrants to seek a job or to work in the state.

The Court upheld provision number one but struck down the other three. The Court explained that the federal government's broad power over immigration and alien status is based on 1) its enumerated power in Art I, Sect. 8 cl. 4 to "establish an uniform Rule of Naturalization;" 2) its inherent sovereign power to control and conduct foreign relations; and 3) the Supremacy clause. The fact that Congress has created a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the nation limits state sovereignty to legislate in a policy field that Congress has occupied. The dissenting Justices argued that the states have their own inherent sovereignty and can legislate on immigration matters of great concern to them.

Think About It!

What should public policy regarding undocumented aliens be? Who should make the policy?

6.8 | Summary

This chapter described federalism, explained the origins of the U.S. system of federalism, and described its development over time. The division of powers between the national and state governments has been controversial throughout the nation's history. Federalism has proven to be a dynamic form of government in the sense that the actual distribution of power between the national and state governments has varied a great deal over time. The Constitution provides for a federal system but, with the notable exception of foreign affairs and interstate commerce, it does not specify exactly what each level of government has power to do. As a result, the actual balance of power between the national and state governments changes. In this sense, federalism is dynamic. The federal government's power has increased, and it has increased relative to the state governments for a variety of reasons, including the development of a global economy. Because of the central role federalism plays in the system of checks and balances, changes in federalism raise important questions about where to strike the right balance between state and federal power.

6.9 | Additional Resources

6.91 | Internet Resources

One valuable resource for information about the states is the PEW Center On the States which describes and analyzes state policy trends, for example. See <http://www.pewcenteronthestates.org/>

The Tenth Amendment Center provides a contemporary view on states' rights: <http://www.tenthamentcenter.com/>

The Urban Institute's publication "Assessing the New Federalism" is an informative look at the place for cities in the U.S. system of federalism: www.urban.org/center/anf/index.cfm

Publius: The Journal of Federalism is an academic journal dedicated to the investigation of issues related to federalism: <http://publius.oxfordjournals.org/>

The National Council of State Legislators provides a variety of information about state legislatures, including ideas about the relationship between the state and federal governments: www.ncsl.org/statefed/afipolicy.htm

6.92 | *In The Library*

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TERMS:

Federalism
Unitary system
Confederation
Delegated powers
Reserved powers
The power problem
Dual federalism
Cooley Doctrine
Cooperative federalism
States' rights
Interposition

6.93 | STUDY QUESTIONS

Why have a federal system of government?

Discuss the allocation of federal and state powers.

Explain how the allocation of federal and state powers has changed over time.

Describe four areas where federal powers have grown into areas traditionally reserved for the states.

Discuss the current state of federalism in the United States.

What role did the civil rights movement play in the expansion of federal powers?

How is federalism dynamic?

Why did the Federalists believe that a strong federal government was necessary?

¹ Larry N. Gerston. 2007. *American Federalism: A Concise Introduction*. New York: M.E. Sharpe, Inc., p.87.

CHAPTER 7: THE MEDIA, GOVERNMENT, AND POLITICS



7.0 | The Media and Democracy

“Were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.”

Thomas Jefferson

“The man who reads nothing at all is better educated than the man who reads nothing but newspapers. The press is the toxin of the nation.” **Thomas Jefferson**

“Why should a government which believes it is doing right allow itself to be criticized. It would not allow opposition by lethal weapons. Ideas are much more fatal things than guns.”

**Nikolai Lenin
(1920)**

“I’m as mad as hell, and I am not going to take this anymore.”

**UBS Evening News
Anchor Howard
Beale
in the film Network
(USA 1976)**

The media play an important role in all modern democracies. A free press is a strong indicator of whether a political system is democratic. In fact, freedom of the press is considered an essential condition for modern democratic government. Freedom of the press is vital for democracy because self-government requires an informed and educated citizenry. The **educative role** is one of the reasons why the press is the only business that is given constitutional protection (the First Amendment guarantees freedom of the press). But education is not the media’s only function. In the U.S. system of government, the media are also expected to play a **watchdog role**. The institutional media are expected to play an important role in checking government power by investigating and reporting on government and public affairs. The modern mass media have also played a **socialization role** by presenting the same information and portraying cultural values to national audiences.

The importance of these roles in a democracy explains why the power of the press (or media) has been such a controversial issue throughout the nation’s history. The power problem with the media is that a free press is not necessarily a fair press. How the press uses its substantial, and growing, power is controversial. Media bias—whether ideological or partisan—is a familiar theme in American politics because of the central role the media play in government and politics. This chapter examines the media’s role in American democracy.

The media are unusual in that they are mostly private companies whose primary purpose is to make money, but they also are expected to serve a public function. Media companies exist to make money—which they do by providing entertainment, information (news), and advertising. The educative and watchdog functions of the media are not the primary roles of media companies. The history of the media reveals major changes in media technology and function. During the founding era, the press was not just political; it was an overtly partisan press. Handbills and flyers and papers were distributed to convince readers to support a person or a party. The emergence of powerful corporations in the railroad, banking, manufacturing, and oil sectors of the economy prompted calls for big government to act as a countervailing force to big business. The media played an investigative, watchdog role by alerting the public to business influence or abuses of power. In the modern era of government and politics, both campaigns and government rely heavily on public communications. The media provide the public with almost constant information about government and politics. But the relationship between the media and democracy has changed. During the founding era, the press was very partisan or closely aligned with political movements and parties. Today the mainstream media are often less obviously committed to one side in public debates, but questions remain about how the large corporate media conglomerates are using their power in an information age. The concerns about the power of the press, about media biases, remain.

7.1 | The Love-Hate Relationship

Despite the common assumption that the media are essential for democratic government, Americans have always been ambivalent about the press. Thomas Jefferson’s comments on the newspapers of his day reflect the attitudes of the politicians of his day and today. Which of Jefferson’s statements about the press quoted above do you think were made before he became president and was made after he became president? Attitudes toward the role of the press may depend on whether you are in office or not. The love-hate relationship is nothing new. In Jefferson’s day, the press was intensely partisan and played an open, active role in politics.

7.2 | The Founding Era

The print press certainly played an important role in the founding of the American republic. The [Trial of John Peter Zenger](#) is an example of one of the famous American trials illustrating the importance of freedom of the press as a way to hold government officials accountable. In 1735, the editor and publisher of a newspaper called *The New York Weekly Journal* was tried on charges of sedition and libel for publishing articles that criticized William Cosby, the governor of the New York colony. The trial was an important event because it presented a challenge to the government’s power to limit freedom of expression in order to maintain what the government considered good public order. The outcome of the case strengthened the colonists’ commitment to two ideas: the idea that freedom of the press and trial by jury were important checks on the power of government.

7.21 | *The First Amendment*

The language of the First Amendment acknowledges the importance of freedom of the press: “Congress shall make no law....abridging the freedom....of the press....” The First Amendment establishes the unique role of the press as only business that is specifically protected by the Constitution. This special status is one reason why the press is sometimes called “the fourth estate”—a reference to the fact that the press is, along with congress, the president, and the judiciary, one of our political institutions. But just as Americans love to hate government, they love to hate the press.

7.22 | *The Hate Relationship – The Partisan Press*



Freedom of the press played an important role in the founding of the republic, but criticism of the press is almost as old as the republic. The early press focused on scandals and salacious stories in order to sell papers. Then, as now, scandals

sold papers. The early press was sometimes called “the penny press” because the papers were very cheap. The penny press was political rather than professional. In the early days of the republic, the press was both political and partisan. A paper was identified with a particular point of view: it openly and explicitly and strongly either supported or opposed a political party; it took strong stands on political issues, candidates, or government officials. There was less news reporting and more of what we today would call editorial or analysis. Neither the reading public nor public officials expected a newspaper to strive for objectivity or neutrality—or to use the phrase popularized by Fox News, “Fair and Balanced” reporting.

7.23 | Libel Laws

In the early days of the republic, the *free press* was not expected to be a *fair press*. Newspapers became early targets of political criticism because the free press was not a fair press. Influential or prominent individuals and powerful government officials were often upset by what their critics in the press printed about them. Their response to what they considered bad press included support for the passage of laws against libel and slander. Libel and slander are false spoken or written statements that injure a person. The injury can be economic or reputational.

The [Alien and Sedition Acts of 1798](#) are examples of early federal laws that limited freedom of the press despite the absolutist language of the First Amendment prohibiting congress from passing any law restricting freedom of speech or press. The Act made it a crime (seditious libel) to publish false or scandalous statements that tend to bring government into disrepute. The laws were passed by a Congress controlled by Federalists who did not appreciate what their political opponents—including Thomas Jefferson and other Anti-federalists—were saying about them. When Jefferson became president and the Democratic-Republican Party became the dominant political party, the Sedition Act of 1798 was repealed.

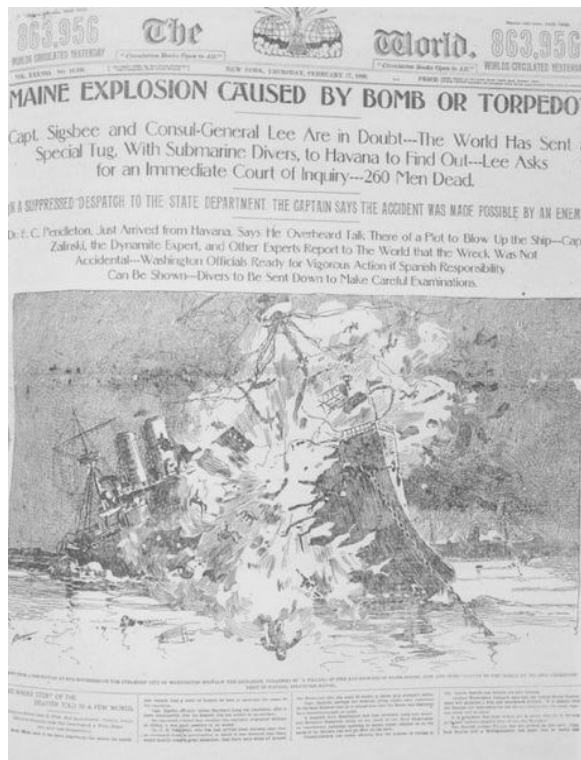
These early controversies involving the role of the press in American politics illustrate that early American attitudes toward the media were complicated. There was strong support for a free press able to criticize public officials, but strong criticism of the press for not being fair.

7.24 | *The Commercial Media*

In the 1830s, the partisan press changed to a commercial press with the emergence of came to be called the penny press. Advances in printing technology allowed newspapers to be produced at a far cheaper rate (one cent rather than 6 cents). The reduced cost of producing newspapers made news profitable. Papers made money by printing sensationalized accounts of crimes and disasters and scandals. This was **yellow journalism**, a pejorative reference to journalism that features scandal-mongering, sensationalism, jingoism, or other unethical or unprofessional practices and coverage.

7.25 | *Pulitzer, Hearst and the Spanish-American War*

The circulation battles over the New York newspaper audience between Joseph Pulitzer's *New York World* and William Randolph Hearst's *New York Journal* lead to increases in the sensationalism of the press. As a part of the battle for dominance for the New York media market, both newspapers sensationalized increasing tensions with Spanish-controlled Cuba. When the U.S. Naval ship *The Maine* exploded in a Cuban harbor, Hearst and Pulitzer both sensationalized the Spanish involvement in the explosion. The U.S. soon went to war with Spain and the Spanish-American war is considered the first press-driven war.



Pulitzer's coverage of the explosion



Hearst's coverage of the explosion

7.25 | Muckraking

Muckraker journalism emerged in the latter part of the 19th Century as an early form of investigative reporting. A muckraker is a journalist who digs around in the muck to expose corruption. The Industrial Revolution and the government's **laissez faire** policies toward corporations prompted journalists to expose public and private crime, fraud, waste, threats to public health and safety, graft, and illegal financial dealings.

7.26 | The Professional Press

Starting around 1900, the press began to be more professional. Joseph Pulitzer started a school of journalism at Columbia University. Journalism schools trained journalists to be objective, to separate facts from of opinion, to avoid biased coverage of public affairs. The byline, or putting the name of newspaper reporters on stories, allowed

the public to hold reporters accountable for their work. During the 20th Century, the institutional print media, including the major national newspapers, and then the institutional broadcast media, added prestige to professional journalism and news reporting on public affairs.

The idea of an objective press was based on a belief that facts were distinct from values: objective journalists should have “faith in *facts*” and skepticism toward *values*; objective journalists should segregate facts and opinions/values.”¹ This professional ethic encouraged journalists to consider the reporter separate from the news they reported and take pride in presenting the news (the facts) as objectively or neutrally as possible. The ideal of an objective *professional* press encouraged the view that the institutional press should function as a virtual “fourth branch” of government describing the world of government and politics. It also created the idea that news reporters would assume a critical role as **watchdog** journalists who investigate and publicize wrongdoing. Two of the most significant instances of the press performing the watchdog role are *The New York Times* reporting on the Pentagon Papers in 1971 and the *Washington Post* reporting on the [Watergate Scandal](#) in 1972. These stories contributed to President Nixon’s famous hostility toward the press. Listen to the following audio recording of a December 14, 1972 conversation where President Nixon gave his Secretary of State, Henry Kissinger, advice about press relations after discussing how to handle press coverage of the Vietnam War. What does it reveal about a president’s attitudes toward the press?

Think About It!

In the Nixon Tape “Nixon, Kissinger on ‘Christmas Bombing’” President Nixon says to Kissinger:

“Also, never forget. The press is the enemy. The press is the enemy. The press is the enemy. The establishment is the enemy. The professors are the enemy. The professors are the enemy. Write that on the blackboard 100 times. And never forget it.”

<http://www.youtube.com/watch?v=h0vi2l0WxO8>

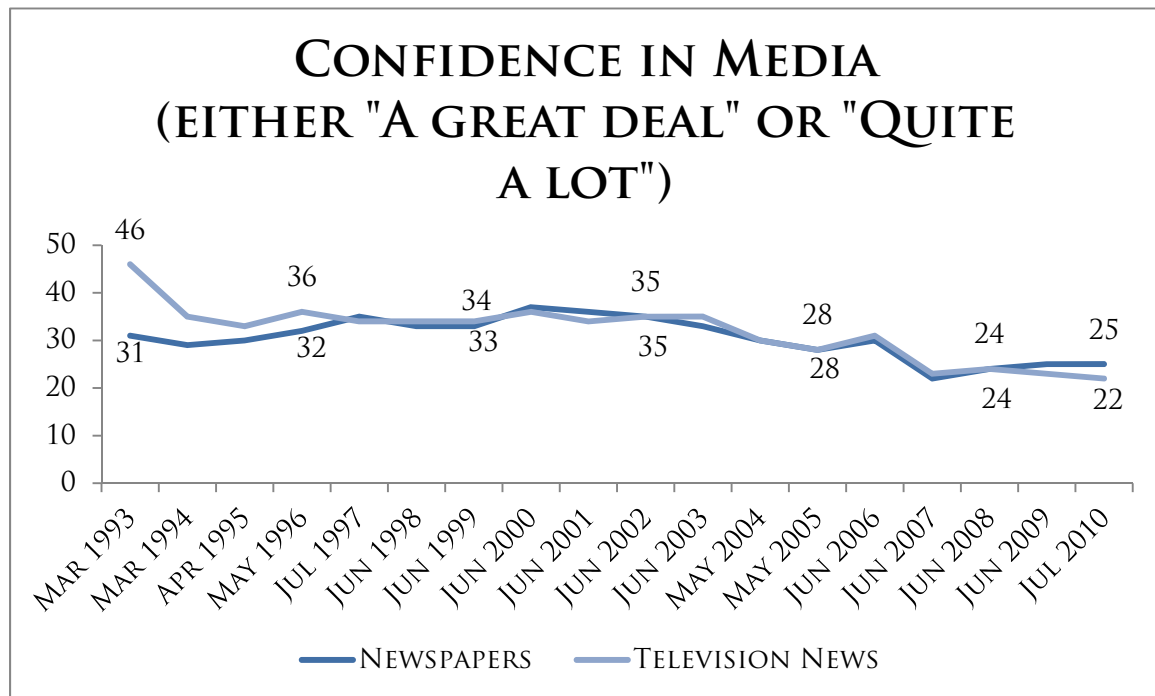
7.3 | The Mass Media

The modern mass media are widely criticized by government officials, politicians, and the general public. The fictional character Howard Beale, the UBS network evening news anchor in the 1976 film [Network](#), captured the criticism of the media’s power in a famous, award winning rant during a television broadcast. Beale tells viewers to go to a window, open it, and shout out as loud as you can: “I’m mad as hell and I’m not going to take it anymore!” The Beale character’s outburst resonated with public frustration with an increasingly powerful media in an era when three broadcast networks—ABC, CBS, and NBC—dominated the airwaves. The media today seem to be everywhere, a pervasive force in modern society. With the proliferation of media outlets, as the internet joined newspapers and television and radio, worries about media power have changed. There is less worry that three corporate media companies control access to information. There is

more worry about too much information, too much entertainment, too much consumer-focused programming, and a segmenting of the information marketplace.

7.31 | *The New Media and the Fragmentation of the Media*

The media have become both consolidated, in terms of ownership, and fragmented, in terms of the types of media that are available. While in 1940, 83% of newspapers were independently owned, less than 20% of newspapers now are not a part of a chain or



media conglomerate. At the same time, a wider menu of options has emerged for those seeking information. Twenty-four hour a day news reporting, internet news sources, and the increasing availability of news sources to match political ideologies has several consequences. First, scholars have found that as competition between news sources increases, the quality and in-depth coverage of news declines. Second, fragmentation may also lead to a decline in the ability of political leaders to hold the attention of the public. Third, the increased number of news outlets results in people seeking out news that reinforces their views. This makes people less open to alternative viewpoints, and more set in beliefs that may or may not be true. Generally, the increased fragmentation and competition have resulted in less confidence in the media in the U.S. As the figure above shows, less than a quarter of the American public has a great deal or quite a lot of confidence in either newspapers or television news.

7.32 | *The Mass Media*

The term mass media refers to media that are specifically designed to reach a large (that is, mass) audience such as the entire population of a nation or state. The term was coined in the 1920s with the development of nationwide radio networks and mass-circulation

newspapers and magazines. The classic examples of mass media are the three television



networks—ABC, CBS, and NBC—before the emergence of cable television networks (CNN and ESPN began in the late 1970s) and the Internet. The programming of the three broadcast television networks was clearly intended to appeal to a national audience. The broadcast networks and the major newspapers (e.g., *The New York Times*, *Washington Post*, *Chicago Tribune*, and *Los Angeles Times*) are sometimes

referred to as the “MSM “ or mainstream media. Cable TV is a relatively recent addition to the mass media.

7.4 | i-Media

Communications technology is changing the media. The mass media are being replaced by individualized (i-media), which are smaller scale, niche audience, or specialized target media. These are sometimes called the “new media.” Some internet media now reach audiences and markets on a scale that was previously limited to the very large mass media. These internet media include personal web pages, podcasts and blogs. The institutional media, whether it is print journalism or electronic journalism, is facing competition from various new media. The new media are not just competing for a market share previously controlled by the mass media; it is a competition that is revolutionizing the production of news and other programming content. The new media provide more user-generated content. These new media blur the distinction between professional and amateur journalism and change the traditional function of the mass media as “mediating” institutions—in a mass society of 300 million people, for example, the institutional press mediated between big government and the individual citizen.

7.41 | *The End of Institutional Press?*

For some time now declining newspaper subscriptions have raised serious questions about the future of newspapers. In “The Report on the State of the News Media in 2007,” Arthur Ochs Sulzberger Jr, the publisher and chairman of The New York Times Company, responded to questions about the impact of technological changes on print journalism. He said, “I really don’t know whether we’ll be printing *The Times* in five years, and you know what? I don’t care?”² This is a surprising statement for a newspaper man to make about the future of the print press.



The *Report* noted that technology was transforming the media in ways that may be as important as the development of the television and radio, and perhaps even as important as the development of the printing press itself. Information technology is not just changing the way people get information. It may be fundamentally changing the relationship of the consumer or citizen to traditional institutions including government, education, and the media: “Technology is redefining the role of the citizen—endowing the individual with more responsibility and command over how he or she consumes information—and that new role is only beginning to be understood.” Information technology has empowered individuals by making them less dependent on the institutional media to *mediate*. Political scientists use the term mediating to refer to those institutions in large, mass societies that stand between the state (i.e., big government) and the individual. For example, as the national government grows larger, the gap between a lone individual and big government increases. Mediating institutions provide individuals with information about government and check on government. The owners of newspaper, television, and internet companies, and the editors who work for them, filter, edit, or otherwise decide what is newsworthy and merits reporting. Information technology is making this traditional “mediating” role less important. But eliminating the mediating institutions leaves the individual citizen or consumer with more responsibility for determining the accuracy of the electronic information that is now so widely available and either free or cheap. These new or non-institutional media are part of trend toward “de-intermediation” that includes Wikipedia, We Media, YouTube, and the blogosphere.

7.42 | I-Media and Politics

The advent of new forms of media has had a strong effect on political action and political campaigning, particularly in the 2008 presidential election. A survey by the Pew Center for Internet & American Life³ found that nearly three quarters of (74%) of internet users (55% of the general population) went online in 2008 to get involved in the political process or to get news and information about the election. 45% of internet users used the internet to watch a video related to the campaign and a third forwarded political content to others. These findings – and the increased prominence (and success) of political campaigns internet outreach suggests that traditional forms of media may not be connected people to political information as they have done in the past.



AS GAG-RULERS WOULD HAVE IT.

—Satterfield in the Jersey City Journal.

7.5 | Journalism as a Profession

The development of an independent, professional journalism began after the Civil War when newspapers were no longer as likely to be closely allied with a political party. The fact the newspapers became less partisan did not mean that the press became less political, however. Newspapers in the latter part of the 19th Century became very political during the Progressive Era (roughly the 1890s until World War I), but they

tended to be political in the sense that they criticized political machines and political party bosses, or advocated on behalf of causes such as public corruption. As journalism became a profession, reporters were less partisan but still political. Investigative reporting of scandals or working conditions redefined the role of the press from a partisan press to an institutional press with the power to set the political agenda by calling public attention to an issue than needed political attention.

7.6 | The Media and the Political System

The media, including individuals working as reporters, editors, and producers, as well as media organizations, has a large amount of control over what the American public sees as the news. The approval of government action by the public is essential in a democracy, and the people must be aware of what the government is doing in order to approve. As such, the media's choice of what is newsworthy has very real implications for the health of the American democracy.

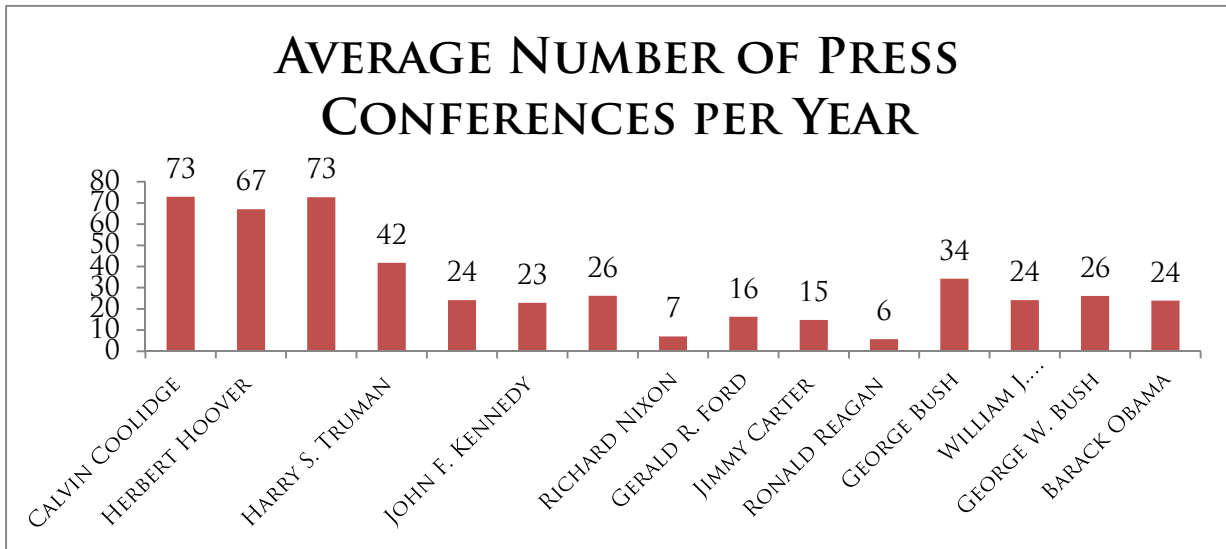
7.61 | *Reporting Political News*

Reporting political news and public affairs information is one of the core functions of media outlets, particularly those with a national focus. Washington, D.C. has the largest concentration of news professionals in the United States. There are more than 8000 reporters with Congressional press passes in Washington, covering political news for the American public.⁴

The president receives the most news coverage of any political figure. Presidents hold press conferences to shape public opinion and explain their actions. Today, a press secretary often briefs the media on a regular basis, instead of having regular press conferences with the president personally, a tradition started in the Eisenhower administration. Prior to that, many reporters maintained personal relationships with the president and received updates directly from him. Now, the majority of news about the president is received through a daily (or near daily) press release, accompanied by a press briefing where the president's press secretary answers questions about the press release. Many scholars feel that the president does get a lot of attention, but most of it is negative. Negative coverage encourages cynicism in the population at large and alienates people from politics.

Presidential press conferences, where the president answers questions directly from the press, are much rarer. Press conferences appear to be an opportunity for the media to directly ask the president a question get an answer from the president (rather than from advisers or spokespeople), but press conferences are actually carefully staged events. Government officials provide answers that they have scripted and rehearsed before the conference. The number of news conferences given by a president varies dramatically, depending on the administration. As the figure below shows, presidents in the early 1900s gave many more press conferences than modern presidents.⁵ Richard Nixon and Ronald Reagan gave very few press conferences; Nixon's low numbers were partially due to the fact that he had bad previous experiences with the press and partially due to the scandal of Watergate. Reagan's low numbers were largely due to the fact that

he preferred alternate venues for communicating with the press, including one-on-one interviews, answering questions on his way to or from the Presidential helicopter or during a photo session, or, as Sam Donaldson, White House reporter for ABC News said, “The reason we yell at Reagan in the Rose Garden is that’s the only place we see him.”⁶



The media encountered challenges in covering George W. Bush’s administration. President Bush prided himself on the “tightlipped, no leaks nature” of his White House. No one from the administration appeared in the media without prior approval, and no one talked about what went on behind closed doors. The administration was happy and the media were unhappy. Obama seems to prefer a more informal, off-the-cuff style of interaction with the press, and he has limited the number of formal press conferences.

Media coverage of Congress is different than the coverage of the President. Congress has 535 members and is a decentralized institution. Public awareness of what Congress is doing and how it operates is rather low. Media coverage focuses on the leadership—the Speaker and majority and minority leaders. The chairs of committees engaged in reviewing important policies *may* get some attention from local stations and papers that report on local representatives.

One of the ways that the media **does** cover Congress is by investigations and scandals. When members of Congress do something scandalous (or illegal) the media give such affairs (and sometimes they are actually affairs) air time or print coverage. This kind of coverage is negative: it focuses on failures or misdeeds or scandals or partisan fights. The negative coverage is partly responsible for the public’s negative perceptions of Congress as an ineffective branch of government. But media coverage of congressional committees doing their work, or the federal bureaucracy doing its work, is not usually considered newsworthy: it is considered as exciting as watching paint dry and not worthy of much attention.

The Media World At Your Fingertips

C-SPAN provides contact information for media organizations in the U.S. and other countries. Engage the media community in another country. Write a letter to the editor about the media organization’s coverage of an issue of interest to you.

<http://www.c-span.org/Resources/Media-Organizations/>

7.7 | Media and Communications Law

There is an extensive body of law that governs freedom of the press. It includes statutory law (federal and state legislation), regulatory law (or administrative rulings and orders), and the case law (court rulings) on the First Amendment.

7.71 | *You can't say whatever you want*

Perhaps the most important thing to know about freedom of the press is that you are not free to publish whatever you want to. The Supreme Court has never said that the First Amendment gives an individual the right to say anything that he or she wants to say. For instance, libel and slander are not protected by the First Amendment. Libel is writing something that is false and injures another person. A person can be held responsible (financial or otherwise) for publishing something libelous and the government can punish individuals who publish factual information that is deemed harmful to national security. During the World War I era the Court upheld laws that punished individuals for criticizing U.S. participation in the war. One of the legal doctrines that the Court uses to determine when freedom of the press can be restricted is the [Clear and Present Danger Test](#). The government can punish individuals for saying or publishing things that raise a “clear and present danger” of causing actions that the government has the power to prevent.

7.72 | *The Modern Media*

The growing role of the media, particularly the various forms of electronic communication, in modern American society has made communications a political issue. The government's role in communications has been controversial for decades. The federal government's media or telecommunications policy has three legal foundations:

7.73 | *Constitutional Law*

The First Amendment is the primary source of Constitutional protections for the media in the United States. It states that the “Congress shall make no law... abridging the freedom



of speech, or of the press.” The Court has generally interpreted this right broadly and struck down attempts by the government to regulate the media. Freedom of the press has largely taken the form of protection from **prior restraint**, or the government banning expression of ideas prior to their publication. The most famous case upholding the press right to publish what it thinks is newsworthy is [New York Times v. United States](#) (1971). This is the *Pentagon Papers* case. The *New York Times* and the

Think About It!

How has communication technology changed media reporting on modern warfare?

<http://www.youtube.com/watch?v=8HSDwTrLnIE>

Washington Post had published excerpts of classified Department of Defense documents (the Pentagon Papers) examining the conduct of the War in Vietnam, and the papers planned additional publications. The Nixon administration sought an injunction against the publication of the documents, contending that the documents would prolong the war and embarrass the government. The Supreme Court explained that the First Amendment freedom

of the press placed a heavy burden of proof on the government to explain why “prior restraint” (that is, an injunction that prohibiting publication) was necessary. And the Court ruled that the government had not met the burden of proof because it did not explain why publication of the documents would lead to immediate, inevitable, and irreparable harm to national security or other interests. As a result of the Court’s rulings, the U.S. has one of the freest presses in the world.

Freedom of the press is not absolute. The government can limit freedom of the press if publication threatens national security interests. The government can legally prevent publication of certain strategic information such as the movement of troops during wartime. It can also legally censor publication of instructions on how to build nuclear bombs. However, information technology has made such efforts to prevent publication practically difficult or even impossible. Information is now freely available on the Internet—even real time images of military actions. The War in Iraq illustrates how media technology has changed coverage of wars. The Pentagon adopted a policy of embedding journalists in military units. And soldiers with smart phones have repeatedly taken photos that exposed inappropriate or illegal behavior.

7.74 | Statutory Laws

The statutory basis for the federal government’s media and telecommunications policy has its roots in two congressional acts, the [Communications Act of 1934](#) and the [Telecommunications Act of 1996](#). The Communications Act of 1934 established the **Federal Communications**



Commission (FCC) to oversee “interstate and foreign commerce in wire and radio communication.” The FCC is considered one of the independent commissions because its members serve terms of office, can be removed only through impeachment, and no more than three of its five members can be from one political party.

The Communications Act went through a major overhaul when Congress passed the Telecommunications Act of 1996. The primary purpose of the Telecommunications Act was to deregulate the telecommunications industry. Prior to the 1996 Act, much of the telecommunications industry resembled a monopoly. People did not have a choice as to where they purchased their telephone service. The 1996 Act also relaxed laws on media ownership. Prior to the 1996 Act, a single company could not own more than twelve television stations or forty radio stations. The 1996 Act greatly relaxed this regulation, instead putting the cap of ownership at 35% of the national market for television and removing the cap entirely for radio ownership. As a result, major media companies like CBS, Fox, and Clear Channel greatly increased their shares of the media markets.

7.75 | *Administrative Regulations*

There are also administrative regulations that determine U.S. telecommunications and media policy. The [Federal Communications Commission](#) (FCC) is the primary source of these regulations, orders and policies. These regulations include the day-to-day actions of the FCC and the 1,899 employees that work for the FCC. This might include the approval of a merger of two telecommunications companies, fining companies for indecency, licensing amateur radio operators, and regulating some aspects of the internet.

7.76 | *The Fairness Doctrine*

One of the rules or regulations that the Federal Communications Commission promulgated was the fairness doctrine. The **fairness doctrine** required radio and television broadcast license holders to present controversial issues of public importance in a fair and balanced manner. The fairness doctrine is an example of an administrative regulation or “law” created by an administrative agency. It is a law in the generic sense that it is an official, binding policy that individuals or organizations are not free to decide whether to comply with it. The FCC’s authority to issue regulations was upheld by the Supreme Court in *Red Lion Broadcasting Co. v. FCC* (1969).⁷ Red Lion Broadcasting aired on a Pennsylvania radio station a 15 minute broadcast by Reverend Billy James Hargis as part of a Christian Crusade series. The broadcast accused an author, Fred Cook, of being a Communist and of writing a book to “smear and destroy Barry Goldwater.” Cook demanded free time to reply under the Fairness Doctrine. Red Lion refused. The FCC ruled that the broadcast was a personal attack that violated the Fairness Doctrine. Red Lion challenged the Fairness Doctrine in court.

The Supreme Court upheld the constitutionality of the Fairness Doctrine on the grounds that Congress had the authority to regulate broadcast media because of the scarcity doctrine. According to the scarcity doctrine, the airwaves are public and the government can regulate them by licensing to prevent signal overlap. The scarcity

doctrine is what differentiates the print media, which are not licensed by the government, from the broadcast media, which are. Cable TV is not subject to the same kinds of government licensing and regulation.

7.77 | *Media Deregulation: Economic*

The FCC repealed the fairness doctrine in 1987. The FCC is managed by five appointed commissioners. No more than three of the five commissioners can be of one political party. The three Republican commissioners, who reflected the broader Republican emphasis on deregulation of business, concluded that the doctrine had grown to inhibit rather than enhance debate. They maintained that the technology revolution had increased the media voices in the information marketplace and made the fairness doctrine unnecessary (and perhaps was even an unconstitutional limit on freedom of expression). One consequence of this economic deregulation of the media in the 1980s was the rise of conservative radio and television hosts/programs, such as Rush Limbaugh and Bill O'Reilly. The repeal of the fairness doctrine occurred at a time when conservatives were taking to the airwaves using a style of public discourse that would not have been possible under the regulatory schemes of the fairness doctrine, which would have required broadcasters to provide right to reply to programs that discussed controversial issues from one perspective or side.

The current FCC continues this economic deregulatory policy by allowing media mergers in the communications industry. The FCC's position is that emerging technology and marketplace competition is preferable to government regulation of this rapidly changing sector of the American economy. Congress has also supported this perspective in the Telecommunications Act of 1996.

7.78 | *Media Re-regulation: Moral Regulatory policy and 'air' pollution*

Media policy has traditionally divided the ideological left and right in American politics. It is not a matter of one side supporting government regulation and the other side opposing government regulation. The left and right are often divided over the purposes of government regulation. Liberals are generally more concerned about violence while conservatives are more concerned about sex. During the 1960s and 1970s, for example, the liberals on the Supreme Court generally supported civil libertarian claims that the First Amendment freedom of expression limited the government's power to restrict access to sexually explicit materials. The Justices increasingly required the government to provide evidence that its restrictions were necessary to prevent harm, and that the traditional argument that the government could restrict access to what it considered immoral materials was no longer valid. The result was a significant "deregulation" of morals or values based policies concerning access to sexually explicit materials.

This deregulation was one of the reasons for the conservative backlash against liberalism. Efforts to reregulate communications include federal laws aimed at increasing the government's power to regulate the media, particularly to protect minors, including the following.

- Communications Decency Act of 1996⁸

This law criminalized the “knowing” transmission of “obscene or indecent messages” to any person who was under 18 years of age. It defined obscene or indecent as any message “that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.” The Supreme Court declared these provisions of the Act unconstitutional in *Reno v. American Civil Liberties Union* (1997) as the act violated the First Amendment.⁹ In the ruling, Justice Stevens found that the act so restricted the ability of adults to engage in communication that is appropriate for them that cost outweighs the benefits of the law.

- Child Online Protection Act of 1998 (The “Son of CDA”)¹⁰

This Act required commercial Web site operators to take actions to prevent persons under 18 from seeing material harmful to children by demanding proof of age from computer users. The Act provided a fine of \$50,000 and 6 month prison term for allowing minors to view harmful content, which it defined as harmful using “contemporary community standards.”¹¹ The law was challenged in court. In *Ashcroft v. American Civil Liberties Union* (2004) the Supreme



Court ruled that the law was unconstitutional because it limited the freedom of expression rights of adults. In 2007, U.S. District Judge Lowell A. Reed explained why he thought it was not a good idea to try to protect minors by limiting their rights as adults: “perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection.”¹²

- Children’s Internet Protection Act of 2000.¹³

This Act required public libraries to and public schools to take measures to limit computer access to certain Web sites in order to protect children. The law was challenged by the American Library Association on the account that it required libraries to block access to constitutionally protected information. In *United States et al. v. American Library Association* (2003), the Supreme Court ruled that the law did not violate the First Amendment because the law did not require libraries to block access to information but simply made the government provision of financial assistance for obtaining internet service dependent on compliance with the law.

The FCC is entrusted with the responsibility of enforcing federal laws concerning obscenity, indecency, and profanity, as well as illegal actions by telecommunications companies, such as “mystery fees”¹⁴ or “pay-to-play” programs.¹⁵ The Enforcement Bureau of the FCC reviews public complaints and investigates to determine whether the facts warrant government action.¹⁶ These investigations can result in The difficulty

determining what constitutes programming that warrants fines or other legal actions is illustrated by Michael Powell, the former Chair of the FCC, who stated the FCC's position on a television network broadcast of the popular film, *Saving Private Ryan* without censoring the soldiers' cursing. In response to public complaints about the primetime broadcast, and in an attempt to ease broadcasting company concerns about whether they would be subject to FCC disciplinary actions (fines or broadcast licensure revocation), Powell provided the following explanation of FCC policy.

**STATEMENT OF MICHAEL K. POWELL, CHAIR
FEDERAL COMMUNICATION COMMISSION**

Re: Complaints Against Various Licensees Regarding Their Broadcast on November 11, 2004, of ABC Television Network's Presentation of the Film "Saving Private Ryan,"

Today, we reaffirm that content cannot be evaluated without careful consideration of context. *Saving Private Ryan* is filled with expletives and material arguably unsuitable for some audiences, but it is not indecent in the unanimous view of the Commission.

This film is a critically acclaimed artwork that tells a gritty story—one of bloody battles and supreme heroism. The horror of war and the enormous personal sacrifice it draws on cannot be painted in airy pastels. The true colors are muddy brown and fire red and any accurate depiction of this significant historical tale could not be told properly without bringing that sense to the screen. It is for these reasons that the FCC has previously declined to rule this film indecent.

This, of course, is not to suggest that legal content is not otherwise objectionable to many Americans. Recognizing that fact, it is the responsible broadcaster that will provide full and wide disclosure of what viewers are likely to see and hear, to allow individuals and families to make their own well-informed decisions whether to watch or not. I believe ABC and its affiliated stations made a responsible effort to do just that in this case.

Fair warning is appropriately an important consideration in indecency cases. In complaints you often find that Americans are not excessively prudish, only that they are fed up with being ambushed with content at times and places they least expect it. It is insufficient to tell consumers not to watch objectionable content, if the "shock" value is dependent on the element of surprise. This is particularly true in broadcast television, where viewers are accustomed and encouraged to order their viewing by parts of the day—morning shows, daytime TV and late night have long been the zones in which expectations are set. When those lines are blurred, the consumer loses a degree of control, a degree of choice.

Context remains vital to any consideration of whether profanity or sexual content constitutes legally actionable indecency. The Commission must stay faithful to considering complaints within their setting and temper any movement toward stricter liability if it hopes to give full effect to the confines of the First Amendment."

7.8 | Which Way Are We Going?

The study of communication law and policy leads to the conclusion that for the past several decades (from the 1970s until today) policy has been moving in two different directions at the same time. One direction is toward deregulation (less government):

policy has generally supported economic or business deregulation of telecommunications. In an era of deregulation of various industries (airlines; oil and natural gas), conservatives have argued that marketplace competition and technological innovation are solutions to problems with communications sector, not government regulation. The second direction is toward more regulation (more government): policy has supported more government regulation of telecommunications on behalf of social or values purposes. Conservatives worry about sex programming; liberals worry about depictions of violence.

Think about it!

Has communications technology made it possible for almost anyone to claim to be a journalist?

The conflict between economic deregulation and social re-regulation/regulation is apparent in a proposal made by the Chair of the FCC to extend the FCC's regulatory authority to cable

television. Interest groups such as the Parents Television Council support the proposal to give the FCC authority to regulate explicit sex and violence and indecency. Tim Winter, the President of the PTC tried to put telecommunications in proper perspective when he stated that, except for the Pentagon, the FCC has "the most important role in our nation." His argument echoed some of the earliest founding statements about the relationship between the media and democracy, particularly his claim that the way we communicate (the public airwaves, electronic communication, cable, satellite, telephone) is "the essence of our democracy."

The advocates of expanding the FCC's authority over the communications sector by authorizing it to regulate cable as well as broadcast companies, have encountered strong opposition. Opponents of expanding the FCC's regulatory authority include the national Cable and Telecommunications Association. The Association believes that the best way to regulate the industry is to rely on the intensely competitive marketplace, not government intervention. In fact, despite the politics supporting increased government regulation of programming, the law is likely to present a significant hurdle. Blair Levin, the chief of staff to FCC Chairman Reed Hundt, thinks that the effort to extend the FCC's reach to include cable companies would ultimately lose in the courts. He also wryly commented that FCC Chair Martin's push for a la carte service subscriptions, which is related to family values selection, was likely doomed: "Every chairman of the FCC comes to realize there is a conflict between family values and market values."¹⁷

7.9 | Media Bias

The press has been charged with bias from the earliest days of the republic. The charge was certainly accurate during the founding era of the partisan penny press. Contemporary criticism of the media for being biased is partly the result of higher

expectations of a professional press. The growing role of the media has increased scrutiny of the media and the ways in which they influence values, behavior, and public understanding of government and politics.¹⁸

Individuals in positions of power in either the private sector (heads of companies or unions or other organizations) or the public sector (national, state, or local government officials) are likely to be sympathetic to the charge of media bias because the institutional press has historically claimed a watchdog role, one that includes investigative reporting. The government watchdog role has made the media an “oppositional” force in the sense that the press investigates and serves as a watchdog for whatever administration is in control of government.

7.9 | Additional Resources

7.91 | Internet Resources

The Center for Media and Public Affairs at <http://www.cmpa.com/> provides information about the public role of the media.

The Pew Research Center’s Project on Excellence in Journalism at <http://journalism.org/> One of the Pew Research Center’s newer projects is the Pew Internet & American Life Project. It provides interesting perspectives on the cultural effects of the reliance on the Internet. See <http://www.pewinternet.org/>.

One useful source of information about the modern media is <http://journalism.org/>

One example of the new media is the fake news shows have blurred some of the distinctions between news and entertainment (Infotainment).

<http://www.colbertnation.com/the-colbert-report-videos/252013/october-08-2009/bend-it-like-beck>

The University of California at Los Angeles website has both statutory law and case law relating to electronic law and policy <http://www.gseis.ucla.edu/iclp/hp.html>

The Annenberg Public Policy Center of the University of Pennsylvania conducts content analysis on TV coverage of politics. www.appcpenn.org

Newseum is the museum dedicated to the history of news and media, with a Web site that has interesting cyber exhibits, including coverage of the terrorist attacks of September 11, 2001, war correspondents, editorial cartoonists, women photographers, and front-page stories from around the country. www.newseum.org

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Key Terms
 Educative Role
 Watchdog Role
 Commercial Media

STUDY QUESTIONS

1. When covering Congress, who tends to be the focus of media coverage? Why?
2. Leonard Downie, Jr., the former executive editor of the Washington Post, does not vote because he thinks voting might lead to questions about his neutrality. Explain whether you think journalists can be neutral and also vote in elections?
3. Compare and contrast the print press and electronic media.
4. How much confidence does the public have in the media? Is this level of confidence sufficient to ensure a vibrant democracy?
5. What are the major periods of the media?
6. What is the media's relationship with the president?

¹ Schudson, Michael. 1981. *Discovering the News: A social history of American newspapers*. New York: Basic Books.

² Quoted in The State of the News Media 2007, An Annual Report on American Journalism, http://stateofthemediamedia.org/2007/narrative_overview_intro.asp

³ <http://www.pewinternet.org>

⁴ A congressional press pass allows reporters to sit in the House and Senate press galleries, as well as providing some access to presidential press briefings. The process to get a congressional press pass is available here: <http://www.senate.gov/galleries/daily/rules2.htm>

⁵ Gerhard Peters. "Presidential News Conferences." *The American Presidency Project*. Ed. John T. Woolley and Gerhard Peters. Santa Barbara, CA: University of California. 1999-2010. Available at: <http://www.presidency.ucsb.edu/data/newsconferences.php>.

⁶ Steven V. Roberts, "Washington Talk: The Presidency; Shouting Questions At Reagan," *New York Times*, October 21, 1987.

⁷ http://www.oyez.org/cases/1960-1969/1968/1968_2_2

⁸ <http://www.fcc.gov/Reports/tcom1996.txt>

⁹ http://www.oyez.org/cases/1990-1999/1996/1996_96_511

¹⁰ <http://www.ftc.gov/ogc/coppa1.htm>

¹¹ <http://www.gseis.ucla.edu/iclp/coppa.htm>

¹² <http://www.salon.com/21st/feature/1999/02/02feature.html>

¹³ <http://www.fcc.gov/cgb/consumerfacts/cipa.html>

¹⁴ http://www.fcc.gov/eb/News_Releases/DOC-301874A1.html

¹⁵ http://www.fcc.gov/eb/News_Releases/DOC-300325A1.html

¹⁶ <http://www.fcc.gov/eb/>

¹⁷ <http://www.npr.org/templates/story/story.php?storyId=16783080>

¹⁸ http://www.stateofthenewsmedia.org/chartland.asp?id=200&ct=col&dir=&sort=&col4_box=1

CHAPTER 8: PUBLIC OPINION

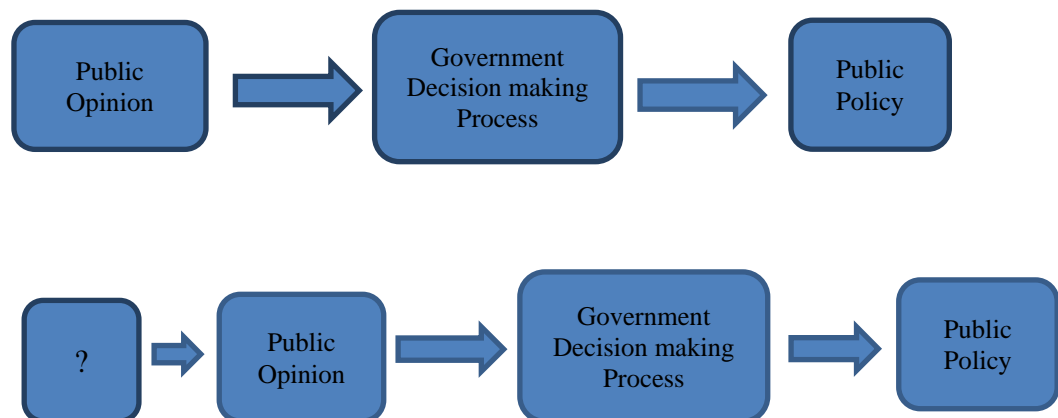


8.0 | Public Opinion

James Madison believed that popular government—what is today called democratic government—requires an informed public. One of the most widely shared *modern* beliefs is that democracy requires an informed, educated, and active citizenry in order to work as a good form of government. The belief that knowledge can overcome ignorance and solve problems is at the foundation of many collective human endeavors whether in the world of science or the world of politics: the scientific community and the political community. It is an article of political faith that knowledge is power and popular information makes self-government possible. The importance of information explains why political scientists, government officials, members of political parties, business groups, organized labor, and so many other interest groups pay so much attention to public opinion. This chapter examines public opinion: what it is; how it is formed; how it is measured; and its role in politics, government, and public policy.

The power problem with public opinion is determining whether, to what degree, and how public opinion influences public policy. **Democratic theory** assumes that public opinion drives the political machine. But political practice (how politics and government actually work) and political science research raise important questions about the theory. The relationship between public opinion and public policy is not a simple “cause” and “effect” relationship as described in Figure 8.1 below. The relationship is complicated by several factors. One complicating factor is the fact that the U.S. is not a pure or direct democracy; it is a constitutional democracy that places limits on majority rule. A second complicating factor concerns the nature of public opinion. Is public opinion a *cause* (that is, does it determine government action) or an *effect* (is it the result of something else). Figure 8.1 describes the democratic assumption about public opinion as the cause of government action. But what if public opinion is itself the effect of something? Questions about who or what controls public opinion are central to the power problem with public opinion because they are central to the assumptions of the democratic theory of politics and government. Governments and other political actors try to control public opinion.

Figure 8.1 The Classic Systems Theory



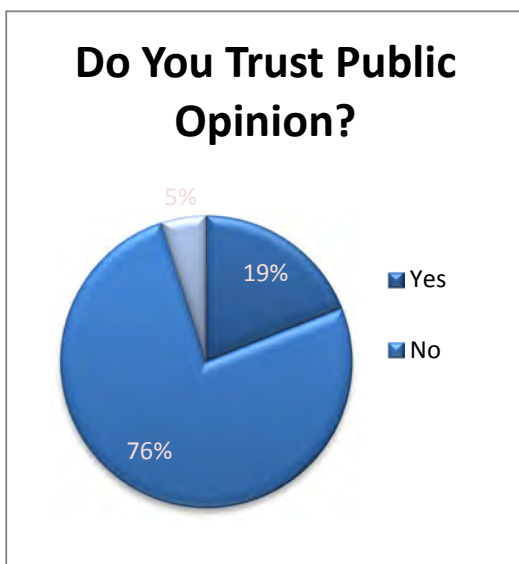
“A popular government without popular information, or means of acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors must arm themselves with the power which knowledge gives.”

James Madison
Letter
to W.T. Barry

8.1 | Definition

Public opinion is defined as the aggregate of public attitudes or beliefs about government or politics. The following description and analysis of public opinion in the U.S. focuses on three main issues. The first issue is the political importance of public opinion in representative systems of government. The second issue is the role of public opinion in two models of democracy—the delegate and trustee models of democracy. The third issue is the nature of public opinion, particularly the formation, measurement, and control of public opinion.

8.2 | IMPORTANCE



Public opinion is important in democratic political systems because democratic self-government is based on the consent of the governed. Democratic theory requires public policies to more or less reflect public opinion. Democracy assumes that the people are the ultimate source of governing authority. This is what is meant by popular sovereignty: the people are sovereign. Popular sovereignty is one of the basic principles of the U.S. system of representative government. The belief that government authority derives from the people means that public policies are supposed to be based on public opinion. Public opinion is supposed to directly or indirectly cause public policies to be enacted. Responsiveness to public opinion is one measure of a political system's legitimacy—the

belief that a system of government is lawful, right, or just.

8.3 | TWO MODELS OF REPRESENTATION

The following describes two models of representation: the delegate model and the trustee model democracy. The two models describe how public opinion influences public policy in modern democracies and how public opinion should influence public policy.

8.31 | THE DELEGATE MODEL

According to the **delegate model**, public opinion is the principal source of government legitimacy because government power is only properly exercised when it is based on public opinion. It describes a strong linkage between public opinion and public policy. Public opinion

is considered the cause of public policy; public opinion is considered the determinant of public policy. The delegate model of democracy is based on the delegate theory of representation. The delegate theory of representation describes elected government officials as obligated to do the will of the people—to represent the constituents who elect them to office. Government officials are instructed delegates in the sense that they are expected to do what the people want. The strong role of public opinion in the delegate model of democracy makes it a populist form of representative democracy. Populist means “of the people.” A populist is a person, party, or philosophy that advocates for “the people” or “the common person” or “the middle class” as opposed to the elites.

8.32 | *THE TRUSTEE MODEL*

The **trustee model** allows government officials more freedom of choice to decide what is in the public interest. Government officials are not expected to act solely upon public opinion. The trustee model of democracy is based on the trustee model of representation, where a government official is not obligated to do what the people want, but can decide what is best. A representative is considered a trustee whose better access to information or good judgment may justify the representative’s beliefs, actions, or votes differ from public opinion at any moment in time. The trustee is not required to do what public opinion polls indicate that the people want. The government officials are held accountable for their decisions in regular elections, but they have considerable freedom to choose courses of action that may in fact differ from the preferences of the public as measured by polls, for example. The trustee model is more elitist in the sense that elected representatives are expected to be the “better sorts” of the community, the leaders who are chosen to make good decisions about public policy without merely following public opinion.

8.4 | THE FOUNDERS’ INTENTIONS

The Framers did not establish a direct democracy. They created an indirect democracy or **republic**, whereby the public selects individuals to represent their interests in government decisions. They believe that a republic was a better form of government than a direct democracy because they worried about majority rule. Absolute majority rule would be replacing monarchy—rule by King George—with democracy—rule by King Numbers. They were committed to popular government, but not one where majority rule applied to all aspects of government and politics. These views are described in Madison’s *Federalist Papers Number 10* and *Number 51*.

Federalist Number 51 elaborates on the ways to limit the abuse of government power that is made necessary by human nature. Popular sovereignty is the primary way to limit the abuse of power, and the system of checks and balances (federalism and the separation of powers) is the

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

secondary (or “auxiliary”) limit on the abuse of power. Madison famously wrote that human nature makes government necessary, and makes it necessary to control government:

In *Federalist Number 10*, Madison explained that the Founders created a representative democracy that was not purely majority rule. They believed that the best form of government was one that was based on limited majority rule. The Constitution placed limits on the power of the people to do whatever they wanted. The constitution protected minorities, landowners, wealthier individuals, white males, from majority rule. This is the concept of a constitutional democracy. It is one which combines two conflicting goals: democracy suggests that the people can do as they will. Democracy suggests pure majority rule. Constitutional suggests limits on the power of a majority to do as it wills. It cannot do whatever it wants. This is one of the tensions in the U.S. system of government. Each generation must strive to achieve “that delicate balance” between granting the majority power to do what it wants and limiting majority rule to protect minorities. The Bill of Rights, for example, places limits on the power of the people as expressed in laws passed by Congress.

8.5 | THE NATURE OF PUBLIC OPINION

8.51 | *FORMATION OF PUBLIC OPINION*

One of the most interesting questions about public opinion is how people acquire their beliefs, attitudes, and orientations. Understanding public opinion begins with examining some of the main sources of public opinion, including political socialization, education, life experience, political parties, the media, and the government.

8.52 | *SOCIALIZATION*

Socialization is all the ways that people acquire attitudes, values, and beliefs. Socialization begins early. The agents of socialization include families, schools, friends, religious institutions, workplace colleagues, and the media. Children begin to form political attitudes very early in life. The family is a strong influence on thinking about government and politics. Children do not always or automatically identify with their parents’ ideology or political party but a person’s party affiliation is causally related to their parents. Socialization also occurs in settings other than the family. Some of the other agents of socialization can limit the influence of the family. For example, the fact that many children are now raised in families where both parents work means that the family’s influence has decreased relative to other sources of socialization such as schools, friends, colleagues, and the media.

8.53 | *LIFE EXPERIENCES*

Not all political attitudes are fixed early in life. A person’s adult experiences, desires, or needs can form new attitudes or change old ones. A change in a person’s health can change attitudes about social welfare programs, for example. A change in a person’s economic status, for better or worse, may affect attitudes. Times of general economic prosperity or an individual’s need may shape a person’s thinking about the appropriate role for government in the

economy. Unemployment due to an economic down turn, or riches from entrepreneurial success, can change a person's thinking about the fairness of the marketplace as a mechanism for allocating resources.

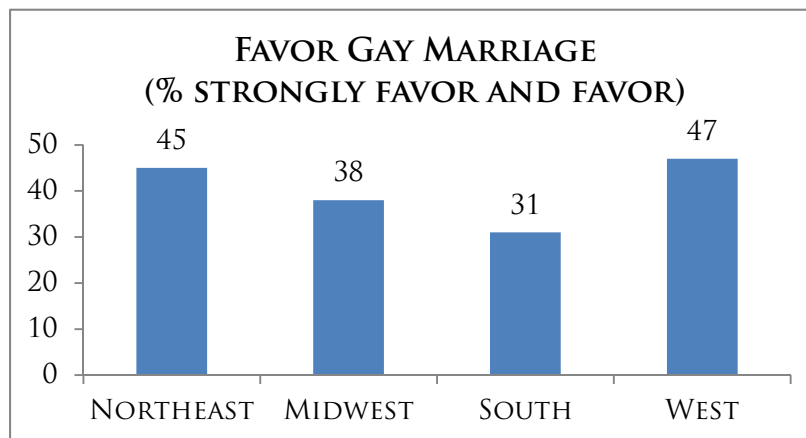
In American politics, economics is one of the factors that have historically divided conservatives and liberals, Republicans and Democrats. A person's work experience as a business owner or manager, or an employee, can affect attitudes toward government and politics. Public opinion about economic issues, such as tax policies and spending policies and government regulation of business, is one of the ways we identify individuals as conservatives, liberals, or populists.

8.54 | EDUCATION

Education is also recognized as one of the major sources of socialization. Students acquire information and attitudes in schools. One of the reasons why issues such as school desegregation, school busing, school prayer, mandatory flag salutes or pledges of allegiance, and curriculum issues such as civics, values, tolerance, and evolution have been so controversial is because public schools have an educational mission and a socialization function. The impact of public schools is not just limited to academics. Educational institutions also play an important role in socialization, which is why school curriculum and policies have been considered worth fighting over.

8.55 | GEOGRAPHY

Regional differences have played an important role in some of the country's most



Pew Forum on Religion & Public Life. "Do you strongly favor, favor, oppose, or strongly oppose allowing gay and lesbian couples to marry legally?" October 9, 2009

important political experiences. Early in the nation's history, the geographic divisions were the result of distinctive economic systems in the northeast (manufacturing and shipping), the south (agrarian and plantation), and the interior frontier. By the middle of the 19th Century, the divisions between the industrial, non-slave North and the agricultural, slave-holding South resulted in the Civil War. The urbanization of the 20th Century produced major

difference of public opinion in urban and rural areas. Political geography still has an effect on attitudes and policy preferences. Generally, people in the Northeast and the West are more likely to support abortion rights, while those in the Midwest and South are more likely to favor restricting access to abortions. As the figure here shows, these regional trends are echoed in the support for gay marriage.

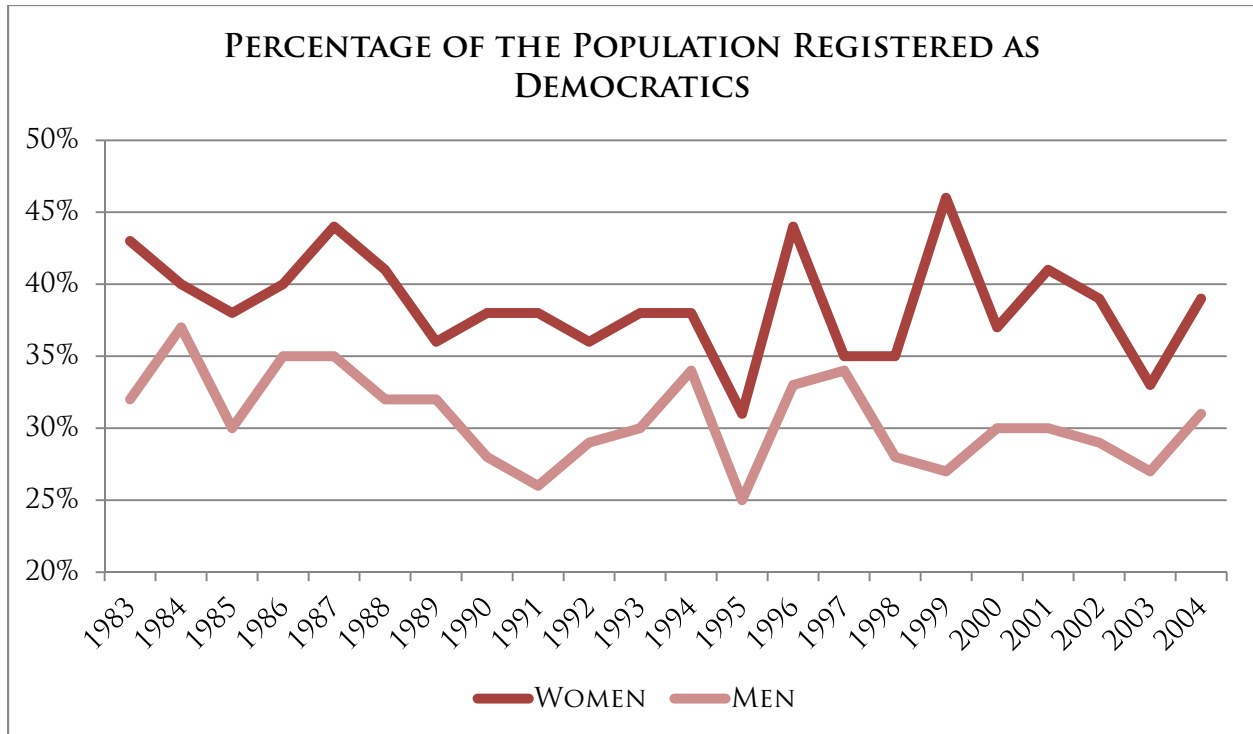
8.56 | RACE AND ETHNICITY

Ethnic and racial groups have differed in their political values throughout our nation's history. African Americans, mobilized by the Republican Party (the party of Lincoln) in post-Civil War period, were excluded from the political system in the South until the Civil Rights movements in the 1950s and 1960s and were eventually won over by the Democratic Party's support for the movement. Currently, African Americans support liberal policies and Democratic candidates.

In the late 1800s and early 1900s, Europeans from countries like Italy, Ireland, Germany, and Poland immigrated in large numbers to the United States. These groups became a part of Franklin Delano Roosevelt's New Deal coalition in the 1930 and they continued to be part of the Democratic Great Society coalition in the 1960s. Since then, however, conservatives such as Ronald Reagan have successfully appealed to these European ethnic groups which were identified as "Reagan Democrats." In recent decades, the political behavior of Hispanics has attracted a great deal of attention because they are the fastest growing ethnic group in the United States. Both the Democratic and Republican parties are interested in securing their political support. But this has been challenging because the term "Hispanic" includes a broad range of people with different backgrounds, experiences, and attitudes. Mexican-Americans, Cuban-Americans, and Puerto Ricans, for example are all considered Hispanic.

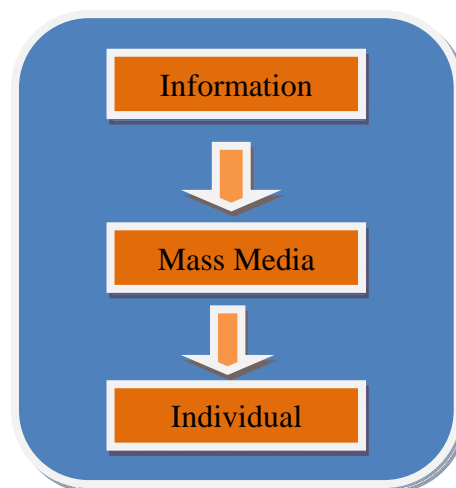
8.57 | GENDER

A person's gender can have a major effect on their political attitudes. During the last thirty years, women have been more likely to support liberal issues and the Democratic Party. The gender difference in party identification is the **gender gap**. Women are more likely to support the Democratic Party and men are more likely to support the Republican Party. Women are also more likely to support affirmative action policies, welfare policies, income assistance, reproductive rights (pro-choice views on abortion), and equal rights for gays and lesbians. Women have voted for the Democratic presidential candidate at a higher rate than men in every presidential election since Jimmy Carter's 1980 bid against Ronald Reagan. Women also register more frequently as members of the Democratic Party. As the figure below shows, the gender gap in party registration fluctuates with the year, but women remain consistently more likely to register as Democrats.



8.55 | THE MEDIA

The media play a large and growing role in modern American society. In 1997, adult Americans spent around thirty hours a week watching television, and children spent even more time watching television.¹ The general consensus that the media have an impact on public opinion masks debates about the nature of that impact. Take, for example, socialization—the process by which individuals acquire information and form attitudes and values. The media are one important source of socialization in the sense that people acquire information and attitudes from the media. The traditional mass media have played an important in “mediating” between individuals and the government. The figure below described the mediating role.



The traditional mass (especially newspapers) (especially the television

The Mediating Role of the Mass Media

media include the print press and the broadcast media and radio networks). The role

the media play in American politics includes *setting the agenda*. The term setting the agenda describes how the media decide what issues the public should be thinking about. The media decide what constitutes “news” that is worth reporting. Media coverage of poverty, the rate of inflation, religion, crime, or national security has an impact on what the public thinks is important as well as how the public thinks about the government’s performance. Media influence on the values and attitudes of minors has been especially controversial. The content of programming, particularly concerning sex and indecent language and violence, has been a political issue for some time. The federal government has undertaken a number of efforts to regulate the content on broadcast networks. Congress has passed legislation regulating programming. The Federal Communications Commission has implemented administrative regulations, including fines, which attempt to control indecent programming on the broadcast networks. And the Supreme Court has ruled on the constitutionality of these legislative and administrative restrictions on programs broadcast over the airwaves. More recently, efforts have focused on the Internet.

Not all of the debate is about the media’s role in making sexually explicit or violent material more widely available. Another issue is the ideology. The ideological bias of the mainstream media is one of the recurring themes of commentary about the political role of the media in modern American society. This issue will be examined in greater detail in the section on the media.

8.56 | THE GOVERNMENT

The government is an important source of public opinion and it has a variety of ways to influence public opinion. Public schools, for example, teach civics—which included attitudes toward government politics. The government is also able to instill patriotic attitudes, and the use of controlled information about national security matters, for example, to influence public opinion. Presidents, for instance, benefit from the “rally around the flag” effect when the country faces a threat. The government’s role in socializing is controversial, however, because it seems to reverse the causal order of democratic theory wherein public opinion determines public policy. And government influence on public opinions is often considered propaganda. Propaganda is one of the normative or value-laden terms like democracy, conservative/liberal, bureaucracy, or terrorism. It is often associated with illegitimate or improper government efforts to influence thinking about politics, such as brain-washing or overly emotional appeals that convinces individuals or groups to support a particular strong leader, a party, or an ideology. But the descriptive, dictionary definition of propaganda is that it is using words or speech intended to convince someone of a political position or point of view. In this sense, propaganda is persuasion or advocacy—which seems central to politics.

Some of the earliest discussions of public opinion were by economists who were interested in the workings of the market place. Adam Smith, the classical economist referred to public opinion in his work, *The Theory of Moral Sentiments* (1759). It is not surprising that economists who think about the role of supply and demand in the marketplace would think about public opinion. The English philosopher Jeremy Bentham also applied the concept of public opinion to thinking about the relationship between the government and the people. Bentham is

associated with the utilitarian philosophy that the political and economic calculation of the public good or public interest is the greatest good for the greatest number. This variation of rule by “king numbers” was rejected by the Founders who did not trust the public enough to give the people direct democracy.

8.6 | IS PUBLIC OPINION A CAUSE OR AN EFFECT?

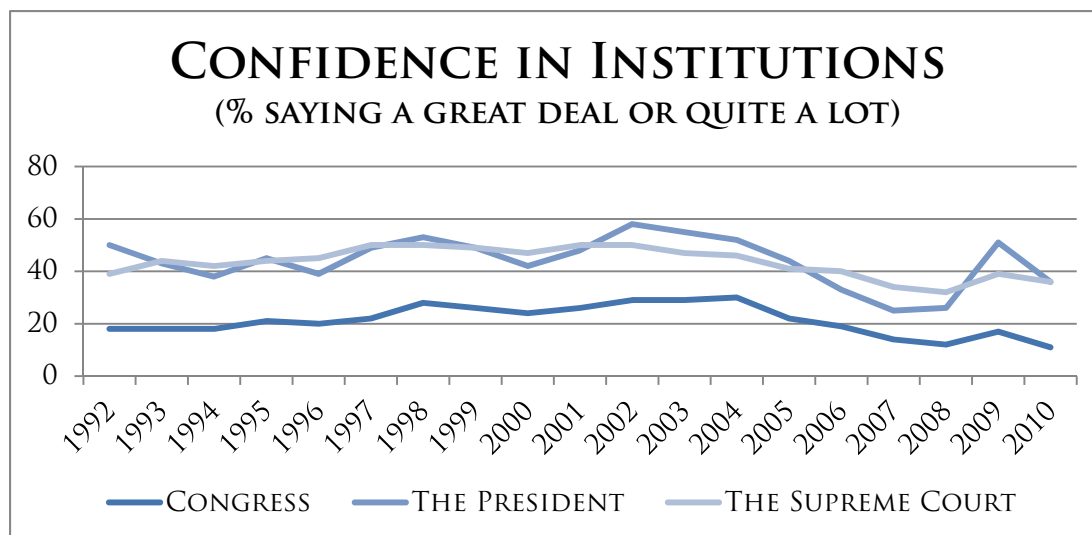
Are attitudes toward government and politics the cause of public policies, or are attitudes (public opinion) the result of other factors? In politics, power is the ability to make another person do what you want. Can political power be used to make a person think what you want? This is an especially important question when the subject is the government.

8.61 | RHETORIC

One important means of public communication is rhetoric. Rhetoric is the art of using language, both public speaking and writing, to communicate, to persuade, or to convince. In the 19th Century rhetoric was taught using collections of memorable political speeches and even “pulpit eloquence” such as *The American Orator*. The *Orator* was an influential book that trained individuals in proper public speaking techniques the way that other books trained people in proper etiquette.

8.63 | DYNAMIC OR STATIC

One of the most important things to remember about public opinion is that it is dynamic, not static. It changes—and perhaps more important, *it can be changed*. Public opinion about the president, for example, is very dynamic and responds to a broad range of factors. Public opinion about congress is more stable, but reflects general public assessments of how congress is performing as a political institution. Public opinion polls such as the [Gallup Poll](#) regularly ask people for their opinion about government.

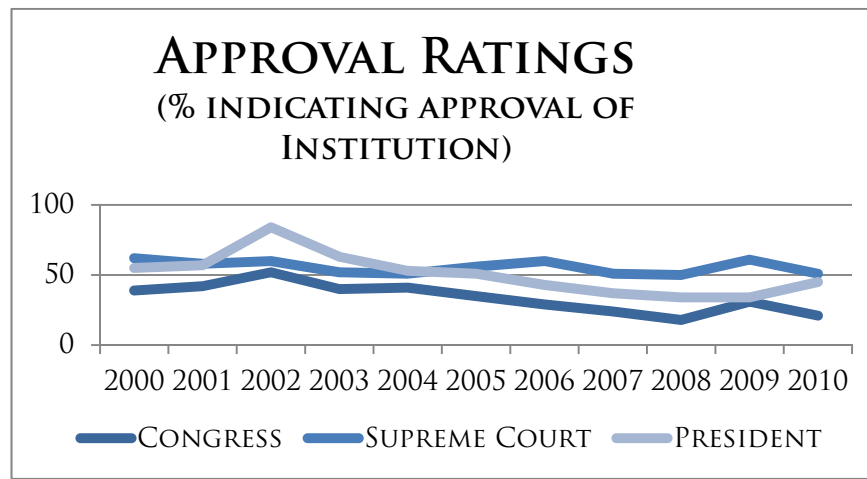


GALLUP 2010 Confidence Poll; “Now I am going to read you a list of institutions in American society. Please tell me how much confidence you, yourself, have in each one -- a great deal, quite a lot, some, or a little”

Sixty-nine

percent of Americans say they have a great deal or fair amount of confidence in the Supreme Court, compared with 50% for Congress and 43% for the president. Public confidence in

Congress and the president has been trending steadily downward for decades. In contrast, public confidence in the Court has remained very stable.²



Political actors, such as candidates for office, government officials, party leaders, interest group leaders, and community activists are not limited to responding to public opinion. Political actors try to influence, change, and even to control public opinion. In government and politics information is power. Information about how people acquire their attitudes can increase the understanding of socialization.

8.64 | THE MARKETPLACE OF IDEAS

Understanding *how* people acquire their attitudes can make it possible to use that information to control *what* people think. This is the essence of the power problem with public opinion. Can public opinion (ideas and attitudes) be manufactured the way material products are made? Can ideas about candidates, parties, and issues be sold the way other products are sold to consumers? The marketplace is a familiar and powerful concept in the United States because the U.S. is a capitalist country where people are very familiar with the idea of a marketplace of goods and services. It is not surprising that the logic of the *economic marketplace* has been applied to politics. The *political marketplace of ideas* refers to the ability to pick and choose from among the competing ideologies and parties the way that consumers are able to pick and choose from among the competing sellers of goods and services.

The application of economic marketplace logic to the political marketplace raises some important questions about the nature of public opinion. One question is about the role of advertising. The conventional economic wisdom is that marketers and advertisers respond to consumer demands for products and services. But modern advertising also creates demand. The ability to create consumer demand, rather than just respond to consumer demands, is one reason why the government regulates the advertising of certain goods and services. Lawyer advertising is regulated by the government. Medical advertising, particularly of drugs, is regulated by the government. Advertising of tobacco products is heavily regulated by the government, particularly advertising campaigns that appeal to minors by using cartoon characters. The [Federal Trade Commission's mission](#) includes regulating business practices that are “deceptive or unfair” to consumers. It has a Bureau of Consumer Protection which prevents “fraud,

deceptive, and unfair business practices in the marketplace.” It investigates complaints about advertising.

8.65 | *THE GOVERNMENT IN THE MARKETPLACE OF IDEAS*

Of course, the government is also in the business of trying to control public opinion rather than merely responding to it. Governments frequently try to control what people think—about the issues, about candidates, about parties, about government officials, and about the government itself. The pejorative term for these efforts is propaganda; the modern term is public relations. In the 1930s and 1940s the government used newly emerging experts (in public relations, advertising, and film) to influence public opinion. An example of these propaganda programs to produce public opinion is the Roosevelt administration’s New Deal WPA program, “[By the People, For the People: Posters from the WPA, 1936-1943](#).” One archive that includes short films that were produced by the government to build popular support for certain public policies, such as the Cold War or military service, is <http://www.archive.org/details/americanorator00cook>. The “moving images” preserved here show government programs to shape the following thinking and behavior:

- For appropriate behavior for young people in the 1950s, watch “How to be a teenage in 1950”;
- For messages encouraging patriotism and support for military service, watch the cartoon “Private Snuffy Smith”; http://archive.org/details/private_snuffy_smith
- For promoting health fears of sexual promiscuity, watch “Sex Madness:” http://archive.org/details/sex_madness
- The WWII removal and detention Japanese living in designated areas of the west coast of the U.S.: <http://www.youtube.com/watch?v= OiPldKsM5w>

<http://www.youtube.com/watch?v=PMrzGauQJdk>

8.66 | *Nature or Nurture?*

Are political ideas something that an individual is born with or something that is acquired? Much of public opinion about government and politics is the result of nurture not nature; it is acquired through experience or learned from family, friends, school, and work. This is one reason why it is considered important for a democracy to provide equal access to information, public discourse about current events, and rational debates about political alternatives. Access to information ensures that individuals have an equal right to participate in politics—regardless of whether that right is actually exercised.

Public opinion is subject to manipulation by a variety of elites, governmental and non-governmental. The Declaration of Independence asserted that all men were created equal and endowed by their Creator with certain unalienable rights. This declaration of equality is generally understood to mean that each individual has legal and political equality, or the same rights rather than having rights based on status or power.

8.7 | DEMOCRATIC THEORY AND POLITICAL REALITY

The relationship between public opinion and public policy is more complicated than simply “public opinion causes or determines public policy.” In most modern, western-style democracies, there are ongoing debates about the degree to which public opinion matters, the degree to which public opinion determines public policy. Critics of modern democracy argue that a group of elites, either officials in government or those individuals or organizations that are outside government with more money, power, or access to resources, essentially control public opinion and make public policy for their special interests, not the general public. Supporters of modern democracy acknowledge that not everyone has equal resources, and that wealth and power are unequally distributed. But they argue that power is sufficiently spread around so that no single set of elites—the wealthy, powerful, informed, or even government—can control public opinion and dominate the political process. These supporters of modern democracy are generally pluralists. Pluralists maintain that there are many elites and many groups that compete for influence, but which are unable to control public opinion or dominate the political process.

8.71 | *The Premise of Democratic Theory*

The premise (or basic assumption) of democratic theory is that an informed public makes choices about government officials and public policies. In other words, democratic theory assumes that elections determine who governs and what policies will be enacted into law. This is the argument that democratic government is legitimate because its authority is based on the consent of the governed. Is this assumption valid? There is empirical evidence that the assumption of an informed public is mistaken. Public opinion polls indicate that the American public is not well-informed about public affairs, candidates, or issues. Civics knowledge is rather low. The average voter has little information about public affairs, including the names of their representatives in city government, county government, state legislature, or congress. People do not pay much attention to

Think About It!

“Are You Smarter Than A 5th Grader?” Is Kelly Pickler?

<http://www.youtube.com/watch?v=Cey35bBWXls>

politics. More attention is paid to social and cultural activities such as entertainment and sports than politics. The low levels of information about politics are the result of apathy (disinterest), the belief that participation in politics does not really matter very much (low levels of efficacy), time constraints (being busy with families and work). People have other priorities for allocating their scarce resources (time, effort, and money). It is much easier for professionals—people who have white collar jobs or information-related jobs such as journalism or academia—to keep up with public affairs than people who have blue collar jobs or jobs that do not involve working with information. There are information costs associated with becoming well-informed about public affairs and keeping up with the issues.

8.8 | MEASURING PUBLIC OPINION

8.81 | *POLLING*

Public opinion polling is one of the facts of modern life. Gallup polls are a familiar feature of modern politics. The widespread use of public opinion measurement around the world

is evidence of the belief that public opinion is important for political and other purposes. Governments find surveys to be useful tools for gathering information about what the public thinks, for guiding public information and propaganda campaigns, and for formulating public policies. The US Department of Agriculture was one of the first government agencies to sponsor systematic and large scale surveys. It was followed by many other federal bodies, including the US information agency which has conducted opinion research throughout the world. It is frequently measured using survey sampling.

An opinion poll is a survey of opinion from a particular sample. Opinion polls are usually designed to represent the opinions of a population by asking a small number of people a series of questions and then extrapolating the answers to the larger group within certain confidence intervals.

8.82 | HISTORY



The first known example of an opinion poll was a local straw vote conducted by *The Harrisburg Pennsylvanian* in 1824. It showed Andrew Jackson leading John Quincy Adams by 335 votes to 169 in the contest for the presidency. This straw vote was not scientific. But straw votes became popular in local elections. In 1916, the *Literary Digest* conducted a national survey as part of an effort to increase circulation. The straw vote correctly predicted Woodrow Wilson's election as president. The *Digest* correctly called the following four presidential elections by simply mailing out millions of postcards and counting

the returns. In 1936, the *Digest's* 2.3 million "voters" constituted a very large sample, but the sample included more affluent Americans who tended to support the Republican Party. This biased the results. The week before the election the *Digest* reported that Republican Alf Landon was far more popular than Democrat Franklin D. Roosevelt. At the same time, George Gallup conducted a much smaller, but more scientifically-based survey. He polled a demographically representative sample, and correctly predicted Roosevelt's landslide victory in the 1936 presidential election. The *Literary Digest* soon went out of business. The polling industry gained credibility and public opinion polling began to play a more important role in politics, particularly campaigning.

But public opinion polling has changed. In a 1968 book, *The Pulse of Democracy*, George Gallup and Saul Rae described public opinion polling as **taking** the pulse of democracy. By this, they meant that polling used social scientific methods to try to accurately measure what the public was thinking about public affairs. Today, polling is more likely to be conducted for the purpose of **making** the pulse of democracy, using social scientific methods to make public opinion. This is the argument made by David W. Moore in *The Opinion Makers* (2008). This change in the way information about how and what people think is used is directly related to the power problem with public opinion.

8.83 | METHODS

In the early days of public opinion polling, polls were conducted mainly by face-to-face interviews (on the street or in a person's home). Face-to-face polling is still done, but telephone polls have become more popular because they can be conducted quickly and cheaply. However, response rates for phone surveys have been declining. Some polling organizations, such as [YouGov](#) and [Zogby](#) use Internet surveys, where a sample is drawn from a large panel of volunteers and the results are weighed to reflect the demographics of the population of interest. This is in contrast to popular web polls that draw on whoever wishes to participate rather than a scientific sample of the population, and are therefore not generally considered accurate.

The wording of a poll question can bias the results. The bias can be unintentional (accidental) or intentional. For instance, the public is more likely to indicate support for a person who is described by the caller as one of the "leading candidates." Neglecting to mention all the candidates is an even more subtle bias, as is lumping some candidates in an "other" category. Being last on a list affects responses. In fact, this is one reason why election rules provide for listing candidates in alphabetic order or alternating Republican and Democratic candidates. When polling on issues, answers to a question about abortion vary depending on whether a person is asked about a "fetus" or an "unborn baby."

All polls based on samples are subject to sampling error which reflects the effects of chance in the sampling process. The uncertainty is often expressed as a margin of error. The margin of error does not reflect other sources of error, such as measurement error. A poll with a random sample of 1,000 people has margin of sampling error of 3% for the estimated percentage of the whole population. A 3% margin of error means that 95% of the time the procedure used would give an estimate within 3% of the percentage to be estimated. The margin of error can be reduced by using a larger sample, however if a pollster wishes to reduce the margin of error to 1% they would need a sample of around 10,000 people. In practice pollsters need to balance the cost of a large sample against the reduction in sampling error and a sample size of around 500-1,000 is a typical compromise for political polls.³

- **Nonresponse bias.** Some people do not answer calls from strangers, or refuse to respond to polls or poll questions. As a result, a poll sample may not be a representative sample from a population. Because of this selection bias, the characteristics of those who agree to be interviewed may be markedly different from those who decline. That is, the actual sample is a biased version of the universe the pollster wants to analyze. In these cases, bias introduces new errors that are in addition to errors caused by sample size. Error due to bias does not become smaller with larger sample sizes. If the people who refuse to answer, or are never reached, have the same characteristics as the people who do answer, the final results will be unbiased. If the people who do not answer have different opinions then there is bias in the results. In terms of election polls, studies suggest that bias effects are small, but each polling firm has its own formulas on how to adjust weights to minimize selection bias.
- **Response bias.** Survey results may be affected by response bias. Response bias is when a respondent gives answers that not reflect his or her actual beliefs. This occurs for a variety of reasons. One reason is that a respondent may feel pressure not to give an unpopular answer. For example, respondents might be unwilling to admit to socially unpopular attitudes such as racism, sexism, or they may feel pressure to identify with socially or politically popular attitudes such as patriotism, civic activism, or religious

commitment. For these reasons, a poll might not reflect the true incidence of certain attitudes or behaviors in the population. Response bias can be deliberately engineered by pollsters in order to generate a certain result or please their clients. This is one of the reasons why the term pollster suggests huckster, or a con artist. Even respondents may deliberately try to manipulate the outcome of a poll by advocating a more extreme position than they actually hold in order to support a position that they identify with. Response bias may also be caused by the wording or ordering of questions.

- **Question wording.** The wording of the questions, the order in which questions are asked, and the number and form of alternative answers offered influence results of polls. Thus comparisons between polls often boil down to the wording of the question. For some issues the question wording can produce pronounced differences between surveys. These differences could be caused by respondents with conflicted feelings or the fact that attitudes are evolving. One way in which pollsters attempt to minimize this effect is to ask the same set of questions over time, in order to track changes in opinion. Another common technique is to rotate the order in which questions are asked. One technique is the split-sample, where there are two versions of a question and each version presented to half the respondents.
- **Coverage bias.** Coverage bias is another source of error is the use of samples that are not representative of the population as a consequence of the methodology used, as was the experience of the *Literary Digest* in 1936. For example, telephone sampling has a built-in error because people with telephones have generally been richer than those without phones. Today an increased percentage of the public has only a mobile telephone. In the United States it is illegal to make unsolicited calls to phones where the phone's owner may be charged simply for taking a call. Because pollsters are not supposed to call mobile phones, individuals who own only a mobile phone will often not be included in the polling sample. If the subset of the population without cell phones differs markedly from the rest of the population, these differences can skew the results of the poll. The relative importance of these factors remains uncertain today because polling organizations have adjusted their methodologies to achieve more accurate election predictions.

8.9 | COMPARATIVE PUBLIC OPINION

Many of the issues that political scientists have identified as most important to understanding American government and politics are not unique to the United States. The comparative study of public opinion reveals the similarities and differences in how the peoples of the world think about politics and government.

8.91 | *THE WORLD VALUES SURVEY*

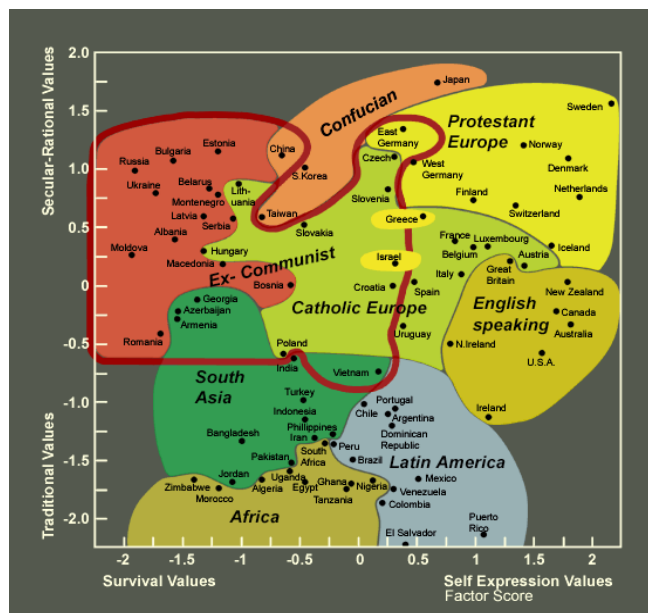
One source of comparative information about public opinion is the [World Values Survey](#). The World Values Survey developed from the European Values Study (EVS) in 1981 which covered only 22 countries worldwide. [Ronald Inglehart](#) (The University of Michigan) is a leading figure in the extension of the surveys around the world. The survey was repeated after an interval of about 10 years in then again in a series of “waves” at approximately five year intervals. The

WVS was designed to provide a longitudinal and cross-cultural measurement of variation of values. The European origin of the project made the early waves of the WVS Eurocentric and notable for their especially weak representation in Africa and South-East Asia. In order to overcome this bias by becoming more representative, the WVS opened participation to academic representatives from new countries that met certain minimal survey standards. They could then exchange their data with the WVS in return for the data from the rest of the project. As a result, the WVS expanded to 42 countries in the 2nd wave, 54 in the 3rd wave and 62 in the 4th wave. Today the WVS is an open source database of the WVS available on the Internet. The Secretariat of the WVS is based in Sweden. The official archive of the World Values Survey is located in [ASEP/JDS] (Madrid), Spain.

The global World Values Survey consists of about 250 questions resulting in some 400 to 800 measurable variables. One of the variables measured is Happiness. The comparative “Perceptions of Happiness” are widely quoted in the popular media. Does the U.S. get a smiley face? The popular statistics website [Nationmaster](#) also publishes a simplified world happiness scale derived from the WVS data. The WVS website allows a user to get a more sophisticated level of analysis such as comparison of happiness over time or across socio-economic groups. One of the most striking shifts in happiness measured by the WVS was the substantial drop in happiness of Russians and some other Eastern European countries during the 1990s.

8.93 | THE INGLEHART MAP

Another result of the WVS is the Inglehart Map. A number of variables were condensed into two dimensions of cultural variation (known as “traditional v. secular-rational” and “survival v. self-expression”). On this basis, the world's countries could be mapped into specific cultural regions because these two dimensions purportedly explain more than 70 percent of the cross-national variance. The WVS also found that trust and democracy were values that crossed most cultural boundaries.



The Inglehart Map of the World

8.94 | RELIGION AND ECONOMIC DEVELOPMENT

The Pew Research Center’s Global Attitudes Project has examined the relationship between a country’s wealth and its religiosity. The results show that countries with a high per capita income tend to score low on religiosity.⁴

8.95 | WEB SOURCES

One valuable source of information about American public opinion, voting, and political participation is the “American National Election Studies” information available at <http://www.electionstudies.org/>

Public speaking continues to be an important influence on public opinion. An electronic source of important public speeches, including the “top 100” American speeches, as well as memorable film speeches, is the Web site <http://www.americanrhetoric.com/>. This Web site includes audio and video recordings of some of the most important American political speeches. Another resource which has archived some of the most memorable political speeches in the nation’s history is the American Rhetoric: Top 100 Speeches Web site. See, for example, the famous Goldwater Speech delivered at the Republican Party Convention in 1964. <http://www.americanrhetoric.com/speeches/barrygoldwater1964rnc.htm>

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8.97 | TERMS

Public Opinion
 Delegate Model
 Trustee Model
 Republic
 Gender Gap
 Marketplace of
 Ideas

8.98 | STUDY QUESTIONS

1. How does race and ethnicity influence public opinion?
2. Looking at your own upbringing, in what ways were you socialized? Be sure to discuss specific people and events and how they shaped your political beliefs.
3. Define public opinion and discuss early efforts to measure it.
4. How do we measure public opinion? Be sure to discuss the different methods and their strengths and weaknesses.
5. The authors of the *Federalist Papers* noted that “all government rests on public opinion.” What did they mean by this claim? Do you agree with them?

Willem E. Saris and
 Paul M.
 Sniderman (eds).

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¹ Statistical Abstract of the United States, 1997 (Washington, DC: Government Printing Office, 1997), 1011.

² Survey Methods: Results are based on telephone interviews with 1,010 national adults, aged 18 and older, conducted Sept. 14-16, 2007. For results based on the total sample of national adults, one can say with 95% confidence that the margin of sampling error is ± 3 percentage points. In addition to sampling error, question wording and practical difficulties in conducting surveys can introduce error or bias into the findings of public opinion polls.

³ Note that to get 500 complete responses it may be necessary to make thousands of phone calls.

⁴ <http://people-press.org/reports/display.php3?ReportID=167>

CHAPTER 10: POLITICAL PARTICIPATION



1960 Democratic National Convention

10.0 | Political Participation

One of the most important, and difficult, political questions is why governments have authority over individuals. Why can the government (or the *community* or the *majority*)

tell people what to do and what not to do? This is the power problem stated in its simplest terms. In theory, democracy addresses this aspect of the power problem through *self-government*. Self-government requires the participation of an active and engaged citizenry. This chapter examines how voting, elections, and campaigns organize participation in politics and government in order to solve the problems that people expect government to solve. Political participation is not limited to voting. Good citizenship, full citizenship, is active and engaged citizenship. Efforts to increase political participation have resulted in a movement to increase civic engagement. The term **civic engagement** refers to a broad range of individual or collective actions that are intended to address issues of public concern. Civic engagement includes volunteerism, working with organizations, and participation in the electoral process. The latter part of this chapter provides examples of how to “do” civic engagement. The chapter begins with voting.

10.1 | Voting

Voting is one of the ways that citizens participate in a democracy. Voting is just one form of political participation. There are many other ways to participate in politics: writing a letter to a newspaper; posting to a Web site; making a campaign contribution; contacting a legislator; running for office; campaigning for a candidate; or lobbying government. But voting is the form of political participation that is most closely associated with meeting the responsibilities of citizenship because voting is an act of self-government. Voters select government officials to represent them and cast votes for or against issues that are on the ballot. There are many other forms of political participation: running for

office, making campaign contributions, working for a party or candidate or issue, lobbying, or contacting government officials about an issue or problem which interests you. Even non-voting—the intentional refusal to participate in an election as a protest against the political system or the candidate or party choices that are available—can be a form of political participation. All these forms of participation are components of political science measures of how democratic a political system is.

10.11 | *Expanding the right to vote*

One of the most important developments in the American system of government has been the expansion of the right to vote. Over time, politics has become much more democratic. The Founders provided for a rather limited right to vote because they were skeptical of direct democracy and the ability of the masses to make good decisions about public policy or government leaders. In fact, the Founders were divided on how much political participation, including voting, was desirable. The Federalists generally advocated limited participation where only white male property owners could vote. A leading Federalist, Alexander Hamilton, advocated a system of representative government that resembled “a natural aristocracy” that was run by “gentlemen of fortune and ability.”¹

The [Anti-federalists](#) advocated broader participation. The Anti-federalist author writing under the name *The Federal Farmer* defined democratic participation as full and equal representation: “full and equal

“The vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men.”

Lyndon B. Johnson

“Always vote for principle, though you may vote alone, and you may cherish the sweetest reflection that your vote is never lost.”

John Quincy Adams

representation is that in which the interests, feelings, opinions, and views of the people are collected, in such a manner as they would be were all the people assembled.” The Anti-federalist *Republicus* advocated an American democracy that provided for “fair and equal representation,” which he defined as a condition where “every member of the union have a freedom of suffrage and that every equal number of people have an equal number of representatives.”

Over time the right to vote was greatly expanded and the political system became much more democratic. Abraham Lincoln’s *Gettysburg Address* is a memorable political speech because of what it said about democracy and equality. Lincoln famously defined democracy as government *of* the people, government *by* the people, and government *for* the people. He also brought equality back into American political rhetoric by emphasizing the political importance of equality that was first stated so memorably in the Declaration of Independence. The Declaration of Independence asserted that all men were created equal and endowed with unalienable rights. The Constitution did not include equality as a political value. It provided for slavery and allowed the states to limit the right to vote. The right to vote was expanded by constitutional amendments and by legislation. The constitutional changes included the following amendments:

- The 14th Amendment (1868) prohibited states from denying to any person with their jurisdiction the equal protection of the laws.
- The 15th Amendment (1870) prohibited states from denying the right to vote on the basis of race.
- The 17th Amendment (1913) provided for direct election of Senators.
- The 19th Amendment (1920) gave women the right to vote.
- The 24th Amendment (1964) eliminated the Poll Tax.
- The 26th Amendment (1971) lowered voting age to 18.



One of the most important *statutory* expansions of the right to vote is the [Voting Rights Act of 1965](#). It made racial discrimination in voting a violation of federal law; specifically, outlawing the use of literacy tests to qualify to register to vote, and providing for federal registration of voters in areas that had less than 50% of eligible minority voters registered. The Act also provided for Department of Justice oversight of registration, and required the Department to approve any change in voting law in districts that had used a “device” to limit voting and in which less than 50% of the population was registered to vote in 1964. The [Civil Rights Act of 1964](#) is a landmark civil rights statute that also expanded the right to vote by limiting racial discrimination in voting.

In addition to these government actions, the political system also developed in ways that expanded the right to vote and made the system more democratic. The emergence of political parties fundamentally changed the American political system. Political parties changed the way the president is chosen by effectively making the popular vote, not the Electoral College, determine who wins the presidency. There have been notable exceptions to the rule that the candidate who receives the most popular votes wins the election (the presidential elections of 1824, 1876, 1888) and 2000), but modern political culture includes the expectation that the people select the president.

10.12 | *How democratic is the United States political system?*

Democracy is a widely accepted value in the U.S. and elsewhere in the world. As more nations adopt democratic political systems, political scientists are paying attention to *whether* a country’s political system is democratic as well as *how democratic* the political system is. Democracy is not an either/or value. There are degrees of democracy: a political system can be more or less democratic. Non-governmental organizations such as [Freedom House](#) and publications such as *The Economist* have developed comparative measures of how democratic a country’s political system is. *The Economist* ranks the U.S. as 17th in the world.² This is a surprisingly low ranking for a nation that extols the value of democracy and promotes it worldwide. The low ranking on democracy is due to several factors:

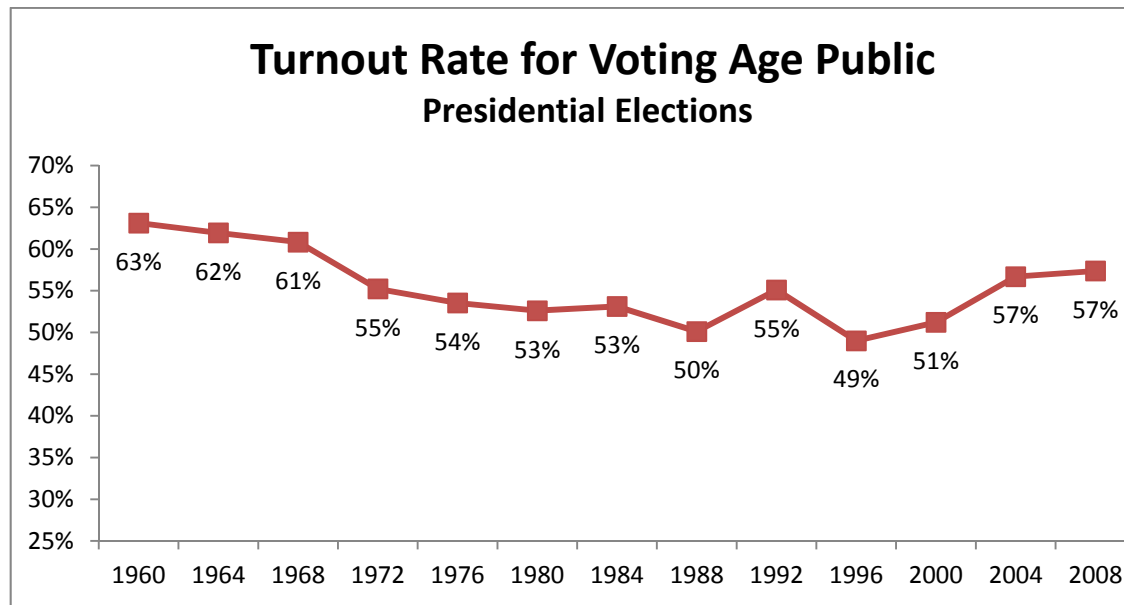
- Voter Turnout. The U.S. has comparatively low rates of voter turn-out. European countries, for example, have much higher rates of voting.
- A Presidential System. The U.S. has developed into a system of presidential governance system where executive power is dominant rather than the more democratic legislative or parliamentary systems.
- National Security. The U.S. has developed extensive provisions for secrecy and national security and emergency powers which are hard to reconcile with democratic values.

10.13 | *Voter Turnout*

Voter turnout is the proportion of the voting-age public that participates in an election. Voter turnout is a function of a number of *individual* factors and *institutional* factors. Voter turnout is low in the United States. What does low mean? In many elections, less than half of the eligible voters participate in the election. The graph below shows the turnout rate for presidential elections from 1960 to 2008.

Think About It!

Should the U.S. try to increase voter turnout by either paying people to vote or by fining (or otherwise sanctioning) eligible voters who do not vote?



Voter turnout is also low compared to other western industrial democracies. Why is U.S. voter turnout low in absolute numbers (less than half) and comparatively? Some of the explanations focus on the individual while others focus on the electoral system.

10.14 | *Individual Explanations*

The individual explanations focus on an individual's motivations. The two main models of individual explanations for voting behavior are the rational choice model and the civic duty model.

The **rational choice** model of voting was developed by Anthony Downs, who argued that individuals are self-interested actors who use a cost-benefit analysis to determine whether it is in their self-interest to vote.³ According to the rational choice model, a person's decision whether to vote is based on an individual's assessment of whether the vote will affect the outcome of the election, the expected benefit of voting and not voting, and the sense of civic duty (the personal gratification or satisfaction from voting). The rational choice model is based on the assumptions in economic models of human behavior.

The **civic duty** model describes non-material, non-rational incentives for voting. According to the civic duty model, a person votes out of a sense of responsibility to the political unit, or a commitment to democratic government and the obligations and duties as well as the rights of citizens to maintain self-government. Patriotic values and the commitment to the community or society are familiar expressions of civic duty.

In order to vote, the probability of voting, times the benefit of vote, plus the sense of duty to vote must outweigh the cost (in time, effort, and money) of voting. As the probability of a vote mattering in a federal election almost always approaches zero (because more than 100,000,000 votes are cast), duty becomes the most important element in motivating people to vote. According to the rational choice model, a person will vote if they think it is worth it; a person will not vote if they think it is not worth it.

According to this cost-benefit ratio, it may be rational not to vote. An individual with a greater commitment to civic duty or responsibility will weigh the relative costs differently and may conclude that voting is worth it.

The concept of political efficacy is central to understanding voting behavior. **Political efficacy** is the belief that one's participation matters, that one's decision to vote really makes a difference. What is the likelihood that one vote will matter in a presidential election where more than 100, 000,000 votes are cast? The rational choice model suggests that voter turnout in the United States is low because individuals have thought about whether or not to vote and simply concluded that it is not worth their time and effort and money to vote.

Demographic factors affect whether or not someone turns out to vote. Demographic factors that are related to voter turn-out include income, education, race and ethnicity, gender, and age. Wealthy citizens have higher rates of voter turnout than poor citizens. *Income* has an effect on voter turnout. Wealthy citizens have higher levels of political efficacy and believe that the political works and their votes will count. On the other hand, people that make less money and have less wealth are less likely to believe that the political system will respond to their demands as expressed in elections. *Race* is also related to voter turnout. Whites vote at higher rates than minorities. *Gender* is also related to voter turnout. Women voted at lower levels than men for many years after gaining suffrage with the passage of the 19th Amendment in 1920, but today women vote at much higher levels than men do. *Age* is also important. There is a strong relationship between age and voter turnout. Older people vote at higher levels than younger people do, which helps explain why candidates for office and government officials are so sensitive to issues that affect seniors (such as reducing spending on Social Security or Medicare).

10.15 | System Explanations

The system explanations focus on aspects of the political system that affect voter turnout. These system factors include voter registration laws, the fact that elections are usually held on one day during the week, the large number of elections in our federal system, and the two-party system.

Eligibility. A person's eligibility for voting is provided for in the U.S. Constitution, state constitutions, and state and federal statutes. The Constitution states that suffrage cannot be denied on grounds of race or color (Fifteenth Amendment), sex (Nineteenth Amendment) or age for citizens eighteen years or older (Twenty-sixth Amendment). Beyond these basic qualifications, the states have a great deal of authority to determine eligibility and to run elections. Some states bar convicted criminals, especially felons, from voting for a fixed period of time or indefinitely. The [National Conference of State Legislatures](#) reports on felon voting rights in the states. The [Sentencing Project reports](#) that 5.8 million Americans are disenfranchised, denied the right to vote, because of a felony conviction. State felon voting laws have a disproportionate impact on African-Americans: one out of 13 African-Americans are ineligible to vote because of a felony conviction.

Voter Registration. Voter registration is the requirement that a person check in with some central registry in order to be allowed to vote in an election. In the U.S., the individual is responsible for registering to vote—sometimes well before the actual election. Furthermore, each state has different voter registration laws and moving from one state to another state requires reregistering to vote.⁴ These registration laws reduce voter turnout. In some countries, the government registers eligible voters and actually fines eligible voters who do not perform their civic duty to vote in an election.

Think About It!

What should you expect when you show up at the polls to vote?

“What to Expect Before Heading to the Polls”

<http://www.npr.org/templates/story/story.php?storyId=96538073>

Voter Fatigue. Voter fatigue is the term for the apathy that the electorate can experience when they are required to vote too often in too many elections. The U.S. has a large number of government units (around 90,000) and Americans elect a large number of government officials—around one for every 442 citizens. Having a large number of elections—in the U.S. there is always an election somewhere—can reduce voter turnout.

The Two-party System. Finally, the two-party system can contribute to low voter turnout by increasing the sense that an individual’s vote does not matter very much. In two-party systems, the parties tend to be primarily interested in winning elections. In order to win elections, the parties tend to compete for moderate voters with middle-of-the-road appeals because most of the voters are by definition centrists rather than extremists. This

can be a winning electoral strategy, but it sometimes leaves voters thinking there isn’t much real difference between the two major parties which compete by “muddling in the middle.” Why vote if there is no real choice between the two candidates or parties? The two major American political parties tend to be interested primarily in winning elections, and only secondarily in advocating ideologies or issues. In contrast, countries with multiple party systems are more likely to have *rational* political parties. As used here, a rational party is one whose primary goal is advancing ideas, issues, or ideology; winning an election is secondary.

Listen to Southern Democrat [Huey Long’s critique](#) of the Democratic and Republican Parties in the 1940 presidential election. George C. Wallace, the former Governor of Alabama and 1968 presidential candidate of the American Independent Party, famously said of the Democratic and Republican candidates for president: there is “not a dime’s worth of difference between them.”⁵ Does it matter whether one votes for a Republican or Democrat when there really isn’t much choice in a two-party system where the major parties don’t differ much on the issues?

Election Tuesday? Why does the U.S. have elections on a Tuesday? The reason for [Tuesday elections](#) goes back to the days of horses and buggies when Monday elections would require traveling on the Sabbath and Wednesday was market day. So in 1845 Congress provided for Tuesday elections. Would changing from one-weekday elections to two-day weekend elections increase voter turnout by making it easier for people to fit voting into busy family and work schedules? It has in some countries. The U.S. has comparatively [low rates of voter turnout](#) but bills to change to weekend voting die in

committee in Congress. Some states now allow early voting and a significant percentage of votes are now cast before prior to the day of the election. Should technology such as electronic voting be used to increase voter turnout?

10.2 | Elections

Elections are one way for people to participate in the selection of government officials. Elections also provide a means of holding government officials accountable for the way they use their power. Participation and accountability are two of the main reasons why elections are a measure of *whether* a political system is democratic and *how democratic* it is. In most cases, it is not as useful to describe a political system as democratic or non-democratic as it is to determine how democratic it is. Many countries of the world have political systems that are more or less democratic. Some countries are more democratic than others. The existence of free, open, and competitive elections is one measure of whether a country's political system is democratic.

10.21 | Three Main Purposes

Elections serve three main purposes in representative democracies (or republics, like the U.S.):

- **Selecting government officials.** The most basic purpose of an election in a democratic system is to select government officials. Elections provide an opportunity for the people to choose their government officials. The fact that voters choose their representatives is one of the ways that democratic or republican systems of government solve the power problem. Voting is part of self-government.
- **Informing government officials.** Elections also provide government officials with information about what the people want, what they expect, and what they think about government. Elections provide an opportunity for the voice of the people to be expressed and heard. Elections thus serve as one of the ways to regularly measure public opinion about issues, political parties, candidates, and the way that government officials are doing their jobs.
- **Holding government accountable.** Elections provide regular or periodic mechanisms for holding elected representatives, other government officials, and even political parties accountable for their actions while in power. The Founders of the U.S. system of republican government provided for elections as part of the system of checks and balances.

The political scientists who study voting and elections describe two theories of elections. One theory is the elections are **forward looking** in the sense that an election provides government officials with information about which direction the public wants the government to go on major issues. The second theory is that elections are **backward looking** in the sense that an election provides government officials with feedback about what has been done—in effect, an election is a referendum on government officials or the political party in power.

10.22 | *Too Much of a Good Thing?*

In the U.S., voters go to the polls to elect national government officials at all levels of government: national, state, and local. Voters indirectly elect the President (through selection by the Electoral College). Voters directly elect the members of the House of Representatives and the Senate. Voters directly elect state government officials such as governors, legislators, the heads of various executive departments, and in many states judges. And voters elect local government officials such as county commissioners, school board members, mayors and city council members, and members of special governing districts such as airport authorities. In addition, most states provide for referendums, elections where voters decide ballot issues. With

more than 90,000 total government units in the U.S., elections are being held somewhere for some office or for some ballot measure almost all the time. Across the whole country, more than one million elected offices are filled in every electoral cycle.

Think about it!

Do we have too many elections?

10.23 | *Initiative and Referendum*

Elections are not limited to those that involve the selection of government officials. In the U.S., many state and local governments provide for ballot initiatives and referendum. A ballot initiative is an election where the voters decide whether to support or reject a proposed law. A referendum is an election where the voters go to the polls to approve or reject a law that has been passed by the state legislature or a local government body. The people vote for or against issues such as state constitutional amendments, county charters, or city charter provisions and amendments.⁶

The increased use of initiatives and referenda in states such as California has raised questions about whether direct democracy is preferable to indirect or representative democracy. In a representative democracy, the elected representatives of the people make the laws; in a direct democracy, the people make the laws. The recent trend toward initiatives and referendum has attracted the attention of people who study American politics. One organization that monitors and reports on what is happening in the states is the [Ballot Initiative Strategy Center](#). This Center acts as a “nerve center” for “progressive” or liberal ballot initiatives in the states. The [Initiative and Referendum Institute](#) (IRI) at the University of Southern California studies ballot initiatives and referendums in the U.S. and elsewhere in the world. Technology has made it possible to use this form of direct democracy to make the political system more democratic by allowing the public more opportunities to participate in the adoption of the laws that government them.

10.24 | *Regulating Elections*

Elections are regulated by both federal and state law. The U.S. Constitution provides some basic provisions for the conduct of elections in Articles I and II. Article I, Section Four provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Chusing Senators.” The 13th, 14th, and 15th Amendments also regulate elections by

prohibiting states from discriminating on the basis of race or gender. The 15th Amendment states that the “right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”

However, most aspects of electoral law are regulated by the states. State laws provide for the conduct of primary elections (which are party elections to determine who the party’s nominee will be in the general election); the eligibility of voters (beyond the basic requirements established in the U.S. Constitution); the running of each state’s Electoral College; and the running of state and local elections.

10.25 | *Primary and General Elections*

Election campaigns are organized efforts to persuade voters to choose one candidate over the other candidates who are competing for the same office. Effective campaigns harness resources such as volunteers; money (campaign contributions); the support of other candidates; and endorsements of other government officials, interest groups and party organizations. Effective campaigns use these resources to communicate messages to voters.

Political parties have played a central role in election campaigns for most of the nation’s history. However, during the last 30 years there has been an increase in candidate-centered campaigns and, more recently, independent organizations (such as super-PACS). Candidates who used to rely on political parties for information about voter preferences and attitudes now conduct their own public opinion polls and communicate directly with the public.

Before candidates can seek election to a partisan political office, they must get the nomination of their party in the **primary election**. A campaign for a non-partisan office (one where the candidates run without a party designation on the ballot), does not require getting the party nomination. A primary election is an election to determine who will be the party’s nominee for office. A general election is the election to actually determine who wins the office. A primary election is typically an intra-party election: the members of a party vote to determine who gets to run with the party label in the general election. A general election is typically an inter-party election: candidates from different parties compete to determine who wins the office. Most state and local political parties in the United States use primary elections (abet with widely varying rules and regulations) to determine the slate of candidates a party will offer in the general election. More than forty states use only primary elections to determine the nomination of candidates, and primaries play a prominent role in all the other states.

There are four basic types of primary elections: **closed primaries**, **open primaries**, **modified closed primaries**, and **modified open primaries**. Closed primaries are primary elections where voters are required to register with a specific party before the election and are only able to vote in the party’s election for which they are registered. Open primary elections allow anyone who is eligible to vote in the primary election to vote for a party’s selection. In modified closed primaries, the state party decides who is allowed to vote in its primary. In modified open primaries, independent voters and registered party members are allowed to vote in the nomination contest.

10.3 | National Elections

The United States has a presidential system of government. In presidential systems, the executive and the legislature are elected separately. Article I of the U.S. Constitution requires that the presidential election occur on the same day throughout the country every four years. Elections for the House of Representatives and the Senate can be held at different times. Congressional elections take place every two years. The years when there are congressional and presidential elections are called presidential election years. The congressional election years when a president is not elected are called midterm elections.

The Constitution states that members of the United States House of Representatives must be at least 25 years old, a citizen of the United States for at least seven years, and be a (legal) inhabitant of the state they represent. Senators must be at least 30 years old, a citizen of the United States for at least nine years, and be a (legal) inhabitant of the state they represent. The president must be at least 35 years old, a natural born citizen of the United States and a resident in the United States for at least fourteen years. It is the responsibility of state legislatures to regulate the qualifications for a candidate appearing on a ballot paper. “Getting on the ballot” is based on candidate’s performances in previous elections.

PRESIDENT AND VICE PRESIDENT PRESIDENTE Y VICE PRESIDENTE		PRESIDENT AND VICE PRESIDENT + PRESIDENTE Y VICE PRESIDENTE + (Vote for One) (Vote por Uno)	
John McCain Sarah Palin	REP	←	▶
Barack Obama Joe Biden	DEM	←	▶
Gloria La Riva Eugene Puryear	PSL	←	▶
Chuck Baldwin Darrell Castle	CPF	←	▶
Gene Amondson Leroy Pletten	PRO	←	▶
Bob Barr Wayne A. Root	LBT	←	▶
Thomas Robert Stevens Alden Link	OBJ	←	▶
James Harris Alyson Kennedy	SWP	←	▶
Cynthia McKinney Rosa Clemente	GRE	←	▶
Alan Keyes Brian Rohrbough	AIP	←	▶
Ralph Nader Matt Gonzalez	ECO	←	▶

2008 Presidential Ballot in Palm Beach County, Florida

10.31 | *Presidential Elections*

The president and vice-president run as a team or ticket. The team typically tries for balance. A balanced ticket is one where the president and the vice-president are chosen to achieve a politically desirable balance. The political balance can be:

- **Geographical.** Geographical balance is when the President and Vice-president are selected from different regions of the country—balancing north and south, or east and west—in order to appeal to voters in those regions of the country.
- **Ideological.** Ideological balance is when the President and Vice-president come from different ideological wings of the party. The two major parties have liberal and conservative wings, and the ideological balance broadens the appeal of the ticket.

- Experience. A ticket with balanced political experience is one that includes one candidate with extensive experience in federal government and the other a political newcomer. Sometimes political experience (being a Washington insider, for instance) is considered an advantage; sometimes it is considered a handicap. Incumbency can be a plus or a minus. Balance can try to have it both ways.
- Demographics. Demographic balance refers to having a ticket with candidates who have different age, race, gender, or religion. Once again, demographic balance is intended to broaden the ticket's appeal.

The presidential candidate for each party is selected through a **presidential primary**. Incumbent presidents can be challenged in their party's primary elections, but this is rare. The last incumbent President to not seek a second term was Lyndon B. Johnson. President Johnson was mired in the Vietnam War at a time when that war was very unpopular. The presidential primary is actually a series of staggered electoral contests in which members of a party choose delegates to attend the party's national convention which officially nominates the party's presidential candidate. Primary elections were first used to choose delegates in 1912. Prior to this, the delegates were chosen by a variety of methods, including selection by party elites. The use of primaries increased in the early decades of the 20th Century then they fell out of favor until anti-war protests at the 1968 Democratic National Convention.



Police attacking protestors at the 1968 Democratic National Convention in Chicago, IL

Currently, more than eighty percent of states use a primary election to determine delegates to the national convention. These elections do not occur on one day: the primary election process takes many months. The primary election process is long, drawn-out, complex, and has no parallel in any other nation in the world. The presidential

candidates begin fundraising efforts, start campaigning, and announce their candidacy months in advance of the first primary election.

It is purely historical accident that New Hampshire and Iowa have the first primary elections and are thus the focus on candidate attention for months prior to their January elections. New Hampshire had an early primary election in 1972 and has held the place of the first primary since that time. Iowa's primary is before New Hampshire, although the state uses a **caucus** to select delegates. Generally, the Iowa caucus narrows the field of candidates by demonstrating a candidate's appeal among party supporters, while New Hampshire tests the appeal of the front-runners from each party with the general public.



Dates of primary elections in 2008.

10.32 | *The Electoral College*

The president is not directly elected by the people. The popular vote does not actually determine who wins the presidency. When the voters in a state go to the polls to cast their votes for president (and vice president), they are actually voting for members of the [Electoral College](#). The winner of a presidential election is the candidate who receives a majority vote of the members of the Electoral College.

With the possible exception of the Federal Reserve Board, the Electoral College may be the least-understood government body in the U.S. system of government. Each member of the Electoral College cast her or his vote for a presidential and vice-presidential candidate. Each state's members of the Electoral College are chosen by the state political party at that state's party convention. The state parties choose party loyalists to be the party's members of the Electoral College if that party wins the popular

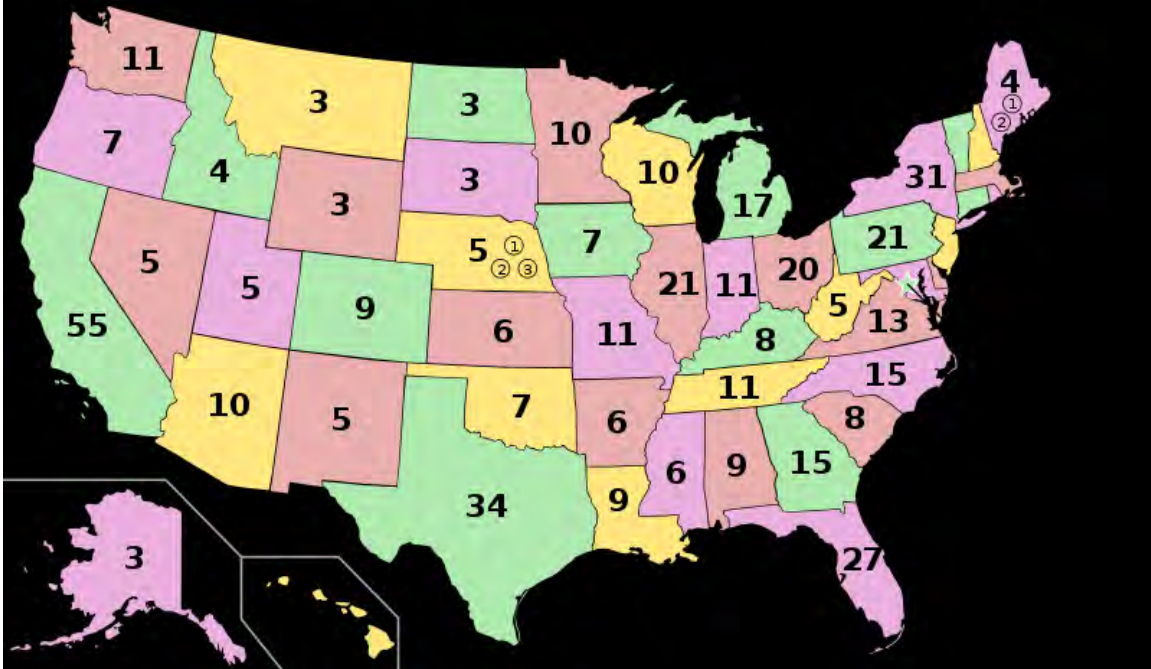
vote in the state. This is why the members of the Electoral College almost always vote for the presidential candidate who wins the popular vote in that state. On rare occasion, a “faithless” Elector will not vote for the candidate who won the popular vote in their state. When voters in a state go to the polls to vote for a president, they actually each cast their votes for a slate of electors that is chosen by a party or a candidate. The presidential and vice-presidential candidate names usually appear on the ballot rather than the names of the Electors. Until the passage of the Twelfth Amendment in 1804, the runner-up in a presidential election (the person receiving the second most number of Electoral College votes) became the vice-president.

The winner of the presidential election is the candidate who receives at least 270 Electoral College votes. The fact that it is possible for a candidate to receive the most popular votes but lose the election by receiving fewer Electoral College votes than another candidate is hard to reconcile with democratic principles. It also does not seem fair in modern American political culture which includes an expectation that voters chose government officials. Abolishing the Electoral College and replacing it with a national direct system would also prevent a candidate from receiving fewer votes nationwide than their opponent, but still winning more electoral votes, which last occurred in the 2000 Presidential election.

State law regulates how the state’s Electoral College votes are cast. In all states except Maine and Nebraska, the candidate that wins the most votes in the state receives all its Electoral College votes (a “winner takes all” system). From 1969 in Maine, and from 1991 in Nebraska, two electoral votes are awarded based on the winner of the statewide election, and the rest (two in Maine, three in Nebraska) go to the highest vote-winner in each of the state’s congressional districts.

The Electoral College is criticized for a variety of reasons:

- It is undemocratic. The people do not actually elect a president; the president is selected by the Electoral College.
- It is unequal. The number of a state’s Electors is equal to the state’s congressional delegation. This system gives less populous states a disproportionate vote in the Electoral College because each state has two senators regardless of population (and therefore two members of the Electoral College). The minimum number of state Electors is three. Wyoming and California have the same number of senators. Wyoming has a population of 493,782 and 3 EC votes, 164,594 people per EC vote. California has a population of 33,871,648 and 55 EC votes, 615,848 people per EC vote.



Map of Electoral College Votes

- It spotlights swing states. The Electoral College system distorts campaigning because the voters in swing states determine the outcome of the election. As a result, voters who live in states that are not competitive are ignored by the political campaigns. Abolishing the Electoral College and treating the entire country as one district for presidential elections eliminate the campaign focus on swing states.
- It is biased against national candidates. The Electoral College also works against candidates whose base of support is spread around the country rather than in a state or region of the country which would enable them to win the popular vote in one or more states. This is what happened to Ross Perot. In 1992, Perot won 18.9% of the national vote, but received no Electoral College votes because his broad appeal across the country did not include strength in one or a few state.

Despite these long-standing criticisms of the Electoral College, abolishing it is unlikely because doing so would require a constitutional amendment—and ratification of a constitutional amendment requires three-quarters of the state legislature to support it. The less populous states are not likely to support an amendment to abolish the Electoral College in favor of direct popular election of the president because doing so would decrease the voting power of the less populous states. Small states such as Wyoming and North Dakota would lose power and more populous states such as California and New York would gain power.

10.33 | Congressional Elections

Congressional elections take place every two years. Each member of the House of Representatives is



2010 Florida Senate Campaign Debate:
(From L to R: Marco Rubio, Charlie
Crist, Kendrick Meek)

elected for a two-year term. Each Senator is elected for a six-year term. About one-third of the Senate is elected in each congressional election. Until the Seventeenth Amendment to the United States Constitution in 1913, Senators were elected by state legislatures, not the electorate of states.

10.34 | House Elections

Elections to the United States House of Representatives occur every two years on the first Tuesday after November 1 in even years. If a member dies in office or resigns before the term has been completed, a special House election is held to fill the seat. House elections are first-past-the-post elections—meaning the candidate who gets the most votes wins the election regardless of whether that person receives a majority of the votes cast in the election. The winner is the one who receives a plurality of the votes. Plurality means the most votes. It is not necessary for the winner to receive a majority (50% plus one) of the votes.

Every two years congressional elections coincide with presidential elections. Congressional elections that do not coincide with presidential elections are called mid-

term elections—because they occur in the middle of a President’s four-year term of office. When congressional elections occur in the same

year as a presidential election, the party whose presidential candidate wins the election usually increases the number of congressional seats it holds. This is one of the unofficial linkages between presidential and congressional elections. The president and members of Congress are officially elected separately, but some voters go to the polls to vote for or against Republicans and Democrats so the president’s popularity has an impact on congressional elections.

There is a historical pattern that the incumbent president’s party loses seats in mid-term elections. In mid-term elections, the president is not on the ballot. The president’s party usually loses seats in mid-term elections. One reason for mid-term losses is the president’s popularity has slipped during the two years in office. Another cause of mid-term election losses is the fact that voter turnout is lower in mid-term elections, and members of the president’s party are less likely to vote in an election when *their* president is not on the ballot. These patterns of voting behavior illustrate the partisan linkages between congressional and presidential elections.

10.35 | Gerrymandering



In 2010, Allen West (R) challenged incumbent and Ron Klein (D) in Florida District 22. West emphasized his military experience. A neighborhood campaign supporter produced a sign which framed the choice as “The Wimp or the Warrior.”

Over time, congressional districts have become far less competitive. Congressional districts are drawn to protect individual incumbents and political parties. Another way to describe this is that congressional districts are drawn to create safe districts. A safe district is one that is not competitive; it is a safe district for the Republican Party or a safe district for the Democratic Party because the district boundaries are drawn to ensure that it contains a majority of Republicans or Democrats. One consequence of drawing safe districts is a reduction in voter choice. The Constitution requires that congressional districts be reapportioned after every census. This means that reapportionment or redistricting is done every ten years. The reapportionment is done by each state. In most cases, the political party with a majority in the state legislature controls redistricting. The fact that either one or the other major party controls the reapportionment encourages partisan gerrymandering.

Gerrymandering is drawing electoral district lines in ways that advantage one set of interests and disadvantage others. Historically, gerrymandering advantaged rural interests and disadvantaged urban interests. Voters in rural districts were over-represented and voters in urban districts were under-represented. Racial gerrymandering is done to advantage one race and to disadvantage others. Historically, racial gerrymandering over-represented white voters and under-represented Black voters. Racial gerrymandering is illegal because the Fourteenth Amendment prohibits states from denying people the equal protection of the laws. Partisan gerrymandering is drawing electoral lines to benefit the majority party and hurt the minority party. It is still practiced as a way for the majority party to use its political power.

One of the ways that the two major parties cooperate is in the creation of safe electoral districts. The Democratic and Republican parties have a vested interest in reducing the number of competitive districts and increasing the number of safe seats. The fact that more than nine out of ten Americans live in congressional districts that are not really competitive, but are safe seats for one party or the other, means that elections are not really very democratic. Redistricting to create safe seats for incumbents (those in office) gives an incumbent a great advantage over any challenger in House elections. In the typical congressional election, only a small number of incumbents lose their seat. Only a small number of seats change party control in each election. Gerrymandering to create safe districts results in fewer than 10% of all House seats actually being competitive in each election cycle—competitive meaning that a candidate of either party has a good chance of winning the seat. The lack of electorally competitive districts means that over 90% of House members are almost guaranteed reelection every two years.



“The Gerry-Mander.” *Boston Gazette*, March 26, 1812.

This is a significant development because competitive elections are one measure of how democratic a political system is. The large number of safe districts makes a political system less democratic because there are fewer competitive elections. Creating safe seats for 1) Republicans and Democrats; and 2) incumbents in either party, results in conditions that resemble one-party politics in a large number of districts. If one party almost always wins a district, and the other party almost always loses, the value of political competitions is greatly diminished.

10.36 | A Duopoly (or Shared Monopoly)

The two major parties collude to create these political monopolies (technically they are duopolies because the two major parties control the political marketplace). The creation of a large number of safe seats makes districts more ideologically homogeneous, thereby making negotiating, bargaining, and ultimately the need to compromise less likely. A candidate who does not have to run for office in a politically diverse district is less likely to have to develop campaign strategies with broad public appeal, and once in office such a legislator is less likely to have to govern with much concern about accommodating different interests or representing different constituents.

10.4 | Campaigns

A political campaign is an organized effort to influence the decisions of an individual, group, organization, or government institution. Campaigns are one way that individuals, parties, and other political actors compete for popular support. Campaigning is a type of advertising: it is political advertising rather than commercial advertising. A candidate, political party, or interest group campaigns by providing the public with favorable information about their issues (this is positive campaigning) or unfavorable information about the opposition (this is negative campaigning). Political (or electoral) campaigns are organized efforts with three elements: message, money, and machine.

10.41 | *The Message*

The campaign message is usually a clear and concise statement that explains why voters should vote for a candidate or an issue. Some examples of campaign messages include the following:

- John Doe is a business man, not a politician. His background in finance means he can bring fiscal discipline to state government.
- Crime is increasing and education is decreasing. We need leaders like Jane Doe who will keep our streets safe and our schools educating our children.
- Jane Doe has missed over 50 congressional votes. How can you lead if you don't show up to vote?
- Jane Doe is not a Washington politician. She remembers where she came from and won't become part of the problem in Washington.
- Jane Doe knows how to keep Americans safe from terrorism.
- John Doe is an experienced leader.
- Vote Yes on Number Four to Protect Marriage.

The message is one of the most important aspects of any political campaign, whether it is an individual's campaign for office or a referendum on an issue. The media (radio, television, and now the new media) emphasize short, pithy, memorable phrases from campaign speeches or debates. These "sound bites" are the short campaign slogans or catchy messages that resemble bumper-stickers. Sound-bite campaigns and campaign coverage reduce political messages to slogans such as "[Peace through Strength](#)" (Ronald Reagan), "Its Morning in America" (President Reagan), and "Change We Can Believe In" (Barack Obama). The [Museum of the Moving Image](#) has archived presidential campaign ads. A memorable campaign slogan from the 1984 Democratic primary campaign was Walter Mondale's ad dismissing his main Democratic challenger, Gary Hart, with the catch phrase from a popular Wendy's commercial: "Where's the beef?" The implied charge was that the photogenic Hart lacked substance, particularly when compared to the dull but experienced Mondale. The mantra of Bill Clinton's presidential campaign in 1992 was "It's the economy stupid." This slogan stressed the importance of keeping the campaign focused on the state of the economy rather than other issues that sometimes distract Democrats. Candidate George W. Bush's campaign used the slogan

“compassionate conservatism” to appeal to both conservatives and those who worried that conservatives did not care about the poor or disadvantaged.

Today’s national and state campaigns are typically professional, sophisticated, carefully crafted campaigns to develop and control the image of a candidate. The marketing of political campaigns has been described as the “packaging” of a candidate and the “selling” of a candidate—even “The Selling of a President.” The reference to selling a president is from Joe McGinniss’ *The Selling of the President* (1968). McGinniss described how candidate Richard Nixon used Madison Avenue marketing professionals and strategies to win the White House. At the time, the idea that a political campaign could, or should, market and sell a candidate the way that beer, deodorant, and bars of soap were marketed and sold other products like beer or deodorant or a bar of soap was controversial. The idea of corporate advertising expertise being applied to democratic politics in order to influence what citizens thought of the president seemed inappropriate and threatening. Bringing marketing values to politics seemed to demean or diminish politics by treating people as consumers rather than as citizens. Political advertising also seemed threatening in the sense that it used psychology to manipulate or control what people think.

In the years since 1968, the marketing and advertising of candidates is widely accepted as the way to conduct a successful national campaign. Presidential campaigns develop a message or candidate “brand.” After the Watergate Scandal exposed President Nixon’s dishonesty, the Jimmy Carter campaign brand was honesty: “I will not lie to you.” During the Carter Administration the Soviet Union invaded Afghanistan, Americans were taken hostages during a revolution in Iran that overthrew the Shah of Iran who was an ally of the United States, and a hostage rescue mission failed. These events, coupled with the loss of the Vietnam War, allowed presidential candidate Ronald Reagan to portray President Carter, the Democrats, and liberals as weak on national defense. The Reagan campaign theme “Peace through Strength” successfully branded Carter, Democrats, and liberals as weak on national defense and Reagan, Republicans, and conservatives as strong on national defense.

The comparison of campaigning and advertising is appropriate because many of the techniques and strategies that are used by Madison Avenue advertisers are mainstream politics. The similarities between the selling of a product or service and the selling of candidate are now acknowledged. In order to be successful, national campaigns spend a great deal of money on gathering information about political consumers so that candidates and parties can craft and present a message that is appealing.

10.42 | Money

Campaign finance has become more important as campaigns have changed from traditional *retail politics* to *wholesale politics*. The term retail politics refers to campaigns where candidates actually meet voters one-on-one, in small groups or communities, at town hall meetings, or other face-to-face settings such as walking a neighborhood. The term wholesale politics refers to campaigns where candidates address large audiences often using the print and electronic mass media.

The change to wholesale politics has increased the cost of campaigning by shifting from labor-intensive campaigning—where friends and neighbors and campaign workers and volunteers canvas a district or city or make personal telephone calls to

individual voters—to capital-intensive campaigns where money is used to purchase television air time or advertising. The change from campaigns as ground wars to air wars has increased the cost of campaigning.

Fundraising techniques include having the candidate call or meet with large donors, sending direct mail pleas to small donors, and courting interest groups who could end up spending millions on the race if it is significant to their interests. The financing of elections has always been controversial because money is often considered a corrupting influence on democratic politics. The perception is that the wealthy can purchase access to government officials or pay for campaigns that influence public opinion. The fact that private sources of finance make up substantial amounts of campaign contributions, especially in federal elections, contributes to the perception that money creates influence. As a result, **voluntary public funding** for candidates willing to accept spending limits was introduced in 1974 for presidential primaries and elections. The [Federal Elections Commission](#) was created in the 1970s to monitor campaign finance. The FEC is responsible for monitoring the disclosure of campaign finance information, enforcing the provisions of the law such as the limits and prohibitions on contributions, and overseeing the public funding of U.S. presidential elections.

A good source of information about money matters in American campaigns and elections is The Center for Responsive Politics. The Center tracks money in politics as part of an [“open secrets project.”](#) The recommendation to “Follow the money” has become all-purpose slogan that is applicable to criminal investigations and investigations of political influence and campaign ads. The saying comes from the Hollywood film *All the President’s Men* which tells the story of how Washington Post reporters investigated the Watergate scandal. A secret source named Deep Throat advised the reporters to “Follow the Money.”

The [National Institute on Money in State Politics](#) is still following the money trail to determine political influence in state politics. The U.S. Supreme Court’s rulings in campaign finance cases has made “Follow the money” even more relevant in today’s politics. In a series of rulings, the Court has said that campaign contributions are speech that is protected by the First Amendment and that government restrictions on campaign contributions are subject to strict scrutiny—which means that the government has to show that campaign finance laws serve a compelling interest in order to be upheld. As a result, corporations can make unlimited independent campaign expenditures. Even the existing requirements that contributions be publicly disclosed are now being challenged. The [Campaign Finance Information Center](#)’s mission is to help journalist follow the campaign money trail in local, state, and national politics. The landmark Supreme Court ruling that has changed the campaign finance rules is *Citizens United v. Federal Election Commission* (2010).

http://www.oyez.org/cases/2000-2009/2008/2008_08_205

<http://www.law.cornell.edu/supct/html/08-205.ZS.html>

10.43 | *The Machine*

The third part of a campaign is *the machine*. The campaign machine is the organization, the human capital, the foot soldiers loyal to the cause, the true believers who will carry the run by



The War Room is a documentary that chronicles Bill Clinton’s 1992 Presidential Campaign from an inside-look at his campaign staff.

volunteer activists, the professional campaign advisers, pollsters, voter lists, political party resources, and get-out-the vote resources. Individuals need organizations to campaign successfully in national campaigns. Successful campaigns usually require a campaign manager and some staff members who make strategic and tactical decisions while volunteers and interns canvass door-to-door and make phone calls. Large modern campaigns use all three of the above components to create a successful strategy for victory.

10.5 | The Media

Modern campaigns for national offices—the presidency, the Senate, and the House of Representatives—are largely media campaigns. They are conducted using the print media, electronic media, and the “new” media (the Internet and the social media). Communication technology has fundamentally altered campaigns. The development of the broadcast media (radio and television) changed political campaigns from “ground wars” to “air” wars. The term ground war refers to a campaign that relies heavily on candidates and their campaign workers meeting voters and distributing campaign literature. The term air war refers to campaigns that rely heavily on the mass media.

The following two quotes from the Museum of the Moving Image archive of presidential campaign ads illustrate the change in thinking about television campaign advertising:

- “The idea that you can merchandise candidates for high office like breakfast cereal is the ultimate indignity to the democratic process.”
Democratic presidential candidate Adlai Stevenson (1956)
- “Television is no gimmick, and nobody will ever be elected to major office again without presenting themselves well on it.” Television producer and Nixon campaign consultant (and later President of Fox News Channel) Roger Ailes (1968)

10.51 | *Who Uses Whom?*

Campaign organizations have a complicated relationship with the media. They need and use each other but they have different, sometimes conflicting needs. The media like **good visuals** and compelling personal interest stories which capture the attention of the public and turn the general public into an audience. Campaigns like to provide such visuals. But the media (and campaigns) also like to play “gotcha.” The media consider it a good story to catch a candidate’s ignorance, mistake, or gaffe—or even to ask a question that might cause a candidate to make a mistake. The mistake might be

- Misspelling a word. Vice-presidential candidate Dan Quale spelled “potato” “potatoe.”
- Ignorance. Not knowing the name of a foreign leader. Presidential candidate George W. Bush did not know the name of the leader of Pakistan.
- Misrepresentation. During the presidential primary campaign, Hillary Clinton misrepresented a trip to Kosovo as one where she landed at an airport under fire to convince voters that she had the experience to be commander in chief.

- Math problems. Announcing budget numbers that do not add up.
- Ignorance. Vice-presidential candidate Sarah Palin did not know the name of any Supreme Court decision that she disagreed with.

10.52 | *The Social Media*

Communication technology has changed national campaigns from primarily ground wars (walking the neighborhoods; kissing babies; shaking hands) to air wars (broadcast radio and television ads). Campaigns are now using social media to post material on Tumblr (videos and photos) or Spotify or Pinterest. According to Adam Fletcher, deputy press secretary for the Obama re-election campaign, “It’s about authentic, two-way communication.”⁷ This may be true, but it may also be about a campaign strategy to try to reach people where they are: Online using social media. A presidential campaign that shares songs with the public may be less interested in actually creating two-way communication with the public than it is in establishing social connections with people by appearing to share tastes. Familiarity (with songs, photos and videos that are posted on Spotify, Flickr, Instagram, Twitter, Facebook, etc.) creates trust. [Socialbakers](#), a social media analytics group, says the campaigns have to try to reach people wherever they are, and young people in particular are on-line more than reading newspapers or watching broadcast television networks.

10.53 | *The Age of Digital Campaigns*

The digital age is fundamentally changing campaign advertising. In the age of mass media, campaign ads that aired on the major television and radio networks were intended for the general audiences that were watching or listening to national programs. The

Think About It!
How much does a campaign know about me? See “How Campaigns Amass Your Personal Information to Deliver Tailored Political Ads.”
http://www.pbs.org/newshour/bb/politics/july-dec12/frontline_10-29.html

digital age allows targeted advertising. Political intelligence companies such as Aristotle gather large files of detailed information about a person’s behavior from commercial companies that keep track of consumption patterns or Internet searches, and then sell that data to campaigns. The campaigns, which then know where a person lives; what their demographics are; what they purchase; what they read; what their hobbies are; and other factors that might be related to how they think about politics, can tailor ads to very specific audiences. This digital information is very good for campaigns, but is it good for us? See the following PBS story about “How Campaigns Amass Your Personal Information to Deliver Tailored Political Ads.” The digital campaigns are also developing ways to target “[off the grid](#)” voters, the voters who do not get their public affairs information

from the traditional media sources (papers, television, and radio). Identifying such voters is one thing. Getting them to vote is another. Having a good ground game—people in neighborhoods, cities, districts, and states who can actually contact voters and get them out to vote—is still an important element of a successful presidential campaign strategy.

President Obama's reelection campaign was successful because it combined air wars with a solid ground game in the states that it identified as the key swing states in the 2012 presidential election.

10.54 | *Campaign Fact Checking*

Candidates, parties, and organizations supporting or opposing a candidate, or an issue, say things which may not meet the standard of "the truth, the whole truth, and nothing but the truth." In an age of electronic communications, it is even more likely that Mark Twain, the American humorist, was right when he said, "A lie can travel halfway around the world while the truth is still putting on its shoes." As a result, a number of organizations have developed campaign fact-checking operations to hold campaigners accountable for what they claim as facts. One of these organizations is Factcheck.org. Its Web site provides running description and analysis of inaccurate campaign statements. Some of the more interesting false statements that they [fact-checked](#) were claims that Democratic presidential candidate Barack Hussein Obama was a radical Muslim who refused to recite the Pledge of Allegiance and took the oath of office as a U.S. Senate swearing on the Koran, not the bible.

10.55 | *Political Futures Market*

One of the more innovative and interesting perspectives on the measurement of public opinion as a predictor of the outcome of an election involves the application of economic perspectives. The "political futures" markets are designed to provide an economic measure of support for a candidate as a predictor of whether the candidate will win an election. One example of this approach is [The Iowa Electronic Markets](#). These are real-money futures markets in which contract payoffs depend on economic and political events such as elections. These markets are operated by faculty at the University of Iowa Tippie College of Business as part of their research and teaching mission.

10.6 | How to "Do" Civic Engagement

The importance of fostering civic engagement in higher education is described in *Civic Responsibility and Higher Education* (2000), a book edited by Thomas Ehrlich. Ehrlich worked to promote including civic engagement along with the traditional academic learning in the mission of universities. The American Association of Colleges and Universities stresses the role that higher education plays in developing civic learning to ensure that students become an informed, engaged, and socially responsible citizenry. These efforts emphasize the importance of connecting classroom learning with the community. The connection has two points: usable knowledge and workable skills. The emphasis on usable knowledge includes promoting social science research as problem solving. The term *usable knowledge* refers to knowledge that people and policy makers can apply to solve contemporary social problems. (Lindblom and Cohen) The emphasis on workable skills is even more directly related to civic engagement. Today there are many organizations that advance the cause of linking academic study and social problem

solving. One of these organizations is the [W. K. Kellogg Foundation](#). This Foundation was created by the cereal company magnate. The Foundation emphasizes the importance of developing the practical skills that will enable individuals to realize the “inherent human capacity to solve their own problems.” These skills include dialogue, leadership development, and the organization of effort. In effect, civic engagement develops the practical skills that can help people help themselves. How can you “do” civic engagement?

- Contact a government official. Contact a local, state, and national government official. Ask them what they think are the major issues or problems that are on their agenda. Contacting your member of Congress is easy. (See the Chapter on Congress.)
- Attend a government meeting. Attend the public meeting of a local government: a neighborhood association; a city council meeting; a county commission meeting; a school board meeting; a school board meeting; or a state government meeting (of the legislature or an executive agency).
- Contact an organization. Contact a non-government organization to discuss an issue of your concern, community interest, or the organization’s mission. These organizations, political parties, and interest groups represent business, labor, professional associations, or issues such as civil rights, property rights, the environment, immigration, religion, and education.

10.7 | Summary

One aspect of the power problem is the government authority over individuals. The government’s ability to tell an individual what to do is legitimate—that is, it is authority rather than merely power—if the government’s ability is based on the consent of the government. Democracy, or self-government, requires an active and engaged citizenry in order to make government control over individuals legitimate. Political participation is one of the measures of how democratic a political system is. Therefore, political participation is also a measure of government legitimacy. Voting, elections, and campaigns provide opportunities for individuals to be active and engaged citizens.

10.8 | Additional Resources

10.81 | *In the Library*

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McGinniss, Joe. 1968. *The Selling of the President*.

Schier, Steven. 2003. *You Call This An Election? America's Peculiar Democracy*. Washington, DC: Georgetown University Press.

10.82 | Online Resources

Each state has primary responsibility for conducting and supervising elections. For information about Florida elections go to the My Florida Web site <http://www.myflorida.com/> and click on government, then executive branch, then state agencies, then department of state, then <http://election.dos.state.fl.us/>. Or you can learn about Florida election laws by going directly to the Florida Department of State Web site which provides information about voter registration, candidates, political parties, and constitutional amendment proposals.

[VotSMART](#) provides basic information about American politics and government. It is, in effect, American Government 101.

C-SPAN election resources are available at <http://www.c-span.org/classroom/govt/campaigns.asp>.

Dave Leip's Atlas of U.S. Presidential Elections provides interesting information about presidential elections. <http://uselectionatlas.org/RESULTS/index.html>
Rock-the-Vote is an organization dedicated to getting young people involved in politics. www.rockthevote.org/

Project Vote-Smart is a nonpartisan information service funded by members and non-partisan foundations. It offers “a wealth of facts on your political leaders, including biographies and addresses, issue positions, voting records, campaign finances, evaluations by special interests.” www.vote-smart.org/

The U.S. Census Bureau has information on voter registration and turnout statistics. www.census.gov/population/www/socdemo/voting.html

C-Span produces programs that provide information about the workings of Congress and elections. www.c-span.org

Key Terms:

voter fatigue
 open primaries
 closed primaries
 presidential primary
 caucus
 voter turnout
 rational choice model
 civic duty model
 political efficacy
 Individual explanations
 System explanations
 Voter registration
 “Air” campaigns

10.9 | STUDY QUESTIONS

1. What is the rational choice theory of voting?
2. What are the primary factors at the individual level that influence whether someone turns out to vote?
3. What are the institutional factors that depress voter turnout in the United States?

¹ Alexander Hamilton, in *The Records of the Federal Convention of 1787*, Vol. 2, ed. Max Farrand (New Haven, CT: Yale University Press, 1937), 298-299.

² For the methodology and results, see http://www.economist.com/markets/rankings/displaystory.cfm?story_id=8908438

³ See Anthony Downs. 1957. *An Economic Theory of Democracy*. New York: Harper Press.

⁴ Declare Yourself has information on each state and the requirements for voter registration at http://www.declareyourself.com/voting_faq/state_by_state_info_2.html

⁵ George C. Wallace. *Stand Up For America*. New York: Doubleday, 1976:212.

⁶ The National Conference of State Legislatures provides detailed information about ballot initiatives in each state: <http://www.ncsl.org/default.aspx?TabID=746&tabs=1116,114,802#802>

⁷ Quoted in “Campaigns Use Social Media to Lure Younger Voters,” Jenna Wortham, *The New York Times* (October 7, 2012). www.nytimes.com Accessed October 12, 2012.

CHAPTER 11: POLITICAL PARTIES



11.0 | Why Political Organizations?

Why do people everywhere live, work, and play in groups? Why are large organizations—corporations, political parties, interest groups—the predominant actors in our political, economic, and social systems? Is there something *natural* about *social* organizations? And what is the role of individuals in political systems where groups are the dominant actors? Political scientists are not the only scholars who ask such questions. These are some of the oldest and most interesting questions that are asked by other social scientists (economists, sociologists, and anthropologists), philosophers, and

natural scientists. Scientific research studies the phenomenon of grouping in the animal kingdom to learn why animals such as fish, birds, and elephants live in groups.¹ Social scientific research studies ideological, partisan, and other political groupings of people.

[“I adore political parties. They are the only place left to us where people don’t talk politics.”](#)

-- Oscar Wilde

The old parties are husks, with no real soul within either, divided on artificial lines, boss-ridden and privilege-controlled, each a jumble of incongruous elements, and neither daring to speak out wisely and fearlessly on what should be said on the vital issues of the day.

-- Theodore Roosevelt

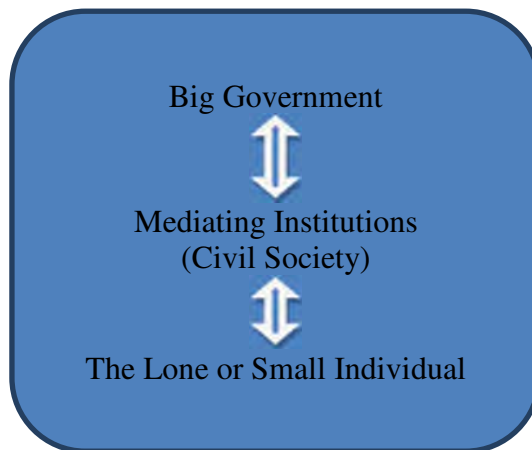
This chapter examines one form of political organization: political parties. Parties exist in all modern democracies but there is an underlying tension between democratic theory, which values individualism, and the political reality that organizations are the dominant actors in modern politics and government. The tension between individualism and organization is one reason why Americans are more skeptical of political parties than people in other western democracies where political parties tend to be stronger. Americans have such a strong commitment to individualism that there is a healthy skepticism about organizations, particularly large, powerful organizations whether in government, politics, or economics. In American politics and government, parties are considered a necessary evil. Their influence over voters and government officials is frequently questioned, but parties are also considered essential for organizing public participation in politics and control over government. The following sections explore these aspects of party politics in the U.S.

11.1 | What is a Political Party?

A **political party** is an organization of people with shared ideas about government and politics who try to gain control of government in order to implement their ideas. Political parties usually try to gain control of government by nominating candidates for office who then compete in elections by running with the party label. Some political parties are very ideological and work to get their set of beliefs implemented in public policy. Other political parties are not as ideological. A party may not be ideologically united because it represents a coalition of different interests. Or it may be more interested in gaining and holding power by having its members win elections than strongly advocating a particular set of beliefs.

Political organizations play an important role in government and politics around the world. It is impossible to understand American government and politics without understanding the role of political parties and interest groups. This is ironic because American culture values individualism, but political organizations such as parties and interest groups have come to play an extremely important role in our political and economic life. Parties and interest groups are linkage institutions. Linkage institutions are sometimes called aggregating or mediating institutions. The media are also a linkage (or mediating) institution. A linkage organization is one that links individuals to one another or the government. A linkage organization aggregates and collects individual interests. This is an important function in large scale (or mass) political systems because it is a way for individuals with shared interests to speak with a single or louder voice. Linkage organizations are also important because they mediate between individuals and government, they “mediate” between the lone (or small) individual and (increasingly) big government. The mediating role becomes more important as a country’s population

increases and as government get larger and larger. Intermediary organizations make it possible for individuals to think that they can have an impact on government. In this sense, political parties like other “mediating structures” actually empower people. Parties are part of **civil society**. The term civil society refers to the *non-governmental sector of public life*. Civil society includes political, economic, social, religious, cultural activities that are part of the crucial, non-governmental foundations of a political community: the family, neighborhoods, churches, and voluntary associations (including parties and interest groups). The Heritage Foundation is a conservative think tank. One of its goals is to promote these [mediating structures](#) as a way to empower people and limit government as envisioned by Peter Berger and John Neuhaus in *To Empower People: The Role of Mediating Structures in Public Policy* (1977). Civic engagement maintains these traditional mediating structures and supports their development.



The following sections examine political parties and their role in American politics pays some. Some attention is paid to the historical development of the U.S. party system, particularly the features of the two-party system.

11.2 | Roles in Modern Democracies

It is hard to imagine modern democracies without political parties. They exist in all democratic political systems. The freedom to form parties and compete in the electoral process is considered one of the essential measures of democracy because parties are considered vital elements of self-government. Political parties perform the following functions:

- Recruit and nominate candidates for office.
- Help run campaigns and elections.
- Organize and mobilize voters to participate in politics.
- Organize and operate the government.

The recruitment and nomination of candidates is one of the most important functions of political parties. In the past, party leaders in the U.S. exerted a great deal of control over the party's candidate for office. Party leaders and activists chose their party's nominee. Today, however, party control over nominations has been weakened by the increased use of primary elections to choose party candidates. In primary elections, the public votes for a party's nominee, which has opened the process and limited the influence of party officials and activists. The party's weakened control over the nomination process has weakened American political parties.

Political parties also organize and mobilize voters. This function is important in large countries because it can help organize the public in ways that increase an individual's sense of political efficacy. Political efficacy is the belief that a person's participation matters, that a person's vote can make a difference. In large scale democracies such as the United States, political parties organize individuals, synthesize their interests, and link or collect their views on government and politics into two or more perspectives. This collection or organization can magnify an individual's political voice. So political parties are not just divisive forces in politics; they can unite individuals with other like-minded people who share their thinking on government and politics.

The role of political parties does not end with an election. After an election, the parties work to organize and operate the government. The majority party in Congress and the party that wins the presidency work to organize the actions of the candidates who campaigned successfully and became government officials. The *Ins* generally support one set of public policies, and the *Outs* support an alternative set of public policies.

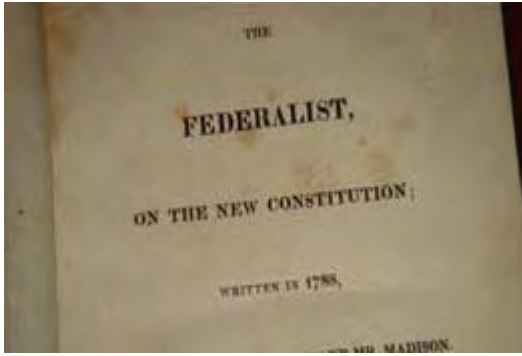
The above roles explain why political scientists see parties as vital elements of modern liberal democracies. Liberal democracies are a form of representative government that is based on individual rights and limited government with political participation organized by parties. But the American political tradition includes skepticism of parties. The fact that about one-third of voters consider themselves

Independents rather than members of either of the two major parties (the Republican and Democratic parties) is evidence that Americans do not have a particularly strong attachment to parties. The Independents apparently think parties are not an essential element of modern democracy, or they associate political parties with the kinds of partisan bickering and fighting that prevent well-meaning people from working together to solve problems.



11.3 | Founding Era Opposition to Political Parties

Political parties have a familiar place in American politics today and they are accepted as established features of politics and government. However, this was not always so. The Constitution does not mention political parties. Indeed, political parties did not even exist when it was written. During the founding era, the groups that pursued a particular political interest were referred to as factions—and they were generally considered harmful influences whose power needed to be checked.



The Founders opposed political parties, and warned against their development in American politics. But they were not banned. The Founders felt that federalism and the separation of powers and checks and balances would keep factions from advancing their special interests and harming the public interest in the new republic. The anti-party views of George Washington and James Madison illustrate the early hostility to the emergence of political parties in the American political system.

11.31 | George Washington

George Washington's [Farewell Address](#) on September 19, 1796 is a famous statement warning against the spirit and actions of political parties. He warned against the development of state parties that created geographic divisions among Americans as well as "the baneful effects of the spirit of party generally," a spirit that was "inseparable from our nature," and existing in all forms of government, but "it is seen in its greatest rankness, and is truly their worst enemy," in popular forms of government:

The alternate domination of one faction over another, sharpened by the spirit of revenge, natural to party dissension, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism. But this leads at length to a more formal and permanent despotism. The disorders and miseries which result gradually incline the minds of men to seek security and repose in the absolute power of an individual; and sooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation, on the ruins of public liberty.

...[T]he common and continual mischiefs of the spirit of party are sufficient to make it the interest and duty of a wise people to discourage and restrain it. It 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, foment 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 passions. Thus the policy and the will of one country are subjected to the policy and will of another."

James Madison also considered factions and other social, economic, and political divisions) a vice. But he thought that banning factions would be a cure that was worse than the disease because factions were rooted in human nature. In *Federalist Number 51* he describes his ingenious solution to the problem of factions. He made factions, which were a problem, part of the solution. The system of checks and balances required so many different interests, parties, and factions that **no one** could dominate the political process and use government power against the others. So the political solution to the problem of factions was more of them. The way to guard against a united majority threatening the rights of the minority is to create a society with "so many separate

descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable.” Madison specifically compared the problem of protecting political rights with the problem of protecting religious rights:

“In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.”

11.32 | *Parties and the Constitution*

As previously mentioned, the Constitution does not say anything about political parties. Parties developed after the Constitution was written. Shortly after the Constitution was written the Federalist and Anti-federalist Parties had emerged to compete for control of the federal government. The Federalist Party supported a strong national government, a strong executive in the national government, and commercial interest. The Federalist Party’s geographic base was in New England. The Anti-federalist Party supported strong state governments, legislative government, and agrarian interests. Its geographic base was strongest in the South and West. Alexander Hamilton and Chief Justice John Marshall were strong Federalists. Thomas Jefferson and James Madison were Anti-federalists (a party which came to be called the Democratic-Republicans). The election of 1800 was a presidential contest won by Jefferson, and the landmark case of *Marbury v. Madison* (1803) began as a political contest over Federalist and Anti-federalist control of government. The Jeffersonians (or Democratic-Republicans) then became the dominant party, winning seven consecutive presidential elections from 1800 to 1824.

The fact that the Constitution does not say anything about one of the most important features of modern American government and politics is surprising. It also explains why it is not possible to read the Constitution to get a good understanding of how government and politics actually work. It is hard to understand American government and politics without understanding the role that political parties play.

11.4 | **Party Systems**

Modern governments typically have one-party systems, two-party systems, or multi-party systems. The U.S. has a two-party system.

11.41 | *One –Party Systems*

In **one-party systems**, only one political party is legally allowed to hold power. Although minor parties may sometimes be allowed in a one-party system, the minor party is legally required to accept the leadership of the dominant party. In a one-party system, the dominant party is usually closely identified with the government. The party organization and the government may not be identical, but sometimes party officials are also government officials so the separation between party and government may not be very

great. In fact, in some one-party systems the party leadership position may be more important and powerful than positions within the government itself. Communist countries such as China and Cuba, and formerly the Soviet Union, are examples of one-party political systems. One-party systems are usually in countries without a strong democratic tradition.

Although there are few one-party systems, there is a variant called the **dominant party system** that is fairly common. A dominant party system is one where one party is so strong, so dominant, that even though other parties are legally allowed no other party has a real chance of competing in elections to win power. Dominant party systems can exist in countries with a strong democratic tradition in the country. The inability of any party other than the dominant party to compete in elections may be due to political, social and economic circumstances, public opinion, or the fact that the dominant party is entrenched in government and uses the government powers to preserve its privileged position. In countries with weak democratic traditions, the dominant party may remain in power by using political patronage (distribution of government jobs, contracts, or other government benefits to influence votes), voting fraud, or other manipulations of the electoral process. Where voting fraud is used to stay in power, the definition between a dominant and a one-party system is blurred. Examples of dominant party systems include the People's Action Party in Singapore and the African National Congress in South Africa. Mexico was a one-party dominant system with the Institutional Revolutionary Party until the 1990s. In the United States, the south was a one-party dominant region from the 1880s until the 1970s. It was controlled by the Democratic Party as a result of the Civil War: the Republican Party was the party of Lincoln.

11.42 | *Two-Party Systems*

A **two-party system** is one where there are two major political parties that are so strong that it is extremely difficult for a candidate from any party other than the two major parties to have a real chance to win elections. In a two-party system, a third-party is not likely to have much electoral success. The U.S. has a two-party system. The two major parties, the Republican and Democratic Parties, are the dominant parties. It is difficult for any third or minor party to win elections.

In the U.S., parties are mostly regulated by the laws of the individual states, which organize elections to both local and federal offices. No laws limit the *number* of political parties that may operate, so it is theoretically possible for the U.S. to develop a multi-party system. However, the country has had a two-party system since the early years of the republic. Third or minor parties do appear periodically. The fact that states have restrictive ballot access laws limits the development of third parties, but most are generally of only limited and temporary political significance.

In a two-party system, the typical ideological division is to have one party consisting of a right wing coalition and one party consisting of a left wing coalition. A coalition is a (usually temporary) combination or alliance of different interests that agree to unite to achieve shared goals. In the U.S., the Republican and Democratic parties are coalitions of interests. The Republican Party coalition consists of libertarians, economic conservatives, social conservatives, and national security and public order advocates. The Democratic Party coalition consists of racial and ethnic minorities, civil libertarians, organized labor, and the elderly. The components of the two major party coalitions can

change over time. They are not necessarily permanent members of one party or the other. The two major parties are ideologically broad and inclusive because they need to position themselves to appeal to a broad range of the electorate.

One reason for a two-party system is the rules of the electoral game, specifically whether a country uses proportional representation (PR) or **single-member district plurality vote system** (SMDP). Proportional representation is a system where each party receives a share of seats in parliament that is proportional to the popular vote that the party receives. In a single-member district plurality vote system the person who gets the most votes in an election wins the seat. It is a winner-take-all election: The person who gets the most votes (i.e., the plurality) wins the election even if he or she did not win a majority of the votes. The United States uses this single-member district plurality system. For example, in a congressional election, the candidate who gets the most votes wins the senate seat or a house seat. The Electoral College also uses this winner-take-all system. The presidential candidate that receives the most popular votes in a state gets all of that state's Electoral College votes (with the exception of Nebraska and Maine which use a system of proportional representation). The winner-take-all system is not very democratic and it [disadvantages minor parties](#).

Politics, like sport, is activity that is organized by rules. Election rules have a major impact on **how** the political game is played and **who** is likely to win. The winner-take-all system has the following effects on the way the political game is played:

- It tends to create and maintain a two-party system.
- It tends to make political parties more ideologically moderate because they must compete to win the most votes cast in an election or it will lose the election. Extremist or single-issue parties are unlikely to win elections.
- It increases political stability because tends the differences between the two major parties will not be as great as it would be in a political system where parties competed at the left or right extremes of the ideological spectrum. Maurice Duverger, the French sociologist described how the electoral rules had these effects on party politics.

Duverger's Law is a principle that a plurality election system tends to produce a stable, two party system.

An electoral system based on proportional representation creates conditions that allow new parties to develop and smaller parties to exist. The winner-take-all plurality system marginalizes new and smaller political parties by relegating to the status of loser in elections. A small third party cannot gain legislative power if it has to compete and win in a district with a large population in order to gain a seat. Similarly, a minor party with a broad base of support that is geographically spread throughout a state or spread across the nation is unlikely to attract enough votes to actually win an election even though it has substantial public support. For example, the Libertarian Party has supporters throughout

the country, and may attract a substantial number of votes, but the votes are not enough to be the majority in a single district or a single state.

Duverger also believed the SMDP vote rule produces moderation and stability. Take, for example, the following scenario. Two moderate candidates (from two moderate parties) and one radical candidate are competing for a single office in an election where there are 100,000 moderate voters and 80,000 radical voters. If each moderate voter casts a vote for a moderate candidate and each radical voter casts a vote for the radical candidate, the radical candidate would win unless one of the moderate candidates gathered less than 20,000 votes. Consequently, moderate voters seeking to defeat the radical candidate/party would be more likely to vote for the candidate that is most likely to get more votes. The political impact of the SMDP vote rule is that the two moderate parties must either merge or one moderate party must fail as the voters gravitate to the two strong parties.

A third party usually can become successful only if it can exploit the mistakes of one of the existing major parties. For example, the political chaos immediately preceding the Civil War allowed the Republican Party to replace the Whig Party as the more progressive party. Loosely united on a platform of country-wide economic reform and federally funded industrialization, the decentralized Whig leadership failed to take a



decisive stance on the slavery issue, effectively splitting the party along the Mason-Dixon Line. Southern rural planters, initially lured by the prospect of federal infrastructure and schools, quickly aligned themselves with the pro-slavery Democrats, while urban laborers and professionals in the northern states,

threatened by the sudden shift in political and economic power and losing faith in the failing Whig candidates, flocked to the increasingly vocal anti-slave Republican Party.

In countries that use proportional representation (PR), the electoral rules make it hard to maintain a two-party system. The number of votes that a party receives determines the number of seats it wins, so new parties can develop an immediate electoral niche. Duverger believed that the use of PR would make a two-party system less likely, but other electoral systems do not guarantee new parties access to the system.

11.43 | MULTI-PARTY SYSTEMS

Multi-party systems are systems with more than two parties. The Central Intelligence Agency's [World Factbook](#) provides a list of the political parties in the

countries of the world. Canada and the United Kingdom have two strong parties and a third party that is electorally successful, may place second in elections, and presents a serious challenge to the other two parties, but has still never formally won enough votes to gain control of government. However, strong third parties can play a pivotal “king making” role if one of the two major parties needs its support in order to get the most votes and gain control of government.

Finland is unusual in that it has an active three-party system in which all three parties routinely win elections and hold the top government office. It is very rare for a country to have more than three parties that are equally successful and have the same chance of gaining control of government (that is, “forming” the government or appointing the top government officials such as the prime minister). In political systems where there are numerous parties it is more common that no one party will be able to attract a majority of votes and therefore form a government, so a party will have to work with other parties to try to form a coalition government. Coalition governments, which include members of more than one party, are actually commonplace in countries such as the Republic of Ireland, Germany, and Israel.

In countries with proportional representation, the seats in a country’s parliament or representative assembly would be allocated according to the popular votes the party received. The electoral districts are usually assigned several representatives. For example, assume the following distribution of the popular vote:

<i>Party</i>	<i>Percent of the Popular Vote</i>
Republican Party	36
Democratic Party	35
Libertarian Party	15
Green Party	14

The seats in the country’s 100-member representative assembly would be allocated as follows:

<i>Party</i>	<i>Seats in the Representative Assembly</i>
Republican Party	36
Democratic Party	35
Libertarian Party	15
Green Party	14

Proportional representation makes it easier for smaller or minor parties to survive because they can win some seats in an election even though they never win enough votes to form a majority and control the government. Consequently, proportional representation tends to promote multi-party systems because elections do not result in one winner (the candidate or party that get the most votes) and all the rest of the candidates are losers.

Act on It!#

One way to promote global civic engagement is to contact a political party official in another country and ask about an issue of interest to you. The Central Intelligence Agency's World Factbook lists the political parties in the countries of the world.

11.5 | U.S. Political Parties

The U.S. has a two-party system. The two major parties are the [Republican Party](#) and the [Democratic Party](#). There are, however, minor parties. Two well-established minor parties are the [Libertarian Party](#) and the [Green Party](#). The following table includes the largest current largest parties. Each party was on the ballot in enough states to have had a mathematical chance to win a majority of Electoral College votes in the 2008 presidential election. [Project Vote Smart](#) provides a useful list of political parties in each of the 50 states.

12.51 | Current Largest Parties

Party Name	Date Founded	Founder(s)	Associated Ideologies	Current Party Chair
Democratic Party	1792/ 1820s	Thomas Jefferson/ Andrew Jackson	Liberalism, Progressivism, Social Liberalism	Tim Kaine
Republican Party	1854	Alvan E. Bovay	Conservatism, Neoconservatism, Economic Conservatism, Social Conservatism	Reince Priebus
Libertarian Party	1971	David Nolan	Libertarianism	Mark Hinkle
Green Party	1984	Howie Hawkins John Rensenbrink	Environmental Protection, Liberalism	Theresa El-Amin, Mike Feinstein, Farheen Hakeem, Julie Jacobson, Jason

				Nabewaniec, David Strand, and Craig Thorsen
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*Act on It!#
Contact a political party in your state, or another state, and ask a party official a question about the party's position on an issue or about an issue that interests you.*

11.6 | POLITICAL PARTY ERAS

Political scientists have identified distinctive party eras in the U.S. party system. A party era is a time period when the two major parties took different sides on the most important issues that were facing the nation during that time period. The following describes six party eras.

11.61 | *The First Era: the 1790s until around 1824*

The [election of 1796](#) was the first election where candidates ran as members of a political party. The Federalist Party and the Anti-Federalist Party (or Democratic Republicans) differed on the question of the power of the national government. The Federalists generally supported a strong national government and the Jeffersonian Democratic Republicans supported state government. The election of 1800 produced a number of firsts. It produced “America’s first presidential campaign.”² It marked the beginning of the end for the Federalist Party. John Adams and the Federalist Party supported England, a strong national government, industrial development, and aristocracy. Thomas Jefferson and the Republican Party supported France, decentralized state governments, and agrarian society, and egalitarian democracy. Jefferson won the election of 1800 which was the first transition of power from one party to the opposition party and the beginning of a party system. By 1820, the Federalist Party had gone out of existence and James Madison (of the Democratic Republicans) was elected president in what came to be called the “[Era of Good Feelings](#)” because it was a period of one party-dominance (therefore there was little party competition).

11.62 | *The Second Era: from 1824 until the Civil War*

During the second era, Andrew Jackson and the Democrats were the dominant party. The Democrats advocated a populist political system that is often called **Jacksonian Democracy**. One feature of Jacksonian Democracy is governing based on political patronage. The familiar political slogan, “**To the victor go the spoils (of office),**” describes how the candidate that won an election was entitled to give government jobs (and other benefits) to the people (including the members of his or her

political party) that supported the campaign. This was the era that produced political parties as mass membership organizations rather than political parties as legislative caucuses. The most important national political issues during this era were economic matters, such as tariffs to protect manufacturing and the creation of a national bank to direct economic development, slavery, and the territorial expansion of the republic. In the years 1854 to 1856, the Republican Party emerged to replace the Whig party as the second of the major political parties of the era.

11.63 | *The Third Era: from the Civil War to 1896*

During this party era, the Republican Party and the Democratic Party were divided on two major issues: Reconstruction of the South and the Industrial Revolution. The Republican Party was a northern party that supported manufacturing, railroads, oil, and banking as part of the broader support for the Industrial Revolution. The Republican Party supported the national government's [Reconstruction](#) of the South after the Civil War. The Democratic Party was based in the South. It opposed the use of federal power, including civil rights laws, to regulate the way that Southern states treated newly freed slaves. In terms of economic policy, the Democratic Party also supported rural or agrarian interests rather than urban and industrial interests.

11.64 | *Fourth Era: from 1896 to 1932*

The Republican Party was the dominant party during the fourth party era. It was strongly identified with big business, the northeast, and the west. The Democratic Party was largely limited to its base in the southern states of the old Confederacy. The early years of this era, the period from the 1890s until World War I, were the Progressive Era. The Progressive Era was a major reform era in American politics and government. It produced the civil service system, primary elections, nonpartisan elections, and direct democracy mechanisms such as referendum, initiative, and recall. The civil service system was an effort to replace the spoils system of political patronage with a merit selection system of government officials. Primary and nonpartisan elections weakened political parties by giving voters more control over the selection of candidates for office any by having candidates run without party labels. These reforms were intended to get politics out of the “smoke-filled back rooms” where party bosses chose candidates for office. Referendum and initiative were two electoral reforms that expanded direct democracy by allowing the public to vote on laws proposed by state legislatures or to initiate their own laws without having to rely on state legislatures. Finally, recall was a way for voters to vote government officials out of office.

11.65 | *The Fifth Era: from the 1930s until the latter 1960s*

During this era the Democratic Party was the dominant party. The era includes the major expansions of the federal social welfare state during the New Deal programs advocated by President Franklin D. Roosevelt and the Great Society programs advocated by President Lyndon Johnson. During this era, the Democratic Party became identified with the common person, minorities, and labor, while the Republican Party became identified with business and the wealthy. The New Deal issues included the national government's

response to the Depression and foreign policy matters related to World War II and the Cold War. The Great Society issues focused on the expansion of the social welfare state and civil rights and liberties. Egalitarianism is one of the values associated with New Deal/Great Society liberalism.

11.66 | *The Sixth Era: from the latter 1960s—*

This era began as a conservative backlash or reaction against the liberalism of the New Deal and Great Society. Republicans opposed liberal Democratic policies that conservatives blamed for an increase in crime, social disorder (race riots, prison riots, and antiwar demonstrations), the loss of the War in Vietnam, loosening of sexual mores, school busing, affirmative action, the separation of church and state, inflation, and going soft on communism. Both of the major parties are coalitions of interests or viewpoints. During this era, the Republican Party was like a four-legged stool supported by following four legs:

- Anti-crime: Advocates of getting tough on crime.
- Anti-communism: Cold Warriors.
- Economic conservatives: advocates of the free market.
- Values voters: the conservatives who support traditional and religious values.

The values voters in the Republican Party focus on social issues. The values and lifestyles conflict between liberals and conservatives was called the culture wars. An important movement in the culture war was Patrick Buchanan's Address at the [1992 Republican Party Convention](#). Buchanan, a traditional conservative who lost the Republican Party nomination for president, gave a rousing speech that inspired the social conservative base of the Republic Party with the following declaration and call to action: "There is a religious war going on in this country. It is a cultural war as critical to the kind of nation we shall be as the cold war itself—for this war is for the soul of America."

On economic issues, Republicans during this sixth era took two main positions: de-regulation of business and opposition to taxes. On national security matters Republicans were staunch anti-communists who supported getting tough on the Soviet Union. These issues became the basis for the Republican Party's rise in national politics beginning with President Nixon's election in 1968. The Republican Party won the presidency five of the six presidential elections between 1968 and 1988. And until the mid-term elections in 2006, Republican President George W. Bush's party controlled both houses of Congress. Democratic President Obama's victory in the 2008 presidential election increased speculation that the country was entering a post-party era where party politics was less important than issue politics, but the intense partisan divisions that characterized governance since then have ended such speculation about post-party politics.

Nevertheless, the U.S. party system is dynamic, not static. It is constantly changing. The advanced age of the current party era has raised two related questions. Is the Sixth Party Era about to end? Does the increase in the percentage of the public that consider themselves independents indicate the emergence of a post-party era? The political forces that shape the two major political parties are still at work:

“The modern Democratic Party was shaped by the populism of the 1890s, the antibusiness reformism of the 1930s and the civil rights crusade of the 1960s. The Republican Party was formed by abolitionism in the 1850s, anti-tax revolts in the 1970s and 1980s and the evangelical conservatism of the 1990s and 2000s.”³ The constituent elements of the two major party coalitions change over time, but the parties typically consist of components or interests that are associated with the different sides of public policy debates or issues. As these coalitions change, they pressure the parties to change to accommodate their interests. This could result in a new dominant party era. However, the increase in the number of Americans who consider themselves Independents, and the ability of candidates to run for office using their own resources rather than the resources traditionally provided by a political party, has renewed speculation about the decline of political parties or even an end to the era of political parties. Is the political party over?

*Are political parties
anachronistic?*

“Are Independents Just Partisans in Disguise”

<http://www.npr.org/blogs/itsallpolitics/2012/08/22/159588275/are-independents-just-partisans-in-disguise>

11.67 | PARTIES, CAUSES, AND MOVEMENTS

One of the keys to understanding the continued life of the U.S. two-party system is the relationship between political parties and movements (or causes). A political movement or cause is an organized campaign on behalf of an issue or policy. The American political experience includes many movements: anti-slavery; prohibition; women’s rights; civil rights; anti-war; pro-life; the environment, etc. The Republican and Democratic Parties have causes or movements as part of their political bases. The Tea Party movement is an example of a recent movement within the Republican Party that advocated, among other things, a return to the original understanding of the Constitution.



The Democratic Party has incorporated the business reform movement of the 1930s and the civil rights movement of the 1950s and 1960s into its base. Government regulation of business and government advocacy of civil rights, particularly of minorities, are causes or movements that are associated with the Democratic Party. The Republican Party has incorporated the anti-communist movement of the 1950s and the religious revivalism of the 1980s and 1990s into its base. Political movements to strengthen national defense and promote Christian activism are causes that are generally at home in the Republican Party. Political movements often change the political parties as their ideas are incorporated into the party.

In fact, the movement-party dynamic explains **the continuity and change** in the American political system. The continuity is the fact that the two-party system of Republicans and Democrats has remained the same for almost 200 years. The change is the fact that what it means to be a Republican or Democrat changes over time as movements arise to bring new issues to the political system. The dynamic of the relationship between a political party and the causes and political movements that periodically arise from within elements of a political party help explain how political change occurs within a party system that has not changed very much in 200 years in the sense that we have had the same two major parties since the early decades of the 19th Century.

11.7 | Party Affiliation and Political Attitudes

Political party is related to political attitudes. Therefore, the origins of political partisanship (the identification with a political party) have been studied extensively. There is broad agreement that a person’s identification with a political party is caused by upbringing, ethnicity, race, geographic location, and socioeconomic status. A person also identifies with a party because of ideology or positions on important issues. In order to better understand all of these factors, a Gallup Panel survey asked Americans who identified themselves as Republicans or Democrats (or said they leaned to either party if they initially said they were independents) to explain in their own words just what it is about their chosen party that appeals to them most. The following Gallup Polling data describe the appeal of the two major parties.⁴

Republicans justify their allegiance to the GOP most often with reference to the party’s conservatism and conservative positions on moral issues. Beyond that, Republicans mention the party’s conservative economic positions, usually defined as support for smaller government. Finally, a much smaller number of Republicans mentioned a variety of other things that appealed to them.

Republicans		Democrats	
	Percent		Percent
Conservative/More conservative	26	Social/Moral issue positions	18
Conservative family/moral values	15	Overall platform/ philosophy/ policies	14
Overall platform/ philosophy/ policies	12	Liberal/More liberal	11

Conservative on fiscal/economic issues	10	Help the poor	7
Favors smaller government	8	Disagree with the Republicans	5
Favors individual responsibility/self-reliance	5	Always been a Democrat	5
Always been a Republican	4	Antiwar	3
For the people/working people	3	Healthcare reform	2
Low taxes	3	Pro-environment/conservation	1
Favor strong military	3		
Pro-life on abortion	2		
More honest than the Democrats	2		
Disagree with the Democrats	2		
Other	3	Other	7
Nothing in particular (vol.)	5	Nothing in particular (vol.)	6
No opinion	6	No opinion	5
Asked of Republicans and independents who lean to the Republican Party. What is it about the Democratic Party that appeals to you most? Percentages add to more than 100% due to multiple responses.		Asked of Democrats and independents who lean to the Democratic Party) What is it about the Democratic Party that appeals to you most? Percentages add to more than 100% due to multiple responses.	

The Democrats' justifications are somewhat different. Compared to the percentage of Republicans who mention conservatism as their rationale for identifying with the Republican Party, the percentage of Democrats who mention liberalism is relatively small. Democrats are most likely to mention that the Democratic Party appeals to them because it is for the working class, the middle class, or the *common man*. Democrats also tend to mention issues or party stances in general, and to a lesser extent mention specific issues such as the party's antiwar, pro-healthcare, and pro-environment stances.

11.8 | Summary

One example of how the U.S. political system did not develop the way the Founders intended is the development of political parties. The Founders worried about political parties as divisive forces. They saw parties literally dividing Americans into “parts” or parties. The two-party system has not changed for almost 200 years, but the two major parties have changed a great deal over time as political movements and third or minor parties arise to address new issues facing the nation. American political culture values individualism. Individualism produces skepticism about political parties, but parties are also considered important linkage institutions that organize public participation in politics. So despite a political culture that values individualism, despite skepticism about political organizations and partisanship, despite the rise of interest groups as alternative sources for campaign support, and despite the fact that around one-third of voters now consider themselves Independents, parties continue to play a central role in the modern system of government and politics. So despite the periodic claims that parties are dying, that American politics is entering a post-partisan era, and books entitled *The Party is Over*,⁵ the party is not over. The reports that parties are dead bring to mind Mark Twain's

famous quip about a newspaper report that he had died: “The reports of my death are greatly exaggerated.”

KEY TERMS

political party
nomination process
one-party systems
two-party system
Duverger’s Law
Multi-party systems

Study Questions

What are the roles and functions of political parties in America?
Do parties play a worthwhile role in the American political system?

- 1) How are political parties organized in America? What effect does this have on the political system?
- 2) Trace the evolution of the political parties from the founding through the New Deal. How and why did the parties change during this period?
- 3) What role do political parties play in elections?
- 4) What are the major eras in the history of American political parties?
- 5) Compare and contrast the platforms, strengths, weaknesses, and strategies of the Republican and Democratic Parties.

11.9 | ADDITIONAL RESOURCES

Gov-Spot offers a list of many Political Parties and platforms for review.

<http://www.govspot.com/categories/politicalparties.htm>

The University of Michigan Library Web site provides links to congressional party leadership and platforms. www.lib.umich.edu/govdocs/polisci.html

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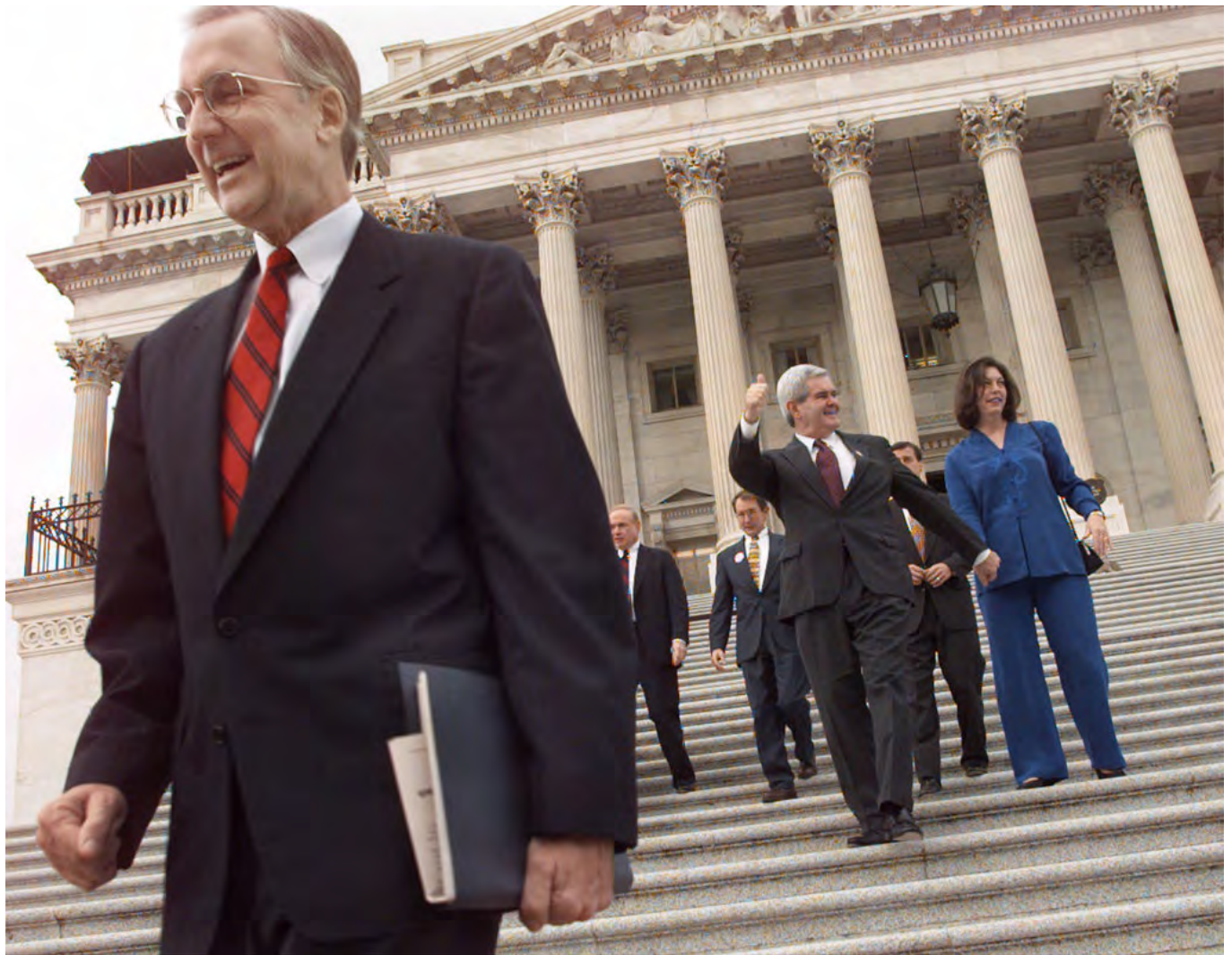
² Edward J. Larson. 2007. *A Magnificent Catastrophe: The Tumultuous Election*

³ Sam Tanenhaus, "Harnessing a Cause Without Yielding to It." *The New York Times* (November 9, 2008), p.3WK.

⁴ <http://www.gallup.com/poll/102691/Whats-Behind-Republican-Democratic-Party-ID.aspx>

⁵ Mike Lofgren. 2012. *The Party Is Over*. New York: Viking.

CHAPTER 12: INTEREST GROUPS



Lobbyist Bob Livingston (L) and former Speaker of the House Newt Gingrich (R)

12.0 | Interest Groups

MADNESS IS RARE IN INDIVIDUALS - BUT IN GROUPS, POLITICAL PARTIES, NATIONS, AND ERAS IT'S THE RULE.

- FRIEDRICH NIETZSCHE

"TEN PEOPLE WHO SPEAK MAKE MORE NOISE THAN TEN THOUSAND WHO ARE SILENT."

NAPOLEON BONAPARTE

Interest groups play an extremely important role in American politics and government. In fact, it is impossible to understand American government or politics without a basic understanding of interest groups. This chapter describes interest groups and their political activities. It also explains their role in politics, government, and the public policy process. The explanation of the increased role that interest groups play in modern politics and government includes assessments of whether their role is basically good or bad, beneficial or harmful, as well as whether interest groups are too powerful. The main question about interest groups is whether they advance their special interests to the detriment of the general, public, or national interest. This question is similar to questions about the role of political parties, and it produces similar skepticism about powerful special interests. In politics as in other areas of life, organization increases effectiveness. Like parties, interest groups are mediating

institutions that organize public participation in politics, function as part of the system of checks and balances, and help civil society control government power. This chapter will help you decide whether group behavior is madness or whether groups give voice to individuals.

12.1 | What is an Interest Group?

An **interest group** is a collection of individuals or organizations that share a common interest and advocate or work for public policies on behalf of the members' shared interests. For these reasons, interest groups are also called advocacy groups, lobbying groups, pressure groups, or even special interest groups. What is the difference between an interest group and a political party? It is not size—although in the U.S. interest groups are smaller than the Republican and Democratic Parties. An interest group can have more or fewer members than a political party. A large organization such as The Association for the Advancement of Retired People (AARP) has more members than some minor political parties.

The major difference between an interest group and a political party is that parties try to achieve their policy goals by running candidates for office in order to control government but interest groups usually do not. Both political parties and interest groups take positions on important public policy issues and work on behalf of their members' goals. But interest groups advocate for policies without actually running candidates in elections in order to try to take control of government. Interest groups typically lobby the government to adopt their positions. Lobbyists are the individuals who represent and advocate on behalf of an interest group. Political scientists agree that interest groups play an important role in American politics, but they do not agree on what exactly defines an interest group. One definition of an interest group focuses on membership: a group must have a significant number of members in order to be officially recognized as an interest group. Another definition focuses on efforts to influence public policy, not membership itself, so that an interest group is defined as any non-government group that tries to affect policy. The term interest group is sometimes used generically to refer to

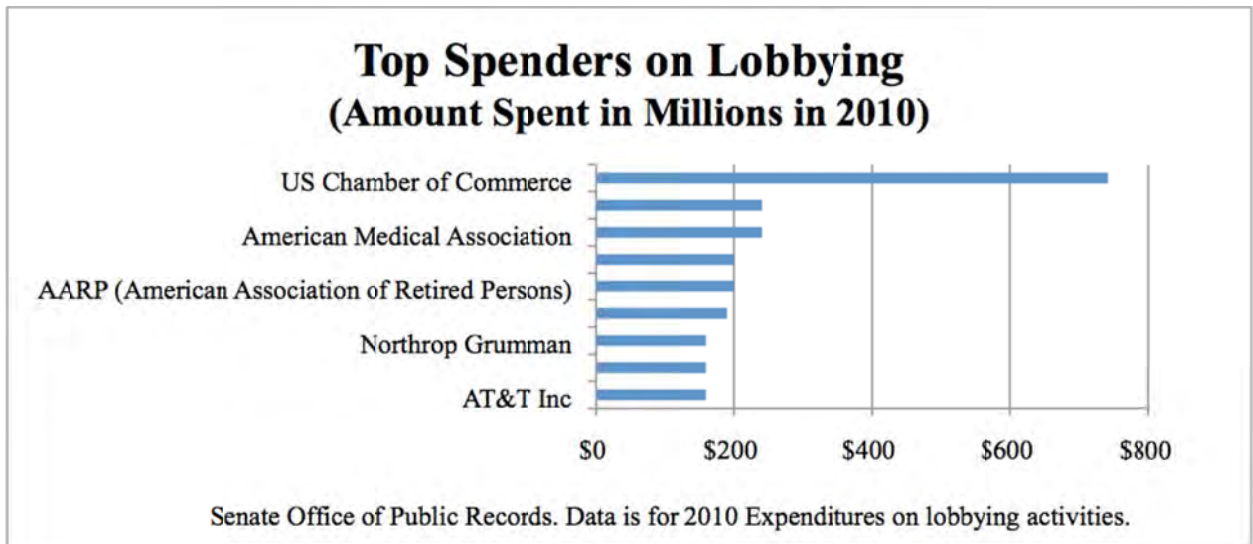
any segment of a society that shares similar political opinions on an issue or group of issues (e.g. seniors, the poor, consumers, etc.) even if they are not necessarily part of an organized group.

12.12 | *Types of Interest Groups*

There are many types of interest groups. Interest groups represent or advocate on behalf of almost every imaginable organized interest from A (abortion; airlines; agriculture) to Z (zoning and zoos). One major distinction between types of interest groups is the difference between public and private interest groups. A **public interest group** is one that advocates for an issue that benefits society as a whole. A **private interest group** is one that advocates for an issue that primarily benefits the members of the group. There are some overlaps between these two types because it is not always possible to separate public and private interests.

[Common Cause](#), founded by Ralph Nader, was one of the first public interest groups. It promotes responsible government generally but it has a primarily liberal orientation. Three prominent public interest groups in the field of public health are the [American Heart Association](#), the [American Cancer Society](#), and the [American Lung Association](#). A related type of public interest group is The [Public Interest Research Group](#) (PIRG), but it is a primarily liberal advocate on issues such as the environment, public transportation, and education. Groups whose primary purpose is advancing the economic interests of their members are private interest groups. The Indoor Tanning Association, for example, is a trade group that advocates for a specific industry. It lobbies to protect an industry from increased government regulation during a time when there is increased concern about skin cancer. During the protracted health care reform debates of 2009 that eventually resulted in the passage of the Patient Protection and Affordable Care Act (Obamacare), Congress considered proposals to pay for the expanded health with a “Botax,” a tax on elective, cosmetic surgery. Doctors successfully lobbied against the Botax in the Senate health care reform bill, so a “tantax” was substituted—a tax on indoor sun tanning services. The [Indoor Tanning Association](#) opposed the proposed Tantax. In fact, the tanning industry has a broader lobbying and [public information campaign](#) to ease public concerns about the adverse health effects of tanning and thereby avoid further taxation and regulation. This campaign is a good example of a defensive strategy, one that is intended to prevent public policy actions that are adverse to a group’s interests. The U.S. political system has many veto points where legislation can be stopped.

The number of organized interest groups began increasing in the post-World War II era, with group formation surging since the 1960s. The increased size of the federal government also meant that many of the interest groups went national in the sense that they focused their activities on Washington, DC.¹



The following illustrate the types of interest groups and interest group activities:

- **Business Groups.** A corporation such as an aerospace manufacturer or a health care company that lobbies to win a government contract to buy airplanes or provide health care services. Corporations often hire a lobbying firm to advocate for their interests.
- **Trade or Professional Associations.** An employers' organization or trade or professional association that represents the interests of an entire industry (e.g., manufacturers or health care or insurance or legal services). An interest group that represents an entire sector of the economy might lobby for favorable tax policies or favorable regulatory policies.
- **Labor Groups.** Labor unions that represent organized labor and other employee rights groups advocate for public policies that benefit workers, such as minimum wage laws or workplace safety laws or health care. These groups can represent private sector workers or public sector workers.
- **Demographic Groups.** These are organizations that represent specific demographic segments of society such as senior citizens; racial, ethnic, or religious minorities; veterans; persons with disabilities; and immigrants. These groups typically lobby for retirement benefits, laws protecting against discrimination, pension benefits, handicap accessibility, religious freedoms and public support, and favorable immigration policies.
- **Single Issue Groups.** These are groups that were created specifically to advocate for a single-issue. Single-issue groups include those that advocate for women's rights, the environment, or advocate for or against abortion or gay rights.
- **Ideological Groups.** Ideological groups include organizations that advocate for conservatism, liberalism, or libertarianism, for example. Ideological groups also include think tanks, the research and policy organizations that often have a

- particular ideological perspective or a particular economic theory that informs their policy analysis and advocacy.
- **Religious Organizations.** Church Groups or organizations active on religious issues lobbying government for exemptions from zoning laws, tax laws, or employment rules and regulations.

12.13 | *Economic Interest Groups*

The greatest number of interest groups is economic interest groups including business, trade and other associations, labor, and professional associations.



- **Business.** Businesses such as General Motors, Microsoft, and Boeing lobby to influence public policy regarding employment, workplace safety, the environment, taxes, and trade policy, among others. In this era of cooperative federalism, where both the national and state governments regulate business and economic activity, corporations typically have a Public Affairs or Public Relations or Government Affairs division to conduct public relations campaigns, to make campaign contributions on behalf of candidates they support, and to lobby on behalf of the business' interests.

- **Trade Associations.**

Businesses with a similar interest sometimes join trade associations to advocate on behalf of the entire industry or sector of the economy. The U.S. Chamber of Commerce, the National Federation of Independent Businesses, and the National Association of Manufacturers are trade associations. They are interest groups that represent business generally, or small business specifically, or the manufacturing sector specifically. The number of such business groups and their local, state, and national influence make them one of the more important political forces in U.S. politics. Business groups are generally members of the Republican Party coalition.

- **Labor.** Interest groups representing workers include labor unions that represent individuals who work on farms or the agricultural sector, manufacturing such as steel and auto manufacturing), and individuals who work in the service sector. Union membership in the U.S. is low, particularly compared with membership in other industrial democracies. Two of the oldest and most powerful labor unions

are the [AFL-CIO](#) (The American Federation of Labor and Congress of Industrial Organizations) and the [Teamsters](#). The influence of organized labor has greatly diminished over the past decades. One reason for their decline is the American economy has moved away from industry and manufacturing, which were the sectors of the economy where unions were strongest, toward an information and service sector economy, where unions were not organized. Industrial and manufacturing unions represented blue-collar workers. White-collar workers have not been heavily unionized. As the economy shifted toward the service sector, a labor union was created specifically to represent these “pink collar” workers. The [Service Employees International Union](#) (SEIU), which calls itself the largest and fastest growing union, organizes on behalf of health care and hospitality industry workers. Labor Unions are traditionally members of the Democratic Party coalition.

- **Professional Associations.** Professionals have organized themselves into some of the most influential interest groups in the U.S. These include such well known professional associations as the [American Medical Association](#); the [American Bar Association](#); the [National Education Association](#); the [National Association of Realtors](#); and engineering associations—the [National Society of Professional Engineers](#) and the [American Engineering Association](#). The AEA’s mission is to make the AEA “an AMA for engineers.” The above “Top Spenders on Lobbying” graph shows that professional associations are the top spenders on lobbying. Each state controls occupational licensure. That is, a state licenses professionals to operate in the state. Therefore there are 50 state medical associations and state bar associations. Medicine, law, and engineering are among the most prestigious professions. Their professional associations can exert considerable influence over government regulation of their professions, including the licensing standards that determine access to the profession. One power question about these professional associations is whether they use their influence to protect the public/consumers (from untrained or unscrupulous doctors, engineers, lawyers, or financial advisors) or whether they use their political power to protect their members.

Act on It!

Civic engagement includes interacting with organizations that are such an important part of civil society. Contact an interest group to ask about an issue that you are interested in or an issue that the group supports.

12.14 | Ideological Groups

Ideological groups are organized to advocate for a particular set of political beliefs. Ideological groups are harder to identify than economic groups. The [American](#)

[Conservative Union](#) calls itself the oldest membership-based conservative organization in the U.S. One of its most widely known actions is the rating of elected government officials. The American Civil Liberties Union might be considered an ideological organization but its advocacy of civil liberties is sometimes liberal and sometimes conservative. The [Americans for Democratic Action](#) calls itself the oldest independent liberal organization in the U.S. There is a large number of radical or fringe organizations that are active in American politics, if sometimes only on the Internet. One such radical right organization is the [Guardians of the Free Republic](#).

12.15 | *Think Tanks*

Think tanks are organizations that are primarily interested in researching and promoting ideas. It is appropriate to think of think tanks as “think-and-do” tanks because they are interested in thought that produces action. Think tanks research and advocate public policies that are based on the ideas they support. The American Action Network is a conservative think tank. A former director of the Congressional Budget Office described its purpose, and the purpose of other think tanks: “Having good ideas is not enough. You actually have to sell them to the Congress, the president, the citizens.”² Two prominent think tanks are the [Brookings Institution](#), a think tank with a generally liberal orientation, and the [American Enterprise Institute](#), a think tank with a generally conservative orientation.

12.2 | Incentives to join

Why do political groups exist? Why do people join groups? The Political Scientist James Q. Wilson identified three types of incentives to join a group: solidarity, material, and purposive.³ Some interest groups provide more than one of these incentives for membership, but the different categories are useful for understanding the different kinds of interest groups.

12.21 | *Solidarity*

Solidarity incentives for a person to join a group are essentially social reasons. Individuals decide to join a group because they want to associate with others with similar interests, backgrounds, or points of view. The old saying, Birds of a Feather Flock Together, describes solidarity incentives. Church groups, civic groups such as the Elks Club, and groups whose members have shared ethnic backgrounds, are examples of groups whose members are motivated primarily by associational or shared interests.

12.22 | *Material*

Material incentives are essentially economic motives for membership. Membership is motivated by a tangible benefit. An individual who joins the Association for the Advancement of Retired People (AARP) to get motel, restaurant, or car rental discounts is motivated by a material incentive to join. A company that becomes a member of a trade association such as the Chamber of Commerce or the National Association of

Manufacturers in order to benefit from the trade association's lobbying is motivated by a material incentive. A study of interest groups in the United States and other countries found that a great majority (almost three-quarters) represents professional or occupational interests. The main motivation of such professional or occupational groups is economic or material interests.⁴

12.23 | Purposive

Purpose incentives are those that appeal to an individual's commitment to advancing the groups' social or political aims. Purposive groups attract members who join for reasons other than merely associating with others who share their interests, or solely because they want to obtain material benefits. Some of these purposive or issue advocacy groups are ideological. Ideological purposive groups advocate on behalf of ideas (e.g., conservative; liberal; libertarian) or causes (right-to-life; civil liberties; property rights; the environment; religious freedom). Purposive groups include the American Conservative Union, the American Civil Liberties Union, the Sierra Club, and the two major interest groups who take different sides in the debate over abortion policy: The [National Right to Life](#) and the [National Abortion Rights Action League](#) (NARAL).



12.3 | What Do Interest Groups Do?

Much of what interest groups do falls under the large umbrella of lobbying. Lobbying is a broad term for an interest group's activities that seek to persuade political leaders and government officials to support a particular position. Lobbying occurs at all levels of government (local, state, national, and international), in all three branches of government (although technically groups do not lobby the courts), and in non-governmental settings. Interest group lobbying includes testifying at government hearings, contacting legislators, providing information to politicians, filing lawsuits or funding lawsuits or submit amicus curiae briefs with a court, and public campaigns to change public opinion or to rally members of the group to contact public officials.

12.31 | Lobby Congress

Congress, committee members, and individual members of congress are frequent targets of lobbying campaigns. Interest groups might lobby in the congressional setting by providing testimony at a committee or subcommittee meeting, contributing to an individual congressional representative's



campaign fund, or organizing a letter or phone-call campaign by members of the interest to convince a particular representative of the public support for a policy.

12.32 | *Lobby the Executive Branch*

Although the executive branch does not actually make the laws, interest groups target the executive branch in order to influence the formation of public policy or its implementation. Lobbying the executive branch may include contacting the president, members of the president's staff (including the chief of staff or policy advisors), cabinet level officials, or other high-ranking members of the executive departments (the political appointees that make policies).



Interest groups also lobby the independent regulatory commissions. These agencies have rule making authority. The rule making process includes taking public comments about proposed regulations. Interest groups participate in this process in order to influence regulatory policy that affects them. Officials in the executive departments also play an important role in the development of the federal budget, so interest groups lobby them to support programs that the groups supports and oppose programs that the group is opposed to. Agricultural interests, food processors, and consumer groups lobby members of the Department of Agriculture, which plays an important role in congressional and administration food policy. Health care providers, insurance companies, and patient rights groups lobby officials in the Department of Health and Human Services, which play an important role in formulating and implementing health care policy (including Medicare and Medicaid). The telecommunications industry, consumer rights groups, and citizen groups interested in the content of broadcast programming lobby the Federal Communications Commission. The [FCC is an independent regulatory agency](#) that licenses broadcast companies and has some authority to regulate the content of broadcast programming and other aspect of the telecommunication industry.

Interest Groups are an important part of the policymaking process. They are one of the three major members of what political scientists call Issue Networks. The term Issue Network describes the patterns of interactions among three sets of participants in the policy making process: a congressional committee; an Executive Department; and interest groups. Each area of public policy has an Issue Network. Interest groups link the government—that is congressional committees and the executive departments or independent regulatory commissions—and the civil society (the interest groups). The following figure describes the Issue Network for defense policy. The arrows describe the mutual benefits the participants provide. Interest groups provide information to the legislative committees and executive departments that make public policy in their area of interest. Congressional committees provide budgets for programs that an interest groups supports. And executive departments support programs that interest groups support.

Figure 12.3 Issue Networks: Defense Policy

**12.33** | “Lobbying” the Courts

In an effort to maintain some separation of law and politics, it is considered inappropriate for interest groups to lobby the courts the way they lobby congress and the executive branch. Interest group efforts to influence the courts take two forms. The first is political litigation. Political litigation is using a lawsuit primarily to change public policy. An interest group may file a lawsuit on behalf of its members. The Sierra Club may file a lawsuit challenging a policy allowing development of a natural environment. The National Federation of Independent Businesses challenged the constitutionality of the Patient Protection and Affordable Care Act (Obamacare). A second way that an interest group can lobby the courts is by filing an *amicus curiae* brief (that is, a friend of the court brief) that advocates for one of the two sides in a case that is before the court. The major cases that the Supreme Court agrees to decide typically have a large number of *amicus curiae* briefs submitted for both sides. A third way that interest groups attempt to influence the courts is by sponsoring a lawsuit, providing legal resources for the actual parties. Taking a case all the way to the Supreme Court requires a great deal of time and money.





A good example of political litigation is the efforts of The National Association for the Advancement of Colored People (NAACP) to support lawsuits challenging the constitutionality of segregated public schools. The landmark Supreme Court ruling in *Brown v. Board of Education* was the result of an organized campaign to use the courts

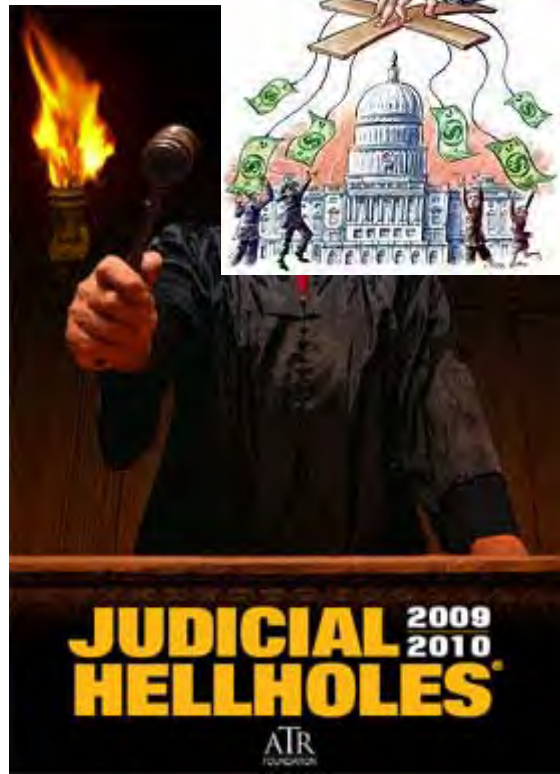
to change public policy. In fact, the various civil rights revolutions of the period 1940s-1960s relied heavily on political litigation. In the 1950s and 1960s, liberal public interest groups relied heavily on political litigation to change public policies related to prisoner rights, racial equality, freedom of expression, the right to privacy, and environmentalism. In the 1970s conservative public interest groups used political litigation to change public policies on abortion, property rights, freedom of religion, affirmative action, business and employer rights, and gun rights.

Today there are many conservative organizations that have adopted a legal strategy to achieve conservative policy goals:

- The Pacific Legal Foundation was created to challenge environmental regulations.
- The U.S. Chamber of Commerce established a National Chamber Litigation Center and the Institute for Legal Reform to advocate pro-business legal policies.
- The Christian Legal Society advocates against the separation of church and state.
- The Cato Institute advocates libertarian positions.
- The National Rifle Association advocates for gun rights.

The tort reform movement is an example of business groups going to court to change legal policies relating to torts—wrongful injuries such as medical malpractice and product liability.

“Judicial Hellholes,” “Jackpot Justice,” “Looney Lawsuits,” and “Wacky Warning Labels Contest” are terms that have entered everyday vocabulary about civil law in modern American society. The American Tort Reform Association has even trademarked the epithet “Judicial Hellholes.” The National Federation of Independent Businesses has created a Small Business Legal Center specifically to advocate in the courts: “The Legal Center is the advocate for small business in the courts. We do what



federal and state NFIB lobbyists do, but instead of lobbying legislatures we lobby judges through briefs and oral arguments in court. We tell judges how the decision they make in a given case will impact small businesses nationwide.”⁵

The [American Tort Reform Association](#)’s membership and funding come from the American Medical Association and the Council of Engineering Companies. The [National Association of Manufacturers](#) uses political litigation to change policies that it considers anti-business, such as product liability laws and campaign finance laws that limit campaign contributions. The U.S. Chamber of Commerce has established an [Institute for Legal Reform](#) which specializes in political litigation to advance pro-business legal policies. Whose side are the lawyers on? In criminal justice, the defense bar represents suspects who have been accused of a crime. In civil justice issues such as product liability and medical malpractice, the plaintiff bar generally represents consumers, employees, or patients. [Lawyers for Civil Justice](#) is a national organization of corporate counsel and defense lawyers advocating for tort reform. The Florida Chamber of Commerce created the [Florida Justice Reform Institute](#) to reform what it calls a wasteful civil justice system. Other business organizations advocating tort reform include America’s Health Insurance Plans, American Hospital Association, Pharmaceutical Research and Manufacturing Association, and the National Federation of Independent Businesses.

12.34 | *Grassroots Lobbying and Protests*

Interest groups also engage in **grassroots lobbying**. Grassroots lobbying is a term for efforts to mobilize local support for an issue position the group has taken. Grassroots lobbying is usually contrasted with Washington lobbying. Washington lobbying is sometimes criticized as “inside-the-beltway” activity that focuses on the Washington political establishment to the neglect of the average American or Mainstreet America. Grass roots lobbying has an “outside-the-beltway” focus and therefore a reputation for being a more genuine reflection of public opinion than Washington lobbying campaigns. Grassroots lobbying consists of interest groups contacting citizens and urging them to contact government officials rather than having the interest group directly contact government officials.



The political appeal of appearing to be a grass-roots organization whose members come from the community has created the phenomenon called “astroturf” lobbying. Astroturf lobbying is where an interest group without a large membership portrays itself as having roots in the community. The membership is artificial, however, which is why the grassroots are called astroturf. In today’s media age and celebrity culture, grassroots campaigns can use influential media personalities (such as Rachel Maddow or Glen Beck) to encourage their listeners or viewers to take action, thereby linking the national

and electronic communities to the local or grassroots. The more extreme version of grassroots lobbying is organizing or supporting protests and demonstrations. Many national organizations have a day where they bring members to Washington, D.C. to call attention to their issues, whether advocating to put an issue on the policy agenda or to protest a change in public policy.

12.35 | Lobbyists

Interest groups frequently pay professional lobbyists to represent the organization to the public and the government. Professional lobbyists can either work directly for the interest group or they can be employees of public relations or law firms who are hired by the group for a specific campaign. One of the most seriously funny depictions of interest group efforts to influence public opinion and public policy, and the image of lobbyists is the Hollywood film *Thank You For Smoking*. The fictional film describes the efforts of



the tobacco lobby, the alcohol lobby, and gun lobby, which IN THE FILM are called the “MOD Squad: Merchants of Death.” The *Youtube* video clip is available at: http://www.youtube.com/watch?v=iBELC_vxqhl

12.36 | Campaigns and Elections

Interest groups also participate in campaigns and elections. In elections of government officials, interest group activity includes the following:

- Candidate recruitment. Groups recruit candidates with specific views on political issues to support for office.
- Campaign contributions. Interest groups provide funding to support campaigns.
- Campaign resources. Interest groups with large memberships provide campaign workers.
- Public information. Interest groups rate candidates (e.g., on conservatism or liberalism) to provide information to voters about where a candidate stands on the issues).
- Get out the vote efforts. Groups can rally their members to go to the polls to vote for a particular candidate.



Of course, money is the mother’s milk of politics. Money has become more important as politics has moved away from the grass roots **retail politics** (one-to-one or personal

relationships) toward **wholesale politics** (mass appeal campaigns). Wholesale politics is more likely to be “air war” campaigns that are conducted on television, radio, and the Internet. One of the main ways that groups participate in elections is by providing money—raising and spending money on behalf of a campaign or political cause. There are a number of organizations that are created specifically to provide money for campaigns. A **Political Action Committee (PAC)** is a political arm of a business, labor, trade, professional, or other group. PACS are legally authorized to raise voluntary funds from employees or members of the group to contribute to a party or candidate. Many interest groups have PACs. Realtors have RPAC; doctors have AMPAC; supporters of abortion rights have NARAL-PAC and pro-life advocates have Right to Life PAC.

Political action committees (PAC) allow interest groups pool resources from group members and contribute to political campaigns and politicians. Under federal law, an organization automatically becomes a PAC by either receiving contributions or making expenditures more than \$1000 for the purpose of influencing a federal election. Individual contributions to federal PACs are limited to \$5,000 per year. However, the whole system of campaign finance law is currently in an unsettled state because the Supreme Court has ruled that campaign spending is a form of free speech that is protected by the First Amendment. As a result, the federal laws limiting the amount of money that an individual could spend on his or her own campaign were struck down. And in *Citizens United v Federal Election Commission* (2010) the Court ruled that corporate campaign contributions that were independent of a candidate’s campaign could not be limited by the government. This ruling resulted in the creation of Superpacs. In addition, organizations that are listed under section 527 of the tax code as social welfare organizations can also engage in more campaign activity without regulation.

Not all campaigns are conducted to elect government officials. Some campaigns are referendums. A referendum is a political campaign where the public votes for or against an issue that is presented on the ballot. An example of a referendum election is one where the public votes whether to approve a tax increase. Interest groups are especially important players in referendum politics because groups organize public support for their side of the issue and public opposition for the side they oppose.

12.37 | *Providing Information*

Interest groups and lobbyists typically describe their function as providing useful information to the public and government officials. The general public and even members of Congress are usually not experts on an issue that they will be voting on. Lobbyists provide technical information about their fields of interest or expertise. Lobbyists for the American Medical Association provide information about health care and lobbyists for health insurance companies provide information about insurance. In this sense, lobbyists describe their role in the political process as an educative role: explaining technical or specialized matters to generalists. Lobbyists who represent large membership groups also “educate” members of Congress or the administration about how the general public or the group’s members feel about a particular issue, bill, or law. This is also a representational role.



An interest group's strategy may also include conducting a public opinion campaign. Public opinion campaigns are efforts to change public opinion about an issue. Issue advocacy campaigns are political advertising campaigns to shape public opinion, to persuade the public to think about an issue the way that the group thinks about an issue. Oil companies that are worried about their public image can hire advertising companies to design campaigns that portray oil companies as "energy companies" that are deeply concerned about the environment, global warming, conservation, jobs, and the socially responsible production of energy. Oil spills such as the Exxon Valdez spill in Alaska and the British Petroleum oil well spill in the Gulf of Mexico in 2010 prompted extensive public relations campaigns to portray the two companies as good stewards of the environment. These kinds of well-financed public relations campaigns conducted by major corporations raise questions about the nature of public opinion in a democracy. Is public opinion the cause of public policy, or is public opinion made by these campaigns. Most interest groups today rely to some extent on direct mail, the use of computerized mailing lists to contact individuals who might share their interests.

12.38 | *Agenda Building*

Agenda building is the process by which new issues are brought to the attention of political decision-makers. There is a seemingly unlimited supply of problems or issues that someone or some group thinks the government should do something about. But public officials have limited resources (time, political capital, information, and money). Politics is the allocation of these scarce resources. Public officials must concentrate on a few important issues. Interest groups can convince politicians to put a new issue on the government's agenda.



12.39 | *Program Monitoring*

Program monitoring is when individuals or groups keep track of the government's actions to determine whether and how a bureaucracy or other administrative agency is implementing legislation. A group that monitors a program may find that a program or policy they supported is not being implemented as intended or is not being implemented well. Interest groups play a role in the policy process by monitoring policies.



12.4 | **Playing Offense or Defense?**

Sometime interest groups lobby *for* changes in public policy. They want to pass health care reform, make abortion illegal, increase regulation of Wall Street companies, enact policies to address global warming, or increase government support



for religious activity. Sometimes interest groups lobby *against* change in public policy. They want to stop health care reform, maintain legal abortions, stop government regulation, or prevent the passage of laws that provide more government support for religious activities.

Health care policy illustrates how some interest groups play offense (they support change) and others play defense (they oppose change). There are interest groups that are working hard to change the current employment-based health care system in favor of a public or national health care policy. The groups playing offense include organized labor unions, the American Association of Retired Persons (AARP), and even the American Medical Association, which has historically opposed the creation of public health care as a form of socialized medicine. The groups playing defense include health care providers, insurance companies, and organizations representing business such as the U.S. Chamber of Commerce. The high economic stakes—health care accounts for around 17 percent of the country’s gross domestic product—make it hard to make any major changes in health care. For decades the interest group battles over health care reform have been a clash of titans—a conflict among big, powerful interest groups with a great deal at stake in the outcome: groups representing doctors, hospitals and other health care providers, insurance companies, and other business groups. Interest groups devote a great deal of money, time, and other resources to such conflicts. The debate over the health care reform proposed by the Obama administration attracted an unprecedented amount of money. For a description of the large sums of money spent on health care reform see [“Exploring the Big Money Behind Health Care Reform.”](#)

Is it easier to play offense or defense? The political system makes it easier to play defense than offense. It is easier to prevent the government from acting than to prompt it to act.

- The separation of powers. Passing a federal law requires working with both the legislative and executive branches.
- Bicameralism. In order for a bill to become a law it must pass both houses of Congress.
- The committee system in Congress. The committee system is a functional division of labor that creates natural contact points for interest groups to participate in the policymaking process. Interest groups can lobby a committee to “kill the bill.”
- Party politics. The “OUT” party often has a vested interest in opposing a bill proposed by the “IN” party.
- Federalism. The geographic division of power between the national and state governments is part of the system of checks and balances.

All of these attributes of the political system create many veto points at which an individual or organization can try to stop action. The multiple veto points make it easier to stop action than to successfully propose it and interest groups are important players in the defensive contests to stop change that they oppose.

12.5 | The Free Rider Problem



A large, active, and committed membership is a valuable resource. Candidates for office and elected government officials tend to listen to lobbyists that represent groups with large and active membership—particularly when the membership includes voters in the individual’s district or state. The American Association of Retired Persons (AARP) is an influential demographic group because it has over 40 million members—and because older people have higher rates of voter turnout than younger people. But attracting and maintaining membership can be challenging.

One of the most important challenges to forming a membership-based group is the **free-rider problem**. The free-rider problem occurs when a person can benefit from an interest group’s actions without having to pay for the costs of those actions. This creates an incentive to be a free rider, to receive benefits without paying costs. Free riders get what is for them a free lunch. The free-rider problem creates membership problems for groups that rely on material or purposive incentives for members to join their group. In fact, the free-rider problem is one reason why the government requires everyone to pay taxes that are used to provide certain goods and services.

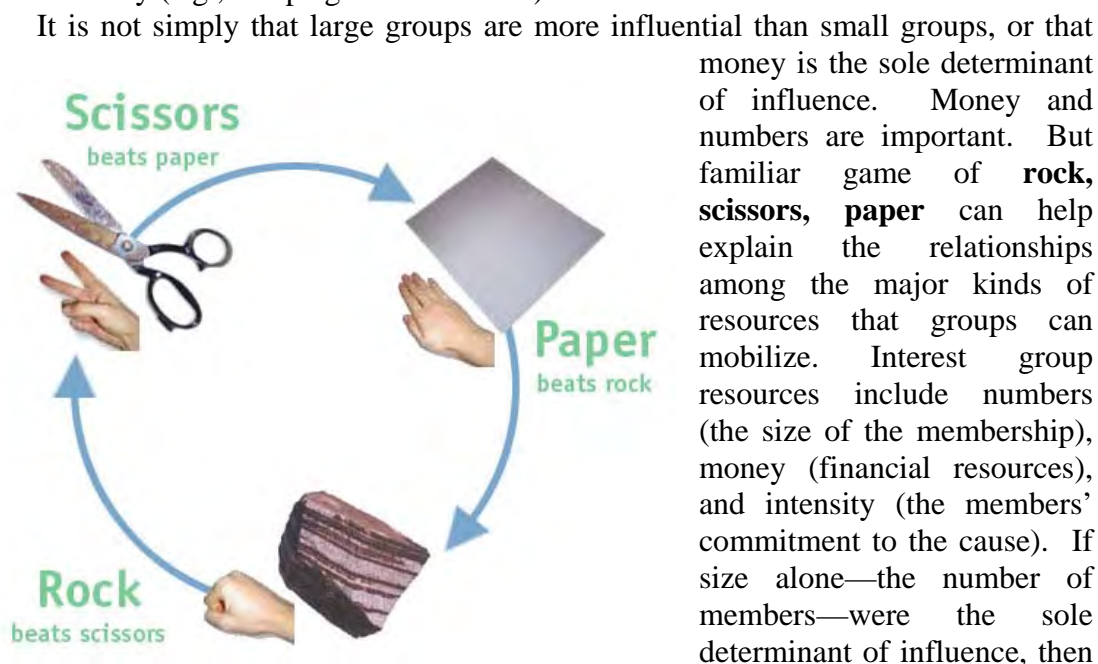
A **private good** is something of value whose benefits can be limited to those who have paid for it. A private good is divisible in the sense that it can be provided to those who have paid for it but not to those who have not paid for it. Cars, computers, and phones are divisible goods. Health care, legal advice, and education are divisible services. A **public good** is something of value whose benefits cannot be limited to those individuals who have actually paid for it. In this sense, a **public good** is an indivisible good because once it is available its benefits cannot be limited to those who have actually paid for it. For these reasons, private goods are available for purchase in the marketplace based on the ability to pay while the government provides public goods. Safe streets, public order, peace, national security, and clean air or clear water are commonly considered public goods because they are indivisible: once provided, it is hard to limit national security or clean air to those who have paid for them.

Political debates about the role and size of government can often be reduced to arguments about whether some goods or services should be considered private goods, and available in the marketplace based on the ability to pay, or public goods that are provided by the government. Is education a public or private good? Does it depend on whether the education is primary or secondary education, or a college or professional education? Is health care a private or public good? The answers to these questions are political because they answer the age-old questions about what government should be doing.

12.6 | Are Interest Groups Harmful or Helpful?

Concern about the influence of interest groups is as old as the republic and as new as the coverage of health care reform. The Founders worried about factions. In *Federalist No. 10*, Madison worried about the apparently natural tendency of individuals to organize themselves into groups that advocate for their special or self-interest rather than the general or public interest. Madison believed that the most common source of factions was “the unequal distribution of property.” He did not think that the “mischief of faction” could be eliminated; he thought they could be controlled if there were so many different factions that no one or two could dominate politics and use government and politics for their narrow self-interest and against the minority interests.

It is not easy to determine whether interest groups play a harmful or helpful role in modern American government and politics. It is easy to criticize special interests for working against the public interest. But there is often disagreement about what the public interest is. And it is not easy to measure the influence of groups. The Center for Responsive Politics⁶ studies the activities and the influence of groups, with a special emphasis on political contributions and their influence on public policy. It is easier to measure activity (e.g., campaign contributions) than influence.



consumers and workers would be much more influential than business interests because there are more of consumers and workers. And the poor would be much more influential than the rich. But size can be trumped by money. The U.S. Chamber of Commerce has less than 10% of the membership of the AARP but the financial resources of the Chamber's members make it an influential interest group. Money is a resource that is used to influence decision makers by making campaign contributions or by public relations campaigns that shape the way people think about an individual, issue, or party. So money can trump numbers. And finally, intensity of interest can trump numbers and money. An organization with a small number of members who are intensely interested or committed to their cause can trump numbers or money. Intensity is one of the keys to explaining the political influence of the National Rifle Association. NRA members are famously committed to the cause of advocating gun rights.

12.7 | Summary

It might be said of interest groups (and bureaucrats) that love them or hate them, we can't seem to live without them. The Founders worried about the "mischiefs" of faction, but groups have been integrated into the American political system at all levels (national, state, and local) and arenas (legislative, executive, and legal). Concerns about the power or influence of special interests remain valid, but it is not easy to determine whether

groups are healthy or harmful. Members of Congress rely on interest groups to provide them with information about subjects being considered for legislation. Legislative committees take testimony from interest groups during committee hearings. Groups do provide a great deal of information to the public and to policymakers in both the legislative and executive branches of government. And like political parties, interest groups are linkage organizations that can increase political efficacy, the individual sense that participation matters, that participation can make a difference, that membership in a group increases citizen control over public policy in a democracy.

12.8 | Additional Resources

In order to get an idea of the number and type of interest groups see the list of some of the more important interest groups in the U.S., a list that is organized by the issues they represent or the public policy areas in which they lobby: “Political Advocacy Groups: A Directory of United States Lobbyists.” <http://www.vancouver.wsu.edu/fac/kfountain/>

American Civil Liberties Union (ACLU) offers information on the entire Bill of Rights including racial profiling, women’s rights, privacy issues, prisons, drugs, etc. Includes links to other sites dealing with the same issues. www.aclu.org

AFL-CIO is the largest trade union organization in America. Its Web site offers policy statements, news, workplace issues, and labor strategies. www.aflcio.org

Richard Kimber’s Worldwide Index of Political Parties, Interest Groups, and Other Social Movements www.psr.keele.ac.uk/parties.htm

Mexican American Legal Defense and Education Fund (MALDEF) Web site offers information on Census 2000, scholarships, job opportunities, legal programs, regional offices information, and more. www.maldef.org

Native American Rights Fund (NARF) Web site offers profiles of issues, an archive, resources, a tribal directory, and treaty information, as well as a lot of other information. www.narf.org

The National Association for the Advancement of Colored People (NAACP) Web site offers information about the organization, membership, and issues of interest to proponents of civil rights. It also has sections on the Supreme Court, Census 2000, and the Education Summit and includes links to other Web sites. www.naACP.org

The National Rifle Association (NRA) offers information on gun ownership, gun laws, and coverage of legislation on associated issues. www.nra.org

National Organization of Women (NOW) Web site offers information on the organization and its issues/activities including women in the military, economic equity,

and reproductive rights. It offers an e-mail action list and the ability to join NOW online. There is also a page with links to related sites. www.now.org

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Key Terms:

interest group
 lobbyists
 Public interest groups
 economic interest groups
 grassroots lobbying
 Political Action
 Committee (PAC)
 agenda building
 Program monitoring

STUDY QUESTIONS

1. What factors make an interest group successful? Provide examples.
2. Discuss and provide examples of how interest groups attempt to influence election outcomes.
3. Should there be additional limits on interest group participation in American politics?
4. What do interest groups do?
5. What are the different types of interest groups?
6. Should interest groups be protected under the First Amendment? Why or why not?

¹ See Allan J. Cigler and Burdett A. Loomis. 2007. *Interest Group Politics*. Seventh Edition. Washington, D.C.: CQ Press.

² Quoted in Jackie Calmes. "G.O.P. Group to Promote Conservative Ideas." *The New York Times*.

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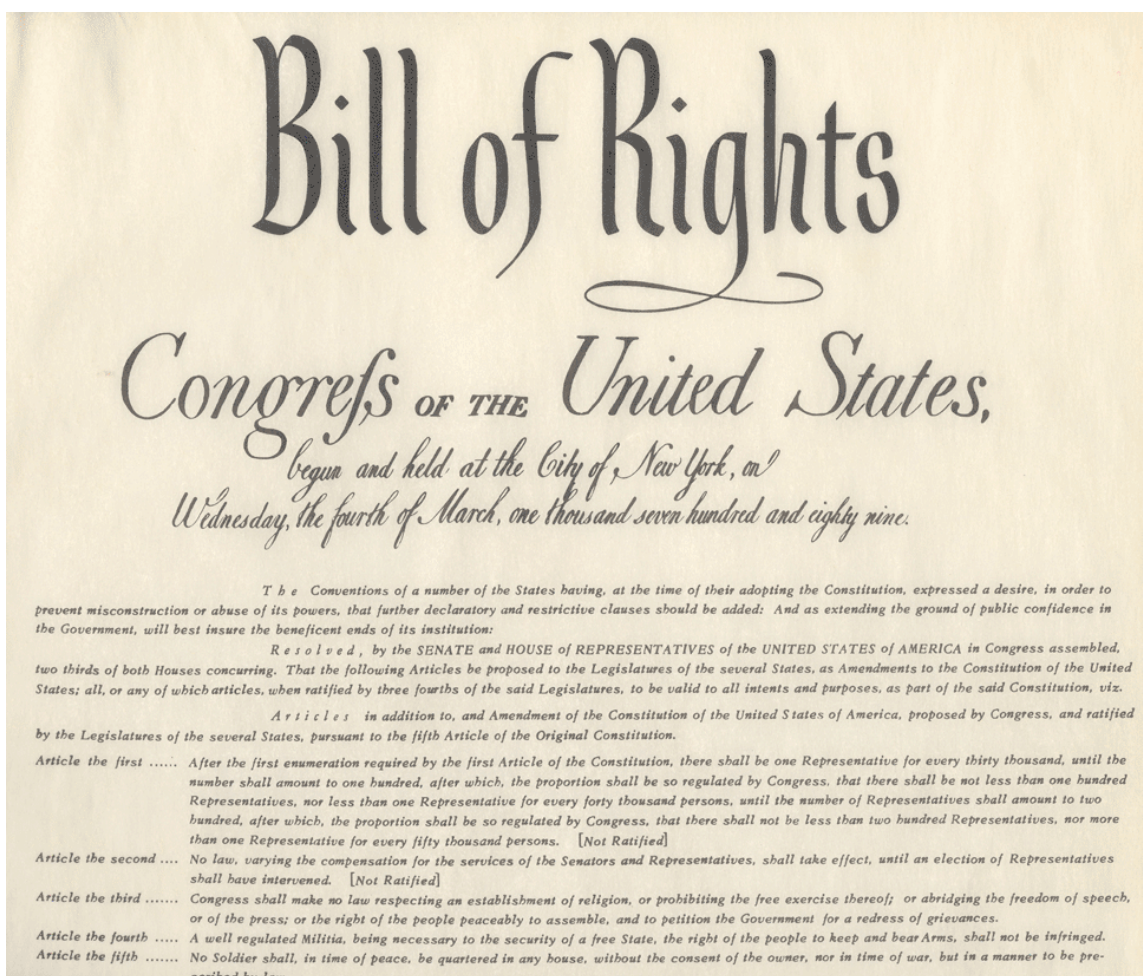
³ Chapter three of James Q. Wilson. 1973. *Political Organizations*. New York: Basic Books.

⁴ See <http://www.worldadvocacy.com/>

⁵ <http://www.nfib.com/small-business-legal-center/about-the-legal-center/>

⁶ <http://www.opensecrets.org/>

CHAPTER 18: CIVIL LIBERTIES & CIVIL RIGHTS



18.0 | Civil Liberties and Civil Rights: Freedom and Equality

This chapter continues the examination of the need to strike the right balance between granting and limiting government power by examining civil liberties and civil rights. Civil liberties and civil rights are directly related to government power. Debates about them are debates about where to strike the balance between individual freedom and government power to limit it. The main purpose of the chapter is to

- Define the terms civil liberties and civil rights. Although *civil liberties* and *civil rights* are commonly used to refer to the same thing—**individual rights**—there are three important differences between them. They have different legal sources (constitutional versus statutory), they serve different purposes (freedom versus equality), and they have different relationships with government power (grants versus limits).
- Describe the development of specific rights and liberties; and
- Explain why freedom and equality are often so controversial despite widespread public support for these two political values.

18.1 | Defining Terms

18.12 | Civil Liberties

In the U.S., civil liberties are **constitutional** guarantees that protect individual **freedom** from government power. This is the negative (as opposed to the positive) concept of individual liberty. Civil liberties are stated negatively. For instance, the Constitution does not give an individual the right to freedom of expression or equal protection of the laws. The First Amendment prohibits Congress from limiting freedom of expression and the 14th Amendment prohibits a state government from denying equal protection of the laws. The main source of civil liberties is the Bill of Rights—the first ten amendments to the Constitution—but some civil liberties are provided in the body of the Constitution (e.g. the writ of habeas corpus), the 13th, 14th, and 15th Amendments, and the 19th Amendment (which prohibits denying the right to vote “on account of sex”). The Bill of Rights include freedom of expression (religion, speech, press, and association); the right to keep and bear arms; protection against unreasonable search and seizure; guarantees of due process of law; the right to a trial by jury and the assistance of counsel; protection against cruel and unusual punishment; and the right to privacy. The civil liberties provisions that apply to criminal justice are examined in the chapter on criminal justice.

Civil liberties cases are conflicts between individual freedom and government power. They are typically conflicts between an individual (or an organization) who claims a right to do something—such as burn a flag as a political protest, demonstrate at a funeral, obtain an abortion, view sexually explicit material on the Internet, carry a handgun or make unlimited campaign contributions—and the government which claims the power to limit that right. As part of the judiciary’s dispute resolution function, courts serve as a neutral third party to settle these civil liberties disputes between individuals and the government. This is an important function in constitutional democracies such as the U.S. because civil liberties are the individual or minority rights that limit the power of

the majority. The burden of proof is on the government. If the government “substantially burdens” a fundamental freedom, the government must demonstrate that it has a compelling interest in limiting the freedom *and* that it has no less restrictive means to achieve it.

18.13 | *Civil Rights*

Civil rights are legal claims that are generally provided in **statutory** law (legislation) rather than the Constitution. They typically are claims to **equal treatment** rather than freedom. And they are legal claims that can be made against other individuals or organizations—not just against the government. Civil rights legislation prohibits racial, ethnic, religious, and gender-based discrimination in voting, education, employment, housing, public accommodations, and other settings. Civil rights movements in the 19th and 20th centuries promoted egalitarianism for racial and ethnic and national minorities, prisoners, juveniles, women, the elderly, the handicapped, aliens, and gays and lesbians. Civil liberties generally promote freedom by limiting government power. Civil rights typically promote equality by using government power to limit individual freedom to discriminate.

18.14 | *Uncivil Liberties: Disturbing the Peace (of Mind)*

Fewer political actions cause a bigger political stir than when people actually use their civil liberties. The American political experience includes a history of strong-willed people standing up for their political and religious beliefs despite the threat of community hostility or government sanction. Some of these people were noble individuals standing for political principles; others were ignoble individuals who were merely taking advantage of constitutional rights. In either case their actions created a political stir. The following is a short list of some of the individuals whose convictions made them part of the American story of civil liberties.

- William Penn preaching on the streets of London and taking a stand for freedom of religion against the charge of unlawful assembly.
- Charles Schenck, the Secretary of the Socialist Party, distributing leaflets that opposed U.S. participation in WWI, which he called a capitalist enterprise to exploit workers, and compared the military draft with slavery.
- Walter Barnette objecting to a school board policy that required school children to recite the pledge of allegiance.
- Gregory Lee Johnson burning an American Flag during the 1984 Republican Party convention.
- Fred Phelps picketing at the funerals of veterans to express his belief that the veteran’s death was God’s punishment for American toleration of homosexuality.
- Xavier Alvarez lying about being a decorated military veteran and then claiming that he could not be prosecuted for violating the Stolen Valor Act of 2005 because the First Amendment prohibits Congress from passing laws that limit freedom of speech.

These are all examples of civil liberties cases where an individual challenges government power to limit freedom of expression. The London trial of [William Penn](#) is part of the American story of religious freedom because a jury refused to convict him despite the fact that he was guilty of unlawful assembly. [Charles Schenck](#) was less fortunate. The Supreme Court upheld his conviction during WWI on the grounds that Congress can prohibit speech that presents a “clear and present danger” that it will cause evils—in this instance, refusal to comply with a military draft law—that Congress has power to prevent.

A WWII era case, [West Virginia State Board of Education v. Barnette](#) (1943), had a different outcome. During the national wave of patriotism during World War II, the West Virginia Board of Education adopted a policy that required all students in public schools to salute the flag as part of daily school activities. Walter Barnette, a Jehovah’s Witness, argued that the requirement violated his child’s freedom of religion. The Supreme Court agreed. When Gregory Johnson burned an American flag as a protest outside the Dallas, Texas City Hall in 1984 he was convicted of violating a Texas law prohibiting desecration of the flag and fined \$2,000. He appealed his conviction arguing that the First Amendment protects expressive actions such as flag burning. [The Supreme Court agreed](#). The ruling was not popular with the general public or many government officials. A constitutional amendment was proposed to ban flag burning but the amendment was never adopted.

Fred Phelps continued this tradition of intentionally using freedom of expression to disturb the peace of mind in a particularly uncivil way. For more than two decades members of the Westboro Baptist Church picketed military funerals as a way to express their belief that God is punishing the United States for tolerating homosexuality. The picketing also condemned the Catholic Church for sex scandals involving its clergy. On March 10, 2006 the church’s founder, Fred Phelps, and six parishioners who are relatives of Phelps picketed the funeral of Marine Lance Corporal Matthew Snyder at a Catholic Church in Maryland. Corporal Snyder was killed in Iraq in the line of duty. The picketing took place on public land about 1,000 feet from the church where the funeral was held, in accordance with rules established by local police. For about 30 minutes prior to the funeral, the picketers displayed signs that stated “Thank God for Dead Soldiers,” “Fags Doom Nations,” “America is Doomed,” “Priests Rape Boys,” and “You’re Going to Hell.” Matthew Snyder’s father saw the tops of the picketers’ signs on the way to the funeral, but he did not learn what was written on them until he watched that evening’s news broadcast. He sued Phelps and his daughters. A jury awarded Snyder more than a million dollars in compensatory and punitive damages. Phelps appealed. The jury award was overturned on the grounds that Phelps’ actions were protected by the First Amendment freedom of expression because they were comments on matters of public affairs and were not provably false. Snyder then took the case all the way to the U.S. Supreme Court, which ruled in Phelps’s favor in the case of [Snyder v. Phelps](#).

Mr. Alvarez was a member of a water district board who in speeches falsely claimed to be a retired marine who received the Congressional Medal of Honor. Criminal defendants have two defense strategies. They can challenge the facts (“I did not do what the government says I did!”) or they can challenge the law (“The law used to prosecute me is unconstitutional!”). Mr. Alvarez admitted the facts but argued that the Stolen Valor

Act was unconstitutional. The Supreme Court agreed that the First Amendment protects lying. Justice Kennedy’s opinion for the Court in [U.S. v. Alvarez](#) (2012) begins:

“Lying was his habit. Xavier Alvarez...lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico. But when he lied in announcing he held the Congressional Medal of Honor, respondent ventured onto new ground; for that lie violates a federal criminal statute, the Stolen Valor Act of 2005. 18 U. S. C. §704.”

So Mr. Alvarez, a person whom a Supreme Court justice described as a habitual liar, is now one of the ignoble individuals whose actions are now part of the American story of civil liberties. The general public and government officials often react to court rulings that protect hateful and bigoted speech, flag burning, anti-war demonstrations, or even lying, with disappointment, disbelief, profound disagreement, or disgust. The reaction reflects disapproval of the individual’s behavior and the courts for reading the Constitution to protect such behavior.

18.2 | The First Amendment

The First Amendment guarantees freedom of expression: freedom of religion, freedom of speech, freedom of the press, and freedom to assemble and petition the government to redress grievances. Freedom of expression is today universally recognized as an essential condition for democracy and self-government. The political importance of freedom of expression is reflected in the fact that it is listed as the first of the Bill of Rights freedoms and the fact that all 50 state constitutions also guarantee freedom of expression. The following sections of this chapter describe freedom of religion and freedom of speech. Freedom of the press is examined in a chapter on the media.

18.21 | *Freedom of Religion: the Two Religion Clauses*

The First Amendment has two religion clauses: the **Establish Clause** and the **Free Exercise Clause**: “Congress shall make no law...respecting the establishment of religion or prohibiting the free exercise thereof.” But the public, judges, and other government officials do not read the First Amendment to mean there can be *no* laws limiting freedom of religion. [Freedom of religion](#) is more complicated than the absolutist language of the First Amendment suggests.

Freedom House is an organization that compares freedom of expression in different countries. Check out the rankings of nations: <http://www.freedomhouse.org/>

18.22 | *Freedom of Religion: the Establishment Clause*

Let’s start the explanation with the first freedom of religion issue: the Establishment Clause. There are two interpretations of the Establishment Clause: the Wall of Separation and Accommodation. The **Wall of Separation** reading holds that the government cannot establish a religion as the official religion of the country, establish religious belief (as opposed to atheism or agnosticism) as the official position of the country, or support or

oppose a particular denomination or religion in general. The Wall is a metaphor for the separation of church and state (government). The **Accommodation** reading is that the government can “accommodate” or support religious belief as long as an official religion is not declared. The Accommodation reading allows fairly extensive government support for religion (school prayer, school aid, tax credits for tuition) and public displays of religious symbols and items (e.g., the Ten Commandments, crèches, crosses and crucifixes, and other religious icons). These two readings of the First Amendment Establishment Clause have fairly consistently divided political conservatives and political liberals as well as legal conservatives and legal liberals. Liberals tend to be secularists who advocate for the Wall of Separation while conservatives tend to be religionists who advocate for more government support for religion and moral values.

The colonists explicitly believed that government and politics had explicitly religious purposes. Their founding documents such as the [Mayflower Compact](#) described government as responsible for making people morally good (as defined by the tenets of an established church) and politics as a community’s efforts to make people morally good (by legislating morality). During the colonial era people came to the new world for, among other reasons, religious freedom. Colonial governments established official churches and used laws for religious purposes including church attendance and punishing blasphemy. The ratification of the Bill of Rights changed the relationship between church and state. But studying religion and American politics reveals ongoing debates about the nature of the relationship between religion and government, debates that have been renewed by the increased religiosity in American politics over the past several decades. In fact, one dimension of the culture wars is the fight over the relationship between church and state.

The Supreme Court developed the **Lemon Test** to help guide decisions about when government support for religion violates the Establishment Clause. [Lemon v. Kurtzman](#) (1971) presented a claim that Pennsylvania and Rhode Island laws providing public support for teacher salaries, textbooks, and other instructional materials in non-public (primarily Catholic) schools violated the Establishment Clause. Chief Justice Burger upheld the laws and explained the three-pronged test to be used in such cases—a test that came to be called the Lemon Test. First, the law must have a *secular legislative purpose* (in this case, the state aid helped educate children). Second, the law must *neither help nor hurt religion*. Third, the law must *not foster excessive government entanglement* with religion. The Lemon Test is still used today. However, political conservatives are critical of the Lemon Test for being too separationist, and they advocate the Accommodation reading of the Establishment Clause. The conservative justices on the Supreme Court share this view and it possible that the Court will eliminate the Lemon Test or change its application to allow Accommodation on matters of religion and government, church and state.

Although the Establishment Clause and the Free Exercise Clause are two separate provisions of the First Amendment, they are related in the sense that government support for one religion or denomination can limit the free exercise of individuals who belong to religions other than the one or ones supported by the government.

18.23 | Freedom of Religion: the Free Exercise Clause

Despite the absolutist language, the First Amendment has never been understood by the American public, government officials, or the courts to mean that there could be no limits on freedom of religion. The Free Exercise Clause has always been understood to mean that government can limit free exercise of religion. This apparently unusual reading of the Clause can be traced to the Supreme Court's ruling in the landmark 19th Century case [Reynolds v. U.S.](#) (1879).

The case arose from a law passed by Congress to prohibit the Mormon Church's practice of bigamy. The law, the Anti-Bigamy Act, made bigamy a federal offense. George Reynolds was prosecuted in the federal district court for the Territory of Utah with bigamy in violation of the Act: "Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than \$500, and by imprisonment for a term of not more than five years." Reynolds was a Mormon who argued that church doctrine required male Mormons to practice polygamy. He asked the trial court "to instruct the jury that if they found from the evidence that he was married...in pursuance of and in conformity with what he believed at the time to be a religious duty," then the jury verdict must be "not guilty."

The Supreme Court acknowledged that Reynolds sincerely believed that this duty was of "divine origin" and that male members of the Church who did not practice polygamy would be punished by "damnation in the life to come." The Court noted that the First Amendment expressly prohibited Congress from passing a law restricting the free exercise of religion. However, it also noted that the government has always been allowed to regulate certain aspects of religious freedom. Some of the colonies and states established churches and punished certain religious beliefs and practices. In 1784 Virginia considered a bill to provide state support for "for teachers of the Christian religion." James Madison wrote *Memorial and Remonstrance* in opposition to the bill. Not only was the bill to provide for teachers of Christianity defeated, the Virginia Assembly passed Thomas Jefferson's bill "establishing religious freedom." The act described government efforts to restrain ideas because of their supposed "ill tendency" as a threat to religious liberty. Jefferson maintained that government power should be limited to "overt acts against peace and good order," that it should not have any power "in the field of opinion." According to Jefferson, beliefs are the business of the Church and actions are the business of the government. This principle separating religious beliefs and political opinions from religious and political actions remains an important principle limiting the scope of government power. A little more than a year after the passage of this Virginia statute, the members of the constitutional convention drafted the Constitution. Jefferson was disappointed that the new Constitution did not specifically guarantee freedom of religion but he supported ratification because he believed the Constitution could be improved by an amendment specifically limiting government power to restrict religious freedom. The first session of the first Congress did so by proposing the First Amendment.

In *Reynolds*, the Court quoted Jefferson's belief that religion is a private matter "solely between man and his god." Accordingly, a person is accountable only to God "for his faith or his worship." The legislative powers of government "reach actions only, and not opinions..." This distinction between faith and actions remains one of the most important rules for determining the limits of government power. According to Jefferson,

the First Amendment meant that “the whole American people” declared that Congress could make no law respecting an establishment of religion or prohibiting the free exercise thereof,” thereby building a wall of separation between church and state. The Reynolds Court considered Jefferson’s view “an authoritative declaration of the scope and effect” of the First Amendment: “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”

The Court then explained why polygamy was not protected by the First Amendment, why Congress could make a law prohibited polygamy: “Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void..., and from the earliest history of England polygamy has been treated as an offence against society.”

Think About it!

Should the First Amendment be read to prohibit *any* law that limits the free exercise of religion? Snake handling? See the CNN video of snake handlers in Tennessee at <http://www.youtube.com/watch?v=cwBVcsWYJd8>

Reynolds created two legal principles that are still used today to decide civil liberties cases. The first principle is that the First Amendment does not guarantee absolute freedom of religion. It guarantees absolute freedom of belief but it allows government to restrict religious practice. This distinction between religious belief and practice also applies to political expression: the government cannot restrict political ideas but it can restrict political actions. The second principle established in *Reynolds* is that government has the power to limit certain kinds of religious practices that were considered morally or socially unacceptable. Many state constitutions, for example, guarantee freedom of religion but only to those religious practices that are consistent with good moral order. The belief that state governments could prohibit certain morally or socially unacceptable practices is relevant to current debates about state laws that have traditionally defined marriage as between one man and one woman.

18.24 | *Free Exercise Today*

As noted in the chapter on the courts, the modern Supreme Court’s role as a protector of civil liberties can be traced to the constitutional revolution of 1937 when the Court announced in the famous Footnote Four in [*United States v. Carolene Products Company*](#) that laws aimed at particular religious, national, or racial minorities had a weaker presumption of constitutionality. According to the Court, “prejudice against discrete and insular minorities” (including religious minorities) may be a special condition which cannot be remedied through the majoritarian political process therefore the legal remedy, going to court to enforce constitutional rights, must be more readily available.

The Court first began reading the First Amendment to protect the free exercise of religion in the 1940s. In [*Cantwell v. Connecticut*](#) (1940), the Court ruled that the Free Exercise Clause of the First Amendment applied to the state governments, not just Congress or the federal government. This ruling signaled the Court’s willingness to review state laws that historically restricted religious beliefs and practices that were considered unpopular, politically unacceptable, or immoral.

18.45 | *Defining Religion*

The Supreme Court has issued some very controversial rulings in both Establish Clause and Free Exercise cases. The decision declaring that organized school prayer in public schools was unconstitutional was particularly controversial. One issue that the Court has been very wary of becoming involved with is defining what beliefs systems constitute a religion. The definition of religion is important because there are many important legal benefits, including tax benefits that come with an organization being officially recognized as a religion. A related question is whether an individual's personal ethical or moral beliefs should be treated as the equivalent of a religion for the purposes of the First Amendment. One material benefit for an organization that is officially recognized as a religion is tax-exempt status. The legal benefit for an individual whose personal beliefs are recognized as religious beliefs, or the equivalent of religious beliefs include religious exemption from compulsory military service (the draft), religious exemptions from certain workplace rules, and religious exemptions from state drug laws for sacramental drug usage (e.g., peyote; marijuana; communion wine).

Three examples of government defining or officially recognizing religions are the "I am" movement, the Department of Veteran's Affairs policy on cemetery headstones, and the Internal Revenue Service rulings on the Church of Scientology.

Guy Ballard was a follower of the "I Am" movement. He solicited money from people for faith healing. The government accused Ballard's organization of being a business enterprise that was engaged in fraud while claiming to be a legitimate religious enterprise. Ballard maintained that his organization was a legitimate religious enterprise and took his case to the U.S. Supreme Court. The Court's reluctance to define what is and what is not a religion, and its reluctance to allow the government to define what is and what is not a religion, is evident in the 1944 case *U.S. v. Ballard*, 322 U.S. 78 (1944). The Court advised the government to be very reluctant to define what was and was not a legitimate religious activity, and to allow very broad claims of religious activity.¹

Since 1944, the Court has broadened the definition of religion by accepting broad claims that beliefs were consistent with the concept of religion. The Court held that an individual could claim that personal "spiritual" beliefs or reasons of conscience (conscientious objector status) were legitimate reasons for religious exemption from the military draft. The claim to exemption from the military draft was not limited to identifiable religious doctrines.

There are many benefits that come with being an officially recognized religion. Must the government recognize witchcraft or humanism as religions? The Department of Veteran's Affairs had a policy to allow military families to choose any of 38 authorized images of religion that the Department would engrave on the headstones of veterans. The Department created a list of authorized headstone symbols. It included symbols for Christianity, Buddhism, Islam, Judaism, Sufism Reoriented, Eckiankar, and Seicho-No-Ie (Japanese), but not the Wiccan pentacle—a five-pointed star in a circle. The widows of two Wiccan combat veterans (approximately 1,800 active-duty service members identify themselves as Wiccan) sued the government claiming the policy that did not allow their religion's symbol on headstones violated the First Amendment. The court rulings have directed the Department of Veteran's Affairs to allow the Wiccan symbol because the government should not have the power to define a legitimate or acceptable or officially

recognized religion. In 2007, the Department finally agreed to allow the Wiccan pentacle to be engraved on veterans' headstones.²

The Church of Scientology engaged in a three decade-long political and legal battle to get the government (specifically, the Internal Revenue Service) to recognize Scientology and related organizations as a church. The government's initial denial of tax-exempt status was challenged in court. In 1993 the IRS finally recognized Scientology as a religious organization and granted it tax-exempt status as a [501\(c\)\(3\) religious or charitable organization](#) for the purposes of the tax code.

18.25 | Content Neutrality

The court rulings striking down a Department of Veteran's Administration policy that allowed some religious symbols to be engraved on headstones but excluded others was based on a well-established legal principle: content neutrality. **Content Neutrality** is the principle that the government is supposed to be neutral toward political and religious beliefs. Government is not supposed to take sides in political debates by supporting some ideas but not others, or opposing some ideas but not others. Content neutrality applies broadly to freedom of expression both political and religious. It means that the government should not favor one religion over others, religious belief over non-belief, one ideology over others, or one political party over others. In effect, content neutrality means that government is not supposed to discriminate for or against ideas. If the government regulates religion, for example, the regulations should be content neutral. If the Internal Revenue Service grants religious organizations tax-exempt status, content neutrality prohibits the IRS from granting the status to some religious organizations but not others. The Department of Veterans' Affairs might be able to deny all religious symbols on headstones, but the principle of content neutrality prohibited it from singling out the Wiccan symbol for exclusion. State laws that provide tax credits or vouchers for costs associated with sending children to religious schools cannot be limited to Christian schools, for example, without violating the idea of content neutrality. Content neutrality means that the government should not take sides in debates about religious or political ideas.

Of course, the government frequently and inevitably takes sides in debates about the relationship between religion and government and politics. The relationship between church and state was once very close. Most states once had Sunday closing laws which required most businesses to close on Sunday. These laws either established Sunday as the day for religious worship or merely designated Sunday as the day of rest. Today, Sunday closing laws (or laws limiting hours or the sale of certain products such as alcohol) are allowed for secular reasons, but not for religious purposes. But regardless of the reason, Sunday closing laws burden religious believers whose Sabbath did not fall on Sunday because observant sabbatarians would have to keep their businesses closed two days a week. State and local laws can recognize Christmas as an official holiday, and even put up public displays such as crèches (nativity scenes), but that is primarily because Christmas is treated as a holiday season rather than a religious season.

State and local governments once required bible reading or organized school prayer in public schools. Legal challenges to such laws promoting religion in public schools have resulted in court rulings that they violate either the Establishment Clause or

Free Exercise Clause of the First Amendment. These rulings weakened the relationship between church and state. The Supreme Court has upheld state laws that prohibit religious practices such as snake handling, and laws that require vaccinations even though an individual's religious beliefs forbid vaccinations. These laws are upheld if they serve a secular purpose (e.g., protecting public health) but struck down if they are intended to show public disapproval of a particular religious belief or practice.

States can also pass laws that are intended to discourage drug use even if they restrict freedom of religion. In [Employment Division of Oregon v. Smith](#) (1990) the Court upheld an Oregon law that was intended to discourage illegal drug use by denying unemployment benefits to workers who were fired drug use. Native Americans who were fired for sacramental drug use argued that the denial of unemployment benefits was unconstitutional because it restricted their freedom of religion. The Court ruled that it was reasonable for a state to pass such a law to discourage illegal drug usage, and that there was no evidence that the generally applicable law was passed to discriminate against Native Americans. Advocates of religious freedom were very critical of the ruling because the Court said that it would use the **reasonableness test** to determine whether a generally applicable law that substantially burdened freedom of religion was constitutional. Prior to this ruling, the Court used the **strict scrutiny test**, which required the government to have a compelling reason for burdening freedom of religion. Religion advocates saw the reasonableness standard as weakening constitutional protection of free exercise of religion. They lobbied Congress to pass The [Religious Freedom Restoration Act of 1993](#) which by statute restored the strict scrutiny test.

A church in Boerne, Texas used the Religious Freedom Restoration Act to challenge the city's zoning laws that limited the church's building expansion. Zoning laws can prohibit churches in residential neighborhoods or limit remodeling and building expansion. The church was located in an historic district of Boerne, Texas. The city rejected the church's building expansion plan and the church went to court claiming the zoning restriction was a violation of freedom of religion. In [Boerne v. Flores](#) (1997) the Supreme Court held that the Religious Freedom Restoration Act was unconstitutional because the Court, not the Congress, determines how to interpret the First Amendment. As a result, the courts still use the reasonableness test when determining whether a generally applicable law, a law that is intended to serve a legitimate public purpose rather than targeting specific unpopular religious practices, can limit freedom of religion. However, Congress then passed the [Religious Land Use and Institutionalized Persons Act of 2000](#) to provide stronger protection for freedom of religion. Advocates of greater protection for religious freedom and greater government support for religion challenge the secularist and Wall of Separation understanding of the relationship between church and state as part of the "war on religion."

Think about it!

Should religious individuals, churches, and religious organizations be given religious exemptions from laws?

Is there currently a war on religion or a war on Christianity?

18.3 | Freedom of Speech

Freedom of speech is essential for democracy. Some of the same legal rules that the Court uses to decide freedom of religion cases apply to freedom of speech. The first rule is that [freedom of speech](#) is not absolute: the government can restrict freedom of speech. The second rule is that the legal principle for determining whether the government can restrict freedom of speech is *the distinction between thought and action*. This distinction is analogous to the distinction between religious belief, which government cannot restrict, and religious action, which the government can restrict. The government cannot restrict political thought but it can restrict political action. Political actions are subject to what are called *time, place, and manner* restrictions: freedom of speech does not mean that people can say whatever they want (e.g., certain provocative words such as hate speech can be limited), however they want (use of bullhorns can be limited as can public demonstrations), wherever they want (speech on private property or in certain public places such as residential neighborhoods or special places such as airports can be limited), and whenever you want (you can make a good point but maybe not at 4:00 in the morning). Despite these limits, there is a presumption of freedom of speech—which means that the government bears the burden of proof to show the need to restrict a fundamental freedom such as freedom of expression. In a capitalist country such as the U.S., where the idea of a free market of goods and services has great appeal, the idea of a free marketplace of ideas also has strong appeal. The assumption is that government intervention in the political marketplace should be limited—that individuals should have freedom of choice of goods, services, and ideas.

Each of the 50 state constitutions provides for freedom of expression. Virtually all of the constitutions in the countries of the world provide for freedom of expression. Comparing state constitutions and national constitutions can increase understanding of the First Amendment to the U.S. Constitution and the different approaches to guaranteeing freedom of expression.

Choose one or two states, or one or two countries, and compare how their constitutions provide for freedom of expression. Search state government web sites, national government web sites or sites that provide national constitutions such as <http://www.constitution.org/cons/natlcons.htm>

Think About it!

Is the U.S. a Christian Nation? And what does that mean?

<http://www.npr.org/2012/08/08/157754542/the-most-influential-evangelist-youve-never-heard-of>

18.4 | The Second Amendment

Gun rights are an important part of American political culture. The Second Amendment declares, “A well regulated Militia being necessary to the security of a free State, the right to keep and bear Arms shall not be infringed.” There are two readings of this Amendment: an individual rights reading and a federalism reading. For 70 years the Supreme Court read the Second Amendment as a provision of the Constitution that was intended to protect state militias from the federal government. This is the federalism reading of the Second Amendment. It holds that the Second Amendment was included in the Bill of Rights to protect the states from the federal government. The new Constitution reduced the powers of the states and greatly increased the power of the federal government by among other things, giving Congress the power to create a military. The Second Amendment protected state militias by preventing the federal government from abolishing state militias. This federalism reading of the Second Amendment is a “state’s rights” reading.

Then in a 2008 case, [District of Columbia v. Heller](#), the Court ruled 5-4 that the Second Amendment guaranteed an individual right to keep and bear arms. Justice Scalia’s opinion for the majority described the right as a fundamental right that had two basic purposes. The first purpose is self-defense. This anti-crime purpose is a reminder that the government does not have a monopoly on the use of force. Individuals have the right to keep and bear arms to fight crime. The second purpose is even more explicitly political. Individuals have the right to arm themselves to fight against government tyranny. The *Heller* ruling declared an individual right and acknowledged that it was not an absolute right, that some gun control measures were constitutional. But it did not say what kinds of gun control laws were constitutional. That is being left up to future cases using the same analysis that the courts apply to other fundamental rights. The government has the burden of proof to demonstrate that the limits on individual freedom are necessary. The *Heller* ruling also did not say whether the Second Amendment applied to the states (and local governments). In [McDonald v. Chicago](#) the Court ruled that it did. So now individuals can use the Second Amendment to challenge state and local gun laws. The Court’s changed reading of the Second Amendment is one chapter in the story of how the law changes in a conservative era of American politics. The liberal activist Warren Court had a different agenda than the conservative activist Roberts Court.

Think About it!

Does the Second Amendment give individuals or groups of individuals a constitutional right to armed rebellion against the government? Read about the Stono Slave Rebellion in South Carolina in 1739.

<http://www.pbs.org/wgbh/aia/part1/1p284.html>

18.5 | Civil Rights

Civil liberties are constitutional protections for individual freedom. Civil rights are statutory laws that promote equality. Liberty and equality are democratic values but the relative emphasis on each value varies from country to country and over time.

Democratic systems generally value individual freedom more than equality. Socialistic systems value equality more than freedom. In the U.S., equality is today a much more important value than it was when the nation was founded.

Equality *is* one of the political values extolled in the Declaration of Independence, which asserts human equality in especially memorable language:

“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.”

But the Declaration of Independence is not a governing document (the Constitution is the government document) or a legal document (it does not create any legally enforceable rights claims). Equality is not one of the political values embodied in the Constitution. The Constitution recognized slavery and did not recognize gender equality. Early statutes also recognized slavery. The Northwest Ordinance of 1787 prohibited slavery in parts of the country (western territories north of the Ohio River) but also provided that fugitive slaves could be “lawfully reclaimed.” The [Missouri Compromise of 1820](#) prohibited slavery in territories north of the parallel 36.5 degrees north of the equator. And the Fugitive Slave Law of 1793 authorized federal judges to recognize a slave owner’s property rights claim to fugitive slaves.

18.51 | *Making Equality an American Value*

Equality only became an important political and legal value in the latter half of the 19th Century with the rhetoric of Abraham Lincoln, the three Civil War Amendments, and federal civil rights legislation enacted under the authority of the 14th Amendment. The Civil War Amendments were passed to guarantee the rights of newly freed slaves by limiting the power of states to discrimination on the basis of race. The 13th Amendment prohibited slavery. The Fourteenth Amendment prohibited states from making or enforcing any law that shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” The Fifteenth Amendment prohibited states from denying the right to vote on account of “race, color, or previous condition of servitude.” Section 5 of the Fourteenth Amendment gave Congress the power to enforce “by appropriate legislation” the provisions of the Amendment.

These three Civil War Amendments became the constitutional foundation for civil rights legislation. Congress passed the Civil Rights Act of 1866 to guarantee “citizens, of every race and color...the same right, in every State and Territory...to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property...” and enjoy other benefits of the laws. Congress passed the Civil Rights Act of 1875, which made it a federal offense for owners or operators of any public accommodations (including hotels, transportation, and places of amusement) to deny the enjoyment of those accommodations on account of race or religion. Innkeepers, theater owners, and a railroad company challenged the law as exceeding government power because it regulated private businesses. The Supreme Court agreed in *The Civil Rights Cases* (1883). The ruling greatly limited Congress’s power to

“The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.”

Anatole France,
The Red Lily, 1894,
chapter 7

use the 14th Amendment as authority for laws promoting racial equality. As a result, matters of racial equality were left to state laws until the 1930s and 1940s. In *Brown v. Mississippi* (1936), the Supreme Court abandoned its traditional hands-off policy toward state criminal justice amid growing federal concern about racial discrimination. In *Brown* the Court unanimously held that police torture of a black suspect in order to compel a confession, questioning that was euphemistically called *the third degree*, violated due process of law. The subsequent federal court rulings in cases involving racial administration of criminal justice were part of the broader civil rights movement in other areas of public policy.

The Civil Rights Act of 1964 and the Voting Rights Act of 1965 are major landmarks in the civil rights movement. The [Civil Rights Act of 1964](#) expanded the federal government’s power to act to eliminate a broad range of discriminatory actions. Congress passed the Act to “enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in

public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.” The [Voting Rights Act of 1965](#) expanded the federal government’s power to remedy a specific type of racial discrimination, racial discrimination in voting, that directly affected how the democratic process worked. Section 2 of the 1965 Act provided 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.”

18.52 | *Does Equality Mean Treating Everyone the Same?*

Each of the various civil liberties and rights movements that made equality a more important political value prompted debates about the meaning of equality. It turns out that equality is more complicated than it initially seems, and defining it is harder than one might expect. Equality does *not* mean treating everyone the same. This chapter began with a famous 1894 quote of the French author, Anatole France, who sarcastically praised a law that prohibited anyone, rich and poor alike, to sleep under the bridges of Paris as egalitarian. On its face, the law treated everyone equally—but of course not everyone needs to sleep under bridges. Almost all laws create categories of individuals and actions, and treat them differently. State driver’s license laws treat people differently based on age: very young people and sometimes very old people are treated differently than middle-aged people. Food stamp programs and Medicaid are means-tested programs: they limit benefits to individuals below certain income levels. Income tax rates vary according to income levels. Laws typically limit the rights of felons to vote, possess firearms, or hold certain kinds of jobs. Some government benefits are limited to veterans while others are limited to married people. Social security is an age and income based program. Medicaid is a program that provides benefits for the poor.

Equality is a political value with social, economic, political, and legal dimensions. The Equal Protection of the Laws is generally understood to require states to provide legal equality to all persons within their jurisdiction. Legal equality means equal standing before the law, but not social or economic equality. Equality does not mean that everyone must be treated the same. Laws create classifications that treat individuals differently. In one sense, then, legislation discriminates by treating individuals and actions differently. This definition of discrimination or treating people differently is not what is commonly understood as discrimination. Discrimination is usually used to mean prejudice or bias against individuals or groups based on inappropriate or invalid reasons. This is the pejorative meaning of discrimination. Discrimination also has a positive meaning whereby “to discriminate” means the ability to see or make fine distinctions among individuals, objects, values, or actions. It refers to making valid distinctions or differences between individuals.

18.53 | *Expanding federal civil rights law: the constitutional revolution of 1937*

As noted in the chapter on the judiciary, 1937 is an important date in U.S. constitutional history because the Court changed from protecting business from government regulation to protecting political liberties. During the latter part of the 19th Century and into the 1930s, the Supreme Court had struck down many federal and state laws that regulated business and economic activity because the Court saw its role as protecting business from government regulation. During the Great Depression, for example, the Court struck down some of the most important provisions of the Roosevelt Administration’s New Deal legislation. The result was a constitutional conflict between the president, and the Court. President Roosevelt used his “bully pulpit” to take to the radio airwaves to blame the Court for not being a team player. Roosevelt’s famous March 9, 1937 Fireside scolded the Court for not being part of the three-horse team that had to pull together if the country were to get out of the Great Depression.³ Roosevelt also took action against the Court. He proposed a court-packing plan to increase the size of the Court to a maximum of fifteen Justices, with the additional six Justices expected to support the President’s views on government power to regulate the economy because the President would nominate them. Against the background of these political pressures, the Court changed its rulings on the government’s economic regulatory power. In late 1936, Justice Roberts, who had been voting with a conservative bloc of Justices who struck down the New Deal laws, changed sides and began to vote with the liberal bloc that upheld New Deal economic regulatory legislation. This was the constitutional revolution of 1937. Retirements eventually gave President Roosevelt the opportunity to change the ideological balance on the Court, and he appointed eight Justices during his terms in office. As a result, the Court changed its role from one that protected economic liberties from government regulation to one that protected political liberties. And one of the Court’s special concerns was racial discrimination

18.54 | *Racial Classifications*

Dred Scott v. Sandford (1857) is a landmark Supreme Court case that is famous, or infamous, for its ruling limiting an individual slave’s constitutional rights and Congress’s

power to limit slavery. Scott was a slave whose owner took him to Illinois and an area of the Louisiana Territory that prohibited slavery. Scott filed a lawsuit claiming that his residence in areas that prohibited slavery made him a free man. The Supreme Court ruled that Scott, as a slave, was not a citizen and could not go to court to claim that he was free. It also ruled the Missouri Compromise of 1820, which prohibited slavery in certain states, unconstitutional. The *Dred Scott* ruling made it clear that slavery was not likely to be resolved politically, and that a civil war was likely.⁴

The three constitutional amendments that were passed after the Civil War were intended to prohibit state action that discriminated against Blacks. Congress also passed civil rights statutes to promote racial equality. But in *The Civil Rights Cases* (1883), the Court greatly limited the federal government's power to regulate racial discrimination.⁵ And in *Plessy v. Ferguson* (1896) the Court held that states could by law require racial segregation as long as the law did not treat one race better than another. This was the famous **Separate but Equal Doctrine** that allowed states to have racial segregation as a matter of public policy for schools, public accommodations, and other services and facilities. Justice Harlan's dissenting opinion in *Plessy* used memorable language to argue that racial segregation was unconstitutional: "Our Constitution is colorblind, and neither knows nor tolerates classes among citizens."⁶ But the majority on the Court held that states could discriminate between blacks and whites, by requiring segregation, as long as the separation of the races did not include treating them unequally.

18.55 | *The Story of School Desegregation*

The story of school desegregation is a classic story of political litigation. Political litigation is the use of litigation to change public policy. Organizations such as the National Association for the Advancement of Colored People used the legal arena (courts) to get what they could not get in the political arena: desegregation of public schools. The state political systems that created racial segregation in public schools continued to support segregation despite political efforts advocating desegregation. As a result, advocates of desegregation went to the federal courts arguing that segregation violated the 14th Amendment's equal protection of the laws. The legal strategy worked. The Supreme Court began chipping away at the **Separate but Equal** doctrine. In *Missouri ex rel. Gaines v. Canada* (1938) the Court struck down a Missouri law that denied Blacks admission to the state's law school, but provided money for Blacks to attend out-of-state law schools. Then in 1950 (*Sweatt v. Painter*) the Court struck down a Texas law that created a separate law school for Blacks as a way to avoid having to admit a Black man to the University of Texas Law School. And on the same day that the Court decided, the Court decided *McLaurin v. Oklahoma State Regents* (1950) McLaurin was a Black man who was admitted to the University of Oklahoma's School of Education graduate school, but a state law required that he be segregated from other doctoral students: separate seating in the classroom; designated cafeteria table; separate library table. The Court ruled that this violated the equal protection of the laws because the treatment was separate but unequal. In these three cases the Court struck down the state segregated education policies because they did not provide separate but equal educational opportunities. The NAACP and other advocates of desegregation continued to target the separate but equal doctrine. Finally, in the landmark case of *Brown v. Board of Education*

of *Topeka, Kansas* (1954), the Court ruled that de jure segregation in public schools, segregation by law, was unconstitutional. The separate but equal doctrine was itself unconstitutional.⁷

The *Brown* ruling was extremely controversial. Critics of Chief Justice Earl Warren put up “Save Our Republic: Impeach Earl Warren” highway billboards because Warren presided over a Court that issued a broad range of controversial rulings. It integrated public schools, and its school prayer rulings “kicked God out of” public schools. The backlash against these rulings included government officials who asserted states’ rights to oppose expanded federal power over race relations. One classic statement of federalism-based states’ rights opposition to *Brown v. Board* is the 1956 [Southern Manifesto](#). Strong opposition to the *Brown* ruling prompted the [Florida Legislature to pass an Interposition Resolution](#) in 1957. Interposition is a Civil War-era doctrine that asserts that a state, as a sovereign entity in the U.S. system of federalism, has the power to “interpose” itself between the people of the state and the federal government whenever the state believes the federal action is unconstitutional. Interposition is a doctrine that gives states power to protect the people from unwarranted federal action.

At the time of the *Brown* ruling, William H. Rehnquist, who went on to become an Associate Justice and then Chief Justice of the Supreme Court, served as a law clerk to Justice Jackson. Rehnquist wrote a controversial *Memorandum* to Justice Jackson which concluded that the **Separate but Equal Doctrine** was still good law and should be upheld.⁸ Rehnquist’s understanding of the legislative history of the intentions of the Framers of the 14th Amendment may be accurate. And requiring racial segregation while treating the races equally, for example by requiring that blacks and whites sit in alternate rows rather than requiring blacks to sit in the back of the bus, may technically meet the “equal protection of the laws” standard. However, the history of separation was inequality. And the argument that the Constitution allows racial apartheid as long as the races are treated equally is no longer considered politically acceptable.

The *Brown* ruling did not order the immediate desegregation of public schools. The Court stated that the segregated school systems had to be dismantled “With all deliberate speed.” Some states took advantage of this ambiguous phrase to choose deliberation rather than speed.⁹ Beginning in the latter 1960s, after more than a decade of little or no action to dismantle the system of segregated public schools, courts began to order actions to integrate public schools. These actions included court-ordered busing, judicial drawing of school attendance zones, racial quotas, and affirmative action programs.

18.56 | School busing

Court rulings that ordered busing to dismantle segregated schools were always controversial, but court-ordered busing was especially controversial when it was used to remedy *de facto* racial segregation. *Brown* ruled *de jure* segregation unconstitutional. *De jure* segregation is segregation “by law.” *De jure* segregation includes segregation that results from any government policy or official actions (such as drawing school attendance boundaries to produce racially segregated schools). *De facto* segregation is segregation that results “by fact.” *De facto* segregation results from private actions such as housing patterns where people of one race or ethnicity or class decide to live with others of the same racial or ethnic or economic background and that just happens to result in

segregation. As the country became more conservative during the latter 1970s and 1980s, public opposition to school busing and other race-based remedies for segregated schools increased. And in an interesting twist, conservatives turned to Justice Harlan's 19th Century ideal of a color blind Constitution, which he used to argue that state laws requiring racial segregation were unconstitutional, to argue that affirmative action policies, which take race into consideration when making school admissions decisions or employment decisions, are unconstitutional. Critics of affirmative action also oppose the recognition of group rights rather than individual rights. Indeed, the conservatives on the Rehnquist and Roberts Courts have been very skeptical of affirmative action and closely scrutinize affirmative action policies to determine whether they violate equal protection of the laws.¹⁰

Think About It!

Should college students have rights? The Foundation for Individual Rights in Education (FIRE) defends individual rights in higher education:

<http://thefire.org/>

18.6 | Civil Rights: Employment

The civil rights movements also targeted employment discrimination. Efforts to expand equal opportunity in employment focused on personnel policies related to hiring, firing, and promotion; equal pay for equal work; and awarding business contracts to minority companies. One strategy was to use affirmative action to remedy past discriminatory practices and promote equality. The use of affirmative action to produce a more diverse work force, one that reflected the racial composition of the community was very controversial. Critics called the affirmative action use of racial or gender quotas or targets in employment settings reverse discrimination. As public support for using equal rights laws to promote greater equality in the workplace decreased, the courts limited the use of affirmative action policies particularly race-based policies.

The civil rights movement to end racial discrimination had one unintended negative consequence. Efforts to end racial segregation unintentionally contributed to the breakup of black economic communities that had developed in segregated areas. The end of *de jure* racial segregation meant that members of the black community were able to live in other neighborhoods and buy goods and services outside of the black business community. This is one of the reasons for the decline in the number of black-owned businesses since desegregation. For an interesting story about one black family's efforts to "Buy Black" for a year, see "One Family's Effort to Buy Black For a Year."

"One Family's Effort to Buy Black For a Year,"

PBS Newshour (June 19, 2012)

<http://www.pbs.org/newshour/bb/business/jan-june12/makingsense43619.html>

18.6 | Gender

Historically, government officials and private sector individuals (such as employers) were free to treat people differently based on gender. The Supreme Court did not examine gender-based legislative classifications until the 1970s. Prior to that time period, the Court did not consider laws that treated women different than men a violation of the Fourteenth Amendment. Gender discrimination was presumed to be constitutional. Laws that treated the “second” sex or the “weaker” sex different than the “first sex” or the “stronger” sex were presumed to reflect natural differences, social values, or public policy preferences. The policy preference for treating women and men differently was considered a matter of politics, not law, a question that was appropriate for the elected representatives of the people rather than the legal judgments of courts.

As a result, states historically used their policy making powers to pass laws that treated men and women different for purposes of voting, employment, education, social welfare benefits, jury duty, and other purposes. Some of these laws were **paternalistic** in the sense that they were intended to protect women. A good example of such a paternalistic law is the Oregon law that limited the hours that women could work in factories. The law was challenged in court but the Supreme Court upheld the law in [*Muller v. Oregon*](#) (1908). Justice Brewer’s opinion for the majority reflected the widely accepted belief that it was reasonable for a state legislature to think that women’s physical constitution and the social role assigned to women in raising children might merit special protection in the workplace:

“...That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical wellbeing of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race. ...[H]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved....” [There are individual exceptions but women are generally not equal to men and are therefore properly placed in a class to be protected by legislation]. “It is impossible to close one’s eyes to the fact that she still looks to her brother, and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the

wellbeing of the race—justify legislation to protect her from the greed, as well as the passion, of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all.”

It is interesting to note that Justice Brewer described gender protective laws as benefiting women **and** society as a whole. This *gender difference rationale* reflected the conventional wisdom of the day and provided the justification for a broad range of public policies that treated women different than men. For instance, states prohibited women from serving on juries.¹¹ Equality does not mean treating everyone the same—but it does require having good reasons for treating people different. The black civil rights movement provided inspiration and energy for the women’s rights movement. Gender discrimination was put on the government’s agenda by the women’s rights movement. The women’s rights movement challenged traditional assumptions about how public policy could treat women different than men, lobbied for statutory laws that prohibited gender discrimination, advocated for an equal rights amendment to the U.S. Constitution, and adopted a legal strategy of political litigation that filed lawsuits that were intended to change public policy toward women.

In 1963 Congress amended the Fair Labor Standards Act to require equal pay for

The 40th Anniversary of the 1972 Title IX Amendments marked an occasion to assess its impact on educational opportunity. One aspect of the changes is discussed in the National Public Radio report, “40 Years On, Title IX Still Shapes Female Athletes.”
<http://www.npr.org/2012/06/22/155529815/40-years-on-title-ix-still-shapes-female-athletes>

equal work. The Civil Rights Act of 1964 prohibited gender discrimination by employers and labor unions. Title VII of the Civil Rights Act of 1964 prohibits sexual harassment in the workplace. In 1972, the Civil Rights Act was amended to require in [Title IX](#) that all programs or activities, including educational institutions, provide equal athletic facilities and opportunities for women. Title IX had a major impact on women’s opportunities. Compare the experience of [Kathrine Switzer](#), who in 1967 was the first women to run in the Boston Marathon with women’s opportunities 40 years after Title IX.

The women’s movement also worked for passage of an Equal Rights Amendment. Congress proposed the ERA in 1972 but it was never ratified by the required three-quarters of the states. Only 35 of the required 38 states ratified the ERA.¹² The political litigation strategy was been successful. Court rulings limited gender discrimination. Women’s rights advocates argued that courts should treat gender more like race when considering the enforcement of anti-discrimination laws. Doing so would make gender discrimination more like racial discrimination: a suspect classification. The Court did hold that the Fourteenth Amendment’s equal protection clause applied to women, but it

Think about it! Are single-sex schools wise/constitutional?

<http://www.npr.org/2011/10/25/141692830/are-single-sex-classrooms-better-for-kids>

never accepted the argument that gender discrimination was analogous to racial discrimination. Unlike race-based legislative classifications, which are considered suspect classifications that trigger strict scrutiny, the Court has never considered gender classifications **suspect classifications** that trigger strict scrutiny.¹³ But courts do closely scrutinize laws that treated people different based on gender, and fewer gender classifications are now considered constitutional. For

example, in *U.S. v. Virginia* (1996) the Court ruled that it was unconstitutional for Virginia to create a separate female military institute as a remedy for a court-ordered finding that the state's male Virginia Military Institute violated the equal protection clause of the Fourteenth Amendment.

One interesting twist in the debates about racial and gender segregation in education is the recent emphasis on the quality of the education rather than racial or gender integration. Are single-sex schools wise (that is good educational policy)? Are they legal?

Gender equality is also an issue in the political and legal debates over abortion policy. The impact on women of state laws prohibiting abortion was a central issue in the decision to adopt a legal strategy to challenge abortion laws, a decision that resulted in the *Roe v. Wade* (1973) ruling that the right to privacy included the decision whether to continue or terminate a pregnancy.

Think About It! Act on It!

Can an individual make a difference by deciding to act on something they believe in? Listen to Sarah Weddington's story.
<http://www.bbc.co.uk/programmes/p0133chj>

18.7 | Other Legislative classifications

18.71 | *Alienage, Citizenship, and Personhood*

Most of the civil liberties provisions refer to “people” or “persons.” The Fifth Amendment provides that no “person” shall be deprived of due process of law. The 14th Amendment prohibits states from denying “to any person” within its jurisdiction the equal protection of the laws. However, these constitutional provisions do not mean that citizens and non-citizens have the same constitutional rights. There are important differences between the rights of citizens and non-citizens because citizenship is a legal status that is relevant in many areas of law. Aliens do not have the same rights as citizens when aliens are entering the United States or when challenging the decision to be deported. Early in the nation's history, federal legislation targeted aliens, both alien enemies and alien friends. The [Alien and Sedition Acts of 1798](#) are examples of early federal laws that not only treated aliens different than citizens but subjected aliens to

harsh treatment. The Alien Act provided that in time of war or a threat against the territorial integrity of the U.S., the president could arrest and deport as “enemy aliens” any males 14 years or older who are citizens or residents of the “hostile” country.

For most of the 20th Century, immigration matters were entirely political in the sense that Congress had plenary power to determine immigration policy. However, as equality became a more important political value in American politics and as the various civil rights movements increased expectations of equality for more and more individuals in more and more settings, political and legal developments expanded the legal protections afforded aliens. In a 1971 case, [Graham v. Richardson](#), the Court held that **alienage** was a suspect classification, and that an Arizona law that limited welfare benefits to citizens and created residency requirements for aliens violated the 14th Amendment provision that prohibited a state from denying to any person within its jurisdiction the equal protection of the laws. And in a 1982 case, *Plyler v. Doe*, the Court ruled that Texas could not deny public education to undocumented aliens.

But states were not required to treat aliens and non-residents the same as citizens who were residents of the state. A state can charge out-of-state individuals higher college tuition rates and higher fishing and hunting license fees for example. And states can require that individuals who hold certain public sector jobs (including teachers and police officers) be citizens. And states can restrict certain government benefits to citizens. In an interesting 2001 case dealing with a federal citizenship law that was based on both alienage and gender classification, the Court explained that the government had a valid legislative purpose when imposing different requirements for a child to become a citizen depending upon whether the citizen parent is the mother or the father. The law made it easier for a child to become a citizen if the mother was the citizen parent than if the father was the citizen parent. So public policy can make a distinction between a citizen mother and a citizen father. This is an example of how equality, and equal protection of the laws, does not mean treating everyone the same.¹⁴

18.72 | *Economic Classifications*

Public policies can also treat people different based on income without violating the equal protection of the laws. Public policies that provide government benefits (social security or Medicaid or food stamps) based on income create economic classifications. Tax policies may also treat people different based on income. Progressive income tax laws treat individuals different based on their income, with lower tax rates for lower income levels and higher rates for higher income levels. The [history of the federal income tax](#) shows how this occurs. In 1861, Congress passed an income tax law that established a flat 3% tax on incomes over \$800. Since then, income tax law has incorporated graduated rates and even progressive tax rates. Inheritance taxes also typically treat estates different based on the size of the estate. For revealing insights into the political rhetoric of debates over estate taxes, read or listen to [“How We Got from Estate Tax to ‘Death Tax.’”](#)

Most states have public school funding policies that rely heavily on property taxes. The result is large disparities in the amount of money available to school districts. School districts in rich communities have much more money than school districts in poor communities. Does this violate the 14th Amendment equal protection of the laws? The

[San Antonio Independent School District](#) filed a lawsuit on behalf of its poorer students arguing that Texas’ property tax violated the equal protection of the laws. The Supreme Court disagreed, holding that the 14th Amendment does not require exactly equal funding of districts, that some funding disparities are legal. Most states do transfer some money from wealthier communities to poorer communities in order to reduce funding disparities. These Robin Hood policies of taking from the rich and giving to the poor are generally supported by liberals more than conservatives.

18.8 | Ways of Looking at Rights

18.81 | “Conservative Rights” in a Conservative Era

The story of civil rights is usually told as the story of liberals who used political litigation to achieve greater equality. In this conservative era in American politics, conservative civil rights and civil liberties movements advocate for *conservative* rights: the right to life (to define an unborn child or fetus as a person); property rights; gun rights; and religious rights. Like liberal public interest groups before them, conservative public interest groups adopted political and legal strategies to achieve their public policy goals. They used political litigation to challenge campaign finance regulations, zoning laws, and gun control laws. Some of these efforts have been very successful. The Roberts Court ruled that the Second Amendment does guarantee an individual right to keep and bear arms, defined campaign contributions as First Amendment freedom of expression, and weakened the distinction between economic and political liberties that conservatives believed relegated economic liberties to second-class status.

Think about it!
Do you prefer the Florida and California Constitutional provisions for freedom of religion or the First Amendment to the U.S. Constitution?

18.82 | Civil Liberties in State Constitutions

In the U.S. system of federalism, civil rights and liberties are provided for in both state and federal law. The 50 state constitutions were modeled on the U.S. Constitution therefore some of the language and the rights in state constitutions resembles the provisions of the Bill of Rights. Article I of The Florida State Constitution, “Declaration of Rights,” provides for civil liberties including freedom of religion, speech, press, and the right of privacy. However, the [Florida Constitution provision for freedom of expression](#) is very different than the First Amendment to the U.S. Constitution. And the California State Constitution is a very lengthy document: [Article I “Declaration of Rights”](#) provides a much more specific, detailed, and lengthy description of civil liberties than the U.S. Constitution’s Bill of Rights.

18.9 | Internet Resources

An Overview of Civil Rights: http://topics.law.cornell.edu/wex/Civil_rights

The Freedom Riders: <http://video.pbs.org/video/1930441944>

Photographs of the Civil Rights Movement in Florida:

http://www.floridamemory.com/OnlineClassroom/PhotoAlbum/civil_rights.cfm

¹ http://religiousfreedom.lib.virginia.edu/court/us_v_ball.html

² See “Use of Wiccan Symbol on Veterans’ Headstones Is Approved,”
<http://www.nytimes.com/2007/04/24/washington/24wiccan.html>

³ Franklin D. Roosevelt’s March 9, 1937 “Fireside Chat,”
<http://www.presidency.ucsb.edu/ws/index.php?pid=15381#axzz1NIGuPlqw>

⁴ For additional information about Dred Scott, see <http://www.pbs.org/wgbh/aia/part4/4p2932.html>
http://www.oyez.org/cases/1851-1900/1856/1856_0

⁵ http://www.law.cornell.edu/supct/html/historics/USSC_CR_0109_0003_ZS.html
http://www.oyez.org/cases/1851-1900/1882/1882_2

⁶ See http://www.oyez.org/cases/1851-1900/1895/1895_210/
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0163_0537_ZS.html

⁷ The Missouri case is available at:
http://en.wikipedia.org/wiki/Missouri_ex_rel._Gaines_v._Canada
<http://supreme.justia.com/us/305/337/case.html>

The Texas case is available at:
http://www.oyez.org/cases/1940-1949/1949/1949_44

The Oklahoma case is available at:
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0339_0637_ZS.html

The Kansas case is available at:
http://www.oyez.org/cases/1950-1959/1952/1952_1/

⁸ <http://www.nytimes.com/2005/09/11/weekinreview/11lipt.html>
<http://www.gpoaccess.gov/congress/senate/judiciary/sh99-1067/324-325.pdf>

⁹ <http://americanhistory.si.edu/brown/history/6-legacy/deliberate-speed.html>

¹⁰ For recent rulings see *Gratz v. Bollinger* (2003)
http://www.oyez.org/cases/2000-2009/2002/2002_02_516; *Grutter v. Bollinger* (2003)
http://www.oyez.org/cases/2000-2009/2002/2002_02_241; *Meredith v. Jefferson County Board of Education* (2007); and recent rulings from Kentucky and Seattle, Washington
http://www.oyez.org/cases/2000-2009/2006/2006_05_915

¹¹ In *Hoyt v. Florida* (1961) the Court unanimously concluded that the equal protection clause did not prohibit the State of Florida from excluding women from jury duty. See
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0368_0057_ZS.html

¹² <http://www.equalrightsamendment.org/>
<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/nineteentham.htm>

¹³ See *Reed v. Reed* (1971). One of the lawyers who represented Sally Reed is Ruth Bader Ginsburg, who later became a Supreme Court Justice. Her personal employment experience, and her professional legal experience representing women in court, may explain her voting record as a Justice who is sympathetic to claims of gender discrimination in the workplace.

http://www.law.cornell.edu/supct/html/historics/USSC_CR_0404_0071_ZO.html
<http://law.jrank.org/pages/13163/Reed-v-Reed.html>

¹⁴ *Nyugen v. Immigration and Naturalization Service* http://www.oyez.org/cases/2000-2009/2000/2000_99_2071